No. 18-609

In the Supreme Court of the United States

JOSEPH DAVID ROBERTSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JEFFREY BOSSERT CLARK
Assistant Attorney General
JENNIFER SCHELLER NEUMANN
J. DAVID GUNTER II
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the term "navigable waters" in the Clean Water Act, 33 U.S.C. 1251 *et seq.*, is unconstitutionally vague as applied to the facts of this case.

2. Whether *Rapanos* v. *United States*, 547 U.S. 715 (2006), should be revisited.

3. Whether an otherwise valid judgment of conviction following a second trial may be overturned based on an alleged insufficiency of the evidence at the first trial, which ended in a mistrial after the jury was unable to reach a verdict.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 875 F.3d 1281. A separate memorandum opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 704 Fed. Appx. 705. The opinion of the district court denying petitioner's renewed motion for acquittal after his first trial (Pet. App. H1-H12) is not published in the Federal Supplement but is available at 2015 WL 7720480. The order of the district court denying petitioner's renewed motion for acquittal after his second trial (Pet. App. E1-E8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 2017. A petition for rehearing was denied on July 10, 2018 (Pet. App. B1). On July 30, 2018, Justice Kennedy extended the time within which to file a

petition for a writ of certiorari to and including November 7, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Montana, petitioner was convicted on two counts of unauthorized discharge of pollutants into the waters of the United States, in violation of 33 U.S.C. 1311(a) and 1319(c)(2)(A), and one count of injuring property of the United States, in violation of 18 U.S.C. 1361. Pet. App. C2-C3. The district court sentenced petitioner to 18 months of imprisonment, to be followed by three years of supervised release. *Id.* at C4-C5. The court of appeals affirmed. *Id.* at A1-A28; 704 Fed. Appx. 705-706.

1. Congress enacted the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). As relevant here, 33 U.S.C. 1311(a) generally prohibits the "discharge of any pollutant by any person," subject to specified exceptions. The CWA defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The CWA defines the term "navigable waters," in turn, to mean "the waters of the United States." 33 U.S.C. 1362(7).

The prohibition on "the discharge of any pollutant by any person," 33 U.S.C. 1311(a), is subject to an exception set forth in 33 U.S.C. 1344. Section 1344 authorizes the Secretary of the Army, acting through the United States Army Corps of Engineers (Corps), to "issue permits * * * for the discharge of dredged or fill material"

into the waters of the United States "at specified disposal sites." 33 U.S.C. 1344(a). During the time period relevant to this case, the Corps defined waters of the United States to encompass, *inter alia*, traditional navigable waters, which include waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1) (2014); "[t]ributaries" of traditional navigable waters, 33 C.F.R. 328.3(a)(5) (2014); and "[w]etlands adjacent" to traditional navigable waters or their tributaries, 33 C.F.R. 328.3(a)(7) (2014).[1] The Corps' regulations authorize the Corps to provide a property owner with a "jurisdictional determination" that expresses the agency's view on "the presence or absence of waters of the United States on a parcel." 33 C.F.R. 331.2 (2014) (emphasis omitted); see *United States Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1812 (2016).

Section 1311's prohibition on the unauthorized discharge of any pollutant is enforceable through civil and criminal penalties. See 33 U.S.C. 1319(b) and (c). Section 1319(c)(2)(A) makes it a crime to "knowingly" violate Section 1311. 33 U.S.C. 1319(c)(2)(A).

2. This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United*

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[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, 33 U.S.C. 1362(7); 33 C.F.R. 328.3 (2014), and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, 33 C.F.R. 328.3(a)(1) (2014), this brief will refer to the latter as "traditional navigable waters."

States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense."). And in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001), the Court did not cast doubt upon its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172.

Most recently, the Court construed the term "waters of the United States" in *Rapanos* v. *United States*, 547 U.S. 715 (2006). *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands adjacent to nonnavigable tributaries of traditional navigable waters. See *id.* at 729 (plurality opinion). All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. See *id.* at 730-731 (plurality opinion); *id.* at 767 (Kennedy, J., concurring in the judgment); *id.* at 792-793 (Stevens, J., dissenting).

Four Justices in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water," 547 U.S. at 739 (plurality opinion), that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a "continuous surface connection" with such water bodies, *ibid.*[2] Justice Kennedy interpreted

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[2] The *Rapanos* plurality noted that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during

the term to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in the judgment) (citation omitted). He explained that "wetlands possess the requisite nexus * * * if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. In addition, Justice Kennedy concluded that the Corps' assertion of jurisdiction over "wetlands adjacent to navigable-in-fact waters" may be sustained "by showing adjacency alone." *Ibid.* The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, interpreted the term "waters of the United States" to encompass, *inter alia*, all tributaries and wetlands that satisfy either the plurality's standard or Justice Kennedy's. *Id.* at 810 & n.14 (Stevens, J., dissenting).

Since *Rapanos*, every court of appeals to have considered the question has determined that the government may exercise CWA jurisdiction over at least those waters that satisfy the test set forth in Justice Kennedy's concurrence. See *United States* v. *Johnson*, 467 F.3d 56, 64-66 (1st Cir. 2006), cert. denied, 552 U.S. 948 (2007); *United States* v. *Donovan*, 661 F.3d 174, 184 (3d Cir. 2011), cert. denied, 566 U.S. 990 (2012); *United States* v. *Gerke Excavating, Inc.*, 464 F.3d 723, 724-725 (7th Cir. 2006) (per curiam), cert. denied, 552 U.S. 810 (2007); *United States* v. *Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *Northern Cal. River Watch* v. *City of Healdsburg*,

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some months of the year but no flow during dry months." 547 U.S. at 732 n.5.

496 F.3d 993, 999 (9th Cir. 2007), cert. denied, 552 U.S. 1180 (2008); *United States* v. *Robison*, 505 F.3d 1208, 1221-1222 (11th Cir. 2007), cert. denied, 555 U.S. 1045 (2008).

3. In 2013 and 2014, petitioner constructed a series of ponds on privately owned and National Forest lands in Montana. Pet. App. A4. An unnamed tributary runs through those lands to Cataract Creek, which in turn runs into the Boulder River and then the Jefferson River, a traditional navigable water. *Ibid.* To construct the ponds, petitioner used an excavator to remove earth from the wetlands surrounding the tributary. See, *e.g.*, C.A. E.R. 945-948, 989. He then deposited the soil and rocks directly into the stream bed, blocking the flow of water. See, *e.g.*, *id.* at 945-950. After learning of petitioner's construction activities in the fall of 2013, an agent from the United States Environmental Protection Agency (EPA) advised petitioner to contact the Corps because he "very likely" needed a permit. *Id.* at 1385; see Pet. App. A4, A20 n.2. Petitioner ignored the advice and continued building for nearly a year, C.A. E.R. 1386-1390, 1417-1427, ultimately affecting 400 linear feet of stream and 1.5 acres of adjacent wetlands, *id.* at 1353-1354.

A federal grand jury in the District of Montana returned a three-count indictment charging petitioner with two counts of knowingly discharging dredged or fill material into the waters of the United States without a Section 1344 permit, in violation of 33 U.S.C. 1311(a) and 1319(c)(2)(A), and one count of willfully injuring and committing depredation of property of the United States (namely, National Forest lands), in violation of 18 U.S.C. 1361. C.A. E.R. 3502-3503.

Following a trial, the jury was unable to reach a unanimous verdict on any of the three counts, and the district court declared a mistrial. Pet. App. H2. Petitioner moved for a judgment of acquittal on the Section 1311(a) counts, arguing that the evidence was insufficient to establish that the tributary and its adjacent wetlands were "waters of the United States." *Id.* at H2-H3. The court denied the motion, *id.* at H1-H12, explaining that it had instructed the jury to apply the "significant nexus" test from Justice Kennedy's concurrence in *Rapanos*, *id.* at H4, and that the government had presented sufficient evidence to establish that the waters in question had "significant" "chemical, physical, and biological effects" on the Jefferson River, a traditional navigable water, *id.* at H9.

A second trial was held in April 2016, Pet. App. A5, and the district court again instructed the jury to apply Justice Kennedy's "significant nexus" test, *id.* at A23 n.4. The jury found petitioner guilty on all three counts. *Id.* at F1-F2. The court denied petitioner's motion for a judgment of acquittal on the Section 1311(a) counts. *Id.* at E1-E8. The court found the evidence sufficient to establish that the tributary and its adjacent wetlands had a "hydrological connection" of "chemical, physical, and biological" significance to the Jefferson River. *Id.* at E5. The court cited the testimony of various scientists that the health of the tributary and others like it in the watershed "affect[s] water temperatures, flood and erosion control, and animal and insect habitat for the entire system," including "fish populations in Cataract Creek and the Jefferson River." *Ibid.* Construing that evidence "in the light most favorable to the government," the court determined that "a rational juror could find that the significant nexus test was met." *Id.* at E6.

At sentencing, the district court noted that, for "nearly ten years," petitioner had received multiple citations for unauthorized activities on National Forest lands, C.A. E.R. 258, and that he had "utterly ignored his legal obligations" arising out of those citations, *id.* at 261. The court also observed that, after his series of ponds was discovered in 2013, petitioner "was told and instructed to cease work until proper permits were either requested and approved or he was told that a permit was not required." *Id.* at 265. Emphasizing that petitioner had "repeatedly demonstrated that he has no respect for the law," *id.* at 275, the court sentenced him to 18 months of imprisonment on each count, to be served concurrently, *id.* at 278.

4. The court of appeals affirmed. Pet. App. A1-A28; 704 Fed. Appx. 705-706.

As relevant here, the court of appeals rejected petitioner's contention that "Justice Kennedy's test from *Rapanos* is not the controlling test for determining CWA jurisdiction." Pet. App. A13. The court observed that it had held in *Northern California River Watch* v. *City of Healdsburg*, *supra*, which predated petitioner's offense conduct, "that Justice Kennedy's 'concurrence is the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases.'" Pet. App. A14. The court acknowledged that it had nine years later issued an en banc decision in *United States* v. *Davis*, 825 F.3d 1014 (9th Cir. 2016), which postdated petitioner's offense conduct, clarifying the court's approach to "fractured Supreme Court decisions" under *Marks* v. *United States*, 430 U.S. 188 (1977). Pet. App. A13. The court explained, however, that it was still bound by its prior precedent in *City of Healdsburg* unless *Davis* was "clearly irreconcilable" with it.

Id. at A15 (quoting *Miller* v. *Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc)). The court determined that "*City of Healdsburg* remains valid and binding precedent" because even under the approach adopted in *Davis*, Justice Kennedy's opinion is the "narrowest" opinion in these circumstances. *Id.* at A18.

The court of appeals also rejected petitioner's contention that he did not have "fair warning" of the meaning of the term "waters of the United States." Pet. App. A19. The court observed that petitioner had "not challenge[d] the general validity of the criminal provisions of the CWA," but rather had focused on the supposed uncertainty about whether *City of Healdsburg* was still the law of the circuit after *Davis*. *Id.* at A20. The court noted that "the conduct at issue in this case took place between October 2013 and October 2014, well after this court had issued *City of Healdsburg* and had held that Justice Kennedy's test controlled CWA jurisdiction, and well before this court's decision in *Davis*." *Ibid.* The court therefore determined that petitioner "was on notice from *City of Healdsburg* at the time of his excavation activities that wetlands and non-navigable tributaries are subject to CWA jurisdiction 'if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable."'" *Ibid.* (quoting *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment)). The court also observed that petitioner "was warned by an EPA agent that he likely needed a permit to authorize his excavations." *Id.* at A20 n.2.

Finally, the court of appeals rejected petitioner's challenge to the sufficiency of the evidence presented

on the Section 1311(a) counts at his first trial. Pet. App. A21-A22. The court explained that, in *Richardson* v. *United States*, 468 U.S. 317 (1984), this Court "held that even where the Government has presented inadequate evidence at the first trial and the jury deadlocks, if the trial judge rejects the defendants' insufficiency arguments, double jeopardy protections do not bar a second trial." Pet. App. A21. The court of appeals reasoned that, "absent double jeopardy protections, a finding that insufficient evidence was offered at the first trial would have no impact on the validity of the second trial." *Id.* at A22. The court therefore concluded that "a criminal defendant cannot challenge the sufficiency of the evidence presented at a previous trial following a conviction at a subsequent trial." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 14-23) that the term "navigable waters" in the CWA is unconstitutionally vague as construed in *Rapanos* v. *United States*, 547 U.S. 715 (2006). That contention, however, was not pressed or passed on below; the statute is not unconstitutionally vague as applied to the facts of this case; and the court of appeals' application of the CWA does not conflict with any decision of this Court or another court of appeals. Petitioner also urges this Court (Pet. 23-29) to revisit its construction of "navigable waters" in *Rapanos*, but he provides no sound reason to do so. Every court of appeals to have considered the question has determined that the government may establish CWA jurisdiction under the standard set forth in Justice Kennedy's concurrence in *Rapanos*. And because the Corps and EPA are still in the process of revising the regulatory definition of "waters of the United States," revisiting the stat-

utory question at this juncture would be premature. Finally, petitioner contends (Pet. 30-36) that the alleged insufficiency of the evidence at his first trial may form the basis for overturning his Section 1311(a) convictions following his second trial, at which the evidence was indisputably sufficient. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. Petitioner contends (Pet. 14-23) that the CWA's definition of "navigable waters" as "waters of the United States" is impermissibly vague under the Due Process Clause of the Fifth Amendment. That contention does not warrant this Court's review.

a. "This Court has held that the Due Process Clause prohibits the Government from 'taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.'" *Beckles* v. *United States*, 137 S. Ct. 886, 892 (2017) (citation omitted). The "touchstone" of the void-for-vagueness inquiry is "whether the statute, either standing alone *or as construed*, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States* v. *Lanier*, 520 U.S. 259, 267 (1997) (emphasis added); see *Posadas de P.R. Assocs.* v. *Tourism Co.*, 478 U.S. 328, 347 (1986) (rejecting a vagueness challenge in light of a "narrowing construction" and "implementing regulations").

Petitioner does not dispute (Pet. 18) that the void-for-vagueness inquiry should account for how the CWA has been construed. Rather, petitioner principally argues (Pet. 18-21) that the CWA is impermissibly vague

as construed by Justice Kennedy in *Rapanos*. In his concurring opinion in that case, Justice Kennedy construed "waters of the United States" to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment) (citation omitted).

Petitioner, however, did not challenge Justice Kennedy's "significant nexus" test as impermissibly vague in the court of appeals. Petitioner instead made a different argument—that he lacked fair notice of whether Justice Kennedy's "significant nexus" test applied at all, in light of the court of appeals' clarification of the *Marks* rule in *United States* v. *Davis*, 825 F.3d 1014 (9th Cir. 2016) (en banc). Pet. C.A. Br. 11-26; see *Marks* v. *United States*, 430 U.S. 188 (1977). The question whether Justice Kennedy's "significant nexus" test is impermissibly vague therefore was not pressed or passed upon in the court of appeals. See Pet. App. A20 (observing that petitioner had "not challenge[d] the general validity of the criminal provisions of the CWA" and addressing only "the effect of *Davis*" on *Northern California River Watch* v. *City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), cert. denied, 552 U.S. 1180 (2008)). For that reason alone, no further review is warranted. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (citation omitted).

b. In any event, petitioner's contention (Pet. 18-21) that Justice Kennedy's "significant nexus" test is impermissibly vague lacks merit. This Court "consider[s]

whether a statute is vague as applied to the particular facts at issue, for 'a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010) (brackets and citation omitted); see *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975) ("It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand."). Petitioner therefore can prevail in his vagueness challenge only by showing that the term "waters of the United States," if construed in accordance with Justice Kennedy's "significant nexus" test, would be impermissibly vague as applied to petitioner's own conduct.

Petitioner makes no effort to demonstrate that the "significant nexus" test is impermissibly vague as applied to the facts of this case. Under that test, "wetlands possess the requisite nexus * * * if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment). "Here, the parties agree[d] that the Jefferson River is a traditionally navigable water." Pet. App. E3. And the evidence showed that the tributary and its adjacent wetlands where petitioner discharged dredged or fill material had a chemically, physically, and biologically "significant" connection with the Jefferson River. *Id.* at E5. One witness, for instance, "testified to walking the length of the tributary and observing both a defined bed and bank, as well as flowing water." *Id.* at E4. Another witness "testified that he performed a visual

flow test on the tributary near the ponds, estimating the tributary's flow at 8-16 gallons per minute." *Ibid.* Still other witnesses testified to the wide range of effects of the waters in question on waters downstream, including with respect to "water temperatures, flood and erosion control, and animal and insect habitat." *Id.* at E5.

Indeed, petitioner had actual notice that blocking the flow of the tributary with soil and rocks "very likely" required a CWA permit. Pet. App. A20 n.2. During a visit to the area in November 2013, an EPA agent told petitioner "that [his] work required permitting and that he needed to contact the United States Army Corps of Engineers and/or the Montana Department of Environmental Quality to seek further guidance and assistance before conducting any further work." C.A. E.R. 262; see *id.* at 1385-1386. A United States Forest Service officer likewise told petitioner that "he needed to stop digging." *Id.* at 989. Petitioner was thus "told and instructed to cease work until proper permits were either requested and approved or he was told that a permit was not required," *id.* at 265, but continued his conduct despite that warning.[3]

c. Petitioner does not contend that the court of appeals' rejection of his vagueness challenge conflicts with any decision of another court of appeals. Petitioner ar-

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[3] Petitioner contends (Pet. 21-23) that the *Rapanos* plurality's construction of the term "waters of the United States" is also unconstitutionally vague. That contention, however, has no bearing on whether the CWA is unconstitutionally vague as applied to petitioner's conduct, because the jury was not instructed to apply the *Rapanos* plurality's test to petitioner's conduct here. Rather, the jury's verdict rested only on application of Justice Kennedy's "significant nexus" test. Pet. App. A23 & n.4.

gues (Pet. 18-21), however, that the decision below conflicts with this Court's decisions in *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018), and *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). That argument lacks merit.

Johnson involved the residual clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), which defines a "violent felony" to include any felony that "involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii). The Court in *Johnson* determined that "[t]wo features of the residual clause" render it unconstitutionally vague. 135 S. Ct. at 2557. "In the first place," the Court explained, "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime," because "[i]t ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Ibid.* Second, the Court continued, "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558. Emphasizing that "[i]t is one thing to apply an imprecise 'serious potential risk' standard to real-world facts" but "quite another to apply it to a judge-imagined abstraction," the Court concluded that the two features it had identified "combin[ed]" to "produce[] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Ibid.* Applying the same analysis in *Dimaya*, the Court determined that a similarly worded clause in the definition of "crime of violence" in 18 U.S.C. 16(b) is likewise impermissibly vague. 138 S. Ct. at 1210.

Johnson and *Dimaya* have no application here, because unlike the statutes at issue in those cases, the CWA, as construed by Justice Kennedy, does not require the application of any indeterminate test to any

"judge-imagined abstraction." *Johnson*, 135 S. Ct. at 2558. Rather, Justice Kennedy described a "significant nexus" test that is applied to "real-world facts," *id.* at 2557—that is, the actual waters at issue in a particular case. The application of the test in petitioner's case was therefore an issue for the jury, which had to find beyond a reasonable doubt that the test was satisfied. Pet. App. A23 n.4. And while Justice Kennedy's test does require gauging the "significan[ce]" of the connection between the waters in question and traditional navigable waters, *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment), the Court in *Johnson* did "not doubt the constitutionality of laws that call for the application of [such] a qualitative standard * * * to real-world conduct; 'the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree.'" 135 S. Ct. at 2561 (citation omitted). Rather, the "problem" in both *Johnson* and *Dimaya* "came from layering such a standard on top of the requisite 'ordinary case' inquiry." *Dimaya*, 138 S. Ct. at 1214. Because the CWA requires no such inquiry into a judicially imagined set of facts, petitioner's reliance on *Johnson* and *Dimaya* to challenge the jury's finding of a knowing CWA violation here is misplaced.

2. Petitioner contends (Pet. 23-29) that this Court should grant review to revisit its decision in *Rapanos*. Petitioner, however, provides no sound reason for this Court to do so in this case. As a threshold matter, petitioner urges this Court (Pet. 23) to revisit *Rapanos* to adopt an interpretation of the CWA that "does not run afoul of the void for vagueness doctrine." As explained above, however, Justice Kennedy's interpretation of the CWA is not unconstitutionally vague as applied to the facts of this case. See pp. 11-16, *supra*. Petitioner also

argues (Pet. 28-29) that this Court should revisit *Rapanos* to clarify which opinion—the plurality's or Justice Kennedy's—should be considered controlling under the rule of *Marks* v. *United States*, *supra*. This Court has previously denied petitions for writs of certiorari that have raised the same issue. See *City of Healdsburg* v. *Northern Cal. River Watch*, 552 U.S. 1180 (2008) (No. 07-625); *Johnson* v. *United States*, 552 U.S. 948 (2007) (No. 07-9). The same result is warranted here.

a. In *Marks*, this Court provided a rule for determining the governing law established by a decision in which the Members of the Court do not agree on a rationale. "When a fragmented Court decides a case, and no single rationale explaining the result enjoys the assent of five Justices," *Marks* held, "'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" 430 U.S. at 193 (citation omitted). Because an opinion "'concurr[ing] in the judgments on the narrowest grounds'" occupies a "middle ground" between Justices with broader and narrower views, *Marks* ensures that "lower courts will decide cases consistently with the opinions of a majority of the Supreme Court in the relevant precedent." *United States* v. *Duvall*, 740 F.3d 604, 610 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc) (citation omitted).

This Court, in applying *Marks*, has not invariably required that one single opinion itself encapsulate the Court's holding. Often, as in *Marks* itself, the Court has designated as controlling a middle-ground opinion falling between plurality and dissenting views that produces results accepted by five Justices in every case.

See, *e.g.*, *Graham* v. *Florida*, 560 U.S. 48, 59-60 (2010); *Panetti* v. *Quarterman*, 551 U.S. 930, 949 (2007); *Marks*, 430 U.S. at 193. On other occasions, however, this Court has taken a different route to the same basic result—asking which litigant would have prevailed under the rationales of at least five Justices by running the facts at hand through multiple opinions. See, *e.g.*, *Bobby* v. *Dixon*, 565 U.S. 23, 30-32 (2011) (per curiam); *City of Ontario* v. *Quon*, 560 U.S. 746, 757 (2010) (plaintiff's claim failed because "two * * * approaches—the plurality's and Justice Scalia's"—each indicated that the plaintiff was not entitled to relief); see also, *e.g.*, *United States* v. *Jacobsen*, 466 U.S. 109, 115-117 (1984) (determining that an earlier case established that "the legality of [a] governmental search must be tested by the scope of the antecedent private search" because that proposition was accepted by a single-Justice concurrence and a four-Justice dissent); *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 16-17 (1983) (similar).

Both methods decide cases consistently with the views of a majority of this Court, and under the principles of *Marks*, the jury's verdict here sufficed to establish coverage under the CWA. Application of the CWA here would necessarily be consistent with the views of a majority of this Court's members.

b. This case does not implicate the circuit conflicts that petitioner asserts (Pet. 28-29) warrant this Court's review. Petitioner first contends (Pet. 28) that the courts of appeals differ as to whether *Marks* "allow[s] the government to follow both the plurality and the concurrence" in *Rapanos*. As petitioner acknowledges (Pet. 29), however, every court of appeals to have considered the issue has determined that the CWA covers at least

those waters that satisfy the test set forth in Justice Kennedy's concurrence. See *United States* v. *Johnson*, 467 F.3d 56, 64-66 (1st Cir. 2006), cert. denied, 552 U.S. 948 (2007); *United States* v. *Donovan*, 661 F.3d 174, 184 (3d Cir. 2011), cert. denied, 566 U.S. 990 (2012); *United States* v. *Gerke Excavating, Inc.*, 464 F.3d 723, 724-725 (7th Cir. 2006) (per curiam), cert. denied, 552 U.S. 810 (2007); *United States* v. *Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *City of Healdsburg*, 496 F.3d at 999; *United States* v. *Robison*, 505 F.3d 1208, 1221-1222 (11th Cir. 2007), cert. denied, 555 U.S. 1045 (2008). Because petitioner does not dispute in this Court that the evidence at his second trial was sufficient to satisfy that test, see Pet. App. E3-E6, any purported disagreement among the courts of appeals on whether the CWA also covers waters that satisfy the *Rapanos* plurality's standard is not implicated here.[4]

Petitioner also argues (Pet. 29) that the courts of appeals disagree on "whether *Marks* allows the use of dissents in determining the holding of a fractured decision of this Court." Both courts that consider dissenting views and those that do not, however, have permitted

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[4] Although the issue is not relevant to the outcome here, petitioner errs in contending (Pet. 28) that the Seventh and Ninth Circuits have held that the government may establish CWA jurisdiction under only Justice Kennedy's test in *Rapanos*. Rather, both circuits have left open the possibility that the government could establish CWA jurisdiction under the *Rapanos* plurality's test where the wetlands at issue satisfy that test but not Justice Kennedy's. See *Gibson* v. *American Cyanamid Co.*, 760 F.3d 600, 621 (7th Cir. 2014) (explaining that *Gerke* did not definitively resolve the issue), cert. denied, 135 S. Ct. 2311 (2015); *Northern Cal. River Watch* v. *Wilcox*, 633 F.3d 766, 781 (9th Cir. 2011) (explaining that *Healdsburg* "did not * * * foreclose the argument that Clean Water Act jurisdiction may also be established under the plurality's standard").

the government to establish CWA jurisdiction under Justice Kennedy's test. See *Johnson*, 467 F.3d at 65-66 (considering dissenting views and permitting the government to use either the *Rapanos* plurality's or Justice Kennedy's test); *Donovan*, 661 F.3d at 182 (same); *Robison*, 505 F.3d at 1221-1222 (declining to consider the dissenting views in *Rapanos* but treating Justice Kennedy's concurrence as the controlling opinion). Indeed, neither of the courts of appeals petitioner identifies (Pet. 29) as having rejected the consideration of dissenting votes has precluded the government from establishing CWA jurisdiction under Justice Kennedy's test: the Seventh Circuit has "applied the rationale in Justice Kennedy's concurrence," *Gibson* v. *American Cyanamid Co.*, 760 F.3d 600, 621 (2014) (citing *Gerke*, 464 F.3d at 724-725), cert. denied, 135 S. Ct. 2311 (2015), while the D.C. Circuit has yet to address the application of *Marks* to *Rapanos* at all. This case therefore does not implicate any circuit conflict on the consideration of dissenting votes in the *Marks* analysis.

c. In any event, revisiting *Rapanos* would be premature at this juncture. Several Members of this Court have suggested that the Corps and EPA "clarif[y] * * * the reach" of the CWA by further developing a definition of the term "waters of the United States." *Sackett* v. *EPA*, 566 U.S. 120, 133 (2012) (Alito, J., concurring); see *Rapanos*, 547 U.S. at 757-758 (Roberts, C.J., concurring); *Rapanos*, 547 U.S. at 811-812 (Breyer, J., dissenting). The Corps and EPA have undertaken the process of doing so. In 2015, the agencies jointly promulgated a final rule that amended the regulatory definition of "waters of the United States." See 80 Fed. Reg. 37,054 (June 29, 2015). That rule, however, is the subject of pending challenges in various federal district

courts, see *National Ass'n of Mfrs.* v. *Department of Def.*, 138 S. Ct. 617, 627 (2018), and in 2017, the agencies proposed to rescind the rule, 82 Fed. Reg. 34,899 (July 27, 2017). That proposal remains under consideration. See 83 Fed. Reg. 32,227 (July 12, 2018) (seeking additional comment on the proposed rescission of the 2015 rule). Meanwhile, in February 2019, the agencies proposed to promulgate a new regulatory definition of "waters of the United States" that would replace the approach in the 2015 rule and the pre-2015 regulations. 84 Fed. Reg. 4154 (Feb. 14, 2019). Because the Corps and EPA are charged with administering the CWA, and because the process of revising the regulatory definition of "waters of the United States" is still ongoing, review of the statutory question in this case is unwarranted.

3. Petitioner contends (Pet. 30-36) that his CWA convictions following his second trial may be overturned based on an alleged insufficiency of the evidence at his first trial, which ended in a mistrial after the jury was unable to reach a verdict. This Court has previously denied a petition for a writ of certiorari raising a similar challenge to convictions at a second trial, see *Achobe* v. *United States*, 558 U.S. 819 (2009) (No. 08-1391), and the same result is warranted here.

a. The court of appeals correctly determined that an alleged insufficiency of the evidence at an initial trial that ended in a mistrial provides no basis for overturning a conviction entered after a second trial at which the evidence was sufficient. Pet. App. A21-A22.

This Court has held that a defendant has a due process right not "to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense."

Jackson v. *Virginia*, 443 U.S. 307, 316 (1979); see *In re Winship*, 397 U.S. 358, 362-363 (1970). Petitioner does not claim, however, that he was *convicted* based on insufficient evidence: petitioner's first trial ended in a mistrial, and petitioner does not challenge the sufficiency of the evidence at his second trial. Petitioner's claim is thus necessarily that the alleged insufficiency of the evidence at his first trial either prohibited the commencement, or invalidates the result, of his second trial.

As the court of appeals correctly concluded, Pet. App. A21-A22, that contention is inconsistent with this Court's decision in *Richardson* v. *United States*, 468 U.S. 317 (1984). In *Richardson*, the defendant moved for a judgment of acquittal at the conclusion of the government's case in chief and renewed that motion at the close of the evidence. *Id.* at 318. The district court denied those motions and submitted the case to the jury, which was unable to reach a verdict with respect to two counts. *Id.* at 319. The district court then declared a mistrial with respect to those counts and scheduled a new trial. *Ibid.* Richardson appealed, arguing that the Double Jeopardy Clause barred the retrial because the evidence at the first trial was legally insufficient. *Ibid.*

After concluding that it had jurisdiction over Richardson's double jeopardy appeal under the collateral order doctrine, *Richardson*, 468 U.S. at 320-322, the Court rejected Richardson's claim on the merits, *id.* at 322-326. The Court noted that *Burks* v. *United States*, 437 U.S. 1 (1978), holds that the Double Jeopardy Clause bars a retrial where a defendant "obtain[s] an unreversed appellate ruling" that the evidence at the first trial was legally insufficient. *Richardson*, 468 U.S. at 323. But the Court observed that it had also "constantly adhered to the rule that a retrial following a

'hung jury' does not violate the Double Jeopardy Clause." *Id.* at 324. The Court explained that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy," *id.* at 325, and it stated that "a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which [a defendant] was subjected," *id.* at 326. As a result, the Court held that, "[r]egardless of the sufficiency of the evidence at [Richardson's] first trial, he ha[d] no valid double jeopardy claim to prevent his retrial." *Ibid.*

Petitioner seeks to distinguish *Richardson* on the ground that "*Richardson* addressed only whether a retrial following the erroneous denial of a motion to acquit would *violate double jeopardy*" and not the supposedly separate question whether that erroneous denial may be reviewed on its own right after a conviction at a second trial. Pet. 34 (emphasis added). But as the court of appeals correctly recognized, Pet. App. A22, the Court's answer to the first question logically controls the answer to the second.

Like the defendant in *Richardson*, petitioner "seeks review of the sufficiency of the evidence at his first trial, not to reverse a judgment entered on that evidence, but as a necessary component of" a claim that the convictions obtained after a second trial should be set aside. *Richardson*, 468 U.S. at 322. Petitioner does not dispute the sufficiency of the evidence at his second trial; his contention is instead that the second trial never should have taken place. The only plausible basis for that claim is the Double Jeopardy Clause. The Double Jeopardy Clause *would* bar a second trial if petitioner

had been acquitted at the first. But unlike the defendant in *Burks*—and like the defendants in *Richardson* and *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294 (1984)—petitioner was not acquitted at his first trial: "he simply maintains that he ought to have been." *Id.* at 307. As this Court has explained, a "claim of evidentiary failure and a legal judgment to that effect * * * have different consequences under the Double Jeopardy Clause." *Id.* at 309; accord *Richardson*, 468 U.S. at 323.

Contrary to petitioner's suggestion (Pet. 30, 34), this Court's holding on "the merits" in *Richardson*, 468 U.S. at 322, means more than that a retrial following a mistrial and an erroneous denial of a motion to acquit does not violate double jeopardy. The holding logically entails that the erroneous denial of a motion to acquit can have no role to play in barring later proceedings. Because those proceedings *can* progress to a second trial, the validity of a conviction must be measured by the events at that trial—not at a first trial that produced no definitive outcome.

Petitioner invokes (Pet. 32) the general principle that parties may seek review of "interlocutory rulings after a final judgment," and he asserts (Pet. 34) that *Richardson* does not "disturb[]" that "well-settled rule." But "interlocutory orders in a litigation are frequently rendered moot by the final judgment in the trial court," *Olson* v. *Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 733 (7th Cir. 1986), and a party cannot obtain reversal based on an interlocutory ruling that has been mooted by subsequent events. That is the case here. Because the evidence at the second trial was sufficient to support petitioner's Section 1311(a) convictions,

Pet. App. E3-E6, petitioner's claim that there was a failure of proof at his *first* trial, which did not result in a conviction, is now moot unless that alleged failure somehow barred the conduct, or invalidates the results, of the second trial. But that is a double jeopardy claim, which *Richardson* rejected on "the merits." 468 U.S. at 322.

b. Petitioner errs in contending (Pet. 31-32) that the decision below conflicts with Eleventh Circuit precedent. Like *Richardson*, the Eleventh Circuit's decision in *United States* v. *Gulledge*, 739 F.2d 582 (1984), involved an interlocutory appeal by a defendant who sought to prevent a second trial on the grounds that the evidence at his first trial was insufficient. The Eleventh Circuit held that the defendant could not appeal the denial of his motion for acquittal following the declaration of a mistrial because there had been no "final decision[]" under 28 U.S.C. 1291, and it rejected the defendant's double jeopardy claim based on *Richardson*. See *Gulledge*, 739 F.2d at 584. In the course of dismissing the defendant's sufficiency claim for lack of appellate jurisdiction, the *Gulledge* court stated that "the purported insufficiency of the evidence in the first trial is reviewable by this court only on appeal from a conviction after a second trial." *Ibid.* As petitioner acknowledges, however, that statement was "dicta," Pet. 16, and the Eleventh Circuit does not appear to have issued a subsequent decision in *Gulledge*. In addition, the only authority that *Gulledge* cited in support of its dictum were two Fifth Circuit decisions—*United States* v. *Rey*, 641 F.2d 222, cert. denied, 454 U.S. 861 (1981), and *United States* v. *Wilkinson*, 601 F.2d 791 (1979). See *Gulledge*, 739 F.2d at 584. Both *Rey* and *Wilkinson* preceded *Richardson*, and the Fifth Circuit has since disavowed both of them in light of *Richardson*. See *United*

States v. *Achobe*, 560 F.3d 259, 266 & n.12 (2008), cert. denied, 558 U.S. 819 (2009).

Petitioner's reliance (Pet. 32) on *United States* v. *Cooper*, 733 F.2d 91 (11th Cir. 1984), is likewise misplaced. In *Cooper*, the Eleventh Circuit rejected the defendant's double jeopardy claim on the ground that the evidence was sufficient to support the conviction at his first trial, which had ended in a mistrial. *Id.* at 92. *Richardson* has since made clear, however, that such a double jeopardy claim must fail "[r]egardless of the sufficiency of the evidence at [the] first trial," 468 U.S. at 326, and the Eleventh Circuit in *Cooper* did not address whether review of the sufficiency of the evidence at the first trial would have been necessary independent of any double jeopardy claim.

The remaining Eleventh Circuit decisions petitioner cites (Pet. 32)—*United States* v. *Martinez*, 509 Fed. Appx. 889 (2013) (per curiam), and *United States* v. *Gavin*, 394 Fed. Appx. 643 (2010) (per curiam), cert. denied, 563 U.S. 927 (2011)—are unpublished opinions, which could not create a conflict warranting this Court's review. In any event, the Eleventh Circuit's review of the sufficiency of the evidence at the first trial in each of those cases had no effect on the outcome. That is because, in each case, the court ultimately found the evidence sufficient and therefore did not reach the question whether insufficient evidence could have been a basis for overturning the judgment of the second trial. See *Martinez*, 509 Fed. Appx. at 891-893; *Gavin*, 394 Fed. Appx. at 645-646.

4. Finally, review is unwarranted in this case in any event because even a decision in petitioner's favor would have little practical effect. Petitioner does not challenge his conviction for injuring property of the

United States, in violation of 18 U.S.C. 1361. He received concurrent terms of imprisonment on both that count and the two CWA counts that he challenges (which he has already served); his concurrent term of supervised release on the property-injury count is longer (three years rather than one year); and his restitution is also supportable by that count alone. See Pet. App. C4-C5, C11; Gov't C.A. Br. 56-57. Although a decision in his favor would result in a vacatur of the two CWA convictions, his supervised-release and restitution obligations would remain, and he has identified no significant prospective consequence of the convictions that he challenges.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JEFFREY BOSSERT CLARK
Assistant Attorney General
JENNIFER SCHELLER NEUMANN
J. DAVID GUNTER II
Attorneys

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