**No.**

IN THE

# Supreme Court of the United States

JOSEPH SULLIVAN,

*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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## QUESTION PRESENTED

In several cases over the last three decades, this Court has recognized that certain obstruction-of-justice crimes carry a "nexus requirement"—the requirement that a defendant's conduct have the "natural and probable effect" of obstructing a proceeding and that the defendant know that his conduct will have that effect. The courts of appeals have adopted this requirement for a host of additional obstruction provisions, and trial courts routinely instruct juries that they must find a nexus to convict. The Second and Seventh Circuits have both recognized that 18 U.S.C. § 1505, which criminalizes obstruction of "a proceeding … before a [U.S.] department or agency," carries the nexus requirement on which a jury must be properly instructed. But the Ninth Circuit holds that § 1505 carries no nexus requirement and it affirmed the conviction here despite no nexus instruction. The question presented is:

Does 18 U.S.C. § 1505 carry the requirement, on which a jury must be instructed, that the defendant's conduct have a nexus to an agency proceeding?

## RELATED PROCEEDINGS

*United States of America v. Joseph Sullivan*, No. 23-927 (9th Cir. judgment entered November 12, 2025)

*United States of America v. Joseph Sullivan*, No. 20-00337 (N.D. Cal. judgment entered May 9, 2023)

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## INTRODUCTION

This petition presents an important and recurring question about the reach of 18 U.S.C. § 1505, which criminalizes the obstruction of a federal agency proceeding. Sometimes the connection between allegedly obstructive conduct and an agency proceeding is obvious—lying in response to an agency's subpoena, for example, or shredding boxes of financial records after an investigation commences. But in other cases, accused conduct is more attenuated from the agency's process—and may consist of everyday activities that merely might or might not have some obstructive effect. This Court has consistently rejected criminal liability for the latter category of conduct by demanding a "nexus" between the defendant's conduct and the proceeding. But the Ninth Circuit here cast aside that key constraint, entrenching a circuit conflict over § 1505 while affirming the conviction of Petitioner Joseph Sullivan for the crime of doing his job.

This Court first recognized the nexus requirement in *United States v. Aguilar*, which arose under a neighboring obstruction provision, 18 U.S.C. § 1503. To satisfy the requirement, the Government must prove that the defendant's conduct had "the 'natural and probable effect'" of obstructing a proceeding and that the defendant "kn[e]w that his actions are likely" to have that effect. 515 U.S. 593, 599-601 (1995). Equivocal conduct—that which merely "might or might not" affect a proceeding—is insufficient. *Id.* Over the next 30 years, this Court adopted *Aguilar*'s nexus requirement wholesale for other federal obstruction statutes, *see Marinello v. United States*, 584 U.S. 1 (2018); *Arthur Andersen LLP v. United States*,

544 U.S. 696 (2005), and embraced similar restraints for still more federal obstruction offenses, *see Fowler v. United States*, 563 U.S. 668, 677-78 (2011) ("reasonably likely" effect); *United States v. Wells*, 519 U.S. 482, 499 (1997) ("'natural tendency to influence'").

Following suit, circuit after circuit has applied the nexus requirement to various obstruction statutes; that includes the Second and Seventh Circuits, both of which have held that § 1505 carries the requirement. Even the Government has embraced the nexus requirement, at least when convenient. Just two terms ago, trying to assure this Court not to worry about the sweep of a neighboring obstruction statute, the Solicitor General touted the nexus requirement as "the ... paradigmatic constraint the Court has pointed to to ensure that obstruction statutes don't sweep too broadly and scoop up everyday conduct that might be happening out in the world." Tr. of Oral Argument at 71, *Fischer v. United States*, No. 23-5572 (U.S. Apr. 16, 2024). And because the nexus requirement is indeed critical, trial courts routinely instruct juries on the requirement, and appellate courts—including this Court in *Arthur Andersen*—overturn convictions when no proper nexus instruction was given.

But here the nexus requirement stood in the way of an ambitious prosecution. Mr. Sullivan was the Chief Security Officer (CSO) at Uber Technologies, hired while the Federal Trade Commission (FTC) was investigating Uber's cybersecurity practices. In 2016, Mr. Sullivan—along with a team of cybersecurity professionals and with CEO approval—resolved a cybersecurity incident using Uber's "Bug Bounty" program. Consistent with program terms, Uber paid a fee to the

individuals who had discovered a vulnerability in Uber's system; in exchange, the individuals disclosed the vulnerability to Uber, agreed not to disclose the incident publicly, and destroyed any user information. Mr. Sullivan's team documented the incident meticulously. No user data was disseminated. And no one at Uber, including in-house counsel, suggested telling the FTC, because its investigation concerned general cybersecurity practices, and it had never asked about the Bug Bounty program.

At trial, the Government did not show the jury that Mr. Sullivan lied to the FTC. It never showed that he asked anyone at Uber to lie to the FTC. It never showed that he destroyed evidence. Nor could it show that Mr. Sullivan was in charge of handling the FTC investigation, a responsibility that fell to in-house counsel. But the Government did not need to show any of this—in the Ninth Circuit, § 1505 has no nexus requirement, and so a court need not give a nexus jury instruction. The Government was thus free to turn Mr. Sullivan's everyday conduct into criminal obstruction of justice. And absent this Court's intervention, the Government remains free to do so in the Ninth and Sixth Circuits, basing convictions on equivocal conduct remote from anything resembling an agency proceeding.

This dangerous result expands the scope of both agency investigatory power and prosecutorial discretion to intolerable breadth. This Court should grant the Petition for Certiorari to resolve a square conflict between the Ninth and Sixth Circuit's erroneous approach and the correct approach in the Second and Seventh Circuits.

## OPINIONS AND ORDERS BELOW

The Ninth Circuit's opinion as amended is reported at 159 F.4th 579 and reproduced at Pet. App. 6a-23a. The Northern District of California's Order Denying Petitioner's Motion for Judgment of Acquittal and New Trial is unreported but available at 2023 WL 163489 and reproduced at Pet. App. 40a-66a.

## JURISDICTION

The Ninth Circuit issued its amended opinion and denied the petition for rehearing en banc on November 12, 2025. Pet. App. 1a-5a. Justice Kagan extended the time to file a petition for a writ of certiorari until March 12, 2026. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1505 provides, in relevant part:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication 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, 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—

> Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

18 U.S.C. § 1515(b) provides:

> As used in section 1505, the term "corruptly" means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

## STATEMENT OF THE CASE

### *The FTC Investigates Uber's Data Practices After A 2014 Hack*

Uber, the popular ride-hailing company, retains an immense amount of data from both drivers and riders. CA App. 1312-20. In May 2014, a hacker obtained access to Uber's systems and downloaded sensitive information for tens of thousands of Uber drivers. Pet. App. 6a-7a. After Uber publicly disclosed this incident, the FTC opened an inquiry in March 2015 into Uber's data collection and use practices. Pet. App. 7a.

In April 2015, as part of its effort to improve its security practices, Uber hired Joe Sullivan as its CSO. Pet. App. 7a. The CSO role was not in the legal department, CA App. 1950, and Mr. Sullivan was not in charge of Uber's response to the FTC's investigation, CA App. 1242. Mr. Sullivan did meet with the FTC to

provide information on Uber's efforts to improve cybersecurity practices and was later deposed on the same topic. Pet. App. 7a, 9a. No one has ever suggested that Mr. Sullivan was anything but fully truthful and forthcoming during these aspects of the proceeding.

### *Uber Resolves A November 2016 Incident Through Its Bug Bounty Program*

Among the initiatives Mr. Sullivan led was the creation of a "Bug Bounty" program, which is considered to be an industry best practice. CA App. 1777, 1783. "Through bug bounty programs, companies solicit and reward" individuals who "discover[] and disclos[e] … their systems' vulnerabilities." Pet. App. 8a.[1] Uber's Bug Bounty program invited "anybody on the internet" who discovers a "valid vulnerabilit[y]" to submit that information in exchange for a payment, CA App. 1781, 1783-84, at a rate to "be determined by Uber in its sole discretion," CA App. 475.

Uber received more than 2,000 reports in the first 100 days of its public program, which caught and fixed over 160 security flaws, resulting in more than

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[1] *See generally* Ian Williams, Note, *The Secrets We Keep...: Encryption and the Struggle for Software Vulnerability Disclosure Reform*, 25 Mich. Tech. L. Rev. 105, 107 (2018) (noting Bug Bounty programs adopted by Google, Microsoft, Facebook, PayPal, and United Airlines); DHS, *DHS Announces "Hack DHS" Bug Bounty Program to Identify Potential Cybersecurity Vulnerabilities* (Dec. 14, 2021), https://tinyurl.com/ydzt6vf6; SECURE Technology Act, Pub. L. No. 115-390 § 102, 132 Stat. 5173, 5175-76 (2018) (6 U.S.C. § 663 note) (authorizing the Department of Homeland Security to establish a "bug bounty pilot program").

$345,000 in payments. CA App. 1785. While the FTC knew Uber had launched a Bug Bounty program, Uber never told the FTC of any of the program's successes and the FTC never asked. CA App. 1281, 2007. In any event, it was Uber's in-house legal team who was responsible for determining whether to disclose an incident. CA App. 1952-62.

In Fall 2016, Uber again used its Bug Bounty program to deal with a vulnerability discovered by third parties. The vulnerability was similar to the one that had led to the initial incident that triggered the FTC's investigation. Uber ultimately resolved the 2016 incident by paying the individuals $100,000, requiring them to delete any data, and (consistent with the program's confidentiality policy, CA App. 1789) requiring the individuals to sign a non-disclosure agreement (NDA). Pet. App. 7a-8a. Thirty-one employees in addition to Mr. Sullivan knew of the incident as it unfolded, including Uber's then-CEO Travis Kalanick and two of Uber's in-house lawyers, one of whom managed the FTC proceeding. CA App. 1039, 1067, 1941, 2098-99, 2424, 2751. Consistent with prior Bug Bounty payments, no one at Uber informed the FTC.

### *The Government Prosecutes Mr. Sullivan For Obstruction Of Justice Based On Uber's Non-disclosure Of The 2016 Incident*

In 2017, after Uber hired a new CEO, it prompted an internal investigation into Kalanick that incidentally revealed the 2016 Bug Bounty payment Kalanick had approved. Pet. App. 9a. The new CEO fired Mr. Sullivan, and Uber disclosed the incident to the FTC. Pet. App. 9a. The FTC then revised its

complaint against Uber and its consent agreement with the company. Pet. App. 9a.

The Government, however, was not content to punish Uber alone. It indicted Mr. Sullivan individually for one count of obstructing FTC proceedings in violation of 18 U.S.C. § 1505, one count of misprision of a felony in violation of 18 U.S.C. § 4, and three counts of wire fraud under 18 U.S.C. § 1343. Pet. App. 41a. (The Government voluntarily dismissed the wire fraud claims. *Id.*) The Government's theory was that by using Uber's Bug Bounty program to resolve the incident, Mr. Sullivan had orchestrated a cover-up meant to obstruct the FTC proceeding.

At trial, Mr. Sullivan requested that the jury be instructed that a conviction under § 1505 requires the jury to find "a nexus between the defendant's conduct and the pending FTC proceeding." Pet. App. 46a-47a; *see* D. Ct. Dkt. 156 at 46. But the district court denied that request based on Ninth Circuit precedent. Pet. App. 48a-49a. The jury found Mr. Sullivan guilty. Pet. App. 10a.

Though the Government sought prison time, the district court sentenced Mr. Sullivan to probation. Pet. App. 26a. In doing so, it rejected the Government's central theory of the case. It found that the November 2016 Bug Bounty "was a very successful effort" in which "the breach was bottled up" and the vulnerable information "hadn't been exposed." CA App. 263. In the district court's view, Uber's $100,000 payment and NDA were "part of the ability to solve the problem," not an "an act of a coverup." CA App. 263.

### *The Ninth Circuit Affirms The § 1505 Conviction, Holding That No Nexus Instruction Is Required*

On appeal, Mr. Sullivan argued that the Ninth Circuit authority on which the district court relied, *United States v. Bhagat*, 436 F.3d 1140, 1147 (9th Cir. 2006), had been superseded by this Court's decisions recognizing the nexus requirement for other obstruction statutes. He argued that § 1505 imposed such a requirement and that it was an element of the crime on which the jury needed to be instructed. Though the Government initially defended *Bhagat*, "[u]pon further consideration," it "revise[d] its position" and "agree[d] that ... Section 1505 ... requires a nexus." Rule 28(j) Letter, CA Dkt. 53 at 2 (May 31, 2024).

The Ninth Circuit did not budge. It brushed aside this Court's precedents because they involved other federal obstruction statutes, not § 1505. Pet. App. 12a-14a. It suggested that even if "a Section 1505 conviction necessitates a *finding* of a nexus," that does not require "an additional *instruction*" that "a nexus finding was required." Pet. App. 10a n.2. The court suggested the jury could discern a nexus requirement "by implication," Pet. App. 14a, even though the instructions do not mention a nexus at all. The Ninth Circuit "decline[d] to reach the question" of whether any error was "harmless[]." Pet. App. 14a. And the court denied Mr. Sullivan's petition for rehearing en banc, effectively reaffirming its decision in *Bhagat*. Pet. App. 5a.

## REASONS FOR GRANTING THE WRIT

### I. The Ninth Circuit's Holding Squarely Conflicts With Holdings In The Second And Seventh Circuits On § 1505's Nexus Requirement.

Both the Second and Seventh Circuits hold that § 1505 carries a nexus requirement; in both, the jury must therefore be instructed that a conviction requires a finding that the defendant's conduct had the natural and probable effect of obstructing an agency proceeding and the defendant knew of that effect. The Ninth Circuit holds that § 1505 carries no such requirement and that a jury need not receive any nexus instruction. The Sixth Circuit has followed the Ninth Circuit. The Court should grant the Petition to resolve this important issue.

**A.** Keying off this Court's decisions in *Aguilar*, *Arthur Andersen*, and *Marinello*, the courts of appeals have repeatedly recognized that various federal obstruction statutes carry a nexus requirement.[2] Section 1505 is no exception.

In *United States v. Quattrone*, the Government prosecuted an investment banker who, following his

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[2] *See, e.g.*, *United States v. Riley*, 115 F.4th 604, 611 (D.C. Cir. 2024) (18 U.S.C. § 1512(c)(1)); *United States v. Beach*, 80 F.4th 1245, 1257 (11th Cir. 2023) (18 U.S.C. § 1512(a)(2)(A)); *United States v. Friske*, 640 F.3d 1288, 1291-93 (11th Cir. 2011) (18 U.S.C. § 1512(c)(2)); *United States v. Phillips*, 583 F.3d 1261, 1264-65 (10th Cir. 2009) (same); *United States v. Reich*, 479 F.3d 179, 185-86 (2d Cir. 2007) (Sotomayor, J.) (same); *United States v. Sutherland*, 921 F.3d 421, 427-28 (4th Cir. 2019) (same).

supervisor's instructions, directed employees in his group to delete files pursuant to the bank's document retention policy. 441 F.3d 153, 161-66 (2d Cir. 2006). The Government indicted the defendant under § 1505, arguing that his instruction was intended to prevent disclosure of this information in a recently commenced SEC investigation. *Id.* at 179.

After the jury convicted, the Second Circuit confirmed that § 1505 "requires a wrongful intent or improper motive to interfere with an agency proceeding, *including the judicially grafted nexus requirement*" set forth in *Aguilar*. 441 F.3d at 174 (emphasis added); *see United States v. Reich*, 479 F.3d 179, 185-86 (2d Cir. 2007) (Sotomayor, J.) (noting that court of appeals has "applied *Aguilar*'s nexus requirement ... to 18 U.S.C. § 1505"). It vacated the conviction because the district court's jury instructions failed to include the "correct formulation" of the nexus requirement. *Quattrone*, 441 F.3d at 180. It held that a court must instruct the jury that it must find that the defendant's "actions may be said to have the natural and probable effect of interfering with that proceeding," *id.* at 177 n.24, and that "a defendant … kn[e]w that his corrupt actions 'are likely to affect the ... proceeding,'" *id.* at 178-79 (quoting *Aguilar*, 515 U.S. at 599).

*United States v. Senffner* similarly held that the Government must prove "that [the defendant's] actions had the 'natural and probable' effect of interfering with [a] proceeding." 280 F.3d 755, 762 (7th Cir.), *cert denied*, 536 U.S. 934 (2002) (quoting *Aguilar*, 515 U.S. at 599). *Senffner* held that *Aguilar*'s nexus requirement for "the similar obstruction provision in 18

U.S.C. § 1503" applies to § 1505. 280 F.3d at 762. And though *Senffner* did not have occasion to address whether a nexus *instruction* is also required, its embrace of the requirement as an essential element of the crime strongly suggests a jury would need to be instructed to find a nexus in order to convict.

Other courts, while not squarely resolving the question, are in substantial agreement with the Second and Seventh Circuits in recognizing the centrality of a nexus requirement for § 1505.

In *United States v. Durham*, the court noted its "belief" that a nexus requirement for § 1505 is "in accord with *Aguilar* and logical given [the] structural similarities between § 1503 and § 1505." 432 F. App'x 88, 91 n.5 (3d Cir. 2011). The court did not need to resolve that question, however, because the district court instructed the jury that it must find "that 'the natural and probable effect of the defendant's conduct was interference with the investigation ... [and] that the defendant was aware of this effect." *Id.* at 91. Notably, the district court included that instruction "*at the request of the Government* ... in light of the Supreme Court's interpretation of a related obstruction statute" in *Aguilar*. *Id.* at 91 & n.5 (emphasis added).

*United States v. Callipari* ultimately relied on a harmless error analysis, but the court of appeals noted that jury instructions regarding § 1505 should "inform[] the jury that the government had to prove a 'nexus' between [the defendant's] acts and the ... proceeding," and that "the better practice would be to include the 'natural and probable effect' language in the instruction." 368 F.3d 22, 42-43 & n.10 (1st Cir.

2004), *vacated on other grounds*, 543 U.S. 1098 (2005). That nexus instruction "reflects the Supreme Court's basic concern" in *Aguilar* that "'if the defendant lacks knowledge that his actions are likely to affect the [ ] proceeding, he lacks the requisite intent to obstruct.'" *Id.* at 43 (quoting *Aguilar*, 515 U.S. at 599, and citing *Senffner*, 280 F.3d at 762).

**B.** The Ninth and Sixth Circuits disagree. In *United States v. Bhagat*, 436 F.3d 1140, 1147 (9th Cir. 2006), the Government prosecuted the defendant under § 1505 for false statements made to the SEC. For the first time on appeal, the defendant argued that the district court should have instructed the jury on the nexus requirement this Court recognized in *Aguilar*. The Ninth Circuit held that for a "convict[ion] under 18 U.S.C. § 1505," the jury need not find that the defendant's actions "have the 'natural and probable effect' of obstructing justice, and that [the defendant] was aware of that effect." *Id.* The Ninth Circuit in this case had the opportunity to overrule *Bhagat* at both the panel stage and on rehearing en banc. It reaffirmed *Bhagat* instead. And it held that the district court "did not err" in refusing to instruct the jury that it must "find that 'there was a nexus between the defendant's conduct and the pending FTC proceeding,'" because *Bhagat* "forecloses [the] argument." Pet. App. 10a, 12a, 14a. The panel made no attempt to square this with *Quattrone* or *Senffner*.

The Sixth Circuit joined the Ninth in *United States v. Warshak*, 631 F.3d 266, 326 n.71 (6th Cir. 2010), rejecting the defendant's argument that "he should not have been convicted because his actions did not have the 'natural and probable effect' of

undermining the FTC proceeding." Citing the Ninth Circuit's decision in *Bhagat*, *Warshak* held that the nexus requirement in *Aguilar* is "inapposite," because it "involved obstruction of a judicial proceeding, not obstruction of an agency proceeding." *Id.* (citing *Bhagat*, 436 F.3d at 1147-48).

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In short, there is a square and entrenched 2-2 split in the courts of appeals. Only this Court's intervention can bring the Ninth and Sixth Circuits into line with this Court's precedent and the many circuits recognizing the nexus requirement as a fixture in obstruction statutes, and an essential finding on which a jury must be instructed.

## II. The Ninth Circuit's Rejection Of A Nexus Requirement And Instruction For § 1505 Conflicts With This Court's Precedents.

The decision below cannot be squared with this Court's trilogy of decisions recognizing the nexus requirement, nor with still others imposing similar proximate-cause-style limitations on criminal prohibitions. The Ninth Circuit's purported distinctions for § 1505 are empty.

### A. This Court's precedents broadly recognize the nexus requirement as a critical limitation on obstruction statutes.

**1.** More than thirty years ago, *Aguilar* held that a prosecution under 18 U.S.C. § 1503—a federal

obstruction statute making it a crime to "corruptly ... influence[], obstruct[], or impede[] ... the due administration of justice"—includes "a 'nexus' requirement" that the defendant's conduct had "the 'natural and probable effect' of interfering with the due administration of justice." 515 U.S. at 598-99. A defendant's conduct satisfies the nexus requirement where it "all but assures" the obstruction of a proceeding, such as when the defendant "delivers false documents or testimony" in the proceeding itself. *Id.* at 601. But where the defendant's conduct "might or might not" affect the proceeding, only affects something "ancillary" to the proceeding, or where the defendant "lacks knowledge that his actions are likely to affect the judicial proceeding," it "falls on the other side of the statutory line." *Id.* at 599-601.

In recognizing the requirement, the Court emphasized the intolerable sweep § 1503 would otherwise entail. Absent a natural-and-probable-effect requirement, the statute would cover "*any* act[] done with the intent to 'obstruct,'" no matter how tenuous its connection to the administration of justice. *Id.* at 602. For example, "a man could be found guilty" if he "lied to his wife about his whereabouts at the time of the crime, thinking that an FBI agent might decide to interview her and that she might in turn be influenced in her statement to the agent by her husband's false account of his whereabouts." *Id.* at 602. "The intent to obstruct justice is indeed present, but the man's culpability is a good deal less clear from the statute than we usually require in order to impose criminal liability." *Id.*

In *Arthur Andersen LLP v. United States*, the Court concluded that a different federal obstruction statute also includes a nexus requirement. 544 U.S. 696 (2005). The relevant statute criminalized "knowingly ... corruptly persuad[ing] another person, … with intent to ... cause" that person to "withhold" documents from, or "alter" documents for use in, an "official proceeding." 18 U.S.C. § 1512(b)(2)(A), (B). Noting that it "faced a similar situation in *Aguilar*," the Court reasoned that the federal obstruction statute "'required something more—specifically, a 'nexus' between the obstructive act and the proceeding,'" *and* that the defendant have "'knowledge that his actions are likely to affect the judicial proceeding.'" *Id.* at 708 (quoting *Aguilar*, 515 U.S. at 599-600). And *Arthur Andersen* also confirmed the requirement of a nexus *instruction*; it held that the jury instructions in that case "failed to convey properly the elements" required by the statute, 544 U.S. at 698, in part because they "led the jury to believe that it did not have to find *any* nexus between" the defendant's acts "and any particular proceeding," *id.* at 707.

*Marinello v. United States* yet again adopted a nexus requirement for another federal obstruction statute. 584 U.S. 1 (2018). There, the Court addressed 26 U.S.C. § 7212(a), which (in relevant part) makes it a crime to "corruptly ... obstruct or impede ... the due administration of" the Internal Revenue Code. This Court held that "to secure a conviction" under that statute, "the Government must show (among other things) that there is a 'nexus' between the defendant's conduct and a particular administrative proceeding," which in turn "requires a 'relationship in time, causation, or logic with the [administrative] proceedings.'"

584 U.S. at 13 (quoting *Aguilar*, 515 U.S. at 599). Embracing the same imperatives animating *Aguilar* and *Arthur Andersen*, the Court emphasized that a statute unconstrained by a nexus requirement would "risk ... unfairness" by transforming everyday conduct into a felony. *Id.* at 9-10.

**2.** This Court has understood still other federal obstruction statutes to carry similar limitations (albeit without using the term "nexus"). In *Fowler v. United States*, 563 U.S. 668 (2011), the Court addressed a statute making it a crime to "kill another person, with intent to ... prevent the communication by any person to a law enforcement officer ... of the United States of information relating to" a federal crime. 18 U.S.C. § 1512(a)(1)(C). The Court held that the statute requires the Government to prove it is "*reasonably likely* under the circumstances" that the defendant's conduct would have prevented communication with a federal law enforcement officer. *Fowler*, 563 U.S. at 677-78 (emphasis added).

Likewise, in *United States v. Wells*, 519 U.S. 482 (1997), the Court considered a statute criminalizing "knowingly mak[ing] any false statement or report ... for the purpose of influencing in any way the action" of certain federal agencies. 18 U.S.C. § 1014. *Wells* emphasized that the statute does not reach "relatively trivial or innocent conduct" because the Government ordinarily must show that the defendant's false statement "has 'the *natural tendency to influence* the [agency] decision.'" 519 U.S. at 498-99 (emphasis added).

**3.** The Government seemed to have finally gotten the message by October Term 2023, when this Court heard argument in *Fischer v. United States*, No. 23-5572. *Fischer* was one of several prosecutions alleging that protestors who entered the Capitol on January 6, 2021, had obstructed an official proceeding under 18 U.S.C. § 1512(c)(2). The Government was resisting arguments from the defendant that to establish a violation, the Government had to prove that the defendant impaired the availability or integrity of evidence. To try to reassure this Court that *that* limitation was unnecessary, the former Solicitor General took the following position:

> [T]he Court has required a nexus, and that's been the requirement in cases like Marinello, Aguilar, and ... Arthur Andersen, where the Court has said it does real narrowing work because you have to show that the natural and probable effect of the action is to obstruct. There has to be a relationship in time, causation, and logic. ...
>
> [T]here are inherent constraints built into the other elements of the statute. The nexus constraint is a really critical one. It is the ... paradigmatic constraint the Court has pointed to to ensure that obstruction statutes don't sweep too broadly and scoop up everyday conduct that might be happening out in the world.

Tr. of Oral Argument 58-59, 71, *Fischer v. United States*, No. 23-5572 (Apr. 16, 2024).

Could not have said it better. The former Solicitor General's own words refute the Ninth Circuit's holding that the jury could convict Mr. Sullivan without being instructed on this "inherent," "critical," and "paradigmatic constraint" that applies to "obstruction statutes."

### B. The Ninth Circuit's reasons for rejecting a nexus requirement or instruction for § 1505 fail.

The Ninth Circuit nevertheless left in place its decision in *Bhagat* rejecting a nexus *requirement* for § 1505 and also suggested, as a fallback, that no nexus *instruction* is required. Its reasoning was wrong on all counts.

**1. *Textual differences in § 1505 do not justify rejecting a nexus requirement.*** The Ninth Circuit thought that "[t]he text of Section 1505 ... distinguish[es]" this case "from *Aguilar*, *Marinello*, and *Arthur Andersen*," because "none of [those] cases concerns Section 1505." Pet. App. 12a, 14a. But *Marinello* rejected a similar argument when "[t]he Government ...urge[d]" the Court "to ignore" *Aguilar* and *Arthur Andersen* because of the differences in "the language ... of the provision at issue." 584 U.S. at 12. The Court found those other cases "highly instructive for use as a guide," and noted that the "underlying principles of all these cases" are "similar." *Id.*; *see Durham*, 432 F. App'x at 91 n.5 (noting the "structural similarities between § 1503 and § 1505"); *United States v. Poindexter*, 951 F.2d 369, 380 (D.C. Cir. 1991) (noting that "[t]he terms of § 1505 were

borrowed from ... § 1503" and "followed [its] language ... very closely").

**2.** ***Mr. Sullivan's awareness of the FTC proceeding does not distinguish this Court's precedent.*** The Ninth Circuit also thought that because Mr. Sullivan's case involves "only one proceeding, of which the defendant was undisputedly aware," it is "distinguish[ed] ... from *Aguilar, Marinello*, and *Arthur Andersen*. Pet. App. 14a. But *Aguilar* did far more than adopt an awareness-of-a-proceeding requirement.

As *Aguilar* noted, 515 U.S. at 599, more than 100 years earlier, this Court held in *Pettibone v. United States*, 148 U.S. 197, 206 (1893), that "'a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court.'" To be sure, *Aguilar* reaffirmed that basic principle. 515 U.S. at 599. But it then went further, recognizing the requirement that the defendant's actions "have the 'natural and probable effect' of interfering with the due administration of justice" and that the defendant had "knowledge that his actions are likely to" have that effect. *Id.* at 599. Mere awareness of a proceeding cannot satisfy the objective requirement, akin to proximate cause, that a defendant's conduct have the natural and probable effect of obstructing the agency's proceeding.

**3.** ***The nexus-less jury instructions do not implicitly embrace a nexus finding.*** There is no dispute that the jury instructions here made no mention

of a nexus requirement because the district court rejected Mr. Sullivan's request for such an instruction. Pet. App. 11a-12a, 67a-70a. Like *Arthur Andersen*, the instructions "led the jury to believe that it did not have to find *any* nexus." 544 U.S. at 707-08; *see Marinello*, 584 U.S. at 5, 13 (reversing where jury instructions omitted nexus requirement).

The Ninth Circuit nevertheless suggested that even if § 1505 requires "a *finding* of a nexus," it does not require "an additional *instruction* as to a nexus finding." Pet. App. 10a n.2. It hypothesized that the jury instructions, by requiring the jury to find intent to obstruct the agency's proceedings, also "require[d] a nexus *by implication*." Pet. App. 14a (emphasis added).

This reasoning misunderstands what the nexus requirement is and does. This Court corrected the very same misunderstanding in *Fowler*, explaining that "one can possess an intent (*i.e.*, one can act in order to bring about a certain state of affairs) even if there is considerable doubt whether the event that the intent contemplates will in fact occur." *Fowler*, 563 U.S. at 674. *Aguilar* is a perfect illustration. The defendant there *lied to an FBI agent*, 515 U.S. at 597, with the "intent to thwart the grand jury investigation," *id.* at 600. But that did not implicitly establish a nexus. The nexus requirement was missing because the effect of the defendant's conduct on the grand jury proceeding was "speculative" since the FBI agent merely "might or might not testify before [the] grand jury." *Id.* at 600-01.

The same analysis applies here: whether Mr. Sullivan *intended* (in part) to use a Bug Bounty agreement to keep the FTC (and anyone else outside Uber) from learning of the 2016 incident is a separate question from the nexus requirement, which focuses on whether the use of Uber's Bug Bounty program would have "*the natural and probable effect*" of influencing the FTC investigation and whether Mr. Sullivan had "*knowledge* that his actions are likely" to have that effect. *Aguilar*, 515 U.S. at 599 (emphasis added). The jury was never required to make those critical findings.

## III. This Case Is An Excellent Vehicle For Resolving The Important Question Presented.

**A.** This case is a perfect vehicle for resolving the question presented. Mr. Sullivan preserved the issue repeatedly by requesting a nexus instruction, raising the absence of such an instruction post-trial, and fully presenting the issue on appeal. *See supra* 8-9; *Arthur Andersen*, 544 U.S. at 707 n.10. The Ninth Circuit resolved the question on the merits. And after "[f]inding no error"—erroneously—it "decline[d] to reach the question of harmlessness." Pet. App. 14a. In short, the legal issue is teed up cleanly for resolution by this Court, with no procedural obstacles or fact-bound issues interfering.

**B.** Though this Court need not reach the issue either, the error here was not harmless. To establish that the failure to instruct the jury on the nexus element was harmless, the Government would need to show that it is "clear beyond a reasonable doubt that

a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999). That is a non-starter in this case, where even the district court ultimately came to see the Government's basic theory that the Bug Bounty was a cover-up as dubious. *Supra* 8.

At the outset, consider how distant Mr. Sullivan's conduct was from the heartland of anything resembling agency process. Mr. Sullivan is not accused of giving false testimony or documents, destroying evidence, or instructing anyone else to do these things. *Compare Aguilar*, 515 U.S. at 601 ("false documents or testimony to the grand jury itself ... all but assures" an obstructive effect). He was responding to a security incident. The Government accuses Mr. Sullivan of obstructing the FTC proceeding by the means he (and others at Uber) pursued to deal with that incident, and then the decision not to actively inform the FTC. That conduct is just Mr. Sullivan doing his job—nothing more and nothing less—far removed from an agency proceeding.

Properly instructed, a reasonable jury could easily have found that use of a Bug Bounty to resolve the incident, and then non-disclosure of that incident, at most "might or might not" have the natural and probable effect of obstructing the FTC's overall inquiry. *Aguilar*, 515 U.S. at 600. And certainly it could have found that Mr. Sullivan did not *know* that acting in his role as CSO to prevent the disclosure of private data by using a Bug Bounty program, or failing to update the agency on those efforts, would obstruct the FTC investigation. As the then-lead counsel for the FTC acknowledged at trial, "[t]he bug bounty

program wasn't particularly relevant to what we [the FTC] were looking at," CA App. 1281, and Mr. Sullivan could hardly be faulted for coming to the same conclusion. Indeed, Uber did not disclose to the FTC the details of more than 100 prior Bug Bounties. CA App. 2007. And in any event, it was never Mr. Sullivan's job to decide whether security incidents should be disclosed to the FTC; that responsibility lay with the company's legal department. CA App. 1952-62.

The Government theorizes that the 2016 Bug Bounty was different—such that Uber should have disclosed its details to the FTC—because it was not a "legitimate bug bounty." CA App. 700. But this ignores that *31 other people* at Uber were aware of the 2016 incident, that many were involved in solving it, and that the team documented everything in a central document. CA App. 483-515. Mr. Sullivan took the issue straight to the top, informing Uber's then-CEO of the incident and receiving his imprimatur and encouragement to address the security vulnerability through the Bug Bounty program. *See supra* 7. And the in-house attorney responsible for the FTC proceeding was aware, too. *Supra* 7. Even if a jury found that Mr. Sullivan intended the FTC not to find out about the 2016 incident, that would hardly be the natural and probable effect of a meticulously documented institutional effort to use an established company program to successfully defuse a cybersecurity incident.

**C.** Review is vitally important for criminal defendants beyond Mr. Sullivan. Though this case involves an investigation into cybersecurity practices, many federal administrative agencies have broad investigative power within their purview. Companies

frequently are under investigation regarding incidents or practices. Those investigations drag on for years, and their scope can be nebulously defined or shifting. *Cf. Axon Enters., Inc. v. FTC*, 598 U.S. 175, 215 (2023) (Gorsuch, J., concurring in the judgment) (noting that agencies "employ relaxed rules of procedure and evidence," and that investigations "[can] drag[] on for ... *years*"). Meanwhile, the company's employees must continue to do their jobs, discharging duties owed to the company. Without a nexus requirement, § 1505 risks sweeping in all manner of everyday business conduct that lacks the sort of culpability for which individual criminal liability is appropriate.

Most problematic is the sort of conduct at issue in this case, where an employee acts within the scope of a corporate policy (with CEO approval, no less) to pursue the company's interests. As noted in *Arthur Andersen*, established corporate policies "are common in business" and "[i]t is, of course, not wrongful for a manager to instruct his employees to comply with" those policies "under ordinary circumstances," "despite [any] reservations" that "some ... managers" might have with respect to the policies' application in particular circumstances. 544 U.S. at 701, 704. Obstruction statutes should be construed to avoid "cover[ing] innocent conduct" by employees acting pursuant to otherwise legitimate and standard business practices, *id.* at 706. And individual employees should not have to fear that discharging core job responsibilities by implementing company policy will subject them to criminal liability.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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March 12, 2026