No. 19-1447

In the Supreme Court of the United States

YEHUDI MANZANO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
BRIAN C. RABBITT
Acting Assistant Attorney General
DANIEL N. LERMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals permissibly granted the government's petition for a writ of mandamus directing the district court, which had previously granted petitioner's request to argue at trial for jury nullification, to deny that request.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Conn.):

United States v. *Manzano*, No. 18-cr-95 (Oct. 29, 2018) (oral ruling granting defendant's motion to argue for jury nullification)

United States Court of Appeals (2d Cir.):

In re United States, No. 18-3430 (Dec. 18, 2019) (granting government's petition for mandamus)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes and rule:

In the Supreme Court of the United States

No. 19-1447

YEHUDI MANZANO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2-57) is reported at 945 F.3d 616.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2019. A petition for rehearing was denied on January 31, 2020 (Pet. App. 59). On March 19, 2020, the Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on June 26, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury in the District of Connecticut returned an indictment charging petitioner with one

count of producing child pornography, in violation of 18 U.S.C. 2251(a); and one count of transporting child pornography, in violation of 18 U.S.C. 2252A(a)(1). Indictment 2-3. At a pretrial conference on the day petitioner's trial was scheduled to begin, the district court granted petitioner's request to argue at trial for jury nullification. Pet. App. 4, 8-9, 94-95, 109. The court of appeals issued a writ of mandamus directing the district court to deny petitioner's request to argue for jury nullification. *Id.* at 32.

1. In October 2016, Connecticut law-enforcement officers received information that petitioner, who was then 31 years old, had been in a sexual relationship with M.M., a 15-year old girl. Pet. App. 5. Petitioner was the landlord of the building where M.M. lived. *Ibid.* Officers searched petitioner's cellphone pursuant to a warrant and discovered a video of petitioner and M.M. engaging in sexually explicit conduct. *Ibid.*

M.M. knew that petitioner was recording the video, and petitioner did not force M.M. to engage in the sexual conduct on the video. Pet. App. 5. But M.M. was incapable of consenting to sexual conduct under Connecticut law because of her age. *Id.* at 5-6 (citing Conn. Gen. Stat. Ann. § 53a-71(a)(1) (West Supp. 2016)). Petitioner uploaded the video to his personal Google Photos folder using Internet servers located outside of Connecticut. *Id.* at 6.

2. A federal grand jury in the District of Connecticut returned an indictment charging petitioner with one count of producing child pornography, in violation of 18 U.S.C. 2251(a); and one count of transporting child pornography, in violation of 18 U.S.C. 2252A(a)(1). Indictment 2-3; see Pet. App. 6. The production count is punishable by a statutory minimum term of 15 years of

imprisonment. 18 U.S.C. 2251(e). The transportation count is punishable by a statutory minimum term of five years of imprisonment. 18 U.S.C. 2252A(b)(1).

Before trial, petitioner filed a "Motion to Permit Counsel to Argue Jury Nullification." D. Ct. Doc. 30 (Oct. 1, 2018) (capitalization altered; emphasis omitted). The motion asserted that petitioner's sexual contact with M.M. would have been consensual if not for her age, and that no one would have seen the video but for law-enforcement officers' search of petitioner's phone because petitioner did not send the video to anyone. *Id.* at 1. Petitioner sought permission to make the jury aware of the penalty for his offense if he were convicted and to argue that the government's application of the law to the facts of this case was "an obscene miscarriage of justice." *Ibid.* Petitioner acknowledged that the government "may well be able to prove the elements of the offense," but he contended that an argument for jury nullification was appropriate because his conduct was "in no way so sinister" as to warrant a 15-year penalty. *Ibid.* The government opposed petitioner's motion and filed a motion in limine seeking to preclude argument for nullification or evidence of the sentencing consequences if petitioner were convicted. Pet. App. 7.

At a pretrial conference on the day that the trial was scheduled to begin, the district court granted petitioner's motion to permit counsel to argue for jury nullification. Pet. App. 94-95 (oral ruling); see *id.* at 109 (minute entry). The court called this a "shocking case" that "calls for jury nullification," and stated that it was "stunned" that the court would not be permitted to impose a sentence shorter than 15 years. *Id.* at 94. The court acknowledged that circuit precedent prohibited it from encouraging jury nullification, but the court took

the view that it was not required to preclude defense counsel from arguing for jury nullification or from introducing evidence about the mandatory minimum. *Id.* at 94-95. The court stated:

> So the law precludes me from charging the jury, the law precludes me from encouraging the jury, and I don't intend to do that. But if evidence comes in about the length of sentence, or if [petitioner's counsel] chooses to argue, I do not feel that I can preclude that. I don't feel I'm required to preclude that. And I think justice requires that I permit that. So it's not going to come from me, but I think justice cannot be done here if the jury is not informed, perhaps by [petitioner's counsel], that that's the consequence here.

Ibid.; see also *id.* at 98-100.

A minute order issued the same day memorialized the district court's oral ruling on petitioner's motion. Pet. App. 109. The entry stated that petitioner's "motion [wa]s denied to the extent [petitioner] seeks a jury charge informing the jury of the mandatory minimum or notifying the jury that they have the power to engage in jury nullification," but that "[t]he motion [wa]s granted to the extent it seeks permission to argue for jury nullification." *Ibid.*

The government filed an emergency motion for a two-week stay of the trial so that it could obtain authorization to file a petition for a writ of mandamus in the court of appeals. Pet. App. 114; see *id.* at 109. At a hearing on the motion later that day, the district court clarified that it had no intention of "instructing the jury on mandatory minimums or their power to nullify." *Id.* at 116. The court stated that it "simply [was] allowing [petitioner's counsel] to argue as he chooses to argue." *Id.* at 116-117. The court further stated that "[t]here is

no doubt that juries have the power to nullify, and [petitioner's counsel] intends to argue that they should." *Id.* at 117.

The district court nevertheless granted the government's motion to stay the trial. The court "recognize[d] that there may be a need to raise" the government's argument "at the Second Circuit by way of mandamus." Pet. App. 119. The court observed that the government would be unable to appeal, and thus to seek appellate review of the permissibility of petitioner's jury-nullification argument, in the event petitioner were acquitted. *Ibid.*

3. A divided panel of the court of appeals granted in part and denied in part the government's petition for a writ of mandamus. Pet. App. 2-32.

a. The court of appeals determined that the government was entitled to a writ of mandamus directing the district court to preclude defense counsel from arguing for jury nullification at trial. Pet. App. 10-24. Quoting this Court's decision in *Cheney* v. *United States District Court*, 542 U.S. 367 (2004), the court of appeals stated that "three demanding conditions must be satisfied before the writ may issue":

> (1) the petitioner must "have no other adequate means to attain the relief it desires;" (2) the petitioner must satisfy "the burden of showing that its right to issuance of the writ is clear and indisputable;" and (3) the issuing court "must be satisfied that the writ is appropriate under the circumstances."

Pet. App. 10 (quoting *Cheney*, 542 U.S. at 380-381) (brackets omitted). The court determined that, with respect to the district court's ruling granting petitioner's request to argue for jury nullification, the government had satisfied all three requirements. See *id.* at 11-24.

The court of appeals found that "the first *Cheney* condition is plainly satisfied." Pet. App. 15. The court observed that "the ordinary appeals process would not afford the government an adequate means of obtaining the relief it seeks." *Id.* at 14. It observed that, if petitioner prevailed at trial and were acquitted, the government would be unable to appeal; "[c]onversely," if the government prevailed and petitioner were convicted, the issue would be moot. *Ibid.* The court recognized that "mandamus may not be invoked as a 'substitute' for an interlocutory appeal," but the court found it "abundantly clear" from case law "that the government's limited right of appeal in criminal cases is relevant to the mandamus inquiry." *Ibid.* (citation omitted).

The court of appeals rejected an argument, raised by the district judge in a brief submitted as amicus curiae, that the government had an adequate alternative remedy in the sense that the district court's ruling did not guarantee that petitioner would be able to argue for jury nullification. Pet. App. 11-14. The amicus brief asserted that the district court's ruling on petitioner's motion was "contingent on whether evidence of the applicable mandatory minimums would later be ruled admissible at trial." *Id.* at 12. The court of appeals rejected that characterization of the ruling. It observed that petitioner "did not seek permission to argue jury nullification only in the event he could introduce evidence of the mandatory minimums at trial" and that the government's motion in limine had sought entirely to bar argument encouraging jury nullification. *Ibid.* And it noted that "[t]he district court granted [petitioner's] motion and denied the government's corresponding request and motion *in limine* without any relevant qualification." *Ibid.*; see *id.* at 13-14.

As to the second *Cheney* factor, the court of appeals determined that the government's right to issuance of the writ was clear and indisputable. Pet. App. 15-22. The court reasoned that the district court had "clearly and indisputably based its ruling on [an] erroneous legal view," namely, its view that "district courts are free to permit jury nullification arguments whenever they feel justice so requires." *Id.* at 16, 19. The court of appeals explained that its precedent made "clear" that "'it is not the proper role of courts to encourage nullification.'" *Id.* at 18 (quoting *United States* v. *Polouizzi*, 564 F.3d 142, 162-163 (2d Cir. 2009)). The court observed that it had previously held that "a presiding judge possesses both the responsibility and the authority to dismiss a juror whose refusal or unwillingness to follow the applicable law becomes known to the judge." *Ibid.* (quoting *United States* v. *Thomas*, 116 F.3d 606, 617 (2d Cir. 1997)). And the court found "no meaningful difference between a court's knowing failure to remove a juror intent on nullification, a court's instruction to the jury that encourages nullification, and a court's ruling that affirmatively permits counsel to argue nullification," reasoning that all of those courses of action "subvert[] the jury's solemn duty to 'take the law from the court, and apply that law to the facts'" of the case "'as they find them to be from the evidence.'" *Id.* at 19-20 (quoting *Sparf* v. *United States*, 156 U.S. 51, 102 (1895)). The court of appeals was "firmly convinced that the district court's jury nullification ruling was based on an erroneous view of the law" and accordingly that the second *Cheney* factor was satisfied. *Id.* at 22.

The court of appeals rejected petitioner's contention that the government had not shown a clear and indisputable right to mandamus because "no binding authority

specifically prevents a district court from allowing counsel to argue jury nullification." Pet. App. 16. It explained that a court presented with a mandamus petition "do[es] not confine [its] review to the narrow (and often empty) universe of binding cases directly on point," but "[i]nstead, as in any case, * * * may consider all relevant legal authorities." *Id.* at 17. The court of appeals determined that, in this case, it clearly followed from precedent that the district court's ruling was premised on a mistaken view of the applicable law. See *id.* at 18. The court of appeals observed that the district court had "in fact recognized that [circuit] case law 'precluded it from encouraging the jury' to nullify." *Ibid.* (quoting *id.* at 94) (brackets omitted). The court of appeals explained that the district court had sought to sidestep that precedent by "draw[ing] an arbitrary distinction between encouraging the jury via jury instructions" and permitting defense counsel "to argue nullification." *Ibid.*

Finally, as to the third *Cheney* factor, the court of appeals "ha[d] little trouble concluding that mandamus is appropriate here." Pet. App. 23; see *id.* at 23-24. The court observed that its decision granting mandamus "reaffirm[ed] a principle of fundamental importance in our jury system" that was "worthy of [its] mandamus jurisdiction," "namely, that the role of the court is to ensure, to the extent possible, that justice is done in accordance with the law—not in derogation of it." *Id.* at 23-24. The court additionally noted that granting mandamus in this case "'will aid in the administration of justice'" by addressing the application of that principle in the particular context of requests by "a defendant to argue jury nullification." *Id.* at 23 (citation omitted). The court stated that that "specific question * * * is novel

and significant in this circuit" and observed that its decision in this case "will serve to guide district courts in any criminal case in which a defendant requests leave to argue jury nullification or the government moves to preclude such argument." *Ibid.*

b. The court of appeals determined, however, that the government was not entitled to a writ of mandamus directing the district court, in advance of trial, to exclude any evidence regarding the sentences applicable to petitioner's offenses in the event he is convicted. Pet. App. 24-31. The court of appeals determined that the first *Cheney* factor was not satisfied with respect to that request for relief because the district court had yet to rule on the admissibility of such evidence. *Id.* at 25.

The court of appeals additionally determined that the government did not have a clear and indisputable right to a pretrial ruling on the admissibility of evidence of sentencing consequences. Pet. App. 26-30. The court noted that a district court has discretion as to the timing and substance of evidentiary rulings, and that it would be premature to ascertain whether jury nullification was the only possible reason for introducing evidence of sentencing consequences here. *Id.* at 26-28. But it emphasized that the district court must exclude evidence of sentencing consequences introduced solely for the purpose of encouraging nullification. *Id.* at 30.

c. Judge Parker concurred in part and dissented in part. Pet. App. 33-57. He agreed with the majority that the government's request for mandamus to direct the district court to exclude evidence of sentencing consequences should be denied. See *id.* at 35. In his view, however, mandamus also was unwarranted with respect to the district court's order permitting petitioner's counsel to argue for jury nullification. See *id.* at 35-57.

ARGUMENT

Petitioner contends (Pet. 6-31) that the court of appeals erred in issuing a writ of mandamus directing the district court—which had granted petitioner's request to argue at trial for jury nullification—to deny that request. The court of appeals permissibly granted mandamus in the particular circumstances of this case, and its decision does not conflict with any decision of this Court or implicate any lower-court conflict that might warrant this Court's review. Further review is not warranted.

1. "The common-law writ of mandamus against a lower court is codified at 28 U.S.C. 1651(a)," *Cheney* v. *United States District Court*, 542 U.S. 367, 380 (2004)—*i.e.*, the All Writs Act, which authorizes courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions," 28 U.S.C. 1651(a). This Court stated in *Cheney* that three conditions must be satisfied before the writ may issue: (1) the petitioner must have "'no other adequate means to attain the relief'"; (2) the petitioner must demonstrate a "'clear and indisputable'" right to issuance of the writ; and (3) the issuing court must be satisfied, "in the exercise of its discretion," that issuance of the writ is "appropriate under the circumstances." 542 U.S. at 380-381 (citation omitted).

Applying that test here, Pet. App. 10, the court of appeals properly determined that the government had satisfied each of the three requirements articulated by this Court in *Cheney* with respect to the district court's order allowing petitioner's counsel to argue at trial for jury nullification, *id.* at 11-24. First, the court of appeals found that the government had no adequate alternative remedy. *Id.* at 11-14. As it observed, "the ordinary appeals process would not afford the government

an adequate means of obtaining the relief it seeks" because, whether petitioner was convicted or acquitted after trial, the government would be unable to appeal and seek review of the district court's ruling. *Id.* at 14. As the court of appeals explained, a conviction would moot any challenge to that ruling, and an acquittal would not allow for an appeal by the government. *Ibid.*

Second, the court of appeals determined that "the government ha[d] a clear and indisputable right to a writ of mandamus directing the district court to deny defense counsel's request for leave to argue nullification." Pet. App. 22-23; see *id.* at 15-23. The court of appeals reasoned that it was "clear" under the applicable case law that "'it is not the proper role of courts to encourage nullification.'" *Id.* at 18 (citation omitted). And the court found "no meaningful difference" between the particular form of encouraging nullification at issue in this case—an order "affirmatively permit[ting] counsel to argue nullification"—and other forms of encouragement that are undisputedly prohibited, such as a district court's "knowing failure to remove a juror" who is "intent on nullification." *Id.* at 19-20.

Third, the court of appeals found that issuance of a writ of mandamus was "appropriate" in these circumstances. Pet. App. 23; see *id.* at 23-24. The court observed that its decision granting the writ "reaffirm[ed] a principle of fundamental importance"—"that the role of the court is to ensure, to the extent possible, that justice is done in accordance with the law—not in derogation of it." *Id.* at 23-24. The court further observed that granting mandamus in this case would "'aid in the administration of justice'" and "guide district courts" concerning the application of that fundamental principle to

the particular context presented here, in which a district court is asked to approve a defendant's request to argue to a jury for nullification. *Id.* at 23 (citation omitted).

2. Petitioner contends (Pet. 9-11) that mandamus should be unavailable in this case because the government did not also possess a statutory right to an immediate appeal of the district court's ruling under 18 U.S.C. 3731. That contention lacks merit.

a. As the court of appeals recognized, "mandamus may not be invoked as a 'substitute' for an interlocutory appeal." Pet. App. 14 (quoting *Will* v. *United States*, 389 U.S. 90, 97 (1967)). But it does not follow that, as petitioner contends, the government may seek mandamus with respect to a district-court ruling only if it also "possess[es] a jurisdictional basis under 18 U.S.C. § 3731" to appeal that ruling immediately. Pet. 9 (emphasis omitted).

The principle that mandamus should not be "used as a substitute for the regular appeals process," *Cheney*, 542 U.S. at 380-381, means that a party may not seek mandamus to avoid the requirements that apply when appellate review is otherwise available and adequate. See, *e.g.*, *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 383 (1953) (mandamus would improperly substitute for appeal when used simply to prevent the "'hardship' occasioned by appeal being delayed until after final judgment"). The absence of any "other adequate means to attain the relief [a petitioner] desires," *Cheney*, 542 U.S. at 380 (citation omitted), such as a statutory right of appeal, is thus a prerequisite for mandamus, not an impediment to granting the writ. Indeed, the "'no other adequate means'" requirement is itself "a condition designed to ensure that the writ will not be used as

a substitute for the regular appeals process." *Id.* at 380-381 (citation omitted).

In this case, the court of appeals' writ did not "substitute for appeal * * * for the simple reason that appeal from the erroneous [order] is not an option for the government" under Section 3731. *United States* v. *Wexler*, 31 F.3d 117, 128 (3d Cir. 1994), cert. denied, 513 U.S. 1190 (1995). As other courts have consistently held, "the fact that the government may have no right of appeal [under Section 3731] does not act as a conclusive bar to the issuance of mandamus in its favor." *United States* v. *Dooling*, 406 F.2d 192, 198 (2d Cir.), cert. denied, 395 U.S. 911 (1969); see *United States* v. *Horn*, 29 F.3d 754, 769 (1st Cir. 1994) ("A federal court of appeals has the power to treat an attempted appeal from an unappealable (or possibly unappealable) order as a petition for a writ of mandamus or prohibition under the All Writs Act.").

Petitioner's contrary interpretation would risk leaving the government with no remedy to correct patently erroneous orders that warrant mandamus relief but that do not fall within the scope of Section 3731. Courts of appeals have, however, granted government petitions for writs of mandamus in criminal cases to correct clearly erroneous jury instructions, *Wexler*, 31 F.3d at 129; bifurcation orders, *United States* v. *Barker*, 1 F.3d 957, 958-959 (9th Cir. 1993), amended, 20 F.3d 365 (9th Cir. 1994); *United States* v. *Collamore*, 868 F.2d 24, 27 (1st Cir. 1989), abrogated on other grounds by *United States* v. *Tavares*, 21 F.3d 1 (1st Cir. 1994) (en banc); mid-trial evidence-exclusion orders, *In re United States*, 614 F.3d 661, 662, 664 (7th Cir. 2010), cert. denied, 562 U.S. 1303 (2011); discovery orders, *In re United States*, 397 F.3d 274, 283 (5th Cir.) (per curiam), cert. denied, 544 U.S. 911

(2005); *United States* v. *United States District Court*, 717 F.2d 478, 481 (9th Cir. 1983); recusal decisions, *In re United States*, 614 F.3d at 666; and certain sentencing orders, *United States* v. *Vinyard*, 539 F.3d 589, 592 (7th Cir. 2008); *United States* v. *Martinez-Zayas*, 857 F.2d 122, 127 (3d Cir. 1988). Petitioner identifies no sound reason to conclude that, in enacting Section 3731, Congress intended to prevent courts of appeals from granting mandamus to remedy "clear abuse[s] of discretion or 'usurpation of judicial power,'" *Bankers Life & Cas. Co.*, 346 U.S. at 383 (citation omitted), when they occur in such contexts.

b. Petitioner contends (Pet. 10) that this Court's decision in *Will* v. *United States*, *supra*, "confined [mandamus] review to matters that 18 U.S.C. § 3731 permits." That contention lacks merit.

In *Will*, this Court cautioned that, if the writ were routinely granted in the course of criminal proceedings, it might come to be "employed as a substitute for appeal in derogation of" Section 3731. 389 U.S. at 97. But *Will* did not hold that a court of appeals may not grant mandamus in criminal proceedings when it is presented with extraordinary circumstances. To the contrary, it rejected the notion that "mandamus may never be used to review procedural orders in criminal cases." *Ibid.* The Court declined to "decide under what circumstances, if any," a court may use "the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal," *id.* at 98—the circumstances presented here. See *Wexler*, 31 F.3d at 128 n.16 (stating that *Will* "does not preclude the use of mandamus to review an interlocutory order that expresses an erroneous, preliminary jury instruction"). And in reversing the court of appeals' grant of mandamus, the

Court emphasized that the record was devoid of findings suggesting that mandamus was justified. See *Will*, 389 U.S. at 107 ("What might be the proper decision upon a more complete record, supplemented by the findings and conclusions of the Court of Appeals, we cannot and do not say.").

Moreover, in the years following *Will*, the Court indicated that Section 3731 does not function, as petitioner contends (Pet. 8), "as a jurisdictional prerequisite to the United States' application for a writ of mandamus." In *United States* v. *United States District Court*, 444 F.2d 651 (6th Cir. 1971), aff'd, 407 U.S. 297 (1972), the government petitioned a court of appeals for a writ of mandamus to compel the district court to vacate an order directing the government to disclose electronic-surveillance information in a criminal case. *Id.* at 653-654. Although the Sixth Circuit ultimately denied the petition because it found that the district court's order was not improper, see *id.* at 664-669, it held (citing *Will*) that it had jurisdiction to consider the government's petition even though the district court's order was not immediately appealable under 18 U.S.C. 3731 or under 28 U.S.C. 1291 or 1292. See 444 F.2d at 655-656. This Court affirmed, and in doing so it observed that the court of appeals had "correctly held that it did have jurisdiction, relying upon the All Writs Act." *United States* v. *United States District Court*, 407 U.S. 297, 301 n.3 (1972); see *id.* at 314-324.

c. Petitioner contends (Pet. 8-9, 11-13) that review is warranted to resolve a conflict among the courts of appeals concerning whether Section 3731 "constrains the United States' ability to seek mandamus relief in a criminal case." Pet. 11. That contention lacks merit.

Petitioner acknowledges (Pet. 8) that the Third, Fifth, and Ninth Circuits have recognized that "the United States does not need to establish a right to a criminal appeal under 18 U.S.C. § 3731 before an appellate court may grant its application for a writ of mandamus." See Pet. 8, 11-12 (citing *Wexler*, 31 F.3d at 128 n.16; *In re United States*, 397 F.3d at 283; and *United States District Court*, 717 F.2d at 481). Petitioner asserts (Pet. 8), however, that the First, Seventh, and Tenth Circuits have held that "the United States must establish its right to a criminal appeal under 18 U.S.C. § 3731 before an appellate court may grant its application for a writ of mandamus." See Pet. 11 (citing *United States* v. *Kane*, 646 F.2d 4, 8-9 (1st Cir. 1981); *United States* v. *Horak*, 833 F.2d 1235, 1248 (7th Cir. 1987); and *United States* v. *McVeigh*, 106 F.3d 325, 332-333 (10th Cir. 1997) (per curiam)). Petitioner misinterprets those decisions, which instead recognize that the government may seek a writ of mandamus if it cannot appeal under Section 3731.

In *United States* v. *Kane*, *supra*, the First Circuit concluded that Section 3731 did not confer jurisdiction over the government's appeal of a district court's disclosure order. 646 F.2d at 5-9. The court of appeals also denied the government's "conditional" petition for a writ of mandamus. *Id.* at 5, 10. The court did not, however, hold that the government's inability to appeal under Section 3731 precluded the government from seeking mandamus. To the contrary, the court found it "clear that [it] ha[d] jurisdiction to entertain the government's petition." *Id.* at 9.

The First Circuit in *Kane* stated that Congress's choice to limit appellate jurisdiction under Section 3731 "would be thwarted if we were to use our mandamus

power to review an order of the district court under the *same standards as we apply on appeal*." 646 F.2d at 9 (emphasis added). And it accordingly proceeded to consider the government's petition applying the mandamus standard—rather than the standard of review that would apply on direct appeal—ultimately denying mandamus relief because the district court's order did not amount to a "usurpation of power." *Id.* at 10 (quoting *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212, 217 (1945)). In subsequent decisions, the First Circuit has continued to recognize that mandamus may be warranted where Section 3731 does not confer appellate jurisdiction in a criminal case. See, *e.g.*, *United States* v. *Acosta-Martinez*, 252 F.3d 13, 17 (1st Cir. 2001), cert. denied, 535 U.S. 906 (2002); *Collamore*, 868 F.2d at 27; *Horn*, 29 F.3d at 769.

In *United States* v. *Horak*, *supra*, the Seventh Circuit concluded that it lacked jurisdiction under Section 3731 over the government's cross-appeal of district court's forfeiture order. 833 F.2d at 1244-1248. It then "consider[ed] [its] power to issue a writ of mandamus" as an alternative to review on direct appeal. *Id.* at 1248. The court stated that, "[p]resumably, [it] ha[d] *jurisdiction* under [the All Writs Act] to issue the writ." *Ibid.* But the court "exercise[d] [its] discretion to decline to issue a writ," finding—like the First Circuit in *Kane*—that the particular order at issue did "not amount to a judicial 'usurpation of power' so as to justify mandamus." *Id.* at 1251 (quoting *De Beers Consol. Mines*, 325 U.S. at 217). And, like the First Circuit, the Seventh Circuit has since made clear that the government's inability to appeal under Section 3731 does not, in itself, bar the government from seeking mandamus. See *Vinyard*, 539 F.3d at 590 (granting writ of mandamus

even though "the district court did not issue any of the orders described by" Section 3731).

Finally, in *United States* v. *McVeigh*, *supra*, the Tenth Circuit concluded that it lacked jurisdiction under Section 3731 over the government's appeal from a district court's witness-sequestration order. 106 F.3d at 329-333. The Tenth Circuit then determined that mandamus was "inappropriate" under the circumstances. *Id.* at 329; see *id.* at 333. The court explained that it did "not categorically preclude the use of mandamus to review any and all criminal rulings, however egregious, unauthorized, and prejudicial, which might fall outside the scope of § 3731." *Id.* at 333 (citing *Will*, 389 U.S. at 97-98, and *Dooling*, 406 F.2d at 198-199). But it concluded that the case before it was not "the appropriate vehicle to permit such review." *Ibid.* (brackets and citation omitted). Since *McVeigh*, however, the Tenth Circuit has determined that mandamus relief was warranted to review a decision not appealable under Section 3731. See *In re United States*, 578 F.3d 1195, 1199-1200 (10th Cir. 2009) (unpublished order issued by a majority of the panel, appended to published dissent).

d. In any event, this case would not be a suitable vehicle to address the issue. Petitioner did not argue in his opposition to the government's petition for a writ of mandamus that Section 3731 presents a barrier to mandamus relief. Instead, he argued only that mandamus relief was not warranted on the merits because the district court's orders were not contrary to law. Pet. C.A. Br. 4-23. And the court of appeals did not directly address whether the government must establish a right to appeal under Section 3731 before an appellate court can grant mandamus relief. Although the dissenting opinion discussed a similar argument, see Pet. App. 51-54,

and although the reasoning of the majority opinion implicitly rejected petitioner's categorical argument by determining that the government's inability to appeal supported the conclusion that no other adequate means of relief was available, see *id.* at 14, the majority did not address the categorical contention that petitioner now advances that the government may never seek mandamus where an appeal under Section 3731 would be unavailable. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation and internal quotation marks omitted); see *EEOC* v. *Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (per curiam). It should follow that rule here.

3. Petitioner additionally contends (Pet. 13-31) that the court of appeals erred in concluding that "the government has a clear and indisputable right to a writ of mandamus directing the district court to deny defense counsel's request for leave to argue jury nullification." Pet. App. 22-23. That contention likewise lacks merit.

a. The second condition stated in *Cheney* for mandamus relief—that the party seeking the writ show that its "right to issuance of the writ is 'clear and indisputable'" *Cheney*, 542 U.S. at 381 (quoting *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976))—may be satisfied "where there is clear abuse of discretion or 'usurpation of judicial power,'" *Bankers Life & Cas. Co.*, 346 U.S. at 383 (citation omitted). And in this case, the court of appeals found that the district court had "clearly and indisputably 'base[d] its ruling on an erroneous view of the law.'" Pet. App. 15 (citation omitted); see *id.* at 15-23.

The court of appeals explained that the district court had "based its jury nullification ruling on an erroneous

view of the law" that was contradicted by controlling precedent. Pet. App. 18. The court of appeals observed that the "case law is clear: 'it is not the proper role of courts to encourage nullification.'" *Ibid.* (citation omitted). That observation was correct. The "federal courts have long noted the de facto *power* of a jury to render general verdicts 'in the teeth of both law and facts.'" *United States* v. *Thomas*, 116 F.3d 606, 615 (2d Cir. 1997) (citation omitted). "However, at least since [this] Court's decision in *Sparf v. United States*, 156 U.S. 51, 102 (1895), * * * courts have consistently recognized that jurors have no *right* to nullify." *Ibid.* "Such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power." *United States* v. *Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983) (per curiam). Because "no juror has a right to engage in nullification—and, on the contrary, it is a violation of a juror's sworn duty to follow the law as instructed by the court—trial courts have the duty to forestall or prevent such conduct." *Thomas*, 116 F.3d at 616.

The court of appeals noted that the district court itself had "recognized that [circuit] case law 'precluded it from encouraging the jury' to nullify," Pet. App. 18 (brackets and citation omitted), but had flouted that principle in this case, see *id.* at 18-20. The district court had "draw[n] an arbitrary distinction between encouraging the jury via jury instructions * * * and granting defense counsel's motion to argue nullification" that the court of appeals observed was "unsupported by [its] case law." *Id.* at 18. And the court of appeals found that the district court had "abdicated its duty" to ensure that the jury follows the law "by ruling that defense counsel could argue jury nullification." *Id.* at 20; see *id.* at 18-20.

b. Petitioner contends (Pet. 13-16) that the court of appeals applied an incorrect legal standard in analyzing whether the government had satisfied the second *Cheney* requirement. He asserts that the court did not find that the government's "right to issuance of the writ is clear and indisputable," Pet. 13 (citation omitted), but instead simply expressed a "'firm conviction' that the district court's view of the law was incorrect," Pet. 14 (citation omitted). That contention lacks merit.

As petitioner acknowledges, the court of appeals' opinion repeatedly articulated the "clear[] and indisputabl[e]" standard petitioner invokes. Pet. 17 (quoting Pet. App. 26); see also, *e.g.*, Pet. App. 15. Petitioner errs in asserting (Pet. 17-18) that the court nevertheless failed to apply that standard to the government's challenge to the district court's order allowing defense counsel to argue for nullification. The court of appeals repeatedly described the proper inquiry as whether the district court had "clearly and indisputably" relied on an erroneous view of the law. Pet. App. 15; see *id.* at 16-17. And the court of appeals concluded its discussion of the second *Cheney* factor with an express determination that "the government has a clear and indisputable right to a writ of mandamus directing the district court to deny defense counsel's request for leave to argue nullification." *Id.* at 22-23.

Contrary to petitioner's contention (Pet. 17), the court of appeals' additional statement that it was "firmly convinced that the district court's jury nullification ruling was based on an erroneous view of the law" (Pet. App. 22) does not show that it applied a different legal standard than it had articulated. Instead, the court of appeals' description of both the standard and its ultimate conclusion—each cast in terms of whether

the government's right to relief was "clear[] and indisputabl[e]," *id.* at 15, see *id.* at 23—speak for themselves. In any event, "this Court reviews judgments, not opinions," *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Because the court of appeals correctly determined that the district court clearly and indisputably relied on an erroneous view of the law, petitioner's qualms with the language of the court of appeals' opinion provide no basis for further review.

c. Petitioner's remaining arguments lack merit.

First, petitioner contends (Pet. 16) that the court of appeals could not properly have found the second *Cheney* requirement satisfied because "the matter of what [a defendant] argues during closing arguments is firmly entrusted to the district court's discretion." Petitioner asserts that, "where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" Pet. 15 (quoting *Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam)) (brackets omitted). But the court of appeals here made clear that it was not second-guessing the district court's exercise of its discretion. It stated that a clear and indisputable right to relief may also be shown where a lower court "'renders a decision that cannot be located within the range of permissible decisions,'" but made clear that in this case it was addressing whether the district court's ruling was "based on an erroneous view of the law." Pet. App. 15-16 (brackets and citation omitted).

Whatever the proper scope of mandamus relief sought based on a district court's exercise of discretion that it possesses, "[a] district court by definition abuses its discretion when it makes an error of law." *Koon* v.

United States, 518 U.S. 81, 100 (1996); see *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990); see also, *e.g.*, *Valdes* v. *Central Altagracia*, 225 U.S. 58, 73 (1912) (stating that the granting of a continuance, which is "peculiarly within the sound discretion of the" district court, can be reversed on appeal in "case[s] of such clear error as to amount to a plain abuse springing from an arbitrary exercise of power"). Lower courts have accordingly held that, "'[w]here a matter is committed to discretion,'" mandamus may be available if the court commits a "clear error of law." *Sporck* v. *Peil*, 759 F.2d 312, 314 (3d Cir.) (quoting *Allied Chem.*, 449 U.S. at 36), cert. denied, 474 U.S. 903 (1985); see *In re Rutledge*, 956 F.3d 1018, 1025 (8th Cir. 2020) ("A clear error of law or clear error of judgment leading to a patently erroneous result may constitute a clear abuse of discretion" warranting mandamus. (brackets and citation omitted)).

Second, petitioner contends (Pet. 20-26) that, prior to the decision below, neither this Court nor the court of appeals had specifically held that a defendant may not argue at trial for jury nullification. The court of appeals correctly rejected that contention. Pet. App. 17. As it observed, in addressing whether the party seeking mandamus has a clear and indisputable right to relief, a court is not required to "confine [its] review to the narrow (and often empty) universe of binding cases directly on point" but instead "may consider all relevant legal authorities." *Ibid.* Where the legal principle at issue is well established and its proper application to a particular set of circumstances is clear, whether a prior decision has already addressed the same specific set of circumstances is not dispositive of whether mandamus may be granted. That is especially true where, as in this case, decisions presenting the issue are relatively

sparse—which may itself reflect the clarity of the relevant principle.

Here, the court of appeals observed that its "case law [was]s clear" in forbidding courts from "'encourag[ing] nullification'" and that it had applied that broad principle in a variety of settings. Pet. App. 18 (citation omitted); see *id.* at 19 (citing decisions). The court of appeals noted that the district court itself had "recognized" that principle but had then flouted it by positing an untenable, "arbitrary distinction * * * unsupported by [the] case law." *Id.* at 18. In such circumstances, the absence of a prior decision specifically addressing the precise same set of facts does not render the district court's error any less clear or undermine the government's right to relief.

d. Petitioner errs in contending (Pet. 16-20) that the decision below implicates a disagreement among courts of appeals regarding the proper standard for determining whether the second *Cheney* requirement is satisfied. Petitioner cites (Pet. 16 & n.3) decisions of a number of courts of appeals that employ the same "clear and indisputable" language as *Cheney* in describing the second requirement for mandamus. As discussed above, the court of appeals here employed the same language and specifically determined that the government had a "clear and indisputable right to a writ of mandamus." Pet. App. 23; see pp. 10-11, 19-20, *supra*. Petitioner asserts that the decision below diverged from the consensus of other circuits by describing that determination as a "firm conviction" that the district court's ruling rested on a legal error. Pet. 18 (citation omitted). That assertion lacks merit for the reasons discussed above. See pp. 21-22, *supra*.

Contrary to petitioner's contention (Pet. 16, 18), the Ninth Circuit's decision in *In re Cement Antitrust Litigation (MDL No. 296)*, 688 F.2d 1297 (1982), aff'd due to absence of quorum, 459 U.S. 1191 (1983), does not provide any evidence of a lower-court conflict. In that case, the Ninth Circuit noted the requirement of showing a "clear and indisputable" entitlement to relief. *Id.* at 1305 & n.5 (citations omitted). It then stated that, in ascertaining whether a lower court's allegedly erroneous legal ruling satisfies that requirement, *i.e.*, whether the ruling is "clearly erroneous as a matter of law," the Ninth Circuit found "helpful" this Court's precedent addressing the similar question of whether a "finding of fact is 'clearly erroneous.'" *Id.* at 1305. In that context, the Ninth Circuit noted, a finding is deemed clearly erroneous if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Ibid.* (quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948), in turn quoting Fed. R. Civ. P. 52(a) (1946)).

The Ninth Circuit in *Cement Antitrust Litigation* thus applied the proper clear-and-indisputable test and simply looked for guidance to this Court's precedent addressing what it viewed as analogous inquiry to aid in determining whether that test is satisfied. Petitioner has not shown that the Ninth Circuit's linguistic formulation of the standard is erroneous or meaningfully different than the standards other courts apply. In any event, even if the Ninth Circuit's gloss diverged from the standards applied by other circuits, the decision below makes clear that the court of appeals in this case asked and answered the correct question by finding that "the government has a clear and indisputable right to a

writ of mandamus" in this case. Pet. App. 22-23. Further review of that decision is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
BRIAN C. RABBITT
Acting Assistant Attorney General
DANIEL N. LERMAN
Attorney

SEPTEMBER 2020