No. 21-6453

IN THE SUPREME COURT OF THE UNITED STATES

DUANE NISHIIE, AKA SUH JAE HON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether all offenses listed in the Wartime Suspension of Limitations Act (WSLA), 18 U.S.C. 3287, which suspends limitations periods for certain types of criminal offenses during a declared war or congressional authorization of the use of military force, are subject to a requirement that they have a substantive nexus to the hostilities.

2. Whether the WSLA requires a categorical analysis of the statutory elements of the offense charged to determine whether those elements "involv[e] fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not," 18 U.S.C. 3287(1).

ADDITIONAL RELATED PROCEEDING

United States District Court (Haw.):

United States v. Nishiie, No. 17-CR-550 (Oct. 31, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 996 F.3d 1013. The order of the district court (Pet. App. 35a-90a) is reported at 421 F. Supp. 3d 958.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 2021. A petition for rehearing was denied on June 29, 2021 (Pet. App. 91a). The petition for a writ of certiorari was filed on November 24, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury in the District of Hawaii charged petitioner with conspiring to commit bribery and honest-services wire fraud, in violation of 18 U.S.C. 201(b)(2), 371, 1343, and 1346; bribery, in violation of 18 U.S.C. 201(b)(2); three counts of honest-services wire fraud, in violation of 18 U.S.C. 1343 and 1346; conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h); and three counts of making a false statement, in violation of 18 U.S.C. 1001. C.A. E.R. 75-91. The district court dismissed all counts except the two conspiracy counts as untimely. Pet. App. 35a-90a; C.A. E.R. 2, 5, 66, 67. The court of appeals reversed and remanded for further proceedings. Pet. App. 1a-34a.

1. Petitioner, a United States government contracting officer, and Seung-Ju Lee, a former officer in the Korean Ministry of Defense's procurement arm, were officials involved in awarding engineering and construction work related to a multi-billion-dollar program to expand Camp Humphreys, a United States military installation in the Republic of Korea. C.A. E.R. 72-85. Between 2008 and 2010, petitioner and Lee engaged in various official acts to steer two contracts -- a 2008 infrastructure and engineering contract for a large area known as Parcel 2A, and a 2010 a contract for the construction of a project management office known as Joint Task Order 16 (JTO-16) -- to SK Engineering & Construction, a multinational engineering and construction firm based in Korea, in exchange for millions of dollars in bribes. Id. at 74-82.

Petitioner's official acts included preparing several memoranda favoring and promoting SK's bid, extending preferential treatment to SK over similarly situated potential bidders, and advocating in favor of SK with other officials. Id. at 76-80. SK was ultimately awarded both the Parcel 2A contract, worth approximately $400 million, and the JTO-16 contract, worth approximately $6 million. Id. at 74-75.

In exchange for their official acts, petitioner and Lee received, between 2009 and May 2012, over $2.8 million in bribes from SK. C.A. E.R. 76, 80-82, 86. To disguise those bribes as payments for legitimate business services, petitioner and Lee funneled them through sham consulting and subcontracting agreements and then distributed the funds to themselves, their co-conspirators, and others. Id. at 80-82. Petitioner and Lee disguised the illegal provenance of the funds through real-estate investments and bank accounts with straw owners. Id. at 76-77, 82-83. Petitioner additionally failed to disclose his financial arrangements with SK and others in the yearly financial-disclosure statements (Forms OGE-450) that he filed between 2009 and 2012. Id. at 84-85. Petitioner later told a co-conspirator to lie, deleted e-mails relevant to the investigation, and encouraged others to do the same. Id. at 76-77, 84-85.

2. In September 2017, a federal grand jury in the District of Hawaii charged petitioner with conspiring to commit bribery and honest-services wire fraud, in violation of 18 U.S.C. 201(b)(2),

371, 1343, and 1346 (Count 1); bribery, in violation of 18 U.S.C. 201(b)(2) (Count 2); three counts of honest-services wire fraud, in violation of 18 U.S.C. 1343 and 1346, with each count linked to a different email petitioner sent between September 2008 and April 2010 (Counts 3, 4, and 5); conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h) (Count 6); and three counts of making a false statement to a federal official, in violation of 18 U.S.C. 1001, with each count linked to a separate financial disclosure statement submitted by petitioner in January 2010, January 2011, and January 2012, respectively (Counts 7, 8, and 9). C.A. E.R. 75-91.

Petitioner moved to dismiss all counts as untimely, contending that the applicable limitations period expired no later than May 2017, five years after petitioner's receipt of SK's last bribe alleged in the indictment. D. Ct. Doc. 89 (June 23, 2019); see C.A. E.R. 86. Petitioner recognized, however, that the Wartime Suspension of Limitations Act (WSLA), ch. 645, 62 Stat. 828 (18 U.S.C. 3287), suspends the statute of limitations in certain types of cases while the government is engaged in military conflicts. As amended most recently in 2008, the WSLA provides:

> When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, * * * 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.

Ibid. Congress enacted the WSLA during World War II to ensure "that the limitations statute[s] will not operate, under stress of [wartime], for the protection of those who would defraud or attempt to defraud the United States." S. Rep. No. 1544, 77th Cong., 2d Sess. 2 (1942).

Petitioner contended that the WSLA suspends the limitations period only 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," 18 U.S.C. 3287. See D. Ct. Doc. 89, at 6-10; D. Ct. Doc. 103, at 2-4 (Aug. 3, 2019). The district court agreed, see Pet. App. 35a-90a, concluding that the WSLA's "which" clause -- i.e., "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," 18 U.S.C. 3287 -- modifies "all three categories of crimes listed in the [WSLA]." Pet. App. 35a; see id. at 89a-90a; C.A. E.R. 2-4. The court acknowledged that several textual features supported reading the "which" clause to reach only the third category involving contract offenses, see Pet. App. 51a-58a, but took the view that

"the WSLA can be reasonably read in more than one way," id. at 42a (capitalization altered; emphasis omitted), and relied on legislative history and the rule of lenity in giving the clause a broad scope, see id. at 76a-89a. The court then dismissed Nishiie's bribery, honest-services fraud, and false-statement counts as untimely, C.A. E.R. 5, but declined to dismiss the conspiracy counts because those counts alleged conspiracies ending in 2015 and 2013, respectively. Id. at 2-4.

3. The court of appeals reversed and remanded. Pet. App. 1a-34a.

At the outset, the court of appeals observed that the issue before it was one of "first impression," Pet. App. 4a, with neither this Court nor any of the courts of appeals having "definitively answer[ed] whether the limiting 'which' clause modifies remote antecedents" in the first two categories of offenses covered by the WSLA, id. at 13a, in addition to the third category of contract-related offenses. The court of appeals observed, however, that in three separate decisions, this Court had "[n]otably * * * omitted inclusion of the limiting 'which' clause when it quoted the statutory text" governing offenses in those first two categories. Id. at 10a & n.3 (quoting Kellogg Brown & Root Servs., Inc. v. United States, 575 U.S. 650, 657 (2015)); see id. at 11a-13a & nn. 4-5 (citing United States v. Smith, 342 U.S. 225, 228 (1952), and United States v. Grainger, 346 U.S. 235, 242 (1953)).

Turning to the statutory text, the court of appeals explained that "[o]rdinary canons of statutory construction support" reading the "which" clause to apply only to the third category of contract-related offenses. Pet. App. 15a. The court identified two considerations that make the "last antecedent canon" -- that is, the "'the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it,'" id. at 15a-16a (quoting Lockhart v. United States, 577 U.S. 347, 351 (2016)) -- especially significant. First, the last-antecedent canon's rationale is "'particularly [apt] where it takes more than a little mental energy to process the individual entries in the list, making it a heavy lift to carry the modifier across them all,'" and in the WSLA, the "varied syntax and distinct elements within each category of offense 'makes it hard for the reader to carry' the limiting clause across the two remote offense categories." Id. at 16a (quoting Lockhart, 577 U.S. at 351, 352). Second, because "[n]o comma separates the limiting 'which' clause from the third offense category in the current version of the WSLA," "common grammatical rules suggest that Congress intentionally tied it to the last antecedent." Id. at 17a (citation omitted) (citing The Chicago Manual of Style § 6.27 (17th ed. 2017)). And the court found that the complexity and structure of the statute did not support application of the competing "series-qualifier canon." Ibid.; see id. at 18a-19a (discussing related examples).

The court of appeals then identified further features of the statute's structure that supported applying the "which" clause only to the third, directly adjacent, category of contract-related offenses. Pet. App. 20a-21a. The court observed that each type of offense is preceded by the word "or," emphasizing their separateness. Id. at 19a. The court also observed that "grafting [the 'which' clause] to remote antecedents" would "invite * * * interpretative conundrums," such as whether the clause modifies the last phrase in the WLSA's fraud prong ("'whether by conspiracy or not'") or instead "modif[ies] only 'fraud and attempted fraud.'" Id. at 20a (citing 18 U.S.C. 3287). The court also noted a question about why Congress would have chosen to place the "limiting 'which' clause * * * not only * * * within the third offense category but also nestled between another limiting clause that corresponds to contractual affairs" -- the clause providing that the third category offenses encompasses offenses connected "'with any disposition of termination inventory by any war contractor or Government agency.'" Id. at 21a (quoting 18 U.S.C. 3287).

The court of appeals furthermore found that the "[s]tatutory history, particularly from 1944, 'conclusively refutes' the interpretation advanced by" petitioner. Pet. App. 21a (quoting Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 231 (2007)). The court observed that the WSLA's predecessor, which was enacted after the United States entered World War II in 1942,

originally identified "[o]nly one offense category" -- "'defrauding or attempts to defraud the United States'" -- that did not include any substantive limitation "comparable [to the] 'which' clause concerning the 'prosecution of the war' or 'authorized use of the Armed Forces.'" Id. at 21a (citing Act of Aug. 24, 1942 (1942 Act), ch. 555, 56 Stat. 747-748). Congress introduced the limiting "which" clause two years later, when it expanded the suspension statute to include a new contract-offense category, with a new "which" clause attached to it. Id. at 23a-24a (citing Act of July 1, 1944 (1944 Act), ch. 358, §19(b), 58 Stat. 667). And Congress then kept the "which" clause attached to the contract offense category when, in October 1944, it added a third category of offenses, involving military surplus property, placed after the contract-offense category. Id. at 24a-25a.

The court of appeals observed that Congress's "[p]lacement of the * * * clause in the October 1944 Act" made "it impossible to read the ['which'] clause as modifying either the then-first (fraud) or certainly the then-third (property) offense categories." Pet. App. 24a-25a. And the court found no indication that the 1948 codification of the federal criminal code, which included a reordering of the WSLA's listing of offense types, was intended to alter the meaning of the statute. Id. at 25a-26a; see Act of June 25, 1948 (1948 Act), ch. 645, § 3287, 62 Stat. 828. The court emphasized this Court's instruction that "absent [substantive] comment it is generally held that a change during

codification is not intended to alter the statute's scope." Pet. App. 26a (quoting Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 318 (1985)). And the court of appeals accordingly explained that the 1948 codification "does not alter congressional meaning evident from prior history, particularly the October 1944 Act," and that the evolution of the statute supplied the "historical lynchpin" that "resolves any ambiguity." Id. at 24a, 26a.

Finally, the court of appeals noted that Article 43(f) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 843(f), also supported reading the "which" clause to apply only to the contract-related offenses. Pet. App. 26a-27a. The court observed that Article 43(f), which Congress enacted in 1950 and codified in its current form in 1956, "mirrors" the version of the WSLA codified in 1948 "[i]n all relevant respects." Id. at 27a-28a. The court further observed that Article 43(f)'s formatting -- which "uses semi-colon punctuation, separated and numbered prongs identifying offense categories, and grammatical space between each category" -- unambiguously subsumes the "which" clause within the contract offense category. Id. at 28a. And the court accordingly reasoned that because "Congress could not have contemplated substantive distinctions between practically identical and nearly contemporaneous statutes of limitations," Article 43(f) supported an analogous interpretation of the WSLA. Ibid.

The court of appeals found no merit in petitioner's counterarguments. It explained that the rule of lenity is inapposite because "[n]o 'grievous ambiguity or uncertainty' in the WSLA arises 'after considering text, structure, [and] history' such that [courts] must guess as to what Congress intended." Pet. App. 29a n.10 (quoting Barber v. Thomas, 560 U.S. 474, 488 (2010)) (second set of brackets in original). And it rejected petitioner's policy-based argument against prolonged limitations periods, reasoning that in this case such "policy concern[s]" were necessarily "subordinated to the WSLA's unambiguous language." Id. at 29a-30a (citing Pereida v. Wilkinson, 141 S. Ct. 754, 766-767 (2021)). The court moreover observed that "Congress has seemingly blessed this lengthy tolling even given the modern expansion of the WSLA's war powers" by extending and expanding the WSLA's suspension of limitations in 2008. Id. at 30a (citing Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 855, 122 Stat. 4545-4546 (2008)).

Judge Schroeder concurred separately. Pet. App. 32a-34a. She agreed with the majority that the statutory history of the WSLA and the "subsequent codification of" Article 43(f) of the UCMJ "compel" the government's construction. Id. at 32a-33a. She also agreed that, contrary to the district court's view, the proponents of the 2008 amendments did not "express any intent to limit the WSLA to [any] particular military activities, and the amendment itself did not contain any such locational limitation."

Id. at 34a. But Judge Schroeder stated that, in her view, the "canon[s] of statutory construction" did not "aid[] [the court's] decision." Id. at 32a.

ARGUMENT

Petitioner renews his contention (Pet. 6-9, 12-19) that the Wartime Suspension of Limitations Act does not suspend the statute of limitations for offenses involving property of the United States or fraud against the United States unless those offenses have a direct, substantive nexus to ongoing hostilities. Petitioner also contends (Pet. 9-12, 19-20) that the court of appeals erred by not analyzing whether his offenses "necessarily" involved property of the United States or fraud against the United States. The interlocutory posture of this case, however, makes any further review unnecessary at this time. In any event, neither of the questions identified in the petition for a writ of certiorari would warrant this Court's review even if the case had reached a final judgment. The court of appeals correctly interpreted the WSLA's "which" clause; petitioner does not contend that its interpretation conflicts with the decision of any other court of appeals; and, moreover, the second question identified in the petition was neither pressed in nor passed upon by the court of appeals. The petition for a writ of certiorari should therefore be denied.

1. This case is currently in an interlocutory posture, because the court of appeals remanded for further proceedings after

reversing the district court's order dismissing some of the counts alleged in the indictment. See Pet. App. 32a. The interlocutory posture of a case ordinarily "alone furnishe[s] sufficient ground for the denial" of a petition for a writ of certiorari. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (observing that a case remanded to district court "is not yet ripe for review by this Court"); see also Abbott v. Veasey, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting the denial of certiorari).

In particular, this Court routinely denies petitions for writs of certiorari filed by criminal defendants challenging interlocutory determinations that may be reviewed at the end of criminal proceedings if the defendant is convicted and his conviction and sentence ultimately are affirmed on appeal. See Stephen M. Shapiro et al., Supreme Court Practice § 4.18, at 4-55 n.72 (11th ed. 2019). That approach promotes judicial efficiency because the issues raised in the petition may be rendered moot by further proceedings on remand. Here, if the statute-of-limitations issue remains live following further proceedings on remand, petitioner could raise that issue, along with any other issues, in a single petition following the entry of final judgment. See Hamilton-Brown Shoe, 240 U.S. at 258. Petitioner identifies no sound basis to deviate from the Court's normal practice.

2. In any event, the court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals.

a. As the court of appeals correctly explained, the WSLA's text, structure, historical development, and context establish that the WSLA's clause requiring a substantive nexus to hostilities "does not modify either the fraud or property offense categories." Pet. App. 10a.

As a textual matter, the rule of the last-antecedent -- under which "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows," Lockhart v. United States, 577 U.S. 347, 351 (2016) (quoting Barnhart v. Thomas, 540 U.S. 20, 26 (2003)) -- strongly supports the court of appeals' interpretation. As noted, the WSLA provides that, when the United States is at war or Congress has authorized the use of military force,

> 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.

18 U.S.C. 3287 (emphasis added).

Under a straightforward application of the last-antecedent rule, the limiting "which" clause applies only to the third, contract-related category, where it appears.

Petitioner contends that the last-antecedent rule is overcome here by the "series qualifier canon," which "instructs that a modifier at the end of a list normally applies to the entire series." Pet. 13 (brackets and citations omitted). But three features of the WSLA make the "which" clause a textbook candidate for applying the last-antecedent rule, not the series-qualifier canon. First, the WSLA's listing of alternative offense types is linguistically complex. Contrary to petitioner's description of the WSLA as a "simple series of three types of offenses," ibid., the provision consists of "a single 187-word sentence." Pet. App. 17a. Its three alternatives are not a simple list of nouns or verbs, but instead each contain 20 or more words and support one or more disjunctive series of dependent elements. Such complexity makes application of the last-antecedent canon especially appropriate, because the last-antecedent rule's "basic intuition" is "particularly true where it takes more than a little mental energy to process the individual entries in the list, making it a heavy lift to carry the modifier across them all." Lockhart, 577 U.S. at 351.

Second, the WSLA does not merely contain a final "or" before the contract-related grouping to which it is attached, but a

separate instance of "or" separates each grouping from the others. See Pet. App. 19a.

Third, the WSLA contains no textual clue, such as a comma before the modifier, that might indicate that the "which" clause applies to all three of the preceding categories. See Pet. App. 16a-17a ("Punctuation also supports the last antecedent canon as the most relevant canon for the WSLA" because "[n]o comma separates the limiting 'which' clause from the third offense category in the current version of the WSLA"). Under "common grammatical rules," that drafting choice confirms that "Congress intentionally tied it to the last antecedent." Id. at 17a.

The WSLA's structure likewise indicates that the "which" clause modifies only the WSLA's contract category. See Pet. App. 20a-21a. As the court of appeals explained, if the "which clause" modified each of the three offense categories (as petitioner maintains), then the clause relating to "termination inventory" that follows the "which" clause -- "or with any disposition of termination inventory by any war contractor or Government agency," 18 U.S.C. 3287 -- necessarily would as well. That result, however, is illogical because "termination inventory" is part and parcel of "contractual affairs" -- the subject of the third category of offenses -- not frauds against the United States or offenses involving United States property. Pet. App. 21a.

If the text and structure of the WSLA leave any doubt about the reach of the "which" clause, the historical evolution of the

WSLA and related provisions "'conclusively'" dispels it. Pet. App. 21a (citation omitted). As the court of appeals explained, the WSLA's precursor, as originally enacted in 1942, including only the grouping of fraud offenses targeting the United States ("offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes," 1942 Act, 56 Stat. 747-748) without any requirement that such offenses have a substantive nexus to the hostilities. Pet. App. 22a. The "which" clause first appeared only two years later as part of the expansion of the WSLA to include a new category of offenses involving war contracts, with the clause entirely within that new contract category. See id. at 23a (discussing 1944 Act § 19(b), 58 Stat. 667). Congress then kept the "which" clause nestled within the (then-second) contract category when, later in 1944, it added a third category of offenses -- after the category containing the "which" clause -- involving real or personal property of the United States. Pet. App. 23a-24a (discussing Act of Oct. 3, 1944, ch. 479, § 28, 58 Stat. 781).

As the court of appeals observed, "[t]hat the contested 'which' clause immediately and consistently follows one offense category -- namely contract offenses -- across predecessor versions of the WSLA is a strong indication of its plain meaning." Pet. App. 24a. And nothing in Congress's subsequent reenactment of the WSLA as part of a broader codification of the criminal code

in 1948 -- which this Court has presumed "is not intended to alter the statute's scope" unless Congress affirmatively indicates otherwise, Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 318 (1985) -- undermines that observation. See 1948 Act § 3287, 62 Stat. 828; United States v. Smith, 342 U.S. 225, 226 n.1 (1952) (observing that the 1948 reenactment introduced "a few changes in wording"); Pet. App. 25a-26a (citing cases).

Moreover, a separate provision of the United States Code, Article 43(f) of the UCMJ, reinforces that Congress always intended the "which" clause to be limited to the WSLA's third category. Article 43(f), originally enacted in 1950 and then recodified in 1956, tracks the pre-2008 WSLA language nearly verbatim. See Pet. App. 26a-27a (citing 10 U.S.C. 843(f)); see Act of May 5, 1950, ch. 169, Art. 43(f), 64 Stat. 122; Act of Aug. 10, 1956, ch. 1041, § 843, 70A Stat. 51-52. And the formatting of that language in Article 43(f) divides categories one, two, and three with line breaks and includes the "which" clause entirely within category three. These features confirm that, when it enacted Article 43(f), Congress intended the "which" clause to apply only to the third category. And because "Congress could not have contemplated substantive distinctions between practically identical and nearly contemporaneous statutes of limitations," Pet. App. 28a -- and certainly would not have enacted such a substantive distinction through the use of line breaks -- Article 43(f)'s formatting

confirms the limitations inherent in the placement of the WSLA's own "which" clause.

b. Petitioner's policy-based arguments provide no basis for adopting his construction of the statutory text. Petitioner deems the decision below "troubling" because "the cessation of hostilities requires official action that elected leaders may be reluctant to take." Pet. 8-9. But it was Congress that chose to require, as a precondition to ending the WSLA's suspension period, "the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress." 18 U.S.C. 3287. Given that unambiguous congressional choice, it is not the courts' "place to pick and choose among competing policy arguments * * * selecting whatever outcome seems * * * most congenial, efficient, or fair." Pereida v. Wilkinson, 141 S. Ct. 754, 766–767 (2021).

Petitioner also contends that the court of appeals "accept[ed] 'unlikely premises'" because, in petitioner's view, "[i]t 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.'" Pet. 14 (citations and emphases omitted; third set of brackets in original). Petitioner's speculation about Congress's motives cannot overcome the plain import of the statutory text and context, and the speculation is, in any event, baseless. Congress had ample reason to want the WSLA to apply

broadly while congressionally authorized hostilities are ongoing. Indeed, petitioner himself does not dispute that the early versions of the WSLA applied to all wartime frauds against the United States and all wartime offenses involving real or personal property of the United States, whether or not they were substantively connected to the hostilities. See pp. 16-18, supra. Particularly given the origins of the statute in the period that included World War II and the Korean War, Congress had every reason to deem military conflicts as overriding government undertakings that massively increase opportunities for all manner of crimes against the government and strain the government's ability to investigate and prosecute complex crimes like fraud in particular. See, e.g., Smith, 342 U.S. at 228-229 ("The fear was that the law-enforcement officers would be so preoccupied with prosecution of the war effort that the crimes of fraud perpetrated against the United States would be forgotten until it was too late."); Bridges v. United States, 346 U.S. 209, 218-219 & n.18 (1953) (similar); Pet. App. 29a-30a; Pet. App. 34a (Schroeder, J., concurring) ("The result * * * was understandable in 1944 * * * when Congress enacted the [relevant] proviso * * * which Congress has not changed."). And Congress "seemingly blessed" such tolling "even given the modern expansion of the WSLA's war powers," when it most recently considered the WSLA in 2008. Pet. App. 30a.

Finally, petitioner's conjecture (Pet. 18) that "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" is misplaced. If petitioner means to suggest that the decision below will render the WSLA's contract prong surplusage, he is incorrect. Neither the fraud category nor the property category, each of which is limited to crimes victimizing the United States, would cover, for example, a contractor's scheme to defraud its subcontractors in connection with war-related contracts for services. Such offenses would, however, be covered by the WSLA's war-connected contract category. If, on the other hand, petitioner means to suggest that the decision below may be invoked in some fraud cases that also happen to involve government contracts, his suggestion merely restates his policy disagreement with the WSLA's plain meaning and fails for the reasons discussed above.

c. The decision below does not create or implicate any conflict among the courts of appeals. As the court of appeals noted, its decision resolved a single question "of first impression," namely, "which of the three categories of offenses under the [WSLA] -- fraud, property, or contract -- is modified by [the] clause requiring a nexus between the charged criminal conduct and a specific, ongoing war or congressional authorization of military force." Pet. App. 4a (citation omitted). No other "circuit-court decision applying the WSLA [has] definitively answer[ed]" that question. Id. at 13a; see United States v. DeLia,

906 F.3d 1212, 1221 n.11 (10th Cir. 2018) (collecting cases). And petitioner does not assert that this Court has previously decided the question, that the decision below conflicts with the decision of any other circuit, or even that any other circuit has resolved the question in a precedential decision. Accordingly, no further review is warranted. See Sup. Ct. R. 10.

3. Petitioner separately contends (Pet. 9-12, 19-20) that, apart from its discussion of the "which" clause, the court of appeals erred by "fail[ing] to analyze whether [petitioner's] offenses necessarily involved fraud against the United States." Pet. 19 (capitalization altered; emphasis omitted). But neither the district court nor the court of appeals passed on that claim, and petitioner did not raise it as an alternative ground for affirmance in the court of appeals.

As petitioner observes (Pet. 11), his brief in the court of appeals quoted the Court's statement in Bridges, supra, that the WSLA's fraud prong "is limited strictly to offenses in which defrauding or attempting to defraud the United States is an essential ingredient of the offense charged." Pet. C.A. Br. 44 (quoting Bridges, 346 U.S. at 221). That citation, however, was offered only in support of petitioner's argument that the "legislative history of the [WSLA] supports that all offenses have a nexus to [the] hostilities." Id. at 31 (capitalization and emphasis omitted); see id. at 31-47. At no point did petitioner's brief in the court of appeals argue that the offenses charged in

the indictment did not "involv[e] fraud * * * against the United States" or "any real or personal property of the United States." 18 U.S.C. 3287. The court of appeals accordingly would have had ample grounds to deem any such claim forfeited for purposes of the government's appeal of the district court's dismissal of certain counts in the indictment on a statute-of-limitations rationale. See United States v. Dreyer, 804 F.3d 1266, 1277 (9th Cir. 2015) (en banc) ("Generally, an appellee waives any argument it fails to raise in its answering brief.").

Consistent with its "traditional rule," this Court should not grant review to consider a question that was "'not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted). Indeed, this case's interlocutory posture makes it a particularly inappropriate candidate for departing from this Court's usual practice. If petitioner's failure to press his claim in the court of appeals did not result in a permanent forfeiture of the issue (as petitioner presumably maintains), he may -- and should be required to -- ask the district court and the court of appeals to adjudicate that claim in the first instance when the case is remanded in accordance with the court of appeals' mandate. If, on the other hand, petitioner's failure to press that claim in the court of appeals constitutes a permanent forfeiture, he should not be permitted to raise it for the first time in this Court. Either way, this Court's intervention is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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