No. 18-609

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

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Petitioner Joseph David Robertson presents this Reply in support of his Petition for Writ of Certiorari.

ARGUMENT

I

THE UNITED STATES OFFERS NO COMPELLING GROUNDS TO DENY ROBERTSON'S REQUEST THAT THIS COURT RECONSIDER *RAPANOS*

The EPA and Army's proposed new rule redefining "navigable waters" does not eliminate the need for this Court to revisit its decision in *Rapanos v. United States*, 547 U.S. 715 (2006). *See* Opposition at 28 (citing 84 Fed. Reg. 4154 (Feb. 14, 2019)). First, the proposed rulemaking acknowledges a range of uncertainty over what *Rapanos* requires and that the agencies are changing their interpretation of *Rapanos* in the proposed rulemaking. *See* 84 Fed. Reg. at 4175 ("The agencies recognize that this is a departure from prior positions of the Federal government."). Next, whether this administration ever adopts a regulation defining "Navigable Waters" that survives judicial review, significant questions will remain about the text and scope of the Act itself. Without a clear interpretation of the Act, regulated parties, the Government, and lower courts will face continued uncertainty over its scope.

The Government does not argue that clearly interpreting the scope of the Act is an unimportant question. Nor can it. In the proposed rule, the agencies admit that the statutory language of the Act has "spurred substantial litigation testing the meaning of

the phrase" "Waters of the United States." 84 Fed. Reg. at 4159. They also note that "[h]undreds of cases and dozens of courts have attempted to discern the intent of Congress when crafting the phrase" and "federal courts have established different analytical frameworks to interpret the phrase, and the applicable test may differ from state to state." *Id.*

The Government implies that the proposed rule will solve these issues. But it is only a proposal, not certain to be adopted. In 2003, the agencies proposed a new regulatory definition of "Navigable Waters." 68 Fed. Reg. 1991 (Jan. 15, 2003). Eleven months later, they abandoned that proposed rule. Eric Pianin, *EPA Scraps Changes to Clean Water Act*, Washington Post (Dec. 17, 2003).[1]

Even assuming the agencies adopt the new proposal, it will not resolve the uncertainties about the Act. Each new administration can tinker with (or wholesale revise) the definition of "navigable waters," because this Court has yet to clearly interpret the phrase. This administration may adopt one "analytical framework," 84 Fed. Reg. at 4159, but without a clear interpretation of the Act, the next one is perfectly free to adopt a completely different framework, and can be expected to.

And if this administration finalizes its proposed rule, a future administration can easily abandon defense of that rule in the litigation that is sure to follow. There is precedent for this in the Army Corps' original regulations, which were invalidated by a

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[1]Available at https://www.washingtonpost.com/archive/politics/2003/12/17/epa-scraps-changes-to-clean-water-act/a743b32b8cfc-4b54-8cca-a2ba1e27378c/?utm_term=.4df1a26c4cf6.

federal district court from whose order the Army decided not to appeal. *See Rapanos*, 547 U.S. at 724. Organizations are already contemplating filing suit if and when the current administration adopts a new rule. *See* Petition at 26 n.6.[2] This is the cycle of regulatory revision, litigation, and electoral politics which Robertson's petition forecasts. *See* Petition at 24-27. Without some guidance from this Court, a new rule from the current administration will not end the continuous litigation over the meaning of "navigable waters."

In the past, proposed regulatory changes have not affected this Court's decisions in CWA cases. In *Decker v. Northwest Environmental Defense Center,* the EPA adopted an amendment to the stormwater discharge regulation at issue in the case three days before oral argument. 568 U.S. 597 (2013). This Court still decided the case. *Id.* at 610. Similarly, in *National Ass'n of Mfrs. v. Department of Defense*, a proposed rule to delay the effective date of a CWA regulation did not prevent this Court from issuing its opinion. 138 S. Ct. 617, 627 n.5 (2018).[3] Proposed regulatory changes do not change the need to revisit *Rapanos*.

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[2] *See also* Natural Resource Defense Council, *Comment on Proposed Rule Titled "Definition of 'Waters of the United States' – Recodification of Preexisting Rules*" at 33 (Sept. 27, 2017), https://www.nrdc.org/sites/default/files/cwr-repeal-comments-devine-20170927.Pdf.

[3] The agencies finalized that rule following this Court's decision in *NAM v. DOD*, 138 S. Ct. 617 (2018). Legal challenges followed, two courts enjoined the rule, and on March 8, 2019, the agencies abandoned their defenses of it, just as with the 1974 regulations. *See* Ellen Gilmer, *EPA, Army Corps give up on WOTUS delay rule*, Greenwire (Mar. 11, 2019), https://www.eenews.net/greenwire/2019/03/11/stories/1060126937.

That is the case here. Uncertainty remains about the scope of the CWA. As Chief Justice Roberts said in *Rapanos*, "[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act" because "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis." 547 U.S. at 758 (Roberts, J., concurring). The district court judge in this case repeated those sentiments during Robertson's sentencing. *See* Appendix D-2–D-3.

The district court judge also considered this case an ideal vehicle to clarify the scope of the Act: "there is a remarkably complete and good record made in this case . . . to raise this serious legal question." Appendix D-2. While the district judge felt bound by previous Ninth Circuit precedent on the issue, he recognized that the question "does require an answer" and encouraged this Court to issue that answer. Appendix D-2–D-3.

The Government attempts to downplay the lack of clarity by citing various circuit court cases interpreting *Rapanos*. Opposition at 5-6. These cases are of limited value. All but one were decided prior to *Sackett v. EPA*, 566 U.S. 120 (2012), and *United States Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016), where several members of this Court expressed concern about the uncertain nature of the Act. *See* Petition at 15-16.

Furthermore, these circuit court cases do not offer a clear interpretation of the Act itself. They merely attempt to apply *Marks v. United States*, 430 U.S. 188 (1977), and many of the lower courts disagree on how to do so. *See* Petition at 28-29. The

Opposition merely highlights how scattered are the circuit courts' efforts to make sense of fractured opinions like *Rapanos*, and the importance of this Court's review to replace such decisions with clear majority opinions as it did last term in *Hughes v. United States*, 138 S. Ct. 1765 (2018).

II

ROBERTSON'S VOID-FOR-VAGUENESS DEFENSE AND SUPPORTING ARGUMENTS WERE RAISED IN THE NINTH CIRCUIT, ARE APPLICABLE TO THE FACTS OF HIS CASE, AND FALL WITHIN *DIMAYA*

Robertson pressed his void-for-vagueness defense at the Ninth Circuit. *See* Appellant's Opening Brief, Ninth Circuit case no. 16-30178, Docket Entry 19-1, at 19-26 (laying out void-for-vagueness defense). And, the Ninth Circuit passed on this defense in its opinion below. Pet. App. A-19–A-20 (rejecting same).

Robertson also presented his argument to the Ninth Circuit that the *Rapanos* concurrence is void-for-vagueness. *See* Appellant's Opening Brief at 13 (trial court's jury instruction based on *Rapanos* concurrence was over Mr. Robertson's objection that statutory term "waters of the United States" violates Due Process on vagueness grounds); *id.* at 22-23 (rule of lenity requires adoption of *Rapanos* plurality over concurrence to satisfy Due Process notice requirements).

Even if Robertson had not raised this precise argument below, he raised the *defense* of void-for-vagueness, and this Court's "traditional rule is that "'[o]nce a federal claim is properly presented, a party can make any argument in support of that claim;

parties are not limited to the precise arguments they made below.'" *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 378-79 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

Robertson's Petition emphasizes the facts to which the void-for-vagueness analysis applies in this case. Petition at i (foot-wide channel with 2-3 garden hoses worth of flow, 40 miles from nearest navigable river), *id.* at 8-9 (same, in greater detail). How the words "navigable waters" could give constitutionally adequate notice that they include a nameless, foot-wide channel in the middle of the Montana woods, 40 miles from the Jefferson River, is precisely the question raised by the Petition. Nor does the *Rapanos* concurrence give fair notice of what other water features are "similarly situated" with the nameless trickle in question, or what the applicable "region" is within which its "situation" is "similar" to other features.

The opinions of agency staff cannot cure constitutionally inadequate notice in a statute. Indeed, the purpose of the void-for-vagueness doctrine is to ensure that criminal enforcement is not left to the arbitrary judgment of enforcement authorities. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis"); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1227-28 (2018) (Gorsuch, J., concurring in part and concurring in judgment) (vague laws "threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions"). The Opposition

offers no argument that the statute itself gives fair notice that it applies to nameless foot-wide channels with a few garden hoses worth of flow, 40 miles upstream from the nearest navigable-in-fact river. "People should be able to find the law in the books; they should not find the law coming upon them out of nowhere." *Air and Liquid Systems Corp. v. DeVries*, 586 U.S. ____, ____ (2019), slip op. at 8 (Gorsuch, J., dissenting).

The Government incorrectly argues that this Court's decision in *Dimaya* is inapplicable because it only applies to legal determinations regarding "judge-made abstractions" not involving "real world facts." This argument ignores the obvious: the *Rapanos* concurrence itself is a "judge-made abstraction." Its 200-word paragraph laying out the details of the significant nexus test, *Rapanos*, 547 U.S. at 779-80 (Kennedy, J., concurring in judgment), is entirely extrapolated from two words in the Clean Water Act: "navigable waters."[4] *Id.* at 755 ("Only by ignoring the text of the statute and by assuming that the phrase . . . ('significant nexus') can be properly interpreted in isolation from that text does Justice Kennedy reach the conclusion he has arrived at.").

And within the *Rapanos* concurrence, "similarly situated" and "region" are abstractions, whether "judge-made" or "agency-staff made." *See* Petition at 19-21. Because the concurrence provides no standards by which to determine what is similarly situated or what the region is, these factors are

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[4] The significant nexus test is also a lot of elephant to hide in a two-word mousehole. *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 468 (2001).

perforce abstract constructs, not "real world facts." *See id.*

III

THE GOVERNMENT MISSTATES FACTS, IGNORES A STATE COURT SPLIT ON THE QUESTION, AND RELIES UPON LAW THAT SUPPORTS GRANTING THE PETITION

On Robertson's third question, the Opposition misstates the facts in order to draw wrong conclusions of law, and diminishes the conflict among lower state and federal courts on the application of *Richardson v. United States*, 468 U.S. 317 (1984). It also counsels in *favor* of granting the Petition on the third question presented.

A. Motion for Judgment of Acquittal Addressed All Counts

The Government incorrectly states that a ruling in Robertson's favor would have no "practical" effect on the sentence he has already received. Opposition at 26. It contends that relief on his motion for judgment of acquittal at the first trial—if reviewed on appeal following the second trial as it should have been—would not affect his sentence because he "does not challenge his conviction for injuring property of the United States, in violation of 18 U.S.C. § 1361," Opposition at 26-27, and that count alone could have led to the same result he obtained when convicted of all three counts.

But that is factually wrong. Robertson moved for a judgment of acquittal on *all three counts*—including the second count of injuring property of the United States. Pet. App. H-2. Thus, one of the

Government's primary arguments against granting the Petition is premised on a misstatement of the facts.

B. The Government Ignores the State Court Split on *Richardson*

The Petition's third question presents a legal issue with significant consequences for criminal defendants that the lower courts resolve in two starkly different ways. One path allows for legal review of the sufficiency of the evidence presented by the Government after a final judgment in the Government's favor, *see, e.g., United States v. Gulledge*, 739 F.2d 582, 584 (11th Cir. 1984), and the other path prevents a defendant from ever questioning whether the Government failed to meet its evidentiary burden in presenting its case for the first time; the path the lower court took here. Only one path can be correct.

This split goes beyond the federal courts and also roils the state courts, a state-court split the Petition identifies but the Government ignores. Some state courts currently allow post-judgment review of first trial sufficiency rulings, *see, e.g., Ohio v. McGill*, No. 99CA25, 2000 WL 1803650, at *6-9 (Ohio Ct. App. Dec. 8, 2000), while others expressly rely on *Richardson* and reject review of first-trial motions for judgment of acquittal. *See, e.g., People v. Doyle*, 765 N.E.2d 85, 91 (Ill. App. Ct. 2002). Given that mistrial rates in state courts, which hear more than 50,000 criminal trials each year, are even higher than in federal courts, this Court's resolution of this question is needed. *See* Paula L. Hannaford-Agor, *et al.*, *Are Hung Juries a Problem?* 19-27, National Center for State Courts (Sept. 30, 2002). Defendants in state

court deserve review of this question as much as Robertson and other federal defendants do.

C. The Government Misconstrues the Question Presented

The Government confuses the question presented by claiming that a motion for judgment of acquittal is mooted by a final judgment, just like other motions are mooted by a final judgment in other circumstances. The Government quotes a single case to make this argument—*Olsen v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731 (7th Cir. 1986). Opposition at 24. But *Olsen* supports Robertson's position.

The parties in *Olsen* were in a dispute over a brokerage agreement that included an arbitration clause. 806 F.2d at 733. The trial court stayed the litigation and ordered the parties to arbitration. *Id.* But before the arbitration began, the appellant appealed the order as well as the stay, contending she should not have to participate in the arbitration. *Id.* The Seventh Circuit held that the interlocutory order sending her case to arbitration was not appealable because there was a possibility that the appellant would be satisfied with the outcome in arbitration, the case would reach a final judgment that did not aggrieve her, and no appeal would ever be needed, thus conserving judicial resources. *Id.* The interlocutory appeal did not meet collateral order criteria. Crucially, Judge Posner explained that if the appellant did not like the ultimate outcome at the end of the case, then she could "unquestionably" appeal the final judgment, "raising among other issues the question whether the arbitration was valid." In other words, the arbitration order she wanted to appeal

immediately would ultimately be appealable *if need be*.

This portion of the *Olsen* decision counsels in favor of Robertson's Petition and supports his argument about what *Richardson* means. In *Richardson* this Court held consistently with *Olsen*, that a defendant could not immediately appeal the denial of the motion for judgment of acquittal before the final judgment in the second trial was reached. There was a possibility that Richardson would be found not guilty after all—making the denial of the motion for judgment of acquittal in the first trial moot. But to follow *Olsen*'s logic, if Richardson was convicted, then ultimately he would have been able to appeal that original denial of the motion for judgment of acquittal. As *Olsen* says, the right to appeal an earlier decision reached before final judgment is "*unquestionably*" appealable after the final judgment. So it should be here. *Richardson* holds the defendant cannot immediately appeal the denial of the motion for judgment of acquittal. But it does not say he *never* can appeal that order. That is a misinterpretation of *Richardson*, and the *Olsen* decision supports, rather than counsels against, granting the Petition.

CONCLUSION

The Petition should be granted.

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Respectfully submitted,

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