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In the
Supreme Court of the United States

Forest M. Kirst, Petitioner

v.

United States of America, Respondent

**On Petition for Writ of Certiorari to the United States
Court of Appeal for the Ninth Circuit**

Petition for Writ of Certiorari

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Question Presented

The question presented here addresses the extent to which 18 U.S.C § 1505 applies to accident investigations by the National Transportation and Safety Board (“NTSB”), an agency that has no power to take enforcement or regulatory action as a result of the accident investigation.

§ 1505 imposes criminal punishment on anyone who, inter alia, “corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct, or impede *the due and proper administration of the law under which any pending proceeding is being had* before any department or agency of the United States.” (emphasis added).

NTSB is a federal agency charged with investigating the cause of all aircraft accidents. As an accident investigator, NTSB has a variety of tools to gather information, including administering oath to witnesses, issuing subpoenas for witnesses and evidence, and enforcing those subpoenas through civil action.

But NTSB lacks authority to take any action beyond its investigation, such as impose any penalty or sanction on a person found

liable or issue regulations prescribing changes in the conduct of aviation or pilots.

The question presented for review is

whether the phrase “the due and proper administration of the law under which any pending proceeding is being had” in § 1505 applies to accident investigations by NTSB?

This is an issue on which the Ninth Circuit issued a divided published opinion. *United States v. Kirst*, 54 F. 4th 610, 619-23, but see *id* at 624-34 (9th Cir. 2022). Other lower federal courts also split on the issue of whether proceedings before an agency that lacks regulatory or enforcement authority over the results of its investigation are covered by § 1505.

PARTIES TO THE PROCEEDINGS

Petitioner is Forest M. Kirst.

Respondent is United States of America.

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Opinions Below

A published opinion of the United States Court of Appeal for the Ninth Circuit was filed November 22, 2022, *United States v. Kirst*, 54 F.4th 610 (9th Cir. 2022). It is also attached at Appendix-001-059. Appellant filed a timely rehearing petition, which the Ninth Circuit denied February 24, 2023. Appendix-060.

Jurisdiction

The Ninth Circuit denied a timely petition for rehearing February 24, 2023. Appendix-060. Jurisdiction of this Court is thus timely invoked under [28 U.S.C. § 1254\(1\)](#).

Statement of Facts and Procedural History

A. Statements Made by Kirst in the NTSB Investigation, Based on Which the Government Charged Kirst With Obstruction

On August 24, 2014, Kirst was piloting a small Cessna airplane with three passengers on an aerial photography tour. *Kirst*, Appendix-038. The plane crashed in the mountain region of Alaska, Kirst and his passengers were severely injured. *Id.*

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After the crash, the NTSB started to investigate the cause.

Appendix-038; [49 U.S.C. § 1131\(a\)\(1\)\(A\), 1132\(a\)\(1\)\(A\)](#). “[T]his inquiry was strictly investigative and its ultimate goal was to try and keep the accident from happening again.” *Id.*

On September 9, 2014, the NTSB interviewed Kirst to find out what led to the accident and to give NTSB a better idea of which direction with their investigation. Appendix-038. No members of the Federal Aviation Administration – the agency with the authority to sanction pilots as a result of an investigation – were presented in that interview. *Id.*

In that interview, Kirst said, among other things, that “[h]e was climbing through 5500-5700 feet, with a target altitude of 6000 feet, with a target altitude of 6000 feet” before the crash. Appendix-038.

Kirst later submitted to the NTSB a written accident report, in which he said, “[w]hile operating at approximately 5600, encountered abrupt and unexpected aircraft instability. Took steps to correct but actions were ineffective. Made decision to protect passengers and myself in light of conditions. Aircraft hit the ground nose up and came to rest on side of hill.” Appendix-038

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The NTSB did not visit the crash site, but the FAA did and it started a separate investigation. Appendix-039. As a result of its own investigation, the FAA concluded that Kirst violated FAA regulations by “flying too low for the terrain” and revoked Kirst’s airman’s certificate.

Id.

Kirst appealed the revocation and during the appeal, made a statement in a deposition that before the crash, he was flying between 5,500 and 5,600 feet and was heading toward 6,000 feet. Appendix-039. At a hearing on the appeal, Kirst similarly testified that he “passed through 5,5000. I was aiming for 6,000, probable close to 5,600.” *Id.* The FAA upheld the suspension of Kirst’s airman’s certificate. *Id.*

B. Kirst Was Convicted of Obstruction Under 18 U.S.C. § 1505 in Count 1 Based on the Statements He Made During the NTSB Investigation into the Cause of the Accident

The Government charged Kirst with two counts of obstructing justice under 18 U.S.C. § 1505 and one count of flying a plain without a valid airman’s certificate.¹ Appendix-039.

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¹¹ All future unassigned statutory references are to the Title 18 of the U.S. Code.

The obstruction charge in Count 1 was that Kirst obstructed the NTSB investigation by making false or misleading statements, including that his plane was climbing through 5,000 to 5,700 feet with a target altitude of 6,000 feet just before the crash. Appendix-039. The jury's special verdict on that count was explicitly based on those statements about the altitude during the NTSB investigation.² Appendix-022.

The district court sentenced [Kirst](#) to 12 months and 1 day, 3 years on supervised release. Appendix-023.

C. **In a Published Opinion, the Ninth Circuit Splits on Whether a Factual Investigation by NTSB is a Proceeding Covered by 18 U.S.C. § 1505**

On appeal, Kirst argued that the evidence in Count 1 is legally insufficient because an NTSB factual investigation of the cause of the accident does not qualify as a “proceeding” as [§ 1505](#). Only a proceeding before an agency that has enforcement or legislative powers qualifies as a “proceeding” involving “due and proper administration of law.”

² The conviction for obstruction in Count 2 was based on the similar statements about the plane's altitude made during the appeal process of the FAA revocation of the airman's certificate. The jury acquitted Kirst in Count 3 of flying a plane without a valid airman's certificate. [Kirst](#), 54 F.4th at 626.

Appendix-040.

In a 2-1 split published opinion, the Ninth Circuit rejected the argument. In an opinion that overlooked statutory language or Congressional intent, the majority reasoned that because NTSB can enhance its investigation by issuing a subpoena and compel sworn witness testimony, a purely factual investigation by the NTSB is a qualifying proceeding under § 1505. Appendix-023-31, citing *United States v. Kelley*, 36 F.3d 1118 (D.C. Cir. 1994) and *United States v. Pac. Gas & Elec. Co.*, 153 F. Supp. 3d 1076 (N.D. Cal. 2015).

In a thorough dissenting opinion, Judge Collins disagreed. Judge Collins found that the NSB factual investigation is not a qualifying “proceeding” under § 1505 because it does not involve “due and proper administration of law” this statute requires. Appendix-048-59. Because NTSB lacks any regulatory or enforcement authority over the accident it investigates, the investigation does not involve “administration of law under which [that] proceeding is being had,” as § 1505 mandates. *Id*, citing *United States v. Aguilar*, 515 U.S. 593 (1995); *Marinello v. United States*, 200 L. Ed. 2d 356 (Mar. 21, 2018).

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Argument

This Court Should Grant Cert Because Whether 18 U.S.C. § 1505 Applies to Proceeding Before an Agency Without Enforcement or Regulatory Authority is an Important Question of Federal Law and the Ninth Circuit Resolved It in a Way that Conflicts with Congressional Intent, Decisions of This Court, and Other Federal Court Decisions

A. Importance of the Question Presented

This Court should grant cert because whether § 1505 applies to factual investigations by the NTSB has serious nationwide impact. This agency investigates many accidents a year. For example, last year alone, NTSB investigated 1,676 incidents. (<https://data.ntsb.gov/carol-main-public/query-builder?month=1&year=2022> (as of 05/22/23). In 2021, it was 1644. (*Id.*) And so far this year, through April 20, 2023, the NTSB investigated 455 incidents. *Id.*

But the potential impact from resolving application of § 1505 to a proceeding before an agency without enforcement or regulatory authority over the results of its investigation goes beyond NTSB. Several federal courts have held that § 1505 does not apply to obstruction of proceedings in front of such agencies, such as law enforcement. *United States v. Higgins*, 511 F. Supp. 453, 456 (W.D. Ky. 1981) (FBI investigation is not a proceeding under § 1505 because legislative history of the statutes shows

intent not to apply it to criminal investigations); *United States v. Wright*, 704 F. Supp. 613 (D. Md. 1989) (criminal investigation by U.S. Attorneys' Office is not a "proceeding" under § 1505 because it is before an agency without rulemaking or adjudicatory power); *United States v. Edgemon*, No. 3-95-cr-43 (E.D. Tenn. 1997) (investigation by the Inspector General of the Tennessee Valley Authority is not a proceeding under § 1505 because it is an investigating agency that lacks adjudicatory powers); *United States v. Turner*, 615 F. Supp. 3d 576 (W.D. Ky. 2020) (investigation directly by the Tennessee Valley Authority is not a proceeding under § 1505 because the agency lacks rulemaking or adjudicative powers).

But if the majority's opinion is allowed to stand, it would doubt on the validity of those prior decisions. After all, many law enforcement agencies have some authority to issue subpoenas and obtain sworn testimony, yet lack enforcement or regulatory authority over the results of their investigation. NTSB is far from being alone in this regard. This would lead to drastic expansion of the reach of § 1505 to factual investigations by law enforcement agencies, which likely number in thousands across our country.

B. Applying 18 U.S.C. § 1505 to Proceedings Before Agency Lacking Enforcement or Regulatory Authority in the Subject of Its Investigation Conflicts With Statutory Text, Congressional Intent, Decisions of this Court

1. Conflict with statutory text

§ 1505 proscribes obstruction of “due and proper administration of the law under which any pending proceeding is being held before any department of the United States or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress.” Appendix-060.

Whether or not accident investigation by the NTSB is a “proceeding” as a matter of everyday usage, the statute gives this term a technical meaning by requiring the proceeding to be before an agency engaged in “due and proper administration of the law” under which that proceeding is being conducted. Appendix-060.

As Judge Collins cogently pointed out in his dissent, the phrase “due and proper administration of the law” should not be read as mere surplus. Appendix-049; see also *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“It is our duty to give effect, if possible, to every clause and word

of a statute”). And the courts should be particularly hesitant to do so when such a selective reading of the text is about an element of the charge. Appendix-049, citing [Jones v. United States, 529 U.S. 848, 857 \(2000\)](#).

Indeed, if Congress wanted [§ 1505](#) to cover any proceeding before any federal agency, it could have said so. But because Congress settled on a narrower definition that requires obstruction of “administration of the law” under which the proceeding is being conducted, the Court must presume that this narrower language is meaningful. So the key question here is whether an NTSB investigation of the accident’s cause is due and proper administration of the law under which a pending proceeding is held.

There is a compelling argument that NTSB investigation of the cause of the accident does not meet this definition. The ordinary meaning of “administer” is “to direct or superintend the execution, use, or conduct of, “which denotes a substantive authority to carry out the law.” Appendix-052. The NTSB, in its investigative capacity, lacks authority to exercise any laws in the sense people ordinarily think of as involving “the administration” of the law. *Id.*

That is so because the NTSB has no enforcement or regulatory authority over the results of its investigation. In other words, NTSB may determine the cause of the accident, but it cannot sanction anyone responsible or make regulations to prevent similar conduct from happening again. Appendix-038; [49 U.S.C. §§ 1131, 1132, 1151, 11113 \(a\)\(1\) and \(a\)\(4\)](#).

Similarly, the trial evidence confirms that the “proceeding” at issue in Count 1 is purely investigative and did not involve any exercise of law enforcement authority. As NTSB witnesses made clear, the agency’s role here was only investigating the probable cause of the crash.³ 6-ER-844-45; 7-ER-1123. Whatever conclusion NTSB may reach about the cause of accident, it has no power to revoke a pilot’s license or take any other punitive or enforcement actions. 6-ER-844-45; 7-ER-1123. Its mandate is to make recommendation from a public safety standpoint, so that the accident does not happen again. 5-ER-845.

For these reasons, when the proceeding at issue is an investigation, [§ 1505](#) can only be reasonably read as requiring, proof that the defendant

³ ER citations to the excerpts of record in the Ninth Circuit.

obstructed the agency's enforcement of the law at issue in the investigation. Appendix-052, citing *United States v. Browning*, 630 F.2d 694, 699 (10th Cir. 1980) (holding that the "ultimate question" under § 1505 "is not whether the defendant told the truth but whether the defendant obstructed or interfered with the process of truth finding in an investigation *in the process of enforcing the law*") (emphasis added). A strictly investigative proceeding by an agency that lacks relevant adjudicatory or regulatory enforcement authority cannot satisfy this requirement. Appendix-052.

2. Conflict with this Court's decisions in *Aguilar* and *Marinello*

Reading of § 1505 as applying only to proceeding before an agency with enforcement or regulatory authority over the subject matter of its investigation is also supported by this Court's decisions in *United States v. Aguilar*, 515 U.S. 593 (1995) and *Marinello*, 200 L. Ed. 2d 356.

Aguilar dealt with interpretation of § 1503, a similarly worded statute to § 1505. *United States v. Laurins*, 857 F.2d 529, 536 (9th Cir. 1988) ("Section 1505 is similar in language to 18 U.S.C. § 1503 (1982), the statute proscribing obstruction of justice in a judicial proceeding, and

cases interpreting [section 1503](#) are relevant to constructions of [section 1505](#)). And the statements at issue were made to an FBI agent; the FBI, like NTSB, has no enforcement authority over the matters it investigates.

Aguilar held that” uttering false statements to an investigating agent ... who might or might not testify before a grand jury” does not “obstruct or impede, the due administration of justice under [§ 1503](#) (a related obstruction statute). Because the “administration of justice” refers to the actions of courts and grant juries in executing the laws against specific persons, a defendant’s act of obstruction would violate [§ 1503](#) only if done ““with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the court’s or grand jury’s authority.” *Aguilar*, 515 U.S. at 599 (emphasis added).

Like the FBI investigation in *Aguilar* the NTSB investigation is an ancillary proceeding independent of the FAA’s enforcement authority to act against Kirst. Appendix-053. And obstruction of the FAA’s “administration of the law” does not count because the laws governing the FAA’s authority are not the laws under which NTSB investigation was conducted. *Id.*

Plus, NTSB investigation was not the basis for the FAA’s subsequent enforcement action. The NTSB investigative report was not issued until March 2017, nearly two years after the FAA already moved to revoke Kirst’s airman certificate in early 2015. Appendix-053-54. Instead, the FAA enforcement action was based on an investigative report prepared by the FAA “Flight Standards District Office.” *Id.* So while the NTSB and the FAA work together and share information, the FAA conducted its own substantial investigation, which involved visiting the crash site (something the NTSB did not do) and performing its own analysis of the GPS device (a key evidence piece in the FAA enforcement action to revoke Kirst’s pilot certificate). And the record of the hearing before the ALJ that upheld the license revocation confirms that the FAA’s enforcement action was based mainly on its own investigation; no NTSB official testified at that hearing.

Similarly, petitioner’s reading of § 1505 is supported by *Marinello*. Relying on *Aguilar*, *Marinello* rejected the view that 26 U.S.C. § 7212(a) – a statute that prohibits the “due administration of [the Internal Revenue Code] – applies to every administrative action by the IRS. *Marinello*, 200 L. Ed. 2d 356. The IRS possesses ample regulatory and enforcement

powers under the Internal Revenue Code and the scope of 26 § 7212(a) was limited to the “targeted acts of administration” by the IRS that could lead to IRS itself taking an enforcement action against the target of the investigation. *Id.* at 1106.

Unlike the IRS, the NTSB – because of its lack of substantive enforcement or regulatory authority – was not engaged in “administration of the law” in the same away that the IRS was in *Marinello*. As Judge Collins found, *Marinello* is pertinent because § 1505 and 26 U.S. 7212 are similarly worded statutes and the courts’ interpretation of the latter potentially overlaps with the interpretation of the former. Appendix-054-55.

3. Conflict between lower federal courts about whether 18 U.S.C. § 1505 applies to a proceeding before an agency without enforcement or regulatory authority over the subject matter of its investigation

Another reason to grant cert on whether § 1505 applies to a proceeding before an agency without enforcement or regulatory authority over the subject matter of the investigation is an ongoing conflict among lower federal courts on that issue.

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On the one hand, the majority here and the D.C. Circuit have read § 1505 to apply to any proceeding before any agency so long as that agency can issue a subpoena for evidence or witness testimony to enhance their investigation, regardless of whether that agency has enforcement or regulatory power over the results of that investigation. Appendix-023-31; *United States v. Kelley*, 36 F.3d 1118, 1123 (D.C. Cir. 1994) (investigation by United States Aid and Development Agency is a proceeding under § 1505 because the agency could issue subpoenas and compel testimony under oath); see also *Pacific Gas and Electric Co.*, 153 F. Supp. 3d at 1078 (NTSB investigation of the cause of a gas explosion is a proceeding under § 1505 because NTSB can issue subpoenas for evidence and witness testimony and can swear in witnesses to receive their testimony).

Yet on the other hand, aside from Judge Collins's well-reasoned dissent on the issue, there is also a long line of the district court decisions holding that investigation by an agency that has no enforcement or regulatory authority is not a proceeding under § 1505. *United States v. Higgins*, 511 F. Supp. 453, 456 (W.D. Ky. 1981) (FBI investigation is not a proceeding under § 1505 because legislative history of the statutes shows

intent not to apply it to criminal investigations); *United States v. Wright*, 704 F. Supp. 613 (D. Md. 1989) (criminal investigation by U.S. Attorneys' Office is not a "proceeding" under § 1505 because it is before an agency without rulemaking or adjudicatory power); *United States v. Edgemon*, No. 3-95-cr-43 (E.D. Tenn. 1997) (investigation by the Inspector General of the Tennessee Valley Authority is not a proceeding under § 1505 because it is an investigating agency that lacks adjudicatory powers); *Turner*, 615 F. Supp. 3d 576 (investigation directly by the Tennessee Valley Authority is not a proceeding under § 1505 because the agency lacks rulemaking or adjudicative powers).

This is a long-standing conflict, which the majority opinion here only deepened. And it is a conflict this Court should resolve without delay. If the majority's faulty reading of § 1505 is allowed to stand uncorrected, it would question the correctness of these decisions. And it would great a great expansion of liability under § 1505 because many agencies, though without enforcement or rulemaking authority over the subject of its investigation, has some authority to force document production and compel witness testimony. Focusing on existence of those powers is divorced from statutory text and increases the scope of § 1505

beyond limits Congress had in mind when it enacted § 1505.

C. This Case is a Good Vehicle to Consider the Question Presented Because This Legal Issue Was Fully Briefed in the Court of Appeal and the Panel Majority’s Resolution of the Question is Unreasonable

This case is a good vehicle to consider the question presented. The issue was fully briefed by the parties in the Ninth Circuit.

And while the standard of review was plain error, in sufficiency of evidence cases (which is the posture of this argument), the difference between the ordinary sufficiency of evidence analysis and plain-error analysis is only semantic. See, e.g., *United States v. Flyer*, 633 F.3d 911, 917 (9th Cir. 2011); *United States v. King*, 735 F.3d 1098, 1105–06 (9th Cir. 2013); *United States v. Ayala-Yupit*, 668 F. App’x 233, 234 (9th Cir. 2016) (unpublished). In either situation, the Court has to apply the sufficiency standard in *Jackson v. Virginia*, 443 U.S. 307 (1979), and if the Court agrees with our reading of § 1505, Kirst’s conviction must be reversed. In sum, this should not impede consideration of the issue.

Finally, taking up the issue in this case is appropriate because the majority’s reading of § 1505 is flawed, for three reasons. First, the majority’s reading of the statute is divorced of the statutory text or

evidence of Congressional intent not to apply the statute to investigations by an agency without regulatory or enforcement authority over the subject of its investigation. As discussed in Judge Collins's opinion, it is a reading that renders the phrase "due administration of the law" meaningless. Appendix-049. The majority discusses the text without ever addressing this point. Appendix-028-31

And for the reasons said earlier, the majority's interpretation of § 1505 creates a conflict with a line of out-of-circuit decisions and potentially dramatically expands the scope of § 1505 (without a hint of acknowledgment of that fact). *Higgins*, 511 F. Supp. at 455–56; *Wright*, 704 F. Supp. At 614–15; *Turner*, 615 F. Supp. 3d 576.

Second, the majority's reliance on *Kelley* and is also wrong. Appendix-026. *Kelley* held that because the Inspector General of the United States Agency for International Development authorizes subpoena issuance to compel testimony as part of agency's activities, that investigation was formal enough to constitute a "proceeding" under § 1505. 36 F.3d at 1127. In reaching that conclusion, *Kelley* rejected the argument that to qualify as a "proceeding" under § 1505, the obstructed activities themselves must be adjudicatory or rule-making in nature. *Id.*

Yet that is not at issue here. Instead, the question is whether the proceeding is being conducted *under the law being administered by that agency*, as § 1505 explicitly requires. *Kelley* did not address that question. Cases are not authority for propositions not considered. See *United States v. Corrales-Vazquez*, 931 F.3d 944, 954 (9th Cir. 2019).

The above point is reinforced by *Kelley* distinguishing its holding from *Higgins*, 511 F. Supp. 453 with a “cf” and described *Higgins* as standing for a proposition that “because [the] FBI was not vested with rule making or adjudicative power relating to [the] subject of [an] indictment, its investigation was not a proceeding under § 1505.” *Kelley*, 36 F.3d at 1127. That proposition directly contradicts the majority’s reading of § 1505.

For these reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,
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