No. _____

In the
Supreme Court of the United States

JOSEPH DAVID ROBERTSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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To the Honorable Anthony Kennedy, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to Supreme Court Rule 13.5, Petitioner Joseph David Robertson respectfully requests an extension of 59 days to file his Petition for Writ of Certiorari in this Court. Granting this application would extend the deadline for the filing of the Petition to December 7, 2018.

The United States Court of Appeals for the Ninth Circuit issued an opinion on November 27, 2017, affirming Mr. Robertson's conviction below on two counts of violating the Clean Water Act, 33 U.S.C. §§ 1251-1388, and one count of damage to federal property under 18 U.S.C. § 1361. *See* Exhibit 1 (also reported at *United States v. Robertson*, 875 F.3d 1281 (9th Cir. 2017)). On Monday, July 10, 2018, the Ninth Circuit denied Mr. Robertson's timely petitions for rehearing and rehearing en banc. *See* Exhibit 2.

The Petition for Writ of Certiorari is due in this Court no later than October 9, 2018. This application precedes that date by more than 10 days, as required. This Court has jurisdiction under 28 U.S.C. § 1254.

This case arises primarily under the Clean Water Act (CWA). For excavating several small ponds for fire suppression and protection (some on an unpatented mining claim and some on a patented mining claim) adjacent to his private property within the Beaverhead-Deerlodge National Forest in Montana, Mr. Robertson was convicted under the CWA of discharging dredged or fill material into navigable waters without a permit, and of depredation of federal property. The government's

evidence was that a narrow rivulet traversed the area where Mr. Robertson excavated the ponds, many river miles upstream from the nearest navigable-in-fact water body, the Jefferson River. The government argued that this rivulet was a federally protected "navigable water" under the Clean Water Act because it had a significant nexus with the Jefferson River, relying on Justice Kennedy's concurring opinion in *Rapanos v. United States*, 547 U.S. 715, 758 (2006) (Kennedy, J., concurring). Mr. Robertson's first trial ended in a hung jury and mistrial, following which the district court denied his motion for acquittal under Federal Rule of Criminal Procedure 29(c) based on insufficiency of the government's evidence. The government then retried Mr. Robertson, and a second jury convicted him on all three counts. The district court sentenced him to 18 months imprisonment, which he has completed, and to make $130,000 restitution, which is ongoing.

On appeal, Mr. Robertson argued (1) that Justice Kennedy's concurrence is not the holding of *Rapanos* and not the legal standard for determining the presence of federally protected navigable waters, under *Marks v. United States*; (2) that the Clean Water Act, as interpreted by the circuit courts' applications of Justice Kennedy's *Rapanos* concurrence, is void for vagueness; and (3) that the district court should have granted his motion for acquittal after his first trial ended in a hung jury and mistrial.

The Ninth Circuit held that Justice Kennedy's concurrence is the controlling opinion in *Rapanos* under *Marks*, explicitly stating that it could and was relying on a combination of the concurring and dissenting opinions in *Rapanos* to arrive at that

conclusion. Exhibit 1, slip op. at 16-17. Based on this, the Ninth Circuit then held that the Clean Water Act, as interpreted by the *Rapanos* concurrence, provides fair notice of its requirements to citizens like Mr. Robertson. Exhibit 1, slip op. at 18-19. The Ninth Circuit also held that under *Richardson v. United States*, 468 U.S. 317 (1984), the government's decision to retry Mr. Robertson effectively voided his opportunity to appeal the district court's denial of his motion for acquittal following the hung jury and mistrial in his first trial. Exhibit 1, slip op. at 19-21.

This case provides an excellent vehicle for this Court to address important issues arising under the Clean Water Act, *Rapanos v. United States*, *Marks v. United States*, and *Richardson v. United States*. This Court considered but did not decide whether the *Marks* framework for applying this Court's fractured decisions requires clarification, in *Hughes v. United States*, 138 S. Ct. 1765, 1771-72 (2018). This case provides another valuable opportunity to assess the circuit courts' use of *Marks*. Particularly, the Ninth Circuit's decision in this case creates a split with the Seventh and DC Circuits on whether a dissent can be the "broader" opinion for a *Marks* analysis. *Compare* Exhibit 1, slip op. at 16, *with Gibson v. American Cyanamid Co.*, 760 F.3d 600, 620-21 (7th Cir. 2014); *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc). This case also presents an opportunity for this Court to resolve the underlying disagreement in *Rapanos* and arrive at a majority opinion about the meaning of "navigable waters" under the Clean Water Act, as it did in *Hughes* with the Sentencing Reform Act.

This case also presents the compelling question of whether the Clean Water Act term "navigable waters" is void for vagueness, a potential concern to which members of this Court have regularly alluded over the years. *See, e.g.*, *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) ("Lower courts and regulated entities will now have to feel their way on a case-by-case basis."); *Sackett v. EPA*, 566 U.S. 120, 124 (2012) ("The Sacketts are interested parties feeling their way."); *id.* at 132 (Alito, J., concurring) ("The reach of the Clean Water Act is notoriously unclear."); *id.* at 133 (phrase "waters of the United States" is "not a term of art with a known meaning" and is "hopelessly indeterminate"); *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1812 (2016) ("It is often difficult to determine whether a particular piece of property contains waters of the United States . . . ."); *id.* at 1816-17 (Kennedy, Alito, Thomas, JJ., concurring) ("[T]he reach and systematic consequences of the Clean Water Act remain a cause for concern.") (citing *Sackett*, 566 U.S. at 132 (Alito, J., concurring)); *National Association of Manufacturers v. Dep't of Defense*, 138 S. Ct. 617, 625 (2018) ("In decades past, the EPA and the Corps . . . have struggled to define and apply that statutory term.").

This case also presents an important question of criminal procedure: whether *Richardson v. United States* forecloses appellate review of a district court's denial of a motion for acquittal following a hung jury mistrial, where the defendant is subsequently retried and convicted. *Richardson* holds that retrial after a hung jury does not violate the Double Jeopardy Clause, on the ground that the first and second trials are essentially a single proceeding. *Richardson* does not and could not address

whether the district court's denial of a motion for acquittal under Criminal Rule 29(c), following a hung jury mistrial in the first trial, is reviewable on appeal following conviction in a second trial. *Richardson* was decided on collateral review of the district court's denial of a motion to bar retrial, before the retrial occurred. *See Richardson*, 468 U.S. at 318 (procedural history), 321-22 (order was subject to collateral order doctrine), 322 (rejecting Double Jeopardy claim), 323-26 (mistrial following hung jury is not acquittal, does not terminate jeopardy or bar retrial under Double Jeopardy clause), 326 n.6 (because merits of Double Jeopardy arguments resolved, orders allowing retrial after hung jury no longer subject to collateral order doctrine).

But without substantive analysis, the Ninth Circuit in this case joined the First, Third, Fifth, and Tenth Circuits in holding that *Richardson* not only bars collateral review of orders allowing retrial, and Double Jeopardy challenges to retrial, but *any* appellate review, following final judgment in the district court, of an order denying a motion for acquittal under Rule 29(c). Exhibit 1, slip op. at 20 (citing *United States v. Achobe*, 560 F.3d 259, 265-68 (5th Cir. 2008); *United States v. Julien*, 318 F.3d 316, 321 (1st Cir. 2003); *United States v. Willis*, 102 F.3d 1078, 1081 (10th Cir. 1996); *United States v. Coleman*, 862 F.2d 455, 460 (3d Cir. 1988).

Petitioner's Counsel of Record was only recently retained as Mr. Robertson's representative, and requires sufficient time to become familiar with Mr. Robertson's file in order to dutifully prepare the Petition for Writ of Certiorari. Petitioner's previous appointed counsel elected not to remain as co-counsel in this Court and was on his own motion relieved of his appointment by the Ninth Circuit, which will necessitate more time than usual for Counsel of Record to review and become familiar with the file in preparing the Petition.

Petitioner's counsel also include two attorneys who are counsel to Respondent Markle Interests, LLC, et al., in this Court in *Weyerhaeuser v. United States Fish and Wildlife Service*, 17-71, which is scheduled for oral argument on October 1, 2018. Markle Interests has moved for divided argument, and if the Court grants that motion, then two of Mr. Robertson's attorneys in this case will also have extensive requirements to prepare for oral argument in *Weyerhaeuser* on October 1, just nine days before the Petition in this case is presently due.

Due to these circumstances and time constraints, Petitioner respectfully requests that an order be entered extending his time to file a Petition for Writ of Certiorari by 59 days, up to and including December 7, 2018.

DATED: July 26, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a single copy of Petitioner's Application for Extension of Time to File Petition for Writ of Certiorari were served this 26th day of July, 2018, via first-class mail, postage pre-paid, and e-mail upon the party required to be served pursuant to this Court's Rule 29.3, namely the following:

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