No. 08-

IN THE
Supreme Court of the United States

MCWANE, INC., ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars retrial when the government failed to produce sufficient evidence under the correct definition of the elements of the offense.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The following parties are cross-petitioners in this cross-petition and respondents in *United States of America v. McWane, Inc., et al.*, No. 08-223: McWane, Inc.; James Delk; and Michael Devine. All cross-petitioners were defendants in the district court. Cross-petitioner McWane, Inc., was an appellant in the court of appeals. Cross-petitioners Delk and Devine were appellants and cross-appellees. Charles Barry Robison was a defendant in the district court. He is not, however, a respondent or cross-petitioner in this Court pursuant to Supreme Court Rule 12.6.

Pursuant to this Court's Rule 29.6, undersigned counsel state that McWane, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

The United States of America is the respondent in this cross-petition and petitioner in *United States of America v. McWane, Inc., et al.*, No. 08-223. The United States brought this prosecution in the district court and was the appellee and cross-appellant in the court of appeals.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

McWane, Inc., James Delk and Michael Devine conditionally cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case. If the Court grants the petition in *United States of America v. McWane, Inc., et al.*, No. 08-223, it should also grant this cross-petition.

OPINION BELOW

The opinion of the court of appeals (08-223 Pet. App. 1a–41a) is reported at 505 F.3d 1208.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2007. The court of appeals denied each side's petition for rehearing on March 27, 2008. 08-223 Pet. App. 42a–59a. On June 14, and again on July 18, Justice Thomas extended the time within which to file the petition for a writ of certiorari, eventually up to and including August 22, 2008. The government's petition for a writ of certiorari in *United States of America v. McWane, Inc., et al.*, No. 08-223 was filed on August 21, 2008. This conditional cross-petition is filed pursuant to Rule 12.5 of the Rules of the Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

This conditional cross-petition concerns the court of appeals' decision to remand for a new trial, rather than to enter judgments of acquittal, after reversing cross-petitioners' convictions under the Clean Water Act ("CWA"), and on related counts. The government's petition in No. 08-223 concerns the court of appeals' determination that the jury instructions improperly stated the definition of "navigable waters" under the CWA and that the instructional error was not harmless. Cross-petitioners argued in the court of appeals that they were entitled to judgments of acquittal because the government failed to adduce evidence sufficient to prove the "navigable waters" element of their alleged offenses according to the correct rule of law. Although the government had ample notice before and during trial that its proposed

definition of navigable waters was overly broad, the court of appeals declined to hold that the Double Jeopardy Clause bars retrial. 08-223 Pet. App. 2a, 32a. The court ruled that it need not inquire further into sufficiency of the proofs after determining that the government had presented enough evidence under its own *erroneous* interpretation of the element.

The ruling that the government is entitled to correct its own earlier error and attempt to present sufficient evidence of the navigable waters element for the first time at a new trial is worthy of this Court's review. This issue has deeply divided the circuits, and the approach adopted by the Eleventh Circuit conflicts with this Court's double jeopardy precedents. In the event this Court grants the government's petition in No. 08-223, this Court should also grant review of the court of appeals' refusal to enter judgments of acquittal.

The underlying facts and procedural history are set forth in cross-petitioners' brief in opposition to the government's petition in No. 08-223 and are incorporated by reference.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

The government has stubbornly refused to acknowledge this Court's repeated rejection of its nearly boundless view of federal authority under the Clean Water Act. Before trial of this case, the government insisted that the Court's ruling in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159 (2001), was "irrelevant" to the law governing the discharges into Avondale Creek. On appeal,

and again before this Court, the government proceeds as if its defeat in *Rapanos v. United States*, 547 U.S. 715 (2006), was a triumph, and as if the derisive rejection of its overreaching in prior cases was instead an endorsement of such tactics. In the government's view, its deliberate and calculated decision to seek convictions based on the minimal evidence consistent with its own self-serving, boundless and already rejected legal theory must be rewarded with another opportunity to convict the cross-petitioners at yet another trial.

The government is entitled to a "do over"—according to it and the court of appeals—because it prompted the trial court to commit two errors instead of one. Had the government simply failed to introduce legally sufficient evidence on the navigable waters element of the CWA, there would be no question that cross-petitioners are entitled to judgments of acquittal. But, according to the Eleventh Circuit and the government, because the government *also* induced the trial court to commit instructional error—letting the jury convict based on the government's preferred, less demanding view of the law—a new trial rather than outright dismissal is permitted. That view cannot be squared with this Court's cases, and it offends those values at the very core of the Double Jeopardy Clause.

If the Court grants the petition in 08-223, it should also grant review to resolve a division of circuit court authority over whether the Double Jeopardy Clause bars retrial when the government has failed to introduce evidence sufficient to support a conviction under the definition of the offense as stated by this Court following trial. Confusion over this question has resulted in extensive litigation,

decades of inconsistent rulings, and unconstitutional retrials. The issue frequently recurs when the Court rules, following a circuit split, that the elements of a crime are narrower than some courts have previously held. This case presents an opportunity to resolve this intractable conflict over the correct application of the Double Jeopardy Clause, an issue that takes on even greater importance when the government elects for tactical reasons to present evidence at trial satisfying only an impermissibly narrow interpretation of the elements of the charged offense.

I. THE COURT OF APPEALS' DECISION TO REMAND FOR A RETRIAL VIOLATES THE DOUBLE JEOPARDY CLAUSE

The Double Jeopardy Clause of the Fifth Amendment provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. It "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11 (1978). A reviewing court may remand for a new trial where the errors below—so-called trial errors such as improper admission of evidence or improper joinder—are not accompanied by a failure of proof. This is because "reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case." *Id.* at 15. But just as retrial is barred where the jury acquits, "the Double Jeopardy Clause precludes a second trial once a reviewing court has determined that the evidence introduced at trial was

insufficient to sustain the verdict." *Greene v. Massey*, 437 U.S. 19, 24 (1978).

The Eleventh Circuit agreed with cross-petitioners that the convictions must be reversed because the jury was allowed to convict based on evidence that was legally insufficient. But the court of appeals, relying on its opinion in *United States v. Sanchez-Corcino*, 85 F.3d 549 (11th Cir. 1996), went on to hold that the government may have a second bite at the apple, even if it failed to muster sufficient evidence—indeed, *any* evidence—of an essential element of the charged offenses: a significant nexus between Avondale Creek and a navigable-in-fact water. 08-223 Pet. App. 32a. And it permitted retrial even though the government bore full responsibility for its own failure to present sufficient proofs, having adamantly insisted that it need not present the evidence required by the Act and even having succeeded in gaining the trial court's endorsement of that erroneous view of the law. The court of appeals' ruling is flatly contrary to this Court's double jeopardy jurisprudence.

1. The first error in the Eleventh Circuit's ruling is its premise that an appellate court may ignore insufficiency of the evidence if it reverses on other grounds. *Id*. This Court has recognized that such an approach would undermine the core protection of the Double Jeopardy Clause, which is the right not to be forced to endure a second trial after the government has failed to muster sufficient proof on its first attempt. As this Court explained in *Tibbs v. Florida*, 457 U.S. 31 (1982), "appellate judges" must "faithfully honor their obligations" to assess any due process claims of insufficient evidence *before* reaching

weight-of-the-evidence arguments that would permit retrial. *Id.* at 44–45; *see also id.* at 51 (White, J., dissenting) ("Hence, the [sufficiency] issue cannot be avoided; if retrial is to be had, the evidence must be found to be legally sufficient, as a matter of federal law, to sustain the jury verdict."). Simply put, a court "may not, consistent with the rule of *Burks v. United States*, ignore the sufficiency claim, reverse on grounds of trial error, and remand for retrial." *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 321–22 (1984) (Brennan, J., concurring) (citation omitted).

Indeed, were the law otherwise, the government would be able to circumvent the Double Jeopardy Clause by mining the trial proceedings with other errors that ease its burden at trial—as it did here. If the government's first attempt to convict based on lesser proofs is rejected on appeal, it may then try a second time under the more rigorous test that it previously avoided. Such an outcome strikes at the core of the protections contained in the Double Jeopardy Clause.

2. Despite a reviewing court's duty under the Double Jeopardy Clause to resolve evidentiary sufficiency claims in addition to—rather than instead of—other types of error, the court of appeals concluded that it "need not evaluate whether there was insufficient evidence that defendants' discharges were into 'navigable waters' as that term is properly defined under *Rapanos*," because that is not the way the term was defined by the district court at the time of trial based on that court's understanding of then-prevailing circuit precedent. 08-223 Pet. App. 31a—32a. But it does not matter whether such a test was

consistent with the law as then understood by the lower court. Rather, it is well established that decisions "holding that a substantive federal criminal statute does not reach certain conduct" apply to cases on direct appeal (and even retroactively to those on collateral attack). *Bousley v. United States*, 523 U.S. 614, 620–21 (1998).

This principle follows from the proposition that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994). Accordingly, an appellate court assessing the sufficiency of the evidence must apply the correct legal standard—that is, the one prevailing at the time of appeal—even if the jury rendered its verdict based on a broader (and hence, improper) definition of the elements of the offense.

3. In characterizing the government's evidentiary failure as the type of error that does not bar retrial, *Sanchez-Corcino* misconstrued *Lockhart v. Nelson*, 488 U.S. 33 (1988). *See Sanchez-Corcino*, 85 F.3d at 554 n.4. *Lockhart* does not remotely support the court of appeals' ruling in this case. That decision identified a narrow circumstance—not applicable here—under which the Double Jeopardy Clause would allow retrial; specifically, *Lockhart* held that retrial is permitted where the evidence admitted at the first trial was *actually sufficient* to establish guilt beyond a reasonable doubt, even though the proofs would have been insufficient if certain evidence had not been erroneously admitted. 488 U.S. at 40–41. "[I]ncorrect receipt or rejection of evidence" is, of course, quintessential "trial error[]" under *Burks*. *Id*.

at 40 (quoting *Burks*, 437 U.S. at 14–16). *Lockhart* therefore allows retrial where reversible error occurs *despite* the presence of sufficient evidence in the record for a jury to convict. Here, relying on *Sanchez-Corcino*, the court of appeals improperly applied this rule to a case where reversible error occurred *in addition to* an utter failure to present sufficient evidence on an essential element of each offense.

This Court has never recognized such a sprawling application of *Lockhart*. On the same day it decided *Burks*, this Court also held that the Double Jeopardy Clause bars retrial even when "trial court error in [the defendant's] favor on a midtrial motion leads to an acquittal." *Sanabria v. United States*, 437 U.S. 54, 78 (1978); *see also Webster v. Duckworth*, 767 F.2d 1206, 1214–16 (7th Cir. 1985) ("*Sanabria* precludes carving an exception out of the *Burks* rule on the basis of an alleged 'trial error' that results in insufficient prosecution evidence."). The government's assertion that it can retry defendants when the failure of proof is accompanied by trial court error in *the government's* favor—much less where the government *created* the trial error—defies logic. *Burks* holds that reversal for insufficient evidence is tantamount to acquittal, 437 U.S. at 16–18, and there is simply no basis for casting off the protections of the Double Jeopardy Clause when the error associated with evidentiary insufficiency was urged by—and substantially benefited—the government rather than the defendant.

4. The court of appeals nonetheless believed that there is an exception to the bar against double jeopardy where the district court's decision to permit conviction based on less than adequate proof of an essential element deprived the government "'of an

opportunity or incentive to present evidence that might have'" been legally sufficient. 08-223 Pet. App. 31a (quoting *Sanchez-Corcino*, 85 F.3d at 554 n.4). The Double Jeopardy Clause permits no such limitation on this important right.

> The underlying idea [of the Double Jeopardy Clause], one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187–88 (1957). The government's resources and power are no less formidable; its attempt to convict is no less repeated; the defendant's embarrassment, expense, ordeal, and continuing states of anxiety and insecurity are no less intense; and the possibility of an erroneous conviction is no less enhanced, in those cases in which the government supposedly lacked the same opportunity or incentive the first time around.

It is particularly repugnant that the government may run cross-petitioners through the gauntlet a second time where the purported lack of opportunity and incentive to comply with the statute's proof requirements is purely a product of the government's own obstinate behavior. From the pretrial proceedings to this very day, the government has steadfastly refused to acknowledge the true limits of its powers under the CWA. Instead, as was true

with its litigating position in cases such as *SWANCC* and *Rapanos*, the federal agencies responsible for enforcing the Act have clung to the view that their power to regulate discharges into purely intrastate, remote and insubstantial bodies of water (and even non-waters) is practically boundless. The government has clung to that view despite this Court's flat rejection of it both before and after trial. Refusing to accept the import of this Court's ruling in *SWANCC*, the government successfully avoided a jury instruction that would have required the jury to find a significant nexus between Avondale Creek and a navigable-in-fact water dozens of miles away. *That* is the reason—the only reason—the government could offer for failing even to attempt to fulfill its duty to present sufficient evidence on the navigable waters elements.

The Double Jeopardy Clause does not give the government a second chance to present sufficient evidence of guilt where the previous failure was of its own making. "[A] litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 897 (1990); *see also Webster*, 767 F.2d at 1215–16 ("If a prosecutor's miscalculation of how much evidence is enough would permit a second trial, *Burks* would be drained of substance."). And even if there had been a legitimate basis for the government to adhere to its view of the definition of navigable waters under the Act, nothing in the text or purpose of the Fifth Amendment suggests that it may attempt to cure its failure of proof through a retrial simply because this Court's post-trial decision on the meaning

of a statute differs from the interpretation previously adopted by some lower courts.[1]

5. Even assuming *arguendo* that, as the Eleventh Circuit concluded, the protection against double jeopardy must occasionally yield even though the government failed to muster sufficient evidence, such an exception has no place where the government was aware of the risks of offering less evidence and made a conscious, tactical decision to take that risk.

There is no question that the government, had it chosen to do so, could have presented evidence in an attempt to show a significant nexus even while pursuing the jury instruction it erroneously requested. Before and during trial cross-petitioners not only agreed that the government was *allowed* to offer evidence of a significant nexus between the point of discharge and a navigable-in-fact water; cross-petitioners argued strenuously that such proof was *required*. The trial court did not restrict the government's ability to present such evidence; the government simply elected not to do so. In fact, even though the test articulated by the court of appeals focuses on whether the government had the opportunity and incentive to present sufficient evidence, the

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[1] Ironically, the government's position would give the state greater protections than those afforded individuals under the Due Process Clause. *See United States v. Rodgers*, 466 U.S. 475, 483 (1984) (holding that persons may be punished, even if their conduct was outside the scope of the criminal statute as it was then interpreted by the pertinent federal court of appeals, if a subsequent change in the interpretation of the statute was "reasonably foreseeable").

court did not so much as suggest that the government was deprived of that opportunity at any point before or during respondents' lengthy trial.

The government was on full and fair notice of the "significant nexus" test from *SWANCC* over four years before trial. 531 U.S. at 167 ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA" previously.). Indeed, as the Chief Justice observed in *Rapanos*, *SWANCC* had rejected the government's "view that its authority" under the CWA "was essentially limitless"; and the government's loss in *Rapanos* was directly traceable to its refusal to acknowledge *"some* notion of an outer bound to the reach of [its] authority." 547 U.S. at 757–58 (Roberts, C.J., concurring) (emphasis in original). Beginning well before trial, cross-petitioners emphasized the government's obligation to present evidence meeting the test that was later set forth in *Rapanos* in their frequent and timely objections to the use of the government's overly broad definition of navigable waters.[2]

The erroneous jury instruction that provides the purported basis for retrying cross-petitioners is the very instruction that the government itself urged on the district court, and that the cross-petitioners fer-

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[2] In contrast, the defendant in *Sanchez-Corcino* waited until *after* the close of the government's case to argue that a conviction for "willfully" selling firearms without a license requires a type of proof that the government had failed to muster. 85 F.3d at 552.

vently opposed. The evidence the government failed to offer at trial—if indeed it exists or can now be created—is evidence that the government had every opportunity and incentive to develop and present. Even if there had been a colorable basis for the government to cling to its overly expansive view of the Act, nothing prevented or even discouraged the government from offering additional evidence on the navigable water element in the event its view did not prevail on appeal. But the government failed even to investigate the possibility of a significant nexus between Avondale Creek and the Black Warrior River, and now it would need to manufacture new evidence before a retrial—evidence that purports to recreate the depth, flow and other features of dozens of miles of waterways as they existed more than seven years ago. It is difficult to imagine a stronger case for enforcing the right not to be placed twice in jeopardy for the same offense.

The upshot of the court of appeals' holding is that the government is encouraged *not* to produce sufficient evidence on an element of the offense if it succeeds in arguing to the trial court that a more government-friendly test of liability is appropriate. In such a case, the government may first attempt to convict where its burden is light, and if that fails on appeal it may have another bite at the apple under the appropriate legal standard. The government, however, may not impose on individuals the embarrassment, expense, ordeal and risk of erroneous conviction that comes with multiple trials, as the price for its pursuit of a "substantially more efficient and straightforward" way to obtain guilty verdicts. *See* 08-223 Pet. 28.

The court of appeals should have assessed the sufficiency of the evidence based on the correct rule of law set forth in *Rapanos*, not the incorrect rule advocated by the government at trial. Because that intervening legal decision was "an authoritative statement of what" the CWA "meant before as well as after the decision" in *Rapanos, see Roadway Express*, 511 U.S. at 312–13, the trial to be held on remand is a trial on the "same offence" and therefore impermissible.

II. THE COURT OF APPEALS' DECISION ENLARGES A CIRCUIT CONFLICT OVER THE APPLICATION OF THE DOUBLE JEOPARDY CLAUSE

The circuit courts have been divided for decades over how to apply the Double Jeopardy Clause when a post-trial decision reveals that the government's trial evidence was insufficient. Indeed, it has now been several years since "a split has emerged among the circuits" over the preliminary question of whether appellate courts must evaluate sufficiency-of-the-evidence claims when there are other grounds for reversal. *See* Sarah O. Wang, *Insufficient Attention to Insufficient Evidence: Some Double Jeopardy Implications*, 79 Va. L. Rev. 1381, 1388 (1993).[3] The

[3] The Second, Ninth, and Tenth Circuits have held that insufficiency of evidence claims should be reviewed, even if there are other grounds for reversal. *See, e.g.*, *United States v. Wallach*, 979 F.2d 912 (2d Cir. 1992); *United States v. Haddock*, 961 F.2d 933, 934 (10th Cir. 1992) (en banc); *United States v. Szado*, 912 F.2d 390, 393 (9th Cir. 1990). The First, Fifth, and Seventh Circuits have held that evidentiary sufficiency need not be addressed when a conviction can be reversed for other reasons.

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court of appeals' decision here deepens that sharp divide.

The Fifth, Seventh, and Tenth Circuits have all held, in the context of convictions under 18 U.S.C. § 924(c), that the Double Jeopardy Clause bars retrial if the government failed to present evidence that is sufficient under a test that was first announced by this Court post-trial. *See Bailey v. United States*, 516 U.S. 137 (1995). The Tenth Circuit held that "if the evidence was insufficient so that a directed verdict of acquittal should have been entered, remand would violate the Double Jeopardy Clause." *United States v. Smith*, 82 F.3d 1564, 1567 (10th Cir. 1996).[4] The Seventh Circuit has adopted a similar approach, remanding for retrial only when the original evidence was sufficient to support a con-

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See United States v. Miller, 952 F.2d 866, 874 (5th Cir. 1992); *United States v. Douglas*, 874 F.2d 1145, 1150 (7th Cir. 1989), *abrogated on other grounds*, *United States v. Durrive*, 902 F.2d 1221 (7th Cir. 1990); *United States v. Porter*, 807 F.2d 21, 24 (1st Cir. 1986).

[4] A series of Tenth Circuit decisions are in accord despite seemingly contrary language in one of its earliest post-*Bailey* decisions. *Compare United States v. Wacker*, 72 F.3d 1453, 1465 (10th Cir. 1995) ("[T]he government here cannot be held responsible for 'failing to muster' evidence sufficient to satisfy a standard which did not exist at the time of trial."), *with United States v. Miller*, 84 F.3d 1244, 1258 (10th Cir. 1996) ("[W]e will remand for a new trial only if the jury could have returned a guilty verdict if properly instructed."), *overruled on other grounds*, *United States v. Holland*, 116 F.3d 1353 (10th Cir. 1997).

viction for using or carrying a firearm according to the newly articulated test. *See, e.g.*, *United States v. Hightower*, 96 F.3d 211, 215 (7th Cir. 1996) ("The only step to be taken on this record is to vacate the conviction on Count III and to remand for dismissal of those charges."); *United States v. Robinson*, 96 F.3d 246, 250 (7th Cir. 1996); *United States v. Jackson*, 103 F.3d 561, 569 (7th Cir. 1996). The Fifth Circuit followed suit. *See United States v. McPhail*, 112 F.3d 197, 200 (5th Cir. 1997) ("[T]he Government is barred by double jeopardy from presenting more evidence on the carry theory.").

Years earlier, the Fifth Circuit had already suggested that the same double jeopardy analysis applied to appeals taken after this Court's decision in *Ratzlaf v. United States*, 510 U.S. 135 (1994), which clarified the standard for proving the illegal structuring of financial transactions. *See United States v. Oreira*, 29 F.3d 185, 188 n.5 (5th Cir. 1994). The Fifth Circuit permitted remand only after determining that there "was sufficient evidence to support a finding of guilt had the jury been properly charged" in accordance with *Ratzlaf*. *Id.* For that reason, the court explained, "remand for a new trial does not pose a double jeopardy problem." *Id.*

The Fourth and Ninth Circuits, however, have taken the opposite approach. For example, the Ninth Circuit permitted retrial even though the government's evidence was insufficient when analyzed after *Ratzlaf*. *See United States v. Weems*, 49 F.3d 528, 531 (9th Cir. 1995); *cf. United States v. Recio*, 371 F.3d 1093 (9th Cir. 2004) (allowing retrial after a post-trial decision regarding the termination of conspiracies).

The Fourth Circuit has also suggested that it would take the same approach with regard to convictions for the possession of child pornography after *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). *See United States v. Ellyson*, 326 F.3d 522, 532–34 (4th Cir. 2003). Although the court held that the government's evidence was sufficient to support the conviction both before and after *Free Speech Coalition*, it stated that it would have allowed retrial regardless of whether the new test was met. *Id.* at 533–34.

The persistence of these inconsistent outcomes demonstrates that the circuit courts are in need of guidance on how to apply the Double Jeopardy Clause following a decision of this Court that defines the elements of a criminal offense more narrowly than the rule of law that the prosecution successfully urged at trial.

III. RESOLVING THE FIFTH AMENDMENT QUESTION THAT HAS DIVIDED THE CIRCUIT COURTS IS ESSENTIAL TO THE CONSISTENT AND FAIR ADMINISTRATION OF CRIMINAL JUSTICE

Correction of the court of appeals' decision is critical to ensuring the even-handed administration of criminal justice. Because the Double Jeopardy Clause confers procedural protections that transcend the substantive statutes at issue in particular cases, the question presented has arisen—and will continue to arise—when this Court or any appellate court interprets the elements of a criminal offense. As illustrated above, the question has arisen in the aftermath of this Court's interpretation of numerous statutes already. *See supra* Part II.

So long as such confusion is allowed to persist, similarly-situated defendants appearing before different courts will continue to face dramatically different outcomes. Extensive litigation will continue. The results will be unpredictable. And countless defendants will face the prospect of unconstitutional retrials. As one commentator lamented, "the Double Jeopardy Clause is one of the least understood and most heavily litigated clauses in the Bill of Rights." Wang, *supra* Part II, at 1384. This case provides an opportunity to clarify the scope of this vital Fifth Amendment protection where the government makes a deliberate choice to risk reversal while relentlessly pursuing an invalid theory of criminal liability.

CONCLUSION

For the foregoing reasons, the conditional cross-petition for a writ of certiorari should be granted if the Court grants the government's petition. Because it is so clear that the government presented insufficient evidence under any interpretation of the ruling in *Rapanos*, the Court may wish to affirm summarily the Eleventh Circuit's reversal of the convictions and remand with instructions for the court of appeals to dismiss the indictment on double jeopardy grounds.

Respectfully submitted.

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