No. 21-6453

IN THE
Supreme Court of the United States

DUANE NISHIIE, AKA SUH JAE HON,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The arguments in the government's opposition to certiorari fall into two categories. *First*, the government conjures concerns with the appropriateness of this case as a vehicle to resolve the scope of the Wartime Suspension of Limitations Act ("WSLA"), 18 U.S.C. § 3287 (2018). It claims that the interlocutory posture here warrants denial. And it claims that Mr. Nishiie failed to preserve his right to argue that the limitations period for a fraud offense is tolled under the WSLA only if it has as an "essential ingredient" pecuniary fraud against the United States. Neither contention is persuasive. This Court regularly grants review in cases, like this one, that present clear-cut issues of law fundamental to further proceedings. Additionally, Mr. Nishiie unquestionably preserved the scope of the WSLA as an issue, and the "essential ingredient" requirement is simply an alternative argument on that issue. Even if it were treated as a distinct issue, the "essential ingredient" requirement was adequately raised at each level of litigation.

Second, the government defends the decision of the court below by more or less regurgitating its reasoning over ten pages—nearly fifty percent—of its brief. See Opp. 6–11, 14–19. The government's extended effort only serves to demonstrate that the question presented is important and worthy of review. And notably, the government neglects altogether key arguments from the petition while mischaracterizing others to make them easier to dispute. The government does not contest the merits of the "essential ingredient" argument at all. It also does not address Congress's reordering of the WSLA's offense categories in 1948, the only way to make sense of which is that Congress wished the war-nexus clause to apply across all

categories. The government then labels as "speculation" the petition's discussion of the purpose of the WSLA. The petition's characterization, however, drew directly from *Kellogg Brown & Root Services, Inc.* v. *United States ex rel. Carter*, 575 U.S. 650, 656 (2015). And the government charges that so-called "linguistic[ ] complex[ity]" prohibits applying the war-nexus clause across all categories when, in fact, Congress wrote a neat (1), (2), (3) numerical list to ease the supposed "mental energy" in interpreting the WSLA. Opp. 15 (citation omitted). Finally, the government cites formatting in a provision of the Uniform Code of Military Justice with comparable language to justify its reading. But that formatting is absent from the WSLA, which only reinforces Mr. Nishiie's reading, and formatting is nonetheless not dispositive.

I. THIS CASE IS AN APT VEHICLE TO INTERPRET THE SCOPE OF THE WSLA.

A. Interpretation of the WSLA Presents a Clear-Cut, Determinative Legal Issue Warranting Interlocutory Review.

1. The government does not—because it could not—dispute this Court's authority to review the decision below. See *Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997) ("[T]here is no absolute bar to review of nonfinal judgments . . . ."); see also 28 U.S.C. § 1254(1) (2018) (authorizing review of court of appeals decisions "[b]y writ of certiorari . . . before or after rendition of judgment or decree"). Rather, the government merely offers that it is "normal practice" to deny certiorari given the interlocutory posture of this case. Opp. 13.

But in fact, the Court regularly grants petitions in an interlocutory posture where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case." Stephen M. Shapiro

et al., *Supreme Court Practice* § 4.18 (11th ed. 2019). The Court has reviewed on an interlocutory basis issues involving, for example, sovereign immunity, see *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947); *Larson* v. *Domestic & Foreign Com. Corp.*, 337 U.S. 682, 685 n.3 (1949), removal jurisdiction, see *Breuer* v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 694 (2003), and partial summary judgment, see *Norfolk S. Ry. Co.* v. *Kirby*, 543 U.S. 14, 22 (2004).

The scope of a statute of limitations, or a tolling statute like the WSLA, also presents a clear issue of law fundamental to a criminal prosecution. The expiration of a limitations period provides a conclusive bar to a charge, "reflect[ing] a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict." *Stogner* v. *California*, 539 U.S. 607, 615 (2003); see also *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879) ("[Statutes of limitations create] a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar."). And whether a prosecution is time-barred is separate from the merits of a case, so it is determined upfront. See *Smith* v. *United States*, 568 U.S. 106, 112 (2013) ("Commission of the crime within the statute-of-limitations period is not an element of the . . . offense.") (emphasis omitted).

What is more, the Court has previously granted certiorari in an interlocutory posture in a case nearly identical to this one: *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987). There, the district court granted summary judgment for the defendants on civil RICO claims, concluding that a state statute with a two-year period applied and thus barred the suit. See *id.* at 146. The court of appeals adopted a different statute with a six-year period, making the claim timely, so it reversed and remanded. See *id.* This

Court then granted certiorari—despite the interlocutory posture—"to resolve the important question of the appropriate statute of limitations." *Id.*

2. The government also suggests that denying certiorari in an interlocutory posture "promotes judicial efficiency because the issues raised in the petition may be rendered moot" and "could [be] raise[d]" after "final judgment." Opp. 13.

That characterization has it backwards. Where, as here, a petition presents an important issue that later proceedings are unlikely to affect, interlocutory review is appropriate precisely because it is efficient. In *Frisby* v. *Schultz*, for example, the Court reviewed a preliminary injunction in a First Amendment challenge to an anti-picketing ordinance. See 487 U.S. 474, 479 (1988). Certiorari was warranted because "further proceedings below would not likely aid [the Court's] consideration of" the issue. *Id.* It also mitigated the need for a (potentially costly) trial and another appeal. *Id*. at 478 (noting defendants requested a trial); see also *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 153 (1964) (noting "that the eventual costs . . . will certainly be less if [the Court] pass[es] on the questions presented" in an appeal of order striking portions of a complaint "rather than send the case back with those issues undecided"). Similarly, in *City of New Orleans* v. *Dukes*, resolving a constitutional challenge to a statutory provision in an interlocutory appeal "obviate[d] the need for further proceedings." 427 U.S. 297, 302 (1976).

The issue here on the WSLA's scope bears these same features. Further proceedings are unlikely to alter the legal trajectory of these statutes-of-limitations questions. Indeed, courts consistently resolve limitations disputes before others in a case because they have dispositive implications and are logically

antecedent and independent of other issues. Delaying review for a potentially unnecessary trial and subsequent appeal wastes cost and time when the Court could resolve the scope of the WSLA now with no apparent downside.

The government's emphasis on efficiency, moreover, is disingenuous. For one, the government frequently seeks certiorari from this Court in cases in interlocutory postures and presenting no split of authorities. See, *e.g.*, Petition for a Writ of Certiorari at 23, *Tanzin* v. *Tanvir*, 141 S. Ct. 486 (2020) (No. 19-71) (seeking review on a "a pure question of statutory interpretation . . . although there is not a circuit conflict . . . and the posture here is interlocutory"). More importantly, in this case, after the government lost before the district court, it moved to appeal that order to the Ninth Circuit on an interlocutory basis. See *United States* v. *Nishiie*, 996 F.3d 1013, 1018 (2021).

B. Mr. Nishiie Preserved the Argument that the WSLA Requires a Categorical Approach to the Fraud Category.

The government avers that Mr. Nishiie forfeited his right to argue "whether [his] offenses necessarily involved fraud against the United States," claiming that he did not raise it below. Opp. 22 (quoting Pet. 19). That is incorrect. This "essential ingredient" argument is just that—an argument—and new *arguments* are allowed so long as the *issue* is preserved. In any event, Mr. Nishiie sufficiently pressed this point below to preserve it even if it were treated as a distinct issue.

1. The "traditional rule" is that certiorari is appropriate only if an "*issue*" was "pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (emphasis added) (citation omitted). But "a party can [also] make *any argument* in support of" a

preserved issue and is "not limited to the precise arguments they made below." *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (emphasis added) (quoting *Yee* v. *Escondido*, 503 U.S. 519, 534 (1992)).

A question regarding statutory scope—as is the case here—exemplifies the issue-versus-argument divide. In *PGA Tour, Inc.* v. *Martin*, for example, the Court considered whether golfers competing in professional tournaments are "members of the class protected by Title III of the" Americans with Disability Act. 532 U.S. 661, 678 (2001). The Court rejected the claimant's argument that the professional golf association's "failure to make this exact argument below preclude[d] its assertion." *Id.* at 678 n.27, The "issue"—one of "Title III coverage"—"was raised in the lower courts." *Id.* The "petitioner advanced this particular argument in support of its position on the issue in its petition for certiorari." *Id.* "[A]nd the argument was fully briefed on the merits by both parties." *Id.*

The issue here similarly concerns statutory scope: the reach of the WSLA. And the arguments offered in the petition are flip sides of the same coin: The WSLA does not toll the limitations period either because the war-nexus clause applies to all three WSLA offense categories or because the charged offenses do not have as an element pecuniary fraud against the United States. Since the issue—the scope of the WSLA—was undoubtedly pressed *and* passed upon at every stage of this case, Mr. Nishiie has every right to make the "essential ingredient" argument now.

2. Regardless, the "essential ingredient" statutory requirement was adequately raised below even if it were treated as a separate issue. "What is enough to raise and preserve an issue" necessarily "depend[s] on the circumstances." Shapiro et al., *supra*, § 4.26.(b). Thus, in *MedImmune, Inc.* v. *Genentech, Inc.*, the

Court saw no problem even though "[the]h petitioner" raised an issue on only "a few pages of its appellate brief." 549 U.S. 118, 125 (2007). That "limited" discussion "merely reflect[ed] counsel's sound judgment," because it was "futile" in the face of binding circuit precedent which the appellate panel could not disturb. *Id.*

The WSLA's "essential ingredient" requirement arose at each stage of this case. The government does not dispute that Mr. Nishiie adequately pressed this requirement at the district court. Nor could it. See Motion to Dismiss Transcript at 9, 11, *United States* v. *Nishiie*, 421 F.Supp.3d 958 (D. Haw. 2019) (No. CR 17-000550), ECF No. 143 ("[The charges] have nothing to do with the pecuniary loss to the United States" and are thus "not part of the WSLA."). Rather, the government appears to take issue with the wording of the section header of the appellate brief where Mr. Nishiie discussed this requirement. See Opp. 22. But the wording of the header does not negate the reality that Mr. Nishiie pressed, no fewer than four times in his brief, the argument that the requirement of "pecuniary fraud[ ] committed against the Government" had not been satisfied. Appellee's Response Brief at 42, *Nishiie*, 996 F.3d 1013 (No. 19-10401), ECF 27 ((quoting *United States* v. *Nishiie*, 421 F. Supp. 3d at 977–79); see also *id.* at 44 n.11; *id.* at 46.

All the more telling is that *the government itself* raised the statutory requirement during oral argument. Oral Argument at 10:30, *Nishiie*, 996 F.3d 1013 (No. 19-10405), (Francesco Valentini: "[A] fraud has to be an essential ingredient of the offense and that the fraud has to be pecuniary in nature."); see also *id.* at 7:20 min. (Valentini: "[P]rice-fixing conspiracy in connection with war related contract, that would not be necessarily defrauding—not have necessarily, in all cases, defrauding the United States as an essential

element as required in the *United States* v. *Bridges*."). And again, the government sought the interlocutory appeal to the Ninth Circuit. The government therefore set the terms of engagement on the issues for appeal. So it is unsurprising that Mr. Nishiie did not press the "essential ingredient" requirement to a greater extent. Cf. *Genentech*, 549 U.S. at 125 (noting "limited" discussion reflected "sound assessment" because of "futil[ity]" of raising it before panel bound by circuit precedent).

II. THE DECISION BELOW IS INCORRECT.

On the merits, the government more or less repackages the Ninth Circuit's reasoning—and does so over nearly fifty percent of its brief. See Opp. 6–11, 14–19. This emphasis only illustrates the important and contested nature of the issue presented in this case. Substantively, the government fails to address key contentions from the original petition. And where it does try to engage with the petition's arguments, it confuses and misstates them.

1. The government expends much energy arguing that Mr. Nishiie waived his argument on whether his charges must involve pecuniary fraud against the United States in order to be tolled. See *supra* § I.B. Yet tellingly, when it comes to responding to the substantive argument, the government says literally nothing.

Nor, for that matter, does the government contest the structural reason that compels applying the war-nexus clause to all three offense categories: the reordering in 1948 of the WSLA's offense categories. As noted in the original petition, Congress amended the statute so that the contract category and the war-nexus clause are at the end rather than in the middle of the series. See Pet. 17–18 (discussing the significance of this reordering). There is no reason why

Congress would have undertaken this reordering unless it wished the war-nexus clause to apply across the series. The government offers no response. See, *e.g.*, *Rumsfeld* v. *F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 58 (2006) (rejecting interpretation rendering amendment "a largely meaningless exercise").

2. The government also wrongly accuses Mr. Nishiie of "speculation about Congress's motives," Opp. 19—specifically, that it was unlikely that Congress intended tolling "for *all* fraud and property crimes . . . through a statute principally 'concerned about war-related frauds.'" *Id.* (emphasis added) (quoting Pet. 14). The government responds that "Congress had ample reason to want the WSLA to apply broadly." *Id.* at 19–20. But that is no answer to the Mr. Nishiie's argument. The assertion was that it was unlikely that Congress wished to require a war nexus to toll contract offenses but not fraud or property offenses, given the statute's overarching focus on "war-related frauds." Pet. 14 (quoting *Kellogg Brown & Root Servs., Inc.* v. *United States ex rel. Carter*, 575 U.S. 650, 656 (2015)). And this involves no speculation: Mr Nishiie quoted the Court's discussion of the WSLA's purpose in *Kellogg*, 575 U.S. at 656—a citation that the government's brief conveniently elides.

The government also argues that the series-qualifier canon is inapt to the WSLA because the statute is "linguistically complex" and applying the war-nexus clause across all offense categories involves "mental energy." Opp. 15 (citation omitted). But this overstates the straightforward interpretative frame offered in the petition. The statute is at its core a list of three categories of offenses: (1) fraud; (2) property; and (3) contracts. The WSLA plainly mitigates the "mental energy" required in its numerical-list structure, with a (1), (2), and (3) separating the categories.

The government further claims that "line breaks" in a provision of the Uniform Code of Military Justice suggest that its war-nexus clause is subsumed in its contract clause; thus, the same clause must be similarly subsumed in the WSLA. Opp. 18 (citing 10 U.S.C. § 843(f) (2018)). This argument, however, rests on a faulty premise. Such formatting idiosyncrasies are not dispositive. See *Paroline* v. *United States*, 572 U.S. 434, 446–47 (2014) (concluding that modifier located within last of six-item list with line breaks similar to § 843 applied to whole series). The government's point, in any event, would only support Mr. Nishiie's construction of the statute, as Congress did not use line breaks in the WSLA as it did in § 843.

In interpreting the WSLA narrowly nearly seventy years ago, the Court emphasized the "longstanding congressional 'policy of repose'" reflected in statutes of limitations. *Bridges* v. *United States*, 346 U.S. 209, 215 (1953). Repose was and remains "fundamental to our society and our criminal law." *Id.* at 216; see also *Kellogg*, 575 U.S. at 661 (stating that "the WSLA should be 'narrowly construed' and 'interpreted in favor of repose'"). And on both the war-nexus and essential ingredient requirements, the government seeks to vitiate that repose. This Court should not condone such a reading.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, this Court should grant the petition.

Respectfully submitted,

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