No. 21-

IN THE
Supreme Court of the United States

DUANE NISHIIE,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the Wartime Suspension of Limitations Act suspends the statute of limitations for fraud offenses that have no nexus to the war or armed conflict.

II. Whether the Wartime Suspension of Limitations Act applies based upon the statutory definition of the offense charged rather than factual allegations of the defendant's conduct.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Duane Nishiie. Respondent is the United States. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the District of Hawaii, and the United States Court of Appeals for the Ninth Circuit:

United States v. *Nishiie,* No. 19-10405 (9th Cir. May 12, 2021)

United States v. *Nishiie,* No. 17-00550 (D. Haw. Sep. 27, 2019)

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Duane Nishiie respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit is published at 996 F.3d 1013 and is reproduced in the appendix to this petition at Pet. App. 1a–34a. The order denying Mr. Nishiie's motion for rehearing en banc is reproduced at Pet. App. 91a. The opinion of the district court is published at 421 F. Supp. 3d 958 and is reproduced at Pet. App. 35a–90a.

JURISDICTION

The Ninth Circuit entered judgment on May 12, 2021, Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Wartime Suspension of Limitations Act, 18 U.S.C. § 3287 provides that:

> When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)), the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United

> States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.

STATEMENT OF THE CASE

The Ninth Circuit's novel interpretation of the Wartime Suspension of Limitations Act (WSLA) impermissibly expands the Act's exceptions to otherwise applicable statutes of limitations. Congress designed the Act's exceptions, as this Court has held, to be narrowly construed in order to uphold a longstanding policy of repose. The Ninth Circuit's ruling does the opposite, authorizing untimely prosecutions to move forward without Congress's intended restrictions. Particularly in the current era of surging WSLA cases, this radical expansion of the Suspension Act's reach warrants this Court's review.

The Ninth Circuit misread the text, purpose, and history of a statute principally "[c]oncerned about *war-related* frauds" by, shockingly, removing the requirement that the alleged fraud have any connection to war. *Kellogg Brown & Root Servs., Inc.* v. *United States ex rel. Carter*, 575 U.S. 650, 656 (2015) (emphasis added). The Ninth Circuit erred further by failing

to address the statutory elements of the offenses charged, ignoring this Court's unambiguous rule that "[i]t is the statutory definition of the offense that determines whether or not the statute of limitations comes within the Suspension Act." *Bridges* v. *United States*, 346 U.S. 209, 222–23 (1953). This ruling will permit a significant number of prosecutions that would otherwise be foreclosed, sows confusion amongst lower courts, and runs contrary to the Court's precedents and the principle that "the WSLA should be 'narrowly construed' and 'interpreted in favor of repose.'" *Kellogg*, 575 U.S. at 661 (quoting *Bridges*, 346 U.S. at 216).

A. Factual Background

More than fifty years after the conclusion of the Korean War, and thousands of miles away from the active military conflicts in the Middle East, the United States and the Republic of Korea ("Korea") began to relocate and consolidate military bases in Korea. From 2006 to 2012, Duane Nishiie worked for the Department of Defense as a contracting officer in Seoul. Over the course of this work and during his later employment by a private company, Mr. Nishiie allegedly provided advantages to bidders for these construction projects in return for bribes and kickbacks. He is further alleged to have made false statements and concealed evidence in relation to this misconduct.

A federal grand jury returned a nine-count indictment against Mr. Nishiie on September 21, 2017. The indictment charged him with conspiracy to commit bribery and honest services fraud (18 U.S.C. § 371), conspiracy to commit money laundering (18 U.S.C. § 1956(h)), bribery (18 U.S.C. § 201(b)(2)), three counts of honest services wire fraud (18 U.S.C. § 1343; 1346), and three counts of making a false statement (18 U.S.C. § 1001). All of the charged offenses are subject

to a five-year statute of limitations and are based on alleged activity that occurred before September 21, 2012—five years prior to Mr. Nishiie's indictment.

B. Proceedings Below

Mr. Nishiie moved to dismiss the charges against him as time barred. Prosecutors countered that the WSLA suspended the five-year statute of limitations, making all charges timely. The WSLA suspends the statute of limitations for three categories of offenses against the United States: (1) fraud, (2) property, and (3) contract. See 18 U.S.C. § 3287. Here, prosecutors argued that Mr. Nishiie's alleged steering of military base contracts in Korea fell under the first category: "offense[s] . . . involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not." *Id.* Prosecutors further argued that argued no connection to war was required for the WSLA to cover these offenses.

Mr. Nishiie contended that the Act only suspends the statute of limitations for offenses "which [are] connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces." *Id.* Mr. Nishiie also argued, citing *Bridges*, that none of the offenses charged included the "'essential ingredient' of pecuniary fraud against the United States" necessary to trigger the WSLA. Ex. A in Support of Mot. to Dismiss at 15, *United States* v. *Nishiie*, 421 F. Supp. 3d 958 (D. Haw. 2019) (No. 17-00550); see also Transcript of Mot. to Dismiss Hearing at 8–11, *Nishiie*, 421 F. Supp. 3d 958 (No. 17-00550) ("Count 2, a bribe, is not a pecuniary loss to the United States.").

The District Court analyzed the statute's text using two competing canons of interpretation: one that would apply the war-nexus clause only to the third

offense (offenses involving "contracts") and one that would apply it to all three offenses in the series. The court found the latter construction better reflected a "common-sense approach to language" most aligned with the Act's "congressional purpose." *Nishiie*, 421 F. Supp. 3d at 983. The court also noted that even if there were disagreement regarding the WSLA's language, history, or purpose, the rule of lenity would compel the same result. *Id.* at 980. With no connection between Mr. Nishiie's alleged conduct and ongoing wars in Iraq and Afghanistan, the District Court dismissed all but the two conspiracy charges.[1]

The Ninth Circuit reversed. Despite the two directly competing canons, it concluded that "[o]rdinary canons of statutory construction support an unambiguous reading of the WSLA's limiting 'which' clause"—a reading restricting the war-nexus clause only to contract and not to fraud offenses. *Nishiie*, 996 F.3d at 1021. Even after acknowledging legislative concern with war frauds, the Ninth Circuit stated that the "[t]he statutory context and history of the WSLA" support the conclusion that fraud offenses need not be connected to the war to fall under the Act. *Id.* at 1024. Finally, it held that "the rule of lenity has no application here." *Id.* at 1027 n.10.

One judge concurred, but "d[id] not agree with the majority . . . that any canon of statutory construction aid[ed] [the] decision." *Id.* at 1029 (Schroeder, J., concurring). Rather, noting "that we can find a canon of interpretation to support any result," the concurrence

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[1]The United States later dropped the two conspiracy charges, conceding they "[we]re time-barred because each conspiracy was completed by April 30, 2012." Appellee's Response Brief at 17 n.6, *United States* v. *Nishiie*, 996 F.3d 1013 (9th Cir. 2021) (No. 19-10405) (quoting Supplemental Status Report of United States).

believed "the legislative history and the subsequent codification of a similar provision in the Uniform Code of Military Justice . . . compel[led] th[e] result." *Id.*

REASONS FOR GRANTING THE PETITION

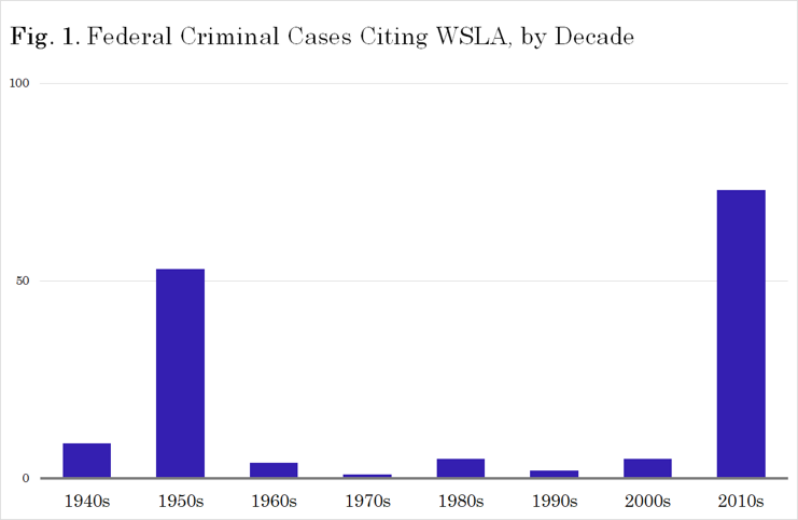
I. THE NINTH CIRCUIT'S DECISION IS CONTRARY TO PRECEDENT FROM THIS COURT.

The Ninth Circuit's expansion of the WSLA's reach undermines "a longstanding congressional 'policy of repose,'" embodied in statutes of limitations, "that is fundamental to our society and our criminal law." *Bridges*, 346 U.S. at 215–16. The related issue of whether courts may look beyond the statutory definitions of offenses to determine if the WSLA applies is an important procedural question. And it is an issue where lower courts' decisions conflict with the Court's holdings in *Bridges* and *United States* v. *Grainger*, 346 U.S. 235 (1953), to say nothing of the division of authorities among the circuit and district courts. Both of these grounds justify the Court granting this petition.

1. Statutes of limitations "are 'vital to the welfare of society' and rest on the principle that 'even wrongdoers are entitled to assume that their sins may be forgotten.'" *Kokesh* v. *SEC*, 137 S. Ct. 1635, 1641 (2017) (internal citation omitted). Limitations "protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Toussie* v. *United States*, 397 U.S. 112, 114–15 (1970); see also *Order of R.R. Telegraphers* v. *Ry. Express Agency*, 321 U.S. 342, 348–49 (1944) ("Statutes of limitation[s] . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been

lost, memories have faded, and witnesses have disappeared."). They "also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." *Toussie*, 397 U.S. at 115; see also *Betterman* v. *Montana*, 578 U.S. 437, 441 (2016) ("In the first stage [of criminal proceedings]—before arrest or indictment, when the suspect remains at liberty—statutes of limitations provide the primary protection against delay . . . ."). The Court has thus concluded that the exceptions in the WSLA to the statute of limitations must be "narrowly construed." *Bridges*, 346 U.S. at 215–16.

If the decision below were allowed to stand, however, it would vitiate these principles. Expanding the WSLA's reach to fraud and property offenses that bear no connection to war would permit prosecutions for decades-old offenses unrelated to any ongoing war effort "so long as the United States is engaged in authorized military activities *anywhere*." *Nishiie*, 996 F.3d at 1030 (emphasis added). The effect would be a dramatic increase in the quantity of crimes for which the statute of limitations is suspended, thus transforming what Congress intended as a "narrow[]" "exception to a longstanding congressional 'policy of repose'" into an exception that swallows the rule. *Bridges*, 346 U.S. at 215–16.



Given the nature and length of the war on terrorism, there has been a concomitant surge in criminal prosecutions in which prosecutors invoke the WSLA. See Fig. 1, below. Although the WSLA arose out of unprecedented mobilization efforts of the World Wars, prosecutors have used this Act more since 2008 than in the prior sixty years combined.[2]

The expansive interpretation and ever-increasing invocations of the WSLA's exceptions are all the more troubling "in today's world where we speak of 'forever wars.'" *Nishiie*, 996 F.3d at 1030. Pursuant to the Ninth Circuit's and other lower courts' holdings, not only will the statute of limitations be suspended for misconduct unrelated to war, but that suspension will continue throughout "the duration of hostilities that may last a generation or more." *Boumediene* v. *Bush*, 553 U.S. 723, 729 (2008).

That is especially true since the cessation of hostilities requires official action that elected leaders may be

[2]Figure 1 data reflects the number of cases citing to 18 U.S.C. § 3287 listed in the LexisNexis database.

reluctant to take. Congress has shown little appetite to repeal either Authorization for Use of Military Force (AUMF) currently in effect. And even though the United States has withdrawn all forces from Afghanistan and the President has stated that "the United States [has] ended 20 years of war" there, the administration has yet to issue a proclamation formally terminating the conflict.[3] See also 18 U.S.C. § 3287 (stating that the limitations period for covered offenses "shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress"). The Taliban takeover of Afghanistan makes it all the less likely that elected officials will repeal the 2001 AUMF.

Especially with the end of America's forever wars far from sight, an expansive interpretation of the WSLA hardly comports with a "policy of repose." *Bridges*, 346 U.S. at 215–16. Setting the record straight on the scope of the WSLA is thus reason enough to grant the petition for certiorari.

2. The related question of whether a court may look beyond the statutory definitions of offenses to determine if the WLSA applies is also procedurally significant. Like the "war nexus" issue, this question governs the types of crimes that are subject to the WSLA. The answer can thus mean the difference between a prosecution proceeding many years after the alleged conduct or being dismissed at the outset.

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[3] *Remarks by President Biden on the End of the War in Afghanistan*, The White House (Aug. 31, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/31/remarks-by-president-biden-on-the-end-of-the-war-in-afghanistan/

Lower courts' decisions on this issue, moreover, "conflict[] with relevant decisions of this Court," Sup. Ct. R. 10(c). And in so doing, they have also created a division of authorities among circuits and districts.

This Court clarified decades ago in *Bridges* and *Grainger* that determining whether an offense is within the WSLA's fraud clause requires looking at elements, not facts. It explained that the WSLA applies to offenses "only where the fraud is of a pecuniary nature" and "only where fraud against the government is an essential ingredient of the crime." *Bridges*, 346 U.S. at 215, 222–23. That is, "[i]t is the statutory definition of the offense that determines whether or not the statute of limitations comes within the Suspension Act." *Id.* at 222–23; see also *Grainger*, 346 U.S. at 242–43 ("In determining the kind of offenses to which that section applies . . . such offenses are limited to those which include fraud as an essential ingredient.").

The Court thus adopted an early version of the categorical method, a now-familiar approach used in several areas of criminal law to determine whether a statute of conviction meets a federal standard. See, *e.g.*, *Borden* v. *United States*, 141 S. Ct. 1817, 1822 (2021) (plurality opinion) (stating that "the facts of a given case are irrelevant" to determine if a state offense is a valid Armed Career Criminal Act predicate and "[t]he focus is instead on . . . whether [it] necessarily involves" specified elements); *United States* v. *Castleman*, 572 U.S. 157, 168 (2014) (stating that under the "categorical approach," courts "look to the statute of . . . conviction to determine whether that conviction necessarily 'ha[d], as an element,'" specified conduct(alteration in original)).

Some courts have respected the *Bridges* and *Grainger* holdings and look only at the elements of the charged offense. See, *e.g.*, *United States* v. *DeLia*, 906

F.3d 1212, 1219 (10th Cir. 2018) ("To determine whether the Suspension Act applies, we must evaluate the elements of the charged offense." (citing *Bridges*, 346 U.S. at 222–23)); see also *United States* v. *Doost*, 2019 WL 1560114 at *13 (D.D.C. Apr. 10, 2019), *aff'd* 3 F.4th 432 (D.C. Cir. 2021); *Weslowski* v. *Zugibe*, 14 F. Supp. 3d 295, 311 (S.D.N.Y. 2014).

Others courts, however, have acted contrary to *Bridges* and *Grainger*. The Eleventh Circuit, for example, applied the WSLA to aircraft parts fraud and conspiracy to commit such fraud—offenses that do not necessarily entail pecuniary fraud against the United States—without engaging in the required elements-focused analysis. See *United States* v. *Frediani*, 790 F.3d 1196, 1200 (11th Cir. 2015); see also *Burnett* v. *United States*, No. 5:20-CV-8011-SLB, 2021 WL 2163528, at *6 n.4 (N.D. Ala. May 27, 2021) ("[A]n offense that does not list the United States as a victim under the statute can still qualify as a covered offense under the WSLA."); *United States* v. *Wilson*, No. 2:18-cr-00136, 2018 WL 5260806, at *3 (W.D. La. Oct. 22, 2018) (concluding that"[t]he element of fraud is satisfied" for a "Conspiracy to Bribe a Public Official" charge based on the facts of the case).

Similarly, the Ninth Circuit in this case accepted "that Nishiie's alleged fraud . . . falls under the first offense category, which involves fraud-based crimes," without ever analyzing the elements of the offenses charged. *Nishiie*, 996 F.3d at 1018. Mr. Nishiie had argued "that 'the wartime suspension of limitations authorized by Congress is limited strictly to offenses in which defrauding or attempting to defraud the United States is an essential ingredient of the offense charged.'" Appellee's Resp. Br. 44, *United States* v. *Nishiie*, 996 F.3d 1013 (9th Cir. 2021) (No. 19-10405) (quoting *Bridges*, 346 U.S. at 221); see also Transcript

of Mot. to Dismiss Hearing at 8–11, *Nishiie*, 421 F. Supp. 3d 958 (No. 17-00550) ("Count 2, a bribe, is not a pecuniary loss to the United States."). Even the government recognized that the WSLA "applies only where (i) the 'fraud is of a pecuniary nature or at least of a nature concerning property'; and (ii) 'defrauding or attempting to defraud the United States is an essential ingredient of the offense charged.'" Opening Br. United States 33–34, *United States* v. *Nishiie*, 996 F.3d 1013 (9th Cir. 2021) (No. 19-10405) (quoting *Bridges*, 346 U.S. at 215, 221). Yet the Ninth Circuit failed altogether to consider whether Mr. Nishiie's charged offenses met these governing requirements.

This departure from the Court's express holdings in *Bridges* and *Grainger* will sow more confusion in lower courts and lead to further inconsistent application of the WSLA. The Court should therefore grant the petition to resolve this disarray and split of authorities.

II. THE NINTH CIRCUIT WRONGLY INTERPRETED THE WAR-NEXUS CLAUSE NOT TO APPLY TO EACH OFFENSE SPECIFIED IN THE STATUTE.

A. The series-qualifier canon rather than the last antecedent canon applies.

The WSLA states that, "[w]hen the United States is at war or Congress has enacted" an AUMF, the statute of limitations is suspended for "any offense (1) involving fraud . . . (2) committed in connection with . . . property . . . or (3) committed in connection with . . . any contract." 18 U.S.C. § 3287. The third offense is followed by the "which" or "war-nexus" clause: "which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces." *Id.*

The Ninth Circuit invoked the "last antecedent" canon, 996 F.3d at 1021, which states that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows," *Facebook, Inc.* v. *Duguid et al.*, 141 S. Ct. 1163, 1170 (2021). And it rejected the conflicting "series-qualifier" canon, 996 F.3d at 1022, which instructs that "a modifier at the end of [a] list 'normally applies to the entire series.'" *Duguid*, 141 S. Ct. at 1169 (citation omitted). The court believed the last antecedent canon to be "the most relevant" because of the supposed "complexity of the WSLA's language" and the lack of a "comma" to "separate[] the limiting 'which' clause from the third offense category." 996 F.3d at 1021–22. It also asserted, without citing any precedent, that "[t]he series-qualifier canon intuitively comports with casual, spoken English, but not with complex criminal legislation." *Id.* at 1022.

Parsing the WSLA does not, contrary to the Ninth Circuit's suggestion, involve "mental gymnastics" or considerable "mental energy." *Id.* at 1021–22 (citation omitted). Instead, "there is a straightforward, parallel construction that involves all [elements] in [the] series." *Duguid*, 141 S.Ct. at 1169 (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012)). The WSLA is at its core a simple series of three types of offenses: (1) fraud, (2) property, and (3) contract. And there is no "determiner (*a*, *the*, *some*, etc.)" that appears "before the second [or final] element" in the series—"[t]he typical way in which syntax would suggest no carryover modification." A. Scalia & B. Garner, *supra*, at 148. Consequently, there is a "presumption that . . . [the] modifier . . . applies to the entire series." Series-Qualifier Canon, *Black's Law Dictionary* (11th ed. 2019).

Applying the war-nexus clause to only the last rather than each item in the series also "would require accepting 'unlikely premises.'" *Paroline* v. *United States*, 572 U.S. 434, 447 (2014) (citation omitted); see also *United States* v. *Bass*, 404 U.S. 336, 340 (1971) ("[I]f that phrase applies only to [the last antecedent], the statute would have a curious reach."). It is quite unlikely that Congress sought to suspend the statute of limitations for *all* fraud and property crimes against the United States through a statute principally "[c]oncerned about *war-related* frauds." *Kellogg*, 575 U.S. at 656 (emphasis added); see also *Duguid*, 141 S. Ct. at 1171 (noting that statutory interpretation should not "take a chainsaw to these nuanced problems where Congress meant to use a scalpel").

The Ninth Circuit's reliance on a single omitted comma, moreover, contravenes the Court's admonition not to apply the last antecedent canon in a "mechanical way." *Paroline*, 572 U.S. at 447. Punctuation alone is hardly "a reliable guide," and construction hinging on "punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning." *U.S. Nat'l Bank of Or.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454–55 (1993). The Court has even previously noted in applying the series-qualifier canon that "the use of commas" at the end of a series "is discretionary." *Bass*, 404 U.S. at 353 n.18, 340 n.6.

Finally, the Ninth Circuit was wrong to assert (and with no authority cited) that the series-qualifier canon is apt only for "casual, spoken English" and not "complex criminal legislation." This Court has in fact applied the canon numerous times to federal criminal statutes without a hint of reservation. See, *e.g.*, *Paroline*, 572 U.S. at 447; *Bass*, 404 U.S. at 340–41.

B. The WSLA's purpose and history favor applying the war-nexus clause to each specified offense.

The past and present of the WSLA confirm that the war-nexus clause applies to each item in the tripartite series. The WSLA, from its origins in World War I, codification after World War II, and amendments in 2008 to apply to the AUMFs for the Iraq and Afghanistan conflicts, retained a consistent purpose: to permit prosecutions of fraud offenses related to war efforts.

The historical context for the WSLA dates to 1921. The Department of Justice at the time was investigating alleged "war frauds" from World War I and requested an extension of time on the statute of limitations. *Bridges*, 346 U.S. at 219 n.17 (quoting H.R. Rep. No. 70–16, at 1 (1927)). Congress thus enacted the Suspension Act and "aimed the proviso at the pecuniary frauds growing out of war contracts." *Id.* at 218 n.14; see also *Kellogg*, 575 U.S. at 656 ("Concerned about war-related frauds, Congress in 1921 enacted a statute that extended the statute of limitations for such offenses.").

At the outset of World War II, Congress again enacted a suspension of the limitations period out of the same concern—that it would be challenging for the government to wage war while simultaneously investigating and prosecuting fraudulent transactions related to it. See *Bridges*, 346 U.S. at 219 n.18 ("[T]he United States . . . is engaged in a gigantic war program. Huge sums of money are being expended for materials and equipment in order to carry on the war successfully. . . . [I]n the[se] varied dealings opportunities will no doubt be presented for unscrupulous persons to defraud the Government or some agency." (quoting S. Rep. No. 1544, at 1–2 (1942)). Congress later codified the WSLA, providing that a future declared war would

also trigger a suspension of the limitations period. See Act of June 5, 1948, Pub. L. No. 80-772, § 3287, 62 Stat. 683, 828.

The contemporaneous understanding and history of the Department of Justice itself suggests that WSLA targeted war-related frauds. The Department established the War Frauds Unit in 1942—the same year that Congress enacted the WSLA—to "prosecute all cases involving fraud upon the government *in its war efforts*."[4] And in 1943, Attorney General Francis Biddle specified that the frauds of focus as those *related* to the war: "[T]he category known as war frauds—cheating the government on its purchases of the *tools of war*, the services and materials and finished products *we must have for our armed forces*."[5]

Congress did not alter or expand the purpose and scope of the WSLA its with its most recent amendment in 2008. That amendment ensured that the WSLA would apply when Congress had authorized the use of military force and thus encompassed the active conflicts in Iraq and Afghanistan. The precise, war-related purpose of the amendment, however, remained clear. See S. Rep. No. 110-431, at 1–2 (2008) ("This legislation will protect American taxpayers from criminal contractor fraud by giving investigators and auditors the time they need to thoroughly review contracts *related to the ongoing conflicts* in Iraq and Afghanistan.") (emphasis added); *id.* at 2, 3 n.4 (the goal was to "target[] fraudulent conduct by war contractors"

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[4] *Historical Timeline*, U.S. Dep't of Just. (updated Jan. 15, 2021), https://www.justice.gov/criminal/history/historical-timeline (emphasis added).

[5] Prosecution of War Crimes: An Address by The Honorable Francis Biddle (Feb. 1, 1943), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/02-01-1943.pdf (emphasis added).

who could "exploit[] the calamity of war" but whose "actions could not be investigated during hostilities"). The 2008 Act, just like its predecessors, sought to "allow additional time for investigators and auditors to thoroughly investigate and review all war contracts and potentially save the U.S. taxpayers untold millions of dollars." *Id.* at 4.

It is therefore no surprise that this Court has concluded that "[t]he legislative history of" the WSLA "emphasizes the propriety of its conservative interpretation." *Bridges*, 346 U.S. at 216. As recently as 2015, this Court confirmed this view, stating that "the WSLA should be 'narrowly construed' and 'interpreted in favor of repose.'" *Kellogg*, 575 U.S. at 661. Thus, "even if there were some ambiguity in the WSLA . . . our cases instruct us to resolve that ambiguity in favor of the narrower definition." *Id.*

Despite a century of legislative history illustrating the WSLA's narrow purpose, the Ninth Circuit concluded that a short-lived version of the Act proves that it extends to non-war-related fraud offenses. In its view, "[p]lacement of the limiting 'which' clause in the October 1944 Act is the historical lynchpin that resolves any ambiguity" because Congress added the war-nexus clause adjacent to the contract clause when the latter was the second rather than the final offense in the series. *Nishiie*, 996 F.3d at 1025.

That gloss misunderstands the significance of the changes in the 1940s to the WSLA and its precursors. The period from 1942 to 1948 was a volatile time for the text; Congress amended the law twice in 1944 alone, for example. See Act of Oct. 3, 1944, ch. 479, 58 Stat. 781; Act of July 1, 1944, ch. 358, § 19(b), 58 Stat. 667. Most importantly, Congress when codifying the WSLA in 1948 reordered the items in the series so that the contract clause was last and the war-nexus clause

appeared at the end of the series. See § 3287, 62 Stat. at 828.[6]

The Ninth Circuit paid no heed to the import of this reordering. But "[w]hen Congress amends legislation, courts must presume it intends the change to have real and substantial effect." *Van Buren* v. *United States*, 141 S. Ct. 1648, 1660 (2021) (quoting *Ross* v. *Blake*, 578 U.S. 632, 641–42 (2016)). And here, there is no discernible reason why Congress would relocate the contract clause to be last and the war-nexus clause to tail the entire series—unless Congress wished to clarify that the war-nexus clause applied to the whole series. That is the only understanding that avoids rendering the revision "a largely meaningless exercise." *Rumsfeld* v. *F. for Acad. and Institutional Rts., Inc.*, 547 U.S. 47, 58 (2006).

What's more, the Ninth Circuit's two-tier system separating "fraud and property" from "contract" offenses creates a distinction that is both dangerous and artificial. "Fraud," "property," and "contract" crimes against the United States share many of the same elements—virtually any contract offense could be characterized as a "fraud" or "property" offense. Thus, under the Ninth Circuit's holding, prosecutors may easily craft indictments that emphasize "fraud" and the loss or theft of "property" rather than, say, a breach of contract, in order to avoid adducing evidence that the defendant's offense is connected to war. Mr. Nishiie's case is illustrative. The United States argues "Nishiie's alleged fraud with respect to steering military base *contracts* in Korea falls under the first

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[6] The only other notable change—not material to this issue—was that Congress amended the reference to property under the Surplus Property Act of 1944 to refer to property of the United States in general. *See id.*

offense category, which involves *fraud-based crimes*." *Nishiie*, 421 F. Supp. 3d at 982 (emphasis added).

The Ninth Circuit thus erred in both its textual and historical construction of the statute. Congress designed the WSLA to suspend the limitations period for a narrow subset of crimes, which the war-nexus clause requires relate to the ongoing hostilities.

III. THE NINTH CIRCUIT FAILED TO ANALYZE WHETHER MR. NISHIIE'S OFFENSES NECESSARILY INVOLVED FRAUD AGAINST THE UNITED STATES.

As noted above, the Court in *Bridges* and *Grainger* held decades ago that whether an offense is subject to the WSLA's fraud clause requires courts to analyze the elements, not the facts, of the charged offense. In *Bridges*, for example, the Court stated that "even though the offense may be committed in a pecuniary transaction involving a financial loss to the Government, that fact, alone, is not enough to suspend the running of the . . . statute of limitations." 346 U.S. at 222. The WSLA "suspend[s] the running of" the limitations period "only where fraud against the Government is an essential ingredient of the crime." *Id.* In other words, courts are to look solely at "the statutory definition of the offense." *Id.* at 222–23; see also *Grainger*, 346 U.S. at 242 ("[T]here is a question whether the mere making of a false statement in the connection specified *necessarily* includes the ingredient of fraud required by the Suspension Act." (emphasis added)).

The Ninth Circuit took for granted that the WSLA fraud clause covered Mr. Nishiie's alleged offenses, thus failing to abide by the unambiguous *Bridges*/*Grainger* rule. The court accepted "the United States's 'conten[tion] that Nishiie's alleged fraud . . . falls under the first offense category,'" but never

evaluated the statutory elements of Mr. Nishiie's offense to test this contention. *Nishiie*, 996 F.3d at 1018 (alteration in original).

If it had, the Ninth Circuit would have seen that *none* of Mr. Nishiie's alleged offenses fall under the WSLA. Making a false statement (18 U.S.C. § 1001) punishes anyone who "makes any materially false, fictitious, or fraudulent statement or representation," thus pecuniary harm to the United States is not an essential ingredient of the offense. Receiving a bribe by a public official (18 U.S.C. § 201(b)) punishes an offender simply for "being influenced in the performance of any official Act"—the Government need not prove pecuniary fraud against the United States to sustain the charge. And while honest services fraud (18 U.S.C. §§ 1343, 1346) involves a loose concept of "fraud," it need not be against the United States, and "depriv[ing] another of the intangible right of honest services" is, by definition, not pecuniary. *Skilling* v. *United States*, 561 U.S. 358, 400, 402 (2010) ("While the offender profited, the betrayed party suffered no deprivation of money or property.").

IV. THIS CASE IS AN APPROPRIATE VEHICLE TO CLARIFY THE WSLA AND RESOLVE CONFUSION.

The issues in this case are squarely presented, dispositive, and ripe for review. Mr. Nishiie has preserved his arguments surrounding the proper interpretation and application of the WSLA, and resolution of these issues will determine whether the claims against him are time barred. Further, if the involvement of the attorneys from the Criminal Division and Main Justice in the proceedings below is any indication, these issues plainly matter to the United States. This case presents an opportunity to resolve serious questions which "[t]he Supreme Court has not squarely confronted . . .

in its few cases interpreting the WSLA," *Nishiie*, 996 F.3d at 1018, and correct lower courts' misunderstandings of *Bridges* and *Grainger*.

Waiting to resolve the questions presented here risks further unwarranted expansion of the WSLA. Lower courts have already interpreted silence on the war-nexus issue from this Court's earlier decisions on the WSLA as indicative on its applicability. See *id.* at 1019 ("Notably, the [Supreme] Court [in *Kellogg*] omitted inclusion of the limiting which clause when quoting the statutory text."). Ironically, at the time *Kellogg* was decided, cases referencing the WSLA were peaking in a manner directly at odds with the narrow construction theory advanced by this Court. See Fig. 1. As WSLA prosecutions continue to rise, the expansion of the Act itself will continue, and confusion amongst the courts will worsen. There is no need to wait. This case is an opportunity to confront the issue head on.

Finally, lower courts failing to analyze only the elements of the charged offense before applying the WSLA has fostered misunderstanding of the *Bridges*/*Grainger* rule requiring just that. Like the war-nexus question, this issue evades review as federal courts simply do not address it. Lower courts may continue to interpret silence as acceptance of WSLA's applicability to an expanding set of offenses. This confused litigation wastes judicial resources and wrongfully places Americans in jeopardy of long-delayed prosecution. Waiting will leave these dangerous inconsistencies unresolved, broaden the construction of the WSLA, and foreclose defendants' chances to challenge its applicability.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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