IN THE SUPREME COURT OF THE UNITED STATES

24A181

EGHBAL SAFFARINIA (A/K/A/ EDDIE SAFFARINIA),

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY IN SUPPORT OF EMERGENCY APPLICATION TO RECALL AND STAY MANDATE PENDING DISPOSITION OF CERTIORARI PETITION

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The government does not defend the D.C. Circuit's reliance on a case this Court has overturned. It ignores the D.C. Circuit's failure to analyze § 1519's text, context, and structure as this Court's precedents demand. It nowhere denies that overbroad interpretations of criminal obstruction statutes present questions of great import. Instead, the government attempts to rewrite the decision below, attacks strawmen, and makes nonsense arguments about the relief Saffarinia would receive in the event of reversal. This Court is sufficiently likely to grant review and reverse. And reversal would require vacatur of Saffarinia's sentence—all of it—and resentencing or (at minimum) a new trial on the § 1519 counts. The mandate having issued on August 23 (before the government filed its response), this Court should recall and stay the mandate to permit Saffarinia the opportunity

to "obtain a writ of certiorari" and seek reversal of the D.C. Circuit's decision without having to report to prison to serve a sentence that is likely to be overturned. 28 U.S.C. §2101(f); see, *e.g.*, *Harrington* v. *Purdue Pharma L.P.*, 144 S. Ct. 44 (2023) (mem.) (recalling and staying mandate); *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 5 (2018) (mem.) (same).

I. SAFFARINIA'S APPLICATION SATISFIES GOVERNING REQUIREMENTS

By statute, this Court may stay the mandate "[i]n *any case*" subject to its review "to enable the party aggrieved to obtain a writ of certiorari." 28 U.S.C. §2101(f) (emphasis added). That applies in criminal cases, including where, as here, a lower court has already granted bail pending appeal under 18 U.S.C. §3143(b). See *McDonnell* v. *United States*, 576 U.S. 1091 (2015) (mem.) (staying mandate); *United States* v. *McDonnell*, No. 15-4019, ECF No. 39 (4th Cir. Jan. 26, 2015) (granting release).

The government responds with the novel argument that §3143(b) "displace[s]" the "general" stay standard in criminal cases if a stay would continue bail already granted by a lower court. Opp. 13. The government never raised that argument when opposing Saffarinia's motion to stay the mandate below. And the argument lacks merit. Section §3143(b) establishes standards for bail pending appeal in the first instance; it explains what "the judicial officer" entertaining bail motions must do. Thus, bail orders under §3143(b) must be accompanied by specific judicial "findings" and subject to specific statutory conditions "in accordance

with" § 3142. 18 U.S.C. § 3143(b). But nothing in § 3143(b) purports to override *this Court's* usual authority to *stay an appellate mandate* under § 2101(f). A stay of the mandate can in effect extend the duration of the defendant's release pending appeal. But a *stay* of the mandate is not itself an order granting bail. Nor does this Court need to, as the government supposes, enter *its own* § 3143(b) release order. In *McDonnell*, for example, this Court simply stayed the mandate—it nowhere mentioned § 3143(b) or that provision's requisite findings and conditions. The government's interpretation of § 3143(b) cannot be reconciled with that order, *especially* given that, when "the applicant" in *McDonnell* argued for § 3143 relief "in the [a]lternative," Opp. 13 n.3, this Court applied its ordinary stay standard instead.[1]

Regardless, the "general" stay standard and § 3143(b) are not meaningfully different. Saffarinia's application satisfies both. Staying the mandate requires "'a reasonable probability'" of certiorari being granted, "'a fair prospect'" of reversal, and irreparable harm. *Maryland* v. *King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers). That subsumes § 3143(b)'s requirement of a "substantial question of law * * * likely to result in" reversal, a new trial, or a sentence without prison time or for less than the appeal's duration. 18 U.S.C. § 3143(b)(1)(B). Saffarinia's application addresses those considerations and explains why they entitle

[1] *Morison* v. *United States*, 486 U.S. 1306 (1988) (Rehnquist, C.J., in chambers), does not say § 3143(b) displaces the mandate-stay standard. *Morison* addressed an application under § 3143(b); it said nothing about staying the mandate.

him to relief. See Appl. 16-37 (certiorari and reversal); Appl. 35, 37-38 (new trial and sentence vacatur).

II. THIS COURT IS LIKELY TO GRANT CERTIORARI AND REVERSE

A. The D.C. Circuit's Decision Conflicts with this Court's Precedents

The government does not *even try* to defend the D.C. Circuit's stubborn reliance on its prior decision in *Fischer* even after this Court overturned that decision. The government does not dispute that this Court's precedents required the D.C. Circuit to "'exercise[] restraint in assessing the reach of'" §1519, and to consult text, structure, and interpretive canons in doing so. *Fischer* v. *United States*, 144 S. Ct. 2176, 2189 (2024). Yet the government nowhere suggests the decision below actually follows any of those edicts. And the government relegates the D.C. Circuit's interpretive touchstone—§1519's legislative "purpose" and "history," Appl. Ex. B, Op. at 10-11—to an apologetic footnote, Opp. 19 n.5. The arguments the government does raise come nowhere close to reconciling the D.C. Circuit's decision with this Court's precedent.

1. The government's attempt to distinguish *Marinello* v. *United States,* 584 U.S. 1 (2018), fares no better than the D.C. Circuit's. The government does not dispute that "due administration" and "proper administration" are synonymous. See Appl. 17-19. It urges that "proper administration" can encompass ordinary form review, when "due administration" does not, because *Marinello*'s reading of "due administration" was influenced by "textual and contextual features" not

present in §1519. Opp. 17-18. That underscores rather than ameliorates the error below. While Saffarinia catalogued the textual and contextual features of §1519 that demand a narrow reading of "proper administration of any matter," the D.C. Circuit mentioned none of them, invoking policy and legislative history instead. See, *e.g.*, Appl. 20-31.

Trying to do what the decision below does not, the government invokes the precise canons of construction the D.C. Circuit eschewed. It urges that §1519's reference to "investigation[s]" confirms that ordinary-course form review qualifies as "administration" of an agency "matter" in §1519. Opp. 18-19. The government argues that, because "investigations" supposedly do not require formality, the "proper administration of any matter" should not either. Opp. 19. But "investigations" are targeted, and adversarial, in ways that routine form review is not. No one would say that every executive, legislative, and judicial branch official who must submit financial disclosure forms is "under investigation" on an annual basis simply because those forms were submitted and reviewed. The government urges that review of financial disclosure forms "do[es] not lack whatever degree of formality might be required." Opp. 19-20. But it makes no attempt to distinguish that supposed level of formality from the formality of the "routine, day-to-day work carried out in the ordinary course by the IRS, such as the review of tax returns" that *Marinello* found insufficient. 584 U.S. at 13. The mere fact that there are

more taxpayers than there are federal employees who file Form 278, Opp. 18, cannot be the difference-maker. [2]

2. The government denies its reading of § 1519 would effectively swallow § 1001 and a host of other, less-punitive laws. Section 1001 and "most of those [other] laws," the government says, do not "require obstructive intent." Opp. 20. But the government posits no plausible scenario where a defendant could "willfully" violate § 1001—make a false statement material to a federal matter—without *also* intending to "impede, obstruct, or influence" that matter. Appl. 24. Nor does it matter that § 1519 concerns "falsifying 'records, documents,' and the like," where other statutes reach oral statements. Opp. 20 (brackets omitted). Complete over-

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[2] Implying harmlessness, the government suggests that Saffarinia's convictions would stand even if *Marinello* governs. Opp. 18. In the government's view, accepting *Marinello* would import a "nexus" requirement into § 1519, requiring that each falsification act be somehow related to a pending or foreseeable federal proceeding. 584 U.S. at 13-14. Neither the jury instructions nor the D.C. Circuit's decision applied any such requirement. And the government misses the point. Unlike the statute in *Marinello*, § 1519 expressly requires a nexus of sorts already—in the form of specific "*intent* to impede, obstruct, or influence" the "proper administration" of an actual, pending, or "contemplat[ed]" federal matter. 18 U.S.C. § 1519 (emphasis added). The question here is whether Saffarinia's convictions must be vacated because the jury, improperly instructed on the meaning of "proper administration" of a matter, could have convicted him without finding legally sufficient criminal intent. See Appl. 35 & n.10. Whether evidence might have shown a *separate* "nexus" between Saffarinia's conduct and the federal activity is irrelevant—the *intent* element must be satisfied. And the idea that § 1519 perhaps should have a nexus requirement underscores the need for review. Every court of appeals to consider whether § 1519 has an additional nexus requirement has rejected the idea—but none questions the intent requirement. See, *e.g.*, *United States* v. *Scott*, 979 F.3d 986, 992 (2d Cir. 2020); *United States* v. *Kernell*, 667 F.3d 746, 754-756 (6th Cir. 2012); *United States* v. *Moyer*, 674 F.3d 192, 209 (3d Cir. 2012); *United States* v. *Yielding*, 657 F.3d 688, 712 (8th Cir. 2011).

lap is unnecessary. That the D.C. Circuit's expansive reading of §1519 "largely obviate[s]" other provisions, particularly those "with far lower maximum sentences," is enough. *Fischer*, 144 S. Ct. at 2187 & n.2.

The "inevitabl[e]" partial overlap of some criminal statutes, see Opp. 20 (citing *Fischer*, 144 S. Ct. at 2189), is no answer. As this Court recently explained, a "'construction that creates substantially less [overlap] is better than a construction that creates substantially more.'" *Fischer*, 144 S. Ct. at 2189 (quoting *United States* v. *Fischer*, 64 F.4th 329, 374 (D.C. Cir. 2023) (Katsas, J., dissenting)). A supposed desire to "clos[e] loopholes in preexisting provisions," Opp. 20, is no answer either. Calling the lower boundary on the statute's textual scope a "loophole" begs the question. Rigorous analysis of text, context, and structure—the analysis absent from the decision below—is how one answers it.

B. The Government's Attempts To Rewrite the D.C. Circuit's Decision Fail

Unable to defend the D.C. Circuit's decision on its own terms, the government spends pages discoursing on the differences between "filekeeping" and "fish," attempting to rewrite the D.C. Circuit's opinion in narrow terms the D.C. Circuit disclaimed, and seeking refuge in dated opinions from other courts—decisions that did not address the issue here (and would be wrong under this Court's cases if they had decided the issue).

Citing *Yates* v. *United States*, 574 U.S. 528 (2015), the government argues §1519 had "'financial-fraud mooring'" and was "'closely associated with filekeeping,'" bringing "falsified financial-disclosure forms"—unlike the "fish" in *Yates*—"at or near the statute's core." Opp. 14-15. But this case concerns a different element. It does not concern the "record, document, or tangible object" requirement at issue in *Yates*. It concerns whether, under §1519's *specific-intent* requirement, ordinary-course review and processing of routine forms qualifies as "proper administration of [a] matter." Under this Court's precedents, it does not. See pp. 4-7, *supra*.

Recognizing that the rules of statutory construction foreclose the D.C. Circuit's contrary analysis below, the government tries to rewrite the D.C. Circuit's decision. The D.C. Circuit's decision could not have "turned solely on an erroneously broad definition of 'proper administration,'" the government says, because the court "construed the statutory text as a whole" and "did not isolate the 'proper administration' term." Opp. 16. Not so. The D.C. Circuit expressly addressed "the construction of the *distinct phrase* 'proper administration.'" Appl. Ex. B, Op. at 11 (emphasis added). It deemed *Marinello* "not persua[sive]" as to that phrase's interpretation. *Ibid.* That defiance of *Marinello*—based on a lower-court precedent that this Court overturned—warrants review.[3]

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[3] Neither the D.C. Circuit nor the government below offered argument or explanation for how ordinary-course review of ethics forms could alternatively qualify as

The government attempts to reframe the D.C. Circuit's decision as limiting § 1519 to cases where defendants seek to obstruct "proceedings" that "follow" review of paperwork. Opp. 14, 19. The government notes that the decision below, at one point, indicated that the forms here were "'subject to further investigation by' government agencies" after review. Opp. 16. But the D.C. Circuit rejected subsequent investigation as a limit on § 1519's scope. Answering Saffarinia's argument that § 1519 excludes mere "form-review," the D.C. Circuit replied: "There is *no such limitation* in Section 1519." Appl. Ex. B., Op. at 10 (emphasis added). If any such limit existed, the court said, Congress would have expressly so stated in the statutory text. Appl. Ex. B, Op. at 10 (citing *Fischer*, 64 F.4th at 344). But see *Fischer*, 144 S. Ct. at 2189 (rejecting that mode of analysis as backward and demanding that "[i]f Congress wanted to authorize such penalties for *any* conduct that delays or influences a proceeding in *any* way, it would have said so"); Appl. 20-21.

Based on that construction of § 1519, and that construction alone, the court of appeals found sufficient evidence of intent to obstruct "proper administration of [HUD's] Forms 278 review," Appl. Ex. B, Op. at 17, *without regard to* any subsequent proceeding. Indeed, the D.C. Circuit had to rest on the forms alone: The court acknowledged that the verdict could have been "predicated * * * *just on*

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an "investigation" under § 1519, see Gov't C.A. Br. 19-21; Appl. Ex. B, Op. at 9-12, even though Saffarinia directly presented the argument that it could not qualify, Saffarinia C.A. Br. 49-50. See Saffarinia C.A. Reply 14.

the basis of the evidence of HUD-OGE review." *Id.* at 14 (emphasis added); see Appl. 9 & n.3. And there has never been any dispute that a legal flaw in that basis for Saffarinia's conviction would require vacatur of Saffarinia's § 1519 convictions. Appl. 35 (citing *McDonnell* v. *United States*, 579 U.S. 550, 579-580 (2016)).[4]

The government's contention that the D.C. Circuit's decision below is in "full accord" with the 8th, 9th, and 11th Circuits, Opp. 15-16, does not advance its cause. If that were true, it would just make this Court's review more urgent. The government's position is that it can now prosecute obstruction of routine administrative procedures, threatening 20-year prison terms, not only in D.C., but across 21 other States and Territories. See Appl. 31-36. Substantively, those cases add no support to the D.C. Circuit's reasoning. All precede *Fischer*. Two precede *Marinello* and *Yates*. And none conducts the required textual, contextual, or structural analysis of § 1519's "proper administration" language, let alone holds that routine procedures fall within its scope.[5]

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[4] It is far from clear that the jury could have found intent to obstruct *subsequent* proceedings. The indictment and jury instructions were limited to proceedings within the jurisdiction of HUD, OGE, or both. Appl. Ex. B, Op. at 14. But the only formal investigative activity after form review in this case was performed by other agencies in an investigation arising from circumstances wholly independent from HUD's and OGE's review of Saffarinia's disclosure forms. See *ibid.*

[5] *United States* v. *Cisneros*, 825 F. App'x 429, 434 (9th Cir. 2020) (mem.) (addressing targeted security-clearance "investigation or inquiry"); *United States* v. *Benton*, 890 F.3d 697, 711 (8th Cir. 2018) (assessing whether report-filing was within agency "jurisdiction," not whether it was "administration"); *United States* v. *Taohim*, 817 F.3d 1215, 1222 (11th Cir. 2013) (per curiam) (addressing a "Coast

C. The Interpretation of § 1519 Is Critically Important

The government's discussion of importance is limited to the conclusory assertion that the issues here are not "sufficiently weighty" to merit review. Opp. 21. But the decision below threatens 20-year sentences for someone who misrepresents her identity when signing for certified mail or a job applicant who intentionally fibs on his résumé when seeking federal employment. To achieve that expansionist reading of § 1519, moreover, the D.C. Circuit and the government must run roughshod over vital protections for individual liberty, including structural separation-of-powers principles and fair-warning principles like the rule of lenity. See Appl. 28-30. And the government wholly ignores case after case—including *Fischer* and *Yates*—where this Court granted review, even absent a circuit conflict, to correct similarly expansive interpretations of criminal laws. Appl. 33-34 & n.9. Such interpretations place dangerous "power in the hands of * * * prosecutor[s]" to leverage 20-year felony statutes like § 1519 in plea bargaining, pressuring defendants to plead guilty on lesser offenses (as the government tried to do here). *Marinello*, 584 U.S. at 11; see Appl. 32-33 & n.8, 36.

The government dismisses the threats of over-criminalization, arbitrary enforcement, and coercive plea bargaining here because "innocuous mistakes" are not "knowing falsification" under § 1519. Opp. 20. But "[i]t goes without saying

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Guard[ ] investigation"); *Yielding*, 657 F.3d at 715-716 (holding evidence of contemplated "federal investigation" sufficient).

that matters of intent are for the jury"—they do not stop prosecutors from bringing charges or threatening long prison terms to coerce guilty pleas. *McCormick* v. *United States*, 500 U.S. 257, 270 (1991). And the issue is not criminalizing mistakes. It is about, for example, the student who knowingly signs his roommate's name to accept a certified letter or who deliberately embellishes his résumé when applying for a government post. Those are the "hardened criminals" who could face decades in prison under the D.C. Circuit's reading of § 1519. This Court—in *Fischer*, *Marinello*, *Yates*, and elsewhere—has repeatedly stepped in to correct overbroad readings of statutes that "criminalize a broad swath of prosaic conduct." *Fischer*, 144 S. Ct. at 2189. Those precedents protect Saffarinia and other citizens no less than they benefit January 6 rioters and non-compliant fishermen.

III. Reversal Would Result In Vacatur Of Saffarinia's Sentence On All Counts And A New Trial On The § 1519 Counts

Without a stay, Saffarinia will spend time in prison based on § 1519 convictions that this Court is likely to vacate. The government does not dispute serving unnecessary prison time is irreparable harm. Appl. 37. But it urges this Court's intervention is not warranted because, even if the § 1519 convictions were vacated, Saffarinia would remain subject to "concurrent sentences" for the § 1001 convictions. Opp. 22.

The theory is frivolous. First, reversal of the § 1519 convictions would vacate Saffarinia's sentence on *all* counts (even if the § 1519 convictions were subject to retrial). Courts "imposing a sentence on one count of conviction * * * consider sentences imposed on other counts." *Dean* v. *United States*, 581 U.S. 62, 67 (2017); see also *id.* at 68 (rejecting argument that district courts should independently calculate the term of imprisonment for each individual offense); 18 U.S.C. § 3553(a) (requiring sentencing courts to consider circumstances of the offense).

Second, recognizing that principle, the district court expressly stated that, absent the § 1519 convictions, it "would likely impose a different (and shorter) sentence." Appl. Ex. F, Bail Order at 4; see Opp. 8. The § 1519 convictions, the district court said, were "driving" the sentence and, without them, it "would be a much different situation." C.A. App. 2573:21-2574:7, 2576:19-2577:5; see C.A. App. 2585:10-12 (sentence of "more than 6 months" "reflect[ed]" district court's "view of the severity of the obstruction offenses"). The government concedes as much. Opp. 8 (acknowledging district court would impose a "shorter" sentence in absence of § 1519 convictions).

Absent the § 1519 convictions, Saffarinia likely would serve no time at all. Saffarinia's § 1001 guidelines range was 0-6 months. Appl. 37-38. And most first-time offenders convicted of only § 1001 charges receive a non-custodial sentence. *Id.* at 38 & n.13; see generally U.S. Sentencing Comm'n, Statistical Information Packet for Fiscal Year 2022, Table 6 (showing nearly 60% of defendants convicted

of fraud-related offenses receive no prison time if eligible). Indeed, the district court's bail order found that, if Saffarinia were to "*begin[]*" serving a prison sentence, that would likely result in "unnecessary jail time" if his obstruction counts were reversed. Appl. Ex. F, Bail Order at 4 (emphasis added). That necessarily implies that reversal on § 1519 would "likely result in * * * a sentence not including a term of imprisonment." *Ibid.* (citing 18 U.S.C. § 3143(b)).

Indeed, if the district court were of the view that reversal of the § 1519 counts would result in a "reduced" sentence (as the government seems to think), the court would have been required to "order [Saffarinia's] detention terminated at the expiration of the likely reduced sentence." 18 U.S.C. § 3143(b)(1). But it ordered full release instead.[6] Saffarinia should not be required to serve time—and potentially complete his sentence—for an improper conviction before this Court has the opportunity to review his petition for a writ of certiorari, pass upon it, and issue a decision on the merits following full briefing. A stay is warranted.

CONCLUSION

Saffarinia thus respectfully requests that this Court recall and stay the mandate pending disposition of his certiorari petition.

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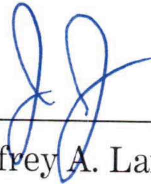
[6] The court's additional statement that the sentence would be "different (and shorter)," Appl. Ex. F, Bail Order at 4; see Opp. 24, is consistent with the idea that a non-custodial sentence is likely. A term of zero months' imprisonment is, indeed, *shorter* than a sentence of one-year-and-one-day. And the other district court statement the government invokes, Opp. 23-24, preceded the bail order.

August 2024

Respectfully submitted,



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