No. 25-1082

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. The Ninth Circuit Precedent Applied Below Remains The Law Of The Circuit And Squarely Conflicts With Holdings In The Second And Seventh Circuits. 3

II. The Requirement Of A Nexus Instruction Under § 1505 Is A Legal Question Suitable For This Court's Resolution. 4

III. The Ninth Circuit's Error Is Not Harmless. 9

IV. The Government's Speculation That Courts Might Self-Correct Their Jury Instructions Is Baseless. 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

Arthur Andersen LLP v. United States,
544 U.S. 696 (2005).....5, 7

Fowler v. United States,
563 U.S. 668 (2011).....6

Marinello v. United States,
584 U.S. 1 (2018).....7, 9, 12

Neder v. United States,
527 U.S. 1 (1999).....11

United States v. Aguilar,
515 U.S. 593 (1995).....5, 10

United States v. Bhagat,
436 F.3d 1140 (9th Cir. 2006).....1, 3

United States v. Lane,
474 U.S. 438 (1986).....11

United States v. Quattrone,
441 F.3d 153 (2d Cir. 2006) 7

United States v. White Horse,
35 F.4th 1119 (8th Cir. 2022) 8

Statutes

18 U.S.C. § 1505 ..... 1, 2, 3, 4, 6, 7, 9, 12

Other Authorities

Ninth Circuit's Criminal Jury Instructions Revisions, www3.ce9.uscourts.gov/jury-instructions/node/1186 (last updated Dec. 2025) 12

Ninth Circuit's Manual of Model Criminal Jury Instructions, Obstruction of Justice, www3.ce9.uscourts.gov/jury-instructions/node/1235 (revised Mar. 2026) 12

Tr. of Oral Argument, *Fischer v. United States*, No. 23-5572 (U.S. Apr. 16, 2024) 6

INTRODUCTION

The Government concedes "that Section 1505 requires a nexus." Opp. 6. It does not defend the Ninth Circuit's contrary holding in this case, or the holding in *United States v. Bhagat*, 436 F.3d 1140 (9th Cir. 2006), on which it relied. The Government also does not dispute that there is a square and entrenched 2-2 circuit conflict on whether 18 U.S.C. § 1505 carries a nexus requirement, Pet. 12-14, or that the issue is an important question of law concerning the scope of a federal criminal obstruction statute, Pet. 24-25. Nor does the Government dispute that Mr. Sullivan preserved the issue, that the district court rejected his request to include a nexus instruction, or that, as a result, the jury instructions followed the Ninth Circuit's erroneous decision in *Bhagat*.

The Government fails in its attempts to duck review of a plainly cert-worthy issue.

First, the Government claims the Ninth Circuit panel here agreed *Bhagat* was wrongly decided and abandoned its precedent. It did not. The panel declined to overrule *Bhagat* and echoed its reasoning. Then the full court denied Mr. Sullivan's rehearing petition. *Bhagat* remains controlling law in the Ninth Circuit.

Second, the Government says the Question Presented—whether § 1505 has a nexus requirement on which the jury must be instructed—is somehow not cleanly teed up. It says the case presents only a fact-bound question about whether the district court adequately conveyed the nexus requirement in its jury

instructions. Wrong again. The district court made *no attempt* to convey the nexus requirement to the jury because circuit precedent precluded it from doing so. Neither the district court nor the Ninth Circuit suggested that whether a nexus instruction is required is a case-by-case determination that turns on the record. If they had so held, *that* ruling would have been a legal error (not a factbound question), because the nexus requirement is an essential element of § 1505 on which a jury must always be instructed.

The Government next seeks refuge in the harmless error rule. Strike three. The Ninth Circuit *expressly declined* to reach that question, and this Court need not address it either. Nor does the Government's selective recitation of the evidence come close to satisfying its burden; indeed, the Government relies only on evidence relating to Mr. Sullivan's intent and his awareness of the FTC proceeding, not the separate nexus requirement that his intended conduct have the natural and probable effect of obstructing a proceeding (let alone his knowledge of those effects).

Finally, the Government insinuates that despite the bad law on the books in the Ninth Circuit, future prosecutors may benevolently acquiesce in a nexus instruction or district courts may ignore *Bhagat* when instructing juries. This is the same Government that opposed a nexus instruction in this case; told this Court the next year in *Fischer* that the nexus requirement is a "really critical" "inherent constraint[]," Pet. 18; and now plays nothing-to-see-here. Only this Court's intervention will correct the law, resolve the circuit split, and prevent future Government overreach.

I. The Ninth Circuit Precedent Applied Below Remains The Law Of The Circuit And Squarely Conflicts With Holdings In The Second And Seventh Circuits.

The Government contends that whether § 1505 carries a nexus requirement is not presented in this case because the Ninth Circuit supposedly "accepted the parties' consensus on that issue" and "took that point as a given." Opp. 7. That is wrong and, in any event, would not have eliminated the square and acknowledged circuit conflict on the issue.

While the Ninth Circuit noted that "the *parties* ... agreed" that § 1505 carries a nexus requirement, Pet. App. 10a n.2 (emphasis added), the court itself *rejected* that view. It reaffirmed *Bhagat*'s holding—that "under Section 1505 ... there was no need to create a causal nexus and, consequently, no need to supplement the [jury] instructions" with a nexus requirement, 436 F.3d at 1148—and expressly declined to "overrule" that case. Pet. App. 12a; *see* Pet. App. 5a (denying petition for rehearing en banc). *Bhagat*'s rule was the basis for the judgment below, remains binding in future Ninth Circuit cases, and conflicts directly with two other circuits' law. Granting review in this case will enable this Court to resolve whether, contra *Bhagat*, § 1505 carries a nexus requirement on which the jury must be instructed—precisely the Question Presented.

II. The Requirement Of A Nexus Instruction Under § 1505 Is A Legal Question Suitable For This Court's Resolution.

The Government is also wrong that the Petition presents a "factbound issue" about "whether the instructions here *adequately conveyed* a nexus requirement." Opp. 7 (emphasis added). The argument misrepresents the decision below; misunderstands the nexus requirement; and in any event fails to avoid a square conflict with cases that require a nexus instruction without any case-specific determination that such an instruction is called for.

A. To begin with, the Government repeats the same mistake addressed above: It forgets that the district court and Ninth Circuit expressly reaffirmed *Bhagat*, and thus categorically rejected the need for a nexus instruction for § 1505. The district court rejected Mr. Sullivan's proposed instruction entirely, holding that any instruction requiring the jury to find a nexus would be contrary to *Bhagat*. Pet. App. 46a-53a. That is why its instructions did not contain a single word informing the jury that it must find a nexus before it could convict under § 1505. Pet. App. 68a-69a. And the Ninth Circuit reaffirmed *Bhagat* wholesale in upholding those instructions. The Government's argument is therefore based on a false premise. The Petition does not, and could not, present a factbound question about whether jury instructions adequately conveyed the nexus requirement, because the Ninth Circuit's erroneous holding in *Bhagat* foreclosed the district court from even trying.

The Government is similarly wrong that Mr. Sullivan insisted on jury instructions formulated to his exact specifications. Opp. 8. Mr. Sullivan requested a basic charge that the jury must find a nexus between his conduct and the FTC proceeding; he did not seek to "define 'nexus'" with some case-specific degree of granularity. Pet. App. 11a. The Government is correct that, in Mr. Sullivan's view, there must be "an express instruction" on the nexus, Opp. 8, but that is not a fact-specific quibble about the instruction's formulation. It is a request consistent with *Arthur Andersen*, where this Court rejected an instruction that "led the jury to believe that it did not have to find *any* nexus" between the defendant's conduct "and any particular proceeding." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 697, 707 (2005). This Petition presents the same type of legal question resolved there.

B. The Government claims the issue here is "fact-bound" based on the Ninth Circuit's observation that this case "involved only one proceeding, of which the defendant was indisputably aware." Opp. 7 (quoting Pet. App. 14a). But this argument just miscasts the nexus requirement by erroneously suggesting that it is satisfied by something else entirely—mere awareness of a proceeding, rather than a causal link. As Mr. Sullivan explained, Pet. 20, the awareness-of-a-proceeding requirement is distinct from and in addition to this Court's "natural and probable effect" nexus as established in *United States v. Aguilar*, 515 U.S. 593 (1995). The same is true for the Government's suggestion that the jury's finding of "intent" obviates the need for a nexus instruction. Opp. 7-8, 10. The nexus requirement is not about intent; it is essentially a requirement of *proximate cause*, and cases like *Aguilar*

and *Fowler v. United States*, 563 U.S. 668, 674 (2011), make perfectly clear that intent and likely effects are two distinct issues. Pet. 21-22.

The Government cannot avoid review of the Question Presented by conflating the nexus requirement with other statutory elements and claiming on that basis that a nexus instruction is unnecessary. And as the then-Solicitor General explained to this Court, that separate "nexus requirement" is a "paradigmatic constraint" that "ensure[s] that obstruction statutes don't sweep too broadly"—not a requirement of mere awareness of a proceeding or intent. Tr. of Oral Argument 58-59, 71, *Fischer v. United States*, No. 23-5572 (Apr. 16, 2024). If anything, the Government's own confusion about what a nexus requires only confirms why this Court's review is essential.

C. Last, the Government abandons its "fact-bound" pretense by arguing that even if § 1505 carries an independent nexus requirement on which a jury must be instructed, that requirement "was apparent by 'implication'" in the jury instructions on § 1505's other elements. Opp. 8 (quoting Pet. App. 14a). As a matter of common sense, this is hard to take seriously. There is an acknowledged circuit split on whether § 1505 even *has* a nexus requirement. The Government argued to the district court that no such requirement exists, only to later change its position. And yet now the Government says the requirement it resisted tooth-and-nail in order to obtain this conviction was really implicit to the jury all along. That a jury would somehow discern an implicit nexus requirement on which the Government itself cannot make up its mind is implausible. What the

Government is really arguing is that a jury does not need to hear about or make a separate nexus finding at all.

The Government's nexus-by-implication argument is thus not an argument against certiorari. After all, if the Government were right that the nexus requirement is implicitly subsumed by instructions on the other statutory elements of § 1505, it would *never* be necessary to give a separate nexus instruction—which gets us right back to *Bhagat*'s holding that the Government concedes is erroneous.

As the Petition explains (at 10-13, 16-17), where a criminal obstruction statute contains a nexus requirement, as § 1505 does, the jury must be expressly instructed on that requirement. Otherwise, the nexus requirement would have no practical meaning, as the jury would not be told that it is an indispensable requirement for a conviction and would have no way of discerning that requirement on its own.

Hence *Arthur Andersen*'s reversal, noted above, of a conviction where the instructions "led the jury to believe that it did not have to find *any* nexus." 544 U.S at 707-08. Hence *Marinello v. United States*, 584 U.S. 1, 5 (2018), where this Court reversed and remanded jury instructions that erroneously omitted the relevant nexus requirement. And hence the Second Circuit in *United States v. Quattrone*—in square conflict with the decision below—which reversed jury instructions that "eviscerated the nexus requirement" in part because they did not properly instruct the jury that it must find that the defendant's actions "are likely to affect ... the proceeding." 441 F.3d 153, 178-79 & n.24

(2d Cir. 2006). None of these cases even hints that a nexus requirement might somehow be "implicit" in the other statutory elements.

Nor, for that matter, do *Arthur Andersen*, *Marinello*, and *Quattrone* suggest that whether an explicit nexus instruction is necessary is a question to be evaluated on the facts of a given case. The Government invokes (Opp. 8) the Eighth Circuit's decision in *United States v. White Horse*, but that case only further supports the point that an express nexus instruction is necessary. *White Horse* held that where a nexus instruction is "not … 'technically perfect'" it can still be "faithful to Supreme Court precedent" if it "capture[s] the gist" of the nexus requirement. 35 F.4th 1119, 1121-23 (8th Cir.), *cert. denied*, 143 S. Ct. 283 (2022). Here the Government resisted and the district court refused to give any nexus instruction at all.

The Government resists all of this by suggesting that *Arthur Andersen*, *Marinello*, and *Quattrone* "do not call into question ... the specific Section 1505 instructions in this case." Opp. 8. It does not explain why. If the Government is making a factual distinction—that the precise errors in those cases are "not the same" as the error "present here," Opp. 8-9—that would be true only in the trivial sense that the precise deficiency in jury instructions varied case to case. Some (like *Arthur Andersen*) had no nexus instruction at all; some (like *Quattrone*) made the attempt but misstated the requirement. All of the cases stand for the proposition that a jury must be properly informed on the nexus requirement in order to return a valid obstruction-of-justice verdict.

If instead the Government is making the anodyne point that some of the cases involved different obstruction-of-justice statutes, that argument cannot deal with *Quattrone*—a § 1505 prosecution that reversed a conviction for improperly instructing the jury on the nexus requirement. More broadly, the Government provides no support for the claim that other federal obstruction statutes carry a nexus requirement *and* require a nexus instruction, but § 1505 requires the former without the latter. *Marinello* rejected a nearly identical argument, holding that cases involving various federal criminal obstruction provisions were "highly instructive for use as a guide" in interpreting different but similar obstruction statutes. 584 U.S. at 12; *see* Pet. 19.

In the end, all of the Government's arguments are just old tricks for making a disagreement on a divisive question of law look case specific. None of this overcomes a basic reality: If this case were prosecuted in the Second or Seventh Circuits, § 1505 would have a nexus requirement and the jury would have been instructed on it. The opposite occurred in Mr. Sullivan's case.

III. The Ninth Circuit's Error Is Not Harmless.

The Ninth Circuit expressly declined to reach the Government's harmless-error argument, Pet. App. 14a, and this Court need not reach it either. The Government nonetheless urges this Court to deny the Petition on that basis, claiming "overwhelming evidence of a nexus." Opp. 9. It makes no such showing.

The Government contends that Mr. Sullivan's conduct "was akin to [a] cover-up," pointing to the Bug Bounty payment and non-disclosure agreement. Opp. 9-10. Even the district court rejected that argument: "The NDA argument that the Government makes, I think, doesn't really fly. *That wasn't an act of a cover-up*. That was part of the ability to solve the problem, in my view." CA App. 263 (emphasis added); *see* Pet. 8.

The Government next lists evidence going to Mr. Sullivan's intent. Opp. 10. But as noted earlier, *supra* 5-6, the Government confuses intent with the entirely distinct question of whether intended conduct would have the natural and probable effect of obstructing the proceedings (and that Mr. Sullivan knew of that likely effect). *See Aguilar*, 515 U.S. at 611 (Scalia, J., concurring in part and dissenting in part) (noting that the "'nexus' requirement sounds like" a question of intent "but is in reality quite different" because it imposes a separate requirement for conviction "even when intent to obstruct … is otherwise clear").

The Government also omits the most salient evidence relating to the nexus requirement: the FTC never once during the course of its investigation asked Uber anything about its Bug Bounty program or the more than 100 prior incidents resolved through it, CA App. 1281, 2007; Pet. 7, 24, and acknowledged at trial that "[t]he bug bounty program wasn't particularly relevant to what" it was investigating, CA App. 1281; Pet. 23-24. Mr. Sullivan could hardly be faulted for coming to the same conclusion when considering whether non-disclosure of the November 2016 Bug Bounty incident would have a natural and probable

effect on the FTC proceedings. (The same, of course, is true for the 31 other people at Uber who were also aware of the November 2016 incident, including its then-CEO and in-house counsel responsible for the FTC proceedings. Pet. 7, 24.)[1]

At a minimum, the evidence is debatable, meaning the Government cannot meet its burden 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). And in all events, that question is beside the point here: the Ninth Circuit declined to reach the harmless error argument, and this Court can do the same.

IV. The Government's Speculation That Courts Might Self-Correct Their Jury Instructions Is Baseless.

There is no merit to the Government's last-ditch speculation that "courts may well provide more specific nexus instructions ... in future cases" because of the "government's revised position" in this case. Opp. 11. The argument is little more than a plea to just let this one erroneous criminal conviction slide on the promise that somehow every future prosecutor and court in the Ninth Circuit will do better next time. *But*

[1] The Government points to the Ninth Circuit's rejection of Mr. Sullivan's sufficiency-of-the-evidence challenge and its observation that "a 'rational trier of fact' could have found that there was a nexus." Opp. 5-6 (quoting Pet. App. 14a n.3). But "the harmless-error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry." *United States v. Lane*, 474 U.S. 438, 450 n.13 (1986).

see Marinello, 584 U.S. at 11 (declining to "rely upon prosecutorial discretion to narrow the statute's scope").

The Government's conjecture is also implausible. The Ninth Circuit did not adopt the Government's revised position, *supra* 3, and there is no reason to think that district courts in that Circuit will follow the Government's (non-binding) Rule 28(j) letter rather than binding circuit precedent. It is now more than two years since the Government filed that letter, but the Ninth Circuit's Model Criminal Jury Instructions for § 1505 continue to omit any nexus instructions and note (citing Mr. Sullivan's case and *Bhagat*) that "[t]he Ninth Circuit has held that there is no need to supplement the above instruction with a 'nexus' element."[2] The court has revised its Model Instructions multiple times in the intervening years,[3] but its § 1505 instructions remain the same. There is no basis for believing it will change in the future.

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[2] Ninth Circuit's Manual of Model Criminal Jury Instructions, Obstruction of Justice, www3.ce9.uscourts.gov/jury-instructions/node/1235 (revised Mar. 2026).

[3] Ninth Circuit's Criminal Jury Instructions Revisions www3.ce9.uscourts.gov/jury-instructions/node/1186 (last updated Dec. 2025).

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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