No.

IN THE SUPREME COURT OF THE UNITED STATES

IAN R. DIAZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

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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QUESTIONS PRESENTED

1. Whether an intent to"harass" or "intimidate" under the federal stalking statute, 18 U.S.C. § 2261A, has an "ordinary" broad meaning or instead is limited to true threats and by the First Amendment principles in *Counterman v. Colorado*, 600 U.S. 66 (2023) and other canons of statutory construction.

2. Whether closing an e-mail account can constitute the "obstruction" offense in 18 U.S.C. § 1519.

STATEMENT OF RELATED CASES

- *United States v. Ian R. Diaz*, No. CR 21-00984-JLS, U.S. District Court for the Central District of California. Judgment entered July 3, 2023.

- *United States v. Ian R. Diaz*, No. 23-1341, U.S. Court of Appeals for the Ninth Circuit. Judgment entered January 23, 2025, rehearing denied February 13, 2025.

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INTRODUCTION

This petition presents two important questions concerning the relentless reach of federal criminal laws in today's interconnected world. The first issue presents a circuit-split concerning the federal stalking statute, 18 U.S.C. § 2261A, which, if not cabined, can dangerously serve as a free-floating emotional-distress crime. The Second, Third, and Eighth Circuits have correctly held that the terms "intimidate" and "harass" in the statute must be given limited constructions under the First Amendment, with the Second Circuit recently reaching this conclusion based on *Counterman v. Colorado*, 600 U.S. 66 (2023). The Ninth Circuit, on the other hand, has held that the terms simply have their "ordinary" or "plain" meanings, with the panel below declaring that *Counterman* had no effect on Ninth Circuit precedent. The Court should resolve the conflict, overrule the Ninth Circuit's minority approach, and vacate petitioner's stalking convictions.

The second question presented is whether the obstruction offense in 18 U.S.C. § 1519 applies to closing an e-mail account causing a service provider to discontinue the electronic storage of such correspondence. This question was debated in the concurring and dissenting opinions in *Yates v. United States*, 574 U.S. 528 (2015) but was not resolved by the Court. The language and context of the statute establish that it does not apply to closing an email account, and this Court should grant review and vacate petitioner's § 1519 conviction.

OPINION BELOW

The opinion below is unpublished but can be found at *United States v. Diaz*, No. 23-1341, 2025 WL 275117 (9th Cir. Jan. 23, 2025).

JURISDICTION

The court of appeals filed its decision on January 23, 2025 and denied a timely petition for rehearing on February 13, 2025. App. 1-2.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

18 U.S.C. § 2261A(2):

> Whoever – . . . .
>
> (2) with the intent to kill, injure, harass, intimidate, or place under supervision with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that –
>
> > (A) places that person in reasonable fear of the death or of serious bodily injury to a person described in paragraph (1)(A); or
> >
> > (B) causes, attempts to cause, or would reasonably be expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A),
>
> shall be punished as provided in section 2261(b) of this title.

[1] "App." refers to the Appendix, "CR" refers to the Clerk's Record, and "ER" refers to the Excerpts of Record in the Ninth Circuit.

18 U.S.C. § 1519:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

U.S. Const. Amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This case presents a titillating set of facts, but really much of the salaciousness does not need to be described for purposes of this petition. On May 12, 2021, just before the statute of limitations expired, a federal grand jury in the Central District of California indicted petitioner, a former Deputy U.S. Marshal, on charges of conspiracy to commit stalking, substantive stalking, and perjury. CR 1. On November 10, 2021, the grand jury returned a superseding indictment, adding a fourth count of obstructing justice under 18 U.S.C. § 1519. 8-ER-1610-23.

The essence of the conspiracy and stalking charges was that, in the spring and summer of 2016, petitioner and his then-wife Angela executed a scheme to

frame his ex-girlfriend, named Michelle. 8-ER-1612.[2] As alleged in the indictment, petitioner and Michelle purchased a condo together in Anaheim, California, with Michelle providing the funds for the down payment. 8-ER-1611. In August 2015, their relationship ended, not on good terms to say the least, and Michelle moved out of the condo. *Id.* Petitioner continued to live there, and the two had an ongoing dispute about how to resolve their joint ownership in the property. *Id.*

Meanwhile, petitioner then began a whirlwind romance with Angela, marrying her in February 2016. *Id.*[3] The newlyweds lived together in the condo while petitioner continued to dispute the property's resolution with Michelle. *Id.* The government's theory was that the dispute about the condo was the financial motivation for framing Michelle, 8-ER-1612, and petitioner and Angela executed their scheme to do so from about late May through July 2016. 8-ER-1611-19.

To frame Michelle, the two created online accounts with false names, some of which used names or phrases associated with Michelle. 8-ER-1612. They then sent themselves threatening messages as if they came from Michelle. *Id.* Also,

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[2] The indictment referred to Angela as Unindicted Co-Conspirator 1, and it referred to Michelle as "Jane Doe." 8-ER-1610-11. At trial, however, their names were used, and Michelle has engaged the media, thereby eliminating any privacy concerns. This petition will just use their first names.

[3] Their marriage was annulled on April 11, 2017. 8-ER-1611.

posing as Michelle, they solicited individuals on Craigslist to come to the condo on the pretense of engaging in a consensual "rape fantasy" so that they could then falsely claim that Michelle had lured these individuals to sexually assault Angela. 8-ER-1612-13. Petitioner and Angela then informed the local police that Michelle had carried out this alleged harassment, causing her to be detained for approximately 88 days before her release and exoneration. 8-ER-1613.

In addition to this scheme to frame Michelle, which constituted the conspiratorial and substantive stalking charges in Counts 1-2, the government also alleged in Counts 3-4 that petitioner engaged in criminal conduct to cover his tracks. 8-ER-1620-23. The indictment alleged that, towards the end of June 2016, petitioner became aware that the U.S. Marshals had commenced an internal-affairs investigation into his conduct with Michelle and that several months later, in December 2016, he closed one of his e-mail accounts with the intent to obstruct the internal-affairs investigation. *Id.* Additionally, in 2019, he committed perjury during a deposition in a civil lawsuit that had been filed by Michelle. *Id.*

Petitioner proceeded to a jury trial in March of 2023, in which he disputed that he knowingly participated in the scheme and argued that it was carried out alone by Angela, who had pled guilty years earlier to numerous related charges in state court. 1-ER-104-05. Meanwhile, the government's theory at trial was that petitioner was involved in the stalking scheme, although it did not contend that he

intended to "kill" or "injure" Michelle. Instead, it asserted that he had the intent to "harass" or "intimidate" for purposes of the federal stalking statute, 18 U.S.C. § 2261A. Accordingly, the jury instructions on § 2261A only included a "harass" or "intimidate" theory of liability. 1-ER-64.

Over objections that the instructions were insufficient under the analysis in *United States v. Yung*, 37 F.4th 70 (3d Cir. 2022), CR 193 (pages 96-97), the district court instructed the jury that it had to find that petitioner had "the intent to harass or intimidate Michelle" and that the terms "harass" and "intimidate" have their "plain and ordinary meaning." 1-ER-64. Although the stalking theory in the indictment was that petitioner intended "to harass and intimidate [Michelle] by framing her for criminal conduct that she did not commit[,]" 8-ER-1612, the government never really explained its theory during summations, simply remarking: "Intent to harass or intimidate Michelle []. Well, we've got lots of that." 1-ER-97.

In addition to objecting to the jury instructions, defense counsel moved for judgments of acquittal as to all counts in the middle of trial, 2-ER-365-66, and after the jury returned guilty verdicts on all four counts. CR 250; 8-ER-1523-27. The district court denied petitioner's motions for acquittal and imposed a total sentence of 121 months in custody and three years of supervised release. 1-ER-2-20; 8-ER-1517.

Petitioner raised several claims on appeal, including renewing his challenges to the sufficiency and the jury instructions on the stalking charges and the sufficiency of the evidence as to the obstruction count. With respect to the stalking charges, the Ninth Circuit recognized that the "district court instructed the jury that the terms 'harass' and 'intimidate' have their 'plain and ordinary meaning[,]'" but it rejected petitioner's challenge to this definition, which was based on cases like *United States v. Yung*, 37 F.4th 70 (3d Cir. 2022) and this Court's recent opinion in *Counterman v. Colorado*, 600 U.S. 66 (2023). App. 3-4. It explained: "None of the cases on which Diaz relies is controlling here, as each either interpreted a different statute, was decided by another circuit, or arose from a facial First Amendment challenge rather than an instructional challenge. Moreover, in the latter context, this Court, in *United States v. Osinger*, 753 F.3d 939, 945 (9th Cir. 2014), held that the term 'harass' in section 2261A(2) is not an 'esoteric or complicated term devoid of common understanding.'" App. 3-4.

The Ninth Circuit also rejected petitioner's challenge to the sufficiency of the evidence as to the § 1519 count. App. 5-6. In doing so, the panel ignored his argument that closing an email account does not constitute a violation of § 1519, an issue that was debated in the concurring and dissenting opinions in *Yates v. United States*, 574 U.S. 528 (2015), but was not decided by the plurality. *Id.* The panel also summarily denied petitioner's request for rehearing. App. 1.

ARGUMENT

I. The Court should grant review to resolve the circuit-split on the meaning of the federal stalking statute, and it should overrule the Ninth Circuit's minority view that the terms "harass" and "intimidate" in § 2261A have their purported "ordinary" meanings.

A. The circuits are split on the meaning of § 2261A

The Second, Third, and Eighth Circuits have held that the terms "harass" and "intimidate" in the federal stalking statute, 18 U.S.C. § 2261A, must be given a limited construction to ensure that the statute complies with the First Amendment. The Ninth Circuit has taken a contrary view. This Court should grant review to resolve the conflict and to overrule the Ninth Circuit's flawed approach.

In an opinion written by Judge Bibas, the Third Circuit concluded that the terms "harass" and "intimidate" in § 2261A have both broad and more narrow ordinary meanings and that, consistent with background First Amendment principles, the terms must be given their narrow meanings. *See United States v. Yung*, 37 F.4th 70, 77-80 (3d Cir. 2022). In doing so, the Third Circuit began its analysis by rejecting the government's contention that § 2261A "focuses on conduct, not speech[,]" explaining that the statute "reaches a lot of speech: it targets emails, texts, and social media posts . . . ." *Id.* at 77.

Judge Bibas concluded that the result element of the offense – substantial emotional distress – did not confine the law to unprotected speech because the

"First Amendment protects lots of speech that is substantially emotionally distressing." *Id.* Statements can be "deeply offensive, yet still covered by the First Amendment." *Id.* As a result, only the intent element of the § 2261A offense can save it from constitutional infirmity, but that element must be narrowly construed. *Id.*

Specifically, if an intent to "harass" or "intimidate" is read "broadly," the statute would "reach protected speech." *Id.* at 78. The term "harass" can include "a spectrum from repeated annoyance to outright violence." *Id.* "Like harassment, intimidation has both narrow and broad meanings." *Id.* The Third Circuit explained: "The First Amendment protects at least some speech that persistently annoys someone and makes him fearful or timid. As then-Judge Alito observed: 'There is no categorical 'harassment exception' to the First Amendment's free speech clause.'" *Id.* (citation omitted).

As a result, the Third Circuit held that an intent to "intimidate" must be narrowly construed to mean that the defendant intended to "put the victim in fear of death or bodily injury." *Id.* at 80. With respect to an intent to "harass," the defendant must intend to "distress the victim by threatening, intimidating, or the like." *Id.* Not only were these narrowing constructions mandated by the First Amendment, but they were "reinforce[d]" by the "neighboring words" with which they were associated. *Id.* The other related words in the statute, "kill" and

"injure," are "violent verbs" suggesting an intent to create fear of violence. *Id.*

The Eighth Circuit reached a similar conclusion in *United States v. Sryniawski*, 48 F.4th 583, 587 (8th Cir. 2022), finding that the terms "harass" and "intimidate" in their "broad sense" would "infringe on rights protected by the First Amendment." "Even where emotional distress is reasonably expected to result, the First Amendment prohibits Congress from punishing political speech intended to harass or intimidate in the broad sense. The Free Speech Clause protects a variety of speech that is intended to trouble or annoy, or to make another timid or fearful." *Id.* Accordingly, like the Third Circuit in *Yung*, the Eighth Circuit explained that a defendant must intend to convey a "true threat," meaning that he "intends to place the victim 'in fear of bodily harm or death.'" *Id.* at 588.[4]

Most recently, the Second Circuit reached the same conclusion in *United States v. Dennis*, 132 F.4th 214 (2d Cir. 2025), citing *Yung* and *Sryniawski* and declaring: "We today join several of our sister circuits in recognizing that applying § 2261A(2)(B) to a course of conduct communicating 'true threats' avoids any

[4] The government attempted to defend the conviction in *Sryniawski* by arguing that the defendant intended to harass the victim by defaming her, arguing that defamatory statements are not protected by the First Amendment. *See Sryniawski*, 48 F.4th at 588. The Eighth Circuit rejected the argument, reasoning that even assuming such a theory were viable, the government "did not advance this theory at trial, and there is no jury finding on defamation." *Id.* The same is true here, as the government did not argue a defamation theory to the jury, and the jury was not instructed on defamation.

First Amendment concerns that might arise from construing that statute's intent and causation requirements too broadly." *Id.* at 228. The Second Circuit held that reading the statute as requiring an intent to make a "true threat" of violence was supported by the recent opinion in *Counterman v. Colorado*, 600 U.S. 66 (2023), where this Court held that the First Amendment requires a subjective intent to create a fear of violence in the context of Colorado's "stalking" statute, which also included an emotional-distress element. *See Dennis*, 132 F.4th at 229-30.

Despite *Counterman* and the prevailing view in the other circuits, the Ninth Circuit has interpreted § 2261A far more broadly. Unlike the Third Circuit's analysis in *Yung*, the Ninth Circuit has declared that § 2261A "is directed toward conduct, not speech," and that "the proscribed acts are tethered to the underlying criminal conduct and not to speech." *United States v. Osinger*, 753 F.3d 939, 944 (9th Cir. 2014). The Ninth Circuit has also stated that the term "harass" is not a "complicated" term and has a "common understanding" while citing the same broad definition that includes "annoying" and causing emotional distress, *id.* at 945, a definition that other courts like *Yung* have rejected.[5]

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[5] Petitioner notes that, in doing so, *Osinger* mistakenly stated that "§ 2261A requires that the defendant act with the *intent* to harass, intimidate, *or cause substantial emotional distress*." *Id.* at 945 (second emphasis added). Substantial emotional distress is part of the causation element; it is not an alternative vehicle for proving the intent element. *See* 18 U.S.C. § 2261A(2)(B). Instead, the intent element can only be satisfied if the defendant intended to "intimidate" or "harass" the victim

The Ninth Circuit panel in this case relied on *Osinger* to conclude that it was permissible to instruct the jury that terms "harass" and "intimidate" have their "plain and ordinary meaning." App. 3-4. The Ninth Circuit dismissed *Yung* as a case "decided by another circuit," and it casually brushed off this Court's opinion in *Counterman* as construing a different statute. App. 3. Another Ninth Circuit panel recently took the same approach, stating that *Counterman* "does not require us to overrule *Osinger*" and that the "cyberstalking statute at issue here and in *Osinger* criminalizes conduct or speech that is harassing or intimidating" and such "conduct or speech need not involve true threats." *United States v. Crawford*, No. 23-2532, 2025 WL 1248825, at *1 (9th Cir. Apr. 30, 2025).

In sum, the Ninth Circuit's interpretation of the federal stalking statute conflicts with the narrowing constructions reached by the Second, Third, and Eighth Circuits. This Court should grant review to resolve the conflict.

B. The Ninth Circuit's minority view is wrong

This Court should also grant review because the Ninth Circuit's view is wrong. This Court recently confirmed in *Counterman* that "stalking" statutes like § 2261A implicate the First Amendment, holding that a conviction under Colorado's stalking statute was unconstitutional because the prosecution was not

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(or "kill" or "injure," which are not applicable here).

required to prove that the defendant had a subjective mental state (of at least recklessness) to convey a "true threat," which is a threat that "'subject[s] individuals to 'fear of violence' . . . ." *Counterman*, 600 U.S. at 75.[6] As the prevailing view in the circuits has explained, the Ninth Circuit has erroneously concluded that § 2261A only implicates conduct and not speech. The statute applies to the use of an "electronic *communication* service or electronic *communication* system[,]" 18 U.S.C. § 2261A (emphases added), and therefore directly targets speech. *See Moody v. NetChoice*, *LLC*, 603 U.S. 707 (2024). A "course of conduct" merely "means a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose." 18 U.S.C. § 2266(2). Thus, two emails, texts, or social-media posts, for example, constitute the "conduct" required under the statute. In short, the statute implicates potential First Amendment activity.

The "first step" in First Amendment analysis is, of course, to "construe" the statute. *United States v. Stevens*, 559 U.S. 460, 474 (2010). In addition to ignoring background First Amendment principles, the Ninth Circuit's construction of § 2261A runs afoul of several fundamental canons of statutory interpretation. As a

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[6] The Colorado stalking statute in *Counterman* was similar to § 2261A, as it applied to following persons but also included "repeatedly mak[ing] any form of communication with another person in a manner that would cause a reasonable person to suffer serious emotional distress[,]" *id.* at 70-71 and n.1, just like § 2261A includes two uses of a communication facility to cause emotional distress.

threshold matter, when construing a federal criminal statute that could implicate protected activity, courts should *not* give the words in the statute their "ordinary" broad meanings that may run afoul of the First Amendment. *United States v. Hansen*, 599 U.S. 762, 773-75 (2023). "When words have several plausible definitions, context differentiates among them. That is just as true when the choice is between ordinary and specialized meanings, as it is when a court must choose among multiple ordinary meanings." *Id.* at 775 (citations omitted). Particularly in the First Amendment context, this Court has been critical of "stack[ing] the deck in favor of ordinary meaning" rather than "giv[ing] specialized meaning a fair shake." *Id*. at 775. The Ninth Circuit's purported "ordinary" meaning approach is inconsistent with *Hansen*.

The approach in *Hansen* is rooted in the interpretive principle of constitutional doubt or avoidance; that is, Congress intended a statute complying with First Amendment jurisprudence. *See Hansen*, 599 U.S. at 781; *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994). Under this principle, terms like "harass" and "intimidate" cannot mean one thing if only communications are involved but can have a broader meaning if the factual allegations are different. "[T]he meaning of words in a statute cannot change with the statute's application. To hold otherwise 'would render every statute a chameleon, and 'would establish within our jurisprudence the dangerous principle that judges can give the same

statutory text different meanings in different cases.'" *United States v. Santos*, 553 U.S. 507, 522-23 (2008) (citations omitted). As Justice Scalia explained, "[p]recisely to avoid that result," the Court's "cases often 'give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support that same limitation." *Id.* at 523. "*The lowest common denominator, as it were, must govern*.'" *Id.*

In determining the constitutionally lowest common denominator for § 2261A, the Court employs fundamental principles of statutory construction, including "the familiar interpretive canon *noscitur a sociis*, 'a word is known by the company it keeps.'" *Dubin v. United States*, 599 U.S. 110, 124 (2023); *see Fischer v. United States*, 603 U.S. 480, 487 (2024). Limiting "harass" and "intimidate" to a violent-type mens rea, as constitutionally required, is supported by the accompanying "kill" and "injure" terms in the statute. *See Yung*, 37 F.4th at 80.[7]

Similarly, this Court has also recently emphasized that the title of a statute is an important contextual clue as to its meaning. *See Dubin*, 599 U.S. at 120-21.

[7] This principle of construction undermines the government's position that "harass" can include non-violence such as an intent to defame, and, in any event, the jury here was not instructed on such a theory. *See Sryniawski*, 48 F.4th at 588.

This is especially true when the "key terms" of the statute "are so 'elastic' that they must be construed 'in light of the terms surrounding them,' and the title Congress chose is among those terms." *Id.* at 121 (citation omitted). The "stalking" title of § 2261A suggests that the statute was meant to target violence and creating a fear of violence, not simple harassment in a broad and ordinary sense. The statute is not entitled "emotional distress," or "annoyance." The Ninth Circuit's interpretation ignores the accompanying language and title of § 2261A.

The Ninth Circuit's construction of § 2261A also ignores that the terms in a statute should be read so as to avoid surplusage, *see Dubin*, 599 U.S. at 126, as it fails to explain the difference between "harass" and "intimidate" as used in the statute. If "harass" has a broad, ordinary meaning as maintained by the Ninth Circuit, then it would essentially subsume "intimidate." As the Third Circuit held, an intent to "intimidate" should be narrowly construed to mean that the defendant intended to "put the victim in fear of death or bodily injury[,]" while an intent to "harass" should be read as an intent to create fear of similar physically offensive conduct, such as unwanted sexual conduct. *Yung*, 37 F.4th at 80.

Importantly, the Ninth Circuit's interpretation fails to address the overbreadth and federalism concerns implicated by giving "harass" and "intimidate" unclear and amorphous "ordinary" meanings. *See Snyder v. United States*, 603 U.S. 1, 14-15 (2024); *Dubin*, 599 U.S. at 124-25. Failing to read

"harass" and "intimidate" in a limited manner would leave a statute that transgresses long-established principles of federalism. *See Bond v. United States*, 572 U.S. 844, 858 (2014). It "is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Id*. *See McDonnell v. United States*, 579 U.S. 550, 576-77 (2016); *United States v. Emmons*, 410 U.S. 396, 411-12 (1973).

Under the Ninth Circuit's expansive view, § 2261A would serve as a free-floating federal emotional-distress statute, an area that has traditionally been reserved for civil lawsuits under state laws and perhaps local prosecutions in egregious circumstances. *See Ciminelli v. United States*, 598 U.S. 306, 315-16 (2023) ("The theory thus makes a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law – in flat contradiction with our caution that, 'absent a clear statement by Congress,' courts should 'not read the mail and wire fraud statutes to place under federal superintendence a vast array of conduct traditionally policed by the States.'"). This Court "require[s]" a "clear statement" from Congress before it will interpret a federal statute to "affect the federal balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). Certainly, no such clear statement exists here, and these federalism concerns are exacerbated by the fact that the Ninth Circuit's expansive interpretation fails to provide fair notice, *see Snyder*, 603 U.S. at 16, and walks

right into a facial overbreadth problem by chilling a substantial amount of potentially protected activity. *See Hansen*, 599 U.S. at 774.

For all of these reasons, the Court should grant review and reject the Ninth Circuit's minority interpretation of § 2261A. Under the majority view requiring a true-threat limitation, petitioner's stalking convictions must be vacated.

II. The Court should grant review to resolve the question left open in *Yates* and should hold that the obstruction offense in § 1519 does not proscribe closing an e-mail account.

Count 4 charged "obstruction" under 18 U.S.C. § 1519 and alleged that petitioner closed his personal e-mail account in order to obstruct an internal-affairs investigation by the United States Marshals Service. 8-ER-1622-23. The trial evidence showed that, in December 2016, petitioner closed an e-mail account that he maintained with Google Mail ("Gmail"). 8-ER-1528. The government did not call any witnesses from Google to explain the record-keeping and retention protocols associated with Gmail. Instead, it simply introduced a one-page document, described as a "Google subscriber information record" by the case agent; that document listed the "status" of the Gmail account as "deleted" and that its end-of-service date was December 22, 2016. 5-ER-865; 8-ER-1528. The agent testified that he obtained a search warrant for the Gmail account, although he did not specify when he did so, and that he "got subscriber records back, but we did not get any e-mails back because the account had been deleted." 5-ER-865.

Obstruction under § 1519 requires the destruction or concealment of a "record, document, or tangible object . . . ." 18 U.S.C. § 1519. The concurring and dissenting opinions in *Yates v. United States*, 574 U.S. 528 (2015) debated the applicability of § 1519 in the context of e-mails, but the Court did not resolve the issue. Justice Alito suggested that an e-mail may be covered under § 1519, but as a "tangible object" as opposed to a "record" or "document." *Id*. at 550-51 (Alito, J., concurring). His rationale, however, seemed to limit such a theory of liability to e-mails that are contained on a physical hard drive, not the closing of an e-mail account. *Id.* His concurring opinion stated:

> "[R]ecord" and "document" are themselves quite general. And there is a risk that "tangible object" may be made superfluous – what is similar to a "record" or "document" but yet is not one? An e-mail, however, could be such a thing. An e-mail, after all, might not be a "document" if, as was "traditionally" so, a document was a "piece of paper with information on it," not "information stored on a computer, electronic storage device, or any other medium." E-mails might also not be "records" if records are limited to "minutes" or other formal writings "designed to memorialize past events." A hard drive, however, is tangible and can contain files that are precisely akin to even these narrow definitions. Both "record" and "document" can be read more expansively, but adding "tangible object" to § 1519 would ensure beyond question that electronic files are included. To be sure, "tangible object" presumably can capture more than just e-mails; Congress enacts "catchalls" for "known unknowns." But where *noscitur a sociis* and *ejusdem generis* apply, "known unknowns" should be similar to known knowns, *i.e.*, here, records and documents. This is especially true because reading "tangible object" too broadly would render "record" and "document" superfluous.

Id. at 550-51 (citations omitted).

Meanwhile, Justices Kagan, Scalia, Kennedy, and Thomas disagreed with Justice Alito's reasoning:

> The concurrence suggests that the term "tangible object" serves not as a catchall for physical evidence but to "ensure beyond question" that e-mails and other electronic files fall within § 1519's compass. But that claim is eyebrow-raising in its own right. Would a Congress wishing to make certain that § 1519 applies to e-mails add the phrase "tangible object" (as opposed, say, to "electronic communications")? Would a judge or jury member predictably find that "tangible object" encompasses something as virtual as e-mail (as compared, say, with something as real as a fish)? If not (and the answer is not), then that term cannot function as a failsafe for e-mails.

Id. at 568-69 (Kagan, J., dissenting) (citations omitted).

This Court should grant review to resolve the question left open in *Yates*, and it should hold that closing an e-mail account does not violate § 1519. When Congress has intended for the continued maintenance of electronic records to be covered, it has specifically said so, as it did in a neighboring statute also enacted as part of the Sarbanes-Oxley Act of 2002. *See* 18 U.S.C. § 1520 (specifically requiring the maintenance of "electronic records"). The fact that Congress did not include similar language in § 1519 demonstrates that the continued maintenance of electronic records is not covered under the statute. *See Dean v. United States*, 556 U.S. 568, 572 (2009) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)). The legislative history also supports this interpretation, as Congress called § 1519 an "anti shredding provision," *Yates*, 574 U.S. at 536, and the Senate Report

reflects that the statute applies to "physical evidence." S. Rep. No. 107-46, p.14 (2002). Thus, to the extent that e-mails are covered under the statute, such a theory of liability is limited to e-mails that are stored on a defendant's hard drive, not the closing of an account.

Furthermore, the verbs listed in § 1519 demonstrate that closing an e-mail account is not covered. *See Yates*, 574 U.S. at 551 (Alito, J., concurring) (the failure of the verbs to "line up" with the nouns "may suggest that something has gone awry in one's interpretation of a text"). The verbs listed are "alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry . . . ." 18 U.S.C. § 1519. The jury instructions at petitioner's trial gave the options of alter, destroy, conceal, or falsify, 1-ER-67, while the indictment only alleged destroy, conceal, and cover up. 8-ER-1622. None of these verbs, however, neatly lines up with closing an e-mail account and its effect on a service provider.

Finally, the "usual approach" to interpreting the obstruction statutes, particularly those carrying a 20-year penalty, is to "resist reading" them broadly. *Fischer v. United States*, 603 U.S. 480, 496-97 (2024). Congress did not intend for individuals under investigation to be required to maintain and pay for e-mail accounts indefinitely or else face a § 1519 charge carrying a penalty of up to 20 years in prison. The Court should grant review, resolve the question left open in *Yates*, and conclude that closing an e-mail account does not violate § 1519.

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

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Respectfully submitted,

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