No. 24A712

# In the Supreme Court of the United States

STEVEN AIELLO, ET AL., APPLICANTS

*v.*

UNITED STATES OF AMERICA

**RESPONSE IN OPPOSITION TO THE APPLICATION FOR A STAY OF THE MANDATE ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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## PARTIES TO THE PROCEEDING

Applicants (defendants-appellants below) are Steven Aiello, Louis Ciminelli, Joseph Gerardi, and Alain Kaloyeros. Respondent (appellee below) is the United States of America. Peter Galbraith Kelly, Jr., Michael Laipple, Joseph Percoco, and Kevin Schuler (defendants in the district court) also qualify as parties under Rule 12.6 of the Rules of this Court.

## ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

*United States* v. *Kaloyeros*, No. 16-cr-776-VEC-2 (Dec. 11, 2018)

*United States* v. *Aiello*, No. 16-cr-776-VEC-4 (Dec. 7, 2018)

*United States* v. *Gerardi*, No. 16-cr-776-VEC-5 (Dec. 6, 2018)

*United States* v. *Ciminelli*, No. 16-cr-776-VEC-6 (Dec. 3, 2018)

United States Court of Appeals (2d Cir.):

*United States* v. *Percoco*, No. 18-2990, 18-3710, 18-3712, 18-3715, 18-3850 (Jan. 17, 2025) (order denying stay of mandate)

*United States* v. *Percoco*, Nos. 18-2990, 18-3710, 18-3712, 18-3715, 18-3850 (Sept. 23, 2024) (judgment on remand)

*United States* v. *Percoco*, Nos. 18-2990, 18-3710, 18-3712, 18-3715, 18-3850, 19-1272 (Sept. 8, 2021) (judgment affirming convictions)

United States Supreme Court:

*Aiello* v. *United States*, No. 21-1161 (May 22, 2023)

*Kaloyeros* v. *United States*, No. 21-1169 (May 22, 2023)

*Ciminelli* v. *United States*, No. 21-1170 (May 11, 2023)

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The Acting Solicitor General, on behalf of the United States, respectfully submits this response in opposition to the application for a stay of the mandate issued by the United States Court of Appeals for the Second Circuit.

Applicants perpetuated a scheme to obtain more than $850 million in taxpayer-funded construction contracts through material misrepresentations and false or fraudulent pretenses. A jury convicted applicants of wire fraud and wire-fraud conspiracy under a "right to control" theory—a "longstanding" theory of liability in the Second Circuit, under which "a defendant is guilty of wire fraud if he schemes to deprive the victim of 'potentially valuable economic information' 'necessary to make discretionary economic decisions.'" *Ciminelli* v. *United States*, 598 U.S. 306, 308-309 (2023) (citation omitted). On direct appeal, the Second Circuit determined that the trial evidence was sufficient to convict applicants under that theory.

This Court, however, reversed applicants' convictions, holding that the right-to-control theory is not a valid basis for wire-fraud liability. And although the government had argued that the trial evidence was sufficient to uphold applicants' con-

victions under a traditional property-fraud theory, the Court declined to undertake that analysis, explaining that "apply[ing]" the evidence "to the elements of a *different* wire fraud theory" was the "function * * * of a jury." 598 U.S. at 316-317.

Without addressing "the Government's ability to retry [applicant Ciminelli] on the theory that he conspired to obtain, and did in fact obtain, by fraud, a traditional form of property, viz., valuable contracts," 598 U.S. at 317-318 (Alito, J., concurring), this Court remanded the case to the Second Circuit for further proceedings. And on remand, the Second Circuit sent the case back to the district court for a new trial in which the jury would be properly instructed on the elements of wire fraud, as elucidated by this Court in *Ciminelli*.

Applicants now argue that it was a violation of the Double Jeopardy Clause of the Fifth Amendment for the court of appeals to order a retrial. They are mistaken. It has "long been settled" that the Double Jeopardy Clause "does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside * * * because of some error in the proceedings leading to conviction." *Lockhart* v. *Nelson*, 488 U.S. 33, 38 (1988). Such errors include when the trial court applied the wrong legal standard or misinstructed the jury—which is what occurred here.

Applicants nonetheless attempt to situate their case within a narrow "exception" to that "general rule," *Lockhart*, 488 U.S. at 39, under which the Double Jeopardy Clause bars re-prosecution when an appellate court determines that the evidence presented at trial was insufficient to sustain the jury's verdict. See *Burks* v. *United States*, 437 U.S. 1, 18 (1978). But the *Burks* exception rests on the proposition that an appellate ruling tantamount to a judgment of acquittal is necessary to terminate jeopardy. The *Burks* exception is thus limited to situations where the trial evidence was insufficient as measured against *the standards on which the jury was*

*charged*. Only then is an appellate finding of insufficient evidence the equivalent of an acquittal at trial capable of terminating jeopardy.

By contrast, when a defendant's conviction is reversed because of an intervening change in applicable law (as here), no such finding has been made, and jeopardy has not terminated. Permitting retrial under these circumstances "'is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed,'" because the government is not "seeking a second bite at the apple but a *first* bite under the right legal test." *United States* v. *Houston*, 792 F.3d 663, 670 (6th Cir. 2015) (citation omitted). That is why no court of appeals has adopted applicants' view of what the Double Jeopardy Clause requires in this situation. To the contrary, ten circuits have issued decisions rejecting it. This Court has previously denied review of similar claims and should do so again.

Applicants instead invoke alleged disagreement in the lower courts regarding a different issue: whether, when a defendant raises a trial-error claim alongside a claim that the evidence was insufficient to convict *under the legal standard employed at trial*, the court of appeals must resolve the sufficiency claim first. But this case does not implicate any disagreement on that point, because the Second Circuit already determined that the evidence was sufficient to convict applicants under the right-to-control theory. In all events, applicants' case would be a poor vehicle for exploring how the Double Jeopardy Clause applies to a change-in-law scenario, not least because the government would prevail if the Second Circuit were to conduct the additional analysis that applicants insist upon. As the government previously maintained before this Court and again on remand, the existing trial record is more than sufficient to convict applicants on the theory that they perpetuated a fraud to obtain a traditional form of property—namely, multi-million-dollar contracts.

Nor can applicants show that the equities counsel in favor of this Court granting extraordinary relief at this juncture. Because this wire-fraud prosecution may implicate the question presented in *Kousisis* v. *United States*, No. 23-909 (argued Dec. 9, 2024), the government will not seek a retrial prior to this Court's issuance of that decision, and the government also does not anticipate substantial motion practice before then. All a stay would accomplish is to preclude any pretrial matters from commencing in the district court in the "few short months" it will take to resolve applicants' forthcoming petition for a writ of certiorari (Appl. 30). Moreover, even if the Court were to take up the double-jeopardy issue in this case and reverse, the consequence would simply be another remand to the Second Circuit for review of the sufficiency of the existing trial evidence—which, as explained, would in turn lead to the same result of a retrial. Ultimately, this Court's intervention would just prolong applicants' criminal proceedings further.

Applicants are entitled to have a jury determine whether the government can meet its burden of proof under the wire-fraud statute as interpreted by this Court, see 598 U.S. at 317. But they are not entitled to prevent a correctly instructed jury from rendering a just verdict. The application to stay the mandate of the Second Circuit should be denied.

**STATEMENT**

Following a jury trial in the United States District Court for the Southern District of New York, applicants were convicted of wire fraud, in violation of 18 U.S.C. 1343, and conspiring to commit wire fraud, in violation of 18 U.S.C. 1349. Appl. Ex. 1, at 3. Applicant Gerardi was also convicted of making false statements to federal officers, in violation of 18 U.S.C. 1001(a)(2). Appl. Ex. 1, at 2. Each applicant was sentenced to a term of imprisonment, and the court of appeals affirmed. 13 F.4th

158. This Court granted applicant Ciminelli's petition for a writ of certiorari, reversed, and remanded the case to the court of appeals. 598 U.S. 306. In light of that decision, the Court also granted the other applicants' petitions for writs of certiorari, vacated, and remanded. 143 S. Ct. 2491; 143 S. Ct. 2490. On remand, the court of appeals vacated applicants' convictions for wire fraud and wire-fraud conspiracy, affirmed Gerardi's false-statements conviction, and remanded to the district court for further proceedings. Appl. Ex. 1.

**A. Applicants' Fraud Scheme**

This case arises from a conspiracy to steer taxpayer-funded construction contracts worth hundreds of millions of dollars to companies owned by applicants Ciminelli, Aiello, and Gerardi. 598 U.S. at 309-310; 13 F.4th at 164-165. In 2012, New York Governor Andrew Cuomo "launched an initiative to develop the greater Buffalo area through the investment of $1 billion in taxpayer funds; the project became known as the 'Buffalo Billion' initiative." 13 F.4th at 164-165 (citation omitted). The nonprofit Fort Schuyler Management Corporation ran the Buffalo Billion initiative, and applicant Kaloyeros, a member of Fort Schuyler's board of directors, "was in charge of developing project proposals" for the initiative. 598 U.S. at 309. Kaloyeros secured that role by making monthly payments of "$25,000 in state funds" to Todd Howe, "a lobbyist who had deep ties to the Cuomo administration." *Ibid.* Howe also had arrangements with Ciminelli, Aiello, and Gerardi, who paid him for help obtaining state-funded construction contracts for Ciminelli's company, LPCiminelli, and Aiello and Gerardi's company, COR Development. *Id.* at 310; see 13 F.4th at 165.

"Howe and Kaloyeros devised a scheme whereby Kaloyeros would tailor Fort Schuyler's bid process to smooth the way" for Ciminelli, Aiello, and Gerardi "to receive major Buffalo Billion contracts." 598 U.S. at 310. First, Kaloyeros successfully con-

vinced Fort Schuyler to establish a request-for-proposal (RFP) process "for selecting 'preferred developers' that would be given the first opportunity to negotiate with Fort Schuyler for specific projects." *Ibid.* Kaloyeros and Howe then worked to develop RFPs that incorporated specific "qualifications or attributes" of LPCiminelli and COR Development "so that the bidding process would favor the selection of these companies as preferred developers." 13 F.4th at 166. For example, "the final Syracuse RFP contained a fifteen-year experience requirement, which directly matched the experience of COR Development, along with a requirement that the preferred developer use a particular type of software (which COR Development also used)." *Ibid.* And "the final Buffalo RFP contained specifications unique to LPCiminelli, including 'over 50 years of proven experience' in the field"—a specification Kaloyeros modified when an investigative reporter started asking questions—as well as "a requirement that the preferred developer be headquartered in Buffalo, and additional language lifted directly from talking points provided to Kaloyeros from Ciminelli" and an LPCiminelli executive. *Id.* at 166-167 (brackets and citation omitted).

The plan worked. Fort Schuyler chose COR Development as the preferred developer for Syracuse, and it chose LPCiminelli and another company as the preferred developers for Buffalo. 13 F.4th at 167. Contracts worth about $105 million were awarded to COR Development, and the "the marquee $750 million 'Riverbend project' in Buffalo" went to LPCiminelli. 598 U.S. at 310; see 13 F.4th at 168.

**B. Prior Proceedings**

1. In 2017, a grand jury in the Southern District of New York charged applicants and other defendants with wire fraud and conspiring to commit wire fraud in connection with the bid-rigging for the Buffalo Billion projects. 13 F.4th at 168. The grand jury also charged Gerardi with making false statements to federal officers,

along with several other counts not directly relevant here (including charges for honest-services fraud that this Court would later address in *Percoco* v. *United States*, 598 U.S. 319 (2023)). See 13 F.4th at 168; *United States* v. *Percoco*, 13 F.4th 180, 186-187 (2d Cir. 2021), rev'd and remanded, 598 U.S. 319.

The wire-fraud statute prohibits using the interstate wires for "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1343. At the time of the indictment here, the Second Circuit had for nearly 30 years approved a "right to control" theory of fraud, under which "a defendant is guilty of wire fraud if he schemes to deprive the victim of 'potentially valuable economic information' 'necessary to make discretionary economic decisions.'" 598 U.S. at 309 (citation omitted); see *id.* at 308 (describing the right-to-control theory as "longstanding"); *United States* v. *Wallach*, 935 F.2d 445, 461-464 (2d Cir. 1991) (accepting and developing the theory). The superseding indictment, in turn, alleged that applicants committed wire fraud by "devis[ing] a scheme to defraud Fort Schuyler of its right to control its assets, and thereby expos[ing] Fort Schuyler to risk of economic harm, by representing to Fort Schuyler that the bidding processes" for the Buffalo Billion projects were "fair, open, and competitive, when in truth and in fact" they were not. 21-1170 J.A. 31-34. And at applicants' trial on the wire-fraud counts, the district court instructed the jury that the relevant "property" targeted by a wire-fraud scheme can include "intangible interests such as the right to control the use of one's assets" and that "[t]he victim's right to control the use of its assets is injured when it is deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets." *Id.* at 41.

The jury found applicants guilty on all counts. 13 F.4th at 169. The district

court sentenced Ciminelli to 28 months of imprisonment, Gerardi to 30 months of imprisonment, Aiello to 36 months of imprisonment, and Kaloyeros to 42 months of imprisonment. *Ibid.*

2. On direct appeal, the Second Circuit rejected applicants' argument that the evidence was insufficient to convict them under the right-to-control theory of wire fraud. 13 F.4th at 170-173. The Second Circuit also rejected applicants' argument "that the district court erred in instructing the jury on the right-to-control theory of wire fraud." *Id.* at 174; see *id.* at 174-176. The court noted that the relevant instructions "clearly explained the right-to-control theory" and "closely tracked the language set forth in [the court's] prior opinions." *Id.* at 175.

3. Applicants filed petitions for writs of certiorari, and this Court granted applicant Ciminelli's petition and reversed. 598 U.S. 306.

a. The Court rejected the right-to-control theory of wire fraud, reasoning that "the federal fraud statutes criminalize only schemes to deprive people of traditional property interests," 598 U.S. at 309, and that the "'economic information'" withheld in a right-to-control scheme "is not a traditional property interest," *ibid.* (citation omitted). Concluding that the right-to-control theory was inconsistent with the fraud statutes' text, structure, and history, the Court held that the theory "cannot form the basis for a conviction under the federal fraud statutes." *Id.* at 316. The Court observed that in Ciminelli's case, the government had relied on the right-to-control theory "[t]hroughout the grand jury proceedings, trial, and appeal"—including in defeating a motion to dismiss the indictment and in successfully moving to exclude certain evidence—and that the government's "indictment and trial strategy rested solely on that theory." *Id.* at 310-311. And the Court noted that the district court's jury instructions had likewise incorporated the right-to-control concept. See

*id.* at 311.

The Court also rejected the government's argument that Ciminelli's convictions should be affirmed "on the alternative ground that the evidence was sufficient to establish wire fraud under a traditional property-fraud theory"—namely, that he conspired to obtain, and did obtain, valuable contracts. 598 U.S. at 316. In the Court's view, that request effectively asked the Court to apply the facts of the case "to the elements of a *different* wire fraud theory in the first instance." *Id.* at 316-317. The Court made clear that such an undertaking was the "function" of "a jury." *Id.* at 317 (citing *McCormick* v. *United States*, 500 U.S. 257, 270-271 n.8 (1991)). The Court instead reversed the judgment of conviction and "remand[ed] the case for further proceedings consistent with this opinion." *Ibid.*

b. Justice Alito filed a concurring opinion. 598 U.S. at 317-318. He agreed with the Court's rejection of the right-to-control theory and explained that because "[t]he jury instructions embody that theory, * * * this error, unless harmless, requires the reversal of the judgment below." *Id.* at 317. Justice Alito also explained that he did not understand the Court's opinion to "address fact-specific issues on remedy outside the question presented," including "the Government's ability to retry [applicant Ciminelli] on the theory that he conspired to obtain, and did in fact obtain, by fraud, a traditional form of property, viz., valuable contracts." *Id.* at 317-318.

c. In light of its disposition in *Ciminelli*, this Court granted the other applicants' petitions for certiorari, vacated the decisions in their cases, and remanded to the court of appeals for further proceedings. 143 S. Ct. 2491; 143 S. Ct. 2490.

3. On remand, the court of appeals vacated applicants' wire-fraud and wire-fraud-conspiracy convictions, affirmed Gerardi's false-statements conviction, and remanded to the district court for further proceedings. Appl. Ex. 1, at 33-34.

And as relevant here, the court of appeals rejected applicants' contention that they were entitled to outright judgments of acquittal on the wire-fraud counts rather than vacatur and remand for retrial. *Id.* at 13-23.

The court of appeals first explained that the Double Jeopardy Clause of the Fifth Amendment did not preclude the government from retrying applicants on a traditional property-fraud theory. Appl. Ex. 1, at 14-17. The court observed that double jeopardy does not bar retrial when a defendant's convictions are vacated for "trial error," as opposed to a vacatur resulting from the government's "'fail[ure] to prove its case'" that would constitute an acquittal for double-jeopardy purposes. *Id.* at 15; see *id.* at 15-16 ("vacating a conviction for trial error 'implies nothing with respect to the guilt or innocence of the defendant' and instead is simply 'a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect'") (quoting *Burks* v. *United States*, 437 U.S. 1, 15 (1978)). The court explained that "a change in the governing law after trial"—including when "the Supreme Court invalidates a legal theory that formed the basis for a conviction at trial"—gives rise to a trial error for which retrial is permissible. *Id.* at 16. And the court further explained that because the error here—the invalidation of the right-to-control theory that had "long been accepted" in the Second Circuit and was employed at trial—was of that type, double jeopardy did not bar a retrial. *Id.* at 17.

The court of appeals declined to conduct its "own sufficiency review of the evidence based on a traditional property theory of wire fraud" before remanding for retrial. Appl. Ex. 1, at 17; see *id.* at 17-23. The court explained that although it typically reviews sufficiency claims before resolving other claims of trial error, "[e]ngaging in [applicants' requested] sufficiency review at this stage" would, in light of this Court's post-trial rejection of the prosecution's original legal theory, "'deny the gov-

ernment an opportunity to present its evidence' under the correct legal standard." *Id.* at 20 (quoting *United States* v. *Bruno*, 661 F.3d 733, 743 (2d Cir. 2011)); see *id.* at 22. The court observed that "[o]ther circuit courts have * * * declined to review the sufficiency of the [existing trial] evidence in these circumstances before remanding for further proceedings." *Id.* at 18-19 (citing decisions from the Sixth, Ninth, and D.C. Circuits). And the court of appeals emphasized that its approach was in line with this Court's own review of this case, observing that "[a]s a practical matter, it is unclear how [the court of appeals] could or would evaluate the sufficiency of the evidence of the wire fraud count and wire fraud conspiracy convictions based on a wire fraud theory that the government did not present to the jury." *Id.* at 21; see *id.* at 21-22 (citing and quoting 598 U.S. at 316-317). Finally, the court rejected applicants' contention, presented for the first time in their remand reply brief, that the court actually had no discretion on the matter and was "*require[d]*" to conduct such a sufficiency review before ordering retrial. *Id.* at 20 n.3; see *id.* at 22 n.4.

4. The court of appeals denied applicants' petition for rehearing and their motion to stay the court's mandate pending the filing and disposition of a petition for a writ of certiorari. Appl. Exs. 2-3. On January 17, 2025, applicants filed an application in this Court renewing their request for a stay.

**ARGUMENT**

Applicants seeking a stay pending the filing and disposition of a petition for a writ of certiorari must show (1) a "reasonable probability" that this Court would grant certiorari, (2) a "fair prospect" that the Court would reverse, (3) a "likelihood that irreparable harm will result from the denial of a stay," and (4) that the equities otherwise justify relief. *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam); see *Maryland* v. *King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (brack-

ets and citation omitted). Applicants have failed to satisfy any of those requirements. They have presented this Court with no sound reason to grant review. They ask the Court to reverse the decision below based on a legal argument that no court of appeals has accepted—and that would not make a difference in the outcome of their case. Nor is a retrial imminent, and it would harm the public interest to further delay, in this long-running case, the limited proceedings that might occur in the few months it would take to consider a petition for certiorari in the normal course. The application for a stay of the mandate should be denied.

## I. CERTIORARI AND REVERSAL ARE UNWARRANTED AND UNLIKELY

Applicants are incorrect (Appl. 16) that the Court is likely to grant review and hold that the "Double Jeopardy Clause required the Second Circuit to evaluate the sufficiency of the evidence in the trial record as judged by the legal requirements set forth in *Ciminelli*" before the court could order a new trial. Applicants' contention that a court of appeals must review the sufficiency of the evidence presented at trial under a legal standard not adopted until after trial lacks merit; no court of appeals has endorsed it; and this Court has denied petitions raising similar double-jeopardy claims. See *Ford* v. *United States*, 571 U.S. 832 (2013) (No. 12-9746); *McWane* v. *United States*, 555 U.S. 1045 (2008) (No. 08-364); *Huls* v. *United States*, 505 U.S. 1220 (1992) (No. 91-1617); *Davis* v. *United States*, 493 U.S. 923 (1989) (No. 89-67).

### A. Applicants' Legal Argument Lacks Merit

1. "It has long been settled * * * that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction." *Lockhart* v. *Nelson*, 488 U.S. 33, 38 (1988); *Burks* v. *United States*, 437

U.S. 1, 14-15 (1978); see *United States* v. *Ball*, 163 U.S. 662, 672 (1896). This Court has identified only one exception to that rule: in *Burks* v. *United States*, the Court held that the Double Jeopardy Clause bars retrial "when a defendant's conviction is reversed by an appellate court on the sole ground that the evidence was insufficient to sustain the jury's verdict." *Lockhart*, 488 U.S. at 39 (citing *Burks*, 437 U.S. at 18).

That singular exception reflects the principle that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson* v. *United States*, 468 U.S. 317, 325 (1984). "[A]n appellate court's finding of insufficient evidence to convict on appeal from a judgment of conviction is for double jeopardy purposes, the equivalent of an acquittal." *Ibid.* It thus "terminate[s] the initial jeopardy," and the Double Jeopardy Clause prohibits a successive prosecution. *Justices of Boston Mun. Ct.* v. *Lydon*, 466 U.S. 294, 308 (1984). No double-jeopardy bar applies, however, when a defendant's conviction has been set aside based on a successful claim of error in the trial proceedings.

In that circumstance, the defendant remains in "continuing jeopardy" because the proceedings "have not run their full course"; a fundamental prerequisite for application of the Double Jeopardy Clause is not satisfied, and the Clause does not bar retrial. *Price* v. *Georgia*, 398 U.S. 323, 326 (1970); see *Lydon*, 466 U.S. at 308. Accordingly, in *Richardson* v. *United State*s, the Court held that "[r]egardless of the sufficiency of the evidence at [his] first trial," a defendant had "no valid double jeopardy claim" when the trial court had declared a mistrial following a hung jury, because such a ruling "is not an event that terminates the original jeopardy." 468 U.S. at 326. Similarly, in *Justices of Boston Municipal Court* v. *Lydon*, the Court rejected the claim of a defendant who was convicted at a bench trial, invoked a state procedure

allowing for a de novo jury trial, and then argued that the jury trial was barred because the evidence at the bench trial had been insufficient. 466 U.S. at 307. The Court reasoned that the defendant had "fail[ed] to identify any stage of the state proceedings that can be held to have terminated jeopardy," emphasizing the difference between a mere "claim of evidentiary failure" and an actual "legal judgment to that effect." *Id.* at 309.

Applicants are similarly situated to the defendants in *Richardson* and *Lydon*. The Double Jeopardy Clause posed no bar to applicants' retrial in this case because the error identified by the court of appeals and this Court was not "the equivalent of an acquittal." *Richardson*, 468 U.S. at 325. Instead, the error was that "the [trial] court applied the wrong legal standard" and "misinstructed the jury," which are trial errors warranting a new trial. 6 Wayne R. LaFave et al., *Criminal Procedure* § 25.4(b) (4th ed. 2015) (LaFave). Applicants accordingly remained in continuing jeopardy throughout the proceedings in this Court and on remand before the court of appeals, and there is no Fifth Amendment bar to their retrial under the now-clarified standards for wire-fraud liability.

2. Applicants' contrary argument (Appl. 4)—that the Double Jeopardy Clause precludes retrial when the government's trial evidence was sufficient under the law as it existed at the time, but would be insufficient following a post-trial change in controlling law—cannot be squared with this Court's decision in *Lockhart* v. *Nelson*. In *Lockhart*, the Court held that the Double Jeopardy Clause did not forbid retrial of a defendant under a habitual-offender statute where his sentence had been set aside because he had actually received a pardon for one of the convictions purportedly supporting his recidivist enhancement. 488 U.S. at 34-37, 42. By definition, the evidence presented at trial was insufficient to sustain the habitual-offender determination:

the statute required a finding of four prior convictions, but without the irrelevant pardoned conviction, the prosecution had presented only evidence of three. See *id.* at 36.

Rather than prohibit a retrial—or conduct or require an appellate sufficiency review that the prosecution would never satisfy—the Court instead held that when a conviction is reversed because the trial court has erroneously admitted evidence, a new trial is permissible even if the rest of the evidence alone would have been insufficient to sustain the conviction. *Lockhart*, 488 U.S. at 40-42. The Court explained that the "basis for the *Burks* exception to the general rule" of allowing retrial after reversal of a conviction "is that a reversal for insufficiency of the evidence should be treated no differently than a trial court's granting a judgment of acquittal at the close of all the evidence." *Id.* at 41. "A trial court in passing on such a motion considers all of the evidence it has admitted, and to make the analogy complete it must be this same quantum of evidence which is considered by the reviewing court." *Id.* at 41-42.

The Court further reasoned that permitting retrial in such a situation "is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed; rather, it serves the interest of the defendant by affording him an opportunity to 'obtain a fair readjudication of his guilt free from error.'" *Lockhart*, 488 U.S. at 42 (quoting *Burks*, 437 U.S. at 15) (brackets omitted). It also serves "the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *Id.* at 38 (citation omitted). As the Court observed, if the district court had made the correct evidentiary ruling at trial, the prosecutor would have had an opportunity to offer additional available evidence. *Id.* at 42. Thus, al-

lowing retrial "merely recreates the situation" that would have existed if the trial court had ruled correctly. *Ibid.*

The same analysis applies to the situation where, as here, a defendant's conviction is reversed because of an intervening change in applicable law. See Appl. Ex. 1, at 17-20. An accurate analogy to the trial court's ruling on a motion for a judgment of acquittal (see *Burks*, 437 U.S. at 10-11) requires the appellate court to assess the sufficiency of the evidence under the legal framework *applied by the trial court*, not the legal standard that came into effect only after the trial concluded. See *United States* v. *Houston*, 792 F.3d 663, 670 (6th Cir. 2015). As Judge Sutton observed on behalf of the Sixth Circuit, were the rule otherwise, "[courts] would be forced to measure the evidence introduced by the government against a standard it did not know it had to satisfy and potentially prevent it from ever introducing evidence on that element." *Ibid.*; see *United States* v. *Kim*, 65 F.3d 123, 126-127 (9th Cir. 1995) ("We do not examine the sufficiency of evidence of an element that the Government was not required to prove under the law of our circuit at the time of trial because the Government had no reason to introduce such evidence in the first place.").

Moreover, allowing the government to retry the defendant under the correct legal standard "is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed." *Lockhart*, 488 U.S. at 42. "Remanding for retrial in this case does not give the government the opportunity to supply evidence it 'failed' to muster at the first trial," because the government "had no reason to introduce such evidence" under controlling circuit law. *United States* v. *Weems*, 49 F.3d 528, 531 (9th Cir. 1995); see Appl. Ex. 1, at 20. "The government therefore is not being given a second opportunity to prove what it should have proved earlier." *Weems*, 49 F.3d at 531.

3. Applicants nonetheless assert (Appl. 21) that the court of appeals made a

"category mistake" in treating as trial error what applicants labeled a sufficiency claim. But as *Lockhart* illustrates—and the courts of appeals have uniformly recognized—a finding of insufficient evidence is the equivalent of an acquittal for double-jeopardy purposes only if the reviewing court is standing in the shoes of the jury and applying the same standard, to the same evidence, that the jury applied. See, *e.g.*, *United States* v. *Reynoso*, 38 F.4th 1083, 1091 (D.C. Cir. 2022); *United States* v. *Harrington*, 997 F.3d 812, 817 (8th Cir. 2021); *United States* v. *Gonzalez*, 93 F.3d 311, 323 (7th Cir. 1996); *United States* v. *Wacker*, 72 F.3d 1453, 1465 (10th Cir. 1995).

In other words, this is not a *Burks* situation where "the government failed to meet its burden of proof" to the jury, such that a rational jury should have acquitted. See *Reynoso*, 38 F.4th at 1091; see *Burks*, 437 U.S. at 3-4, 11 (making clear that the case was one in which it had been determined "as a matter of law that *the jury* could not properly have returned a verdict of guilty") (emphasis added). It is no answer to say, as applicants insist, that decisions interpreting the elements of a federal statute are "clarifying what the statute '*always* meant.'" Appl. 22 (quoting *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994)). The same could be said of an appellate finding of instructional error, that prosecution evidence was wrongly admitted, or—as in *Lockhart*—that a prior conviction had been pardoned and was thus irrelevant for purposes of a statutory enhancement. In all of those situations, a defendant would presumably contend that the ruling simply enforced the correct meaning of the law or rule applicable at the time of trial, as it should have been enforced then.

Nor is it relevant whether the government purportedly had "notice" that a defendant's claim of legal error might ultimately succeed. Appl. 24; see Appl. 24-25. Carving out such an exception to the general principle allowing for retrial would not be administrable. For one thing, it is unclear what kind of "notice" would suffice. It

is rare for a legal decision to come truly out of left field. Instead, reviewing courts—and certainly this Court—base such pronouncements on interpretations of statutes, precedents, and other legal principles that were available at the time of trial. It makes little sense, and has no sound basis in this Court's precedents, to require the prosecution to prophylactically acquiesce in every plausible legal argument that a defendant makes at trial about the interpretation of a statute (or other matter), or else risk the ability to ever obtain a conviction for a crime that it could prove beyond a reasonable doubt even under the later-adopted standard. See, *e.g.*, *Houston*, 792 F.3d at 666, 668, 670 (remanding true-threat prosecution for new trial based on instructional error in light of this Court's intervening decision in *Elonis* v. *United States*, 575 U.S. 723 (2015), which the Court based on a well-established presumption of mens rea in criminal statutes).

Applicants also rely heavily (Appl. 15, 19-20, 22) on this Court's remand instructions in *McDonnell* v. *United States*, 579 U.S. 550 (2016). There, after determining that a former state governor's convictions for honest-services fraud and Hobbs Act extortion were based on an incorrect definition of "official act," this Court vacated the convictions and remanded for the court of appeals to determine whether there was "sufficient evidence for a jury to convict Governor McDonnell" under the proper official-act definition, and if so, to order "a new trial." *Id.* at 580. The Court additionally stated that if the court of appeals determined that the existing evidence was "insufficient," "the charges must be dismissed." *Ibid.* But *McDonnell* did not say anything about the Double Jeopardy Clause or otherwise convey that the Court's remand instructions in that case were the result of a constitutional imperative. Indeed, the parties' briefs did not address the Double Jeopardy Clause.

And in this case, the Court provided different remand guidance. Emphasizing that the jury had been "charged on the right-to-control theory," the Court declined the government's request to "affirm Ciminelli's convictions on the alternative ground that the evidence was sufficient to establish wire fraud under a traditional property-fraud theory." 598 U.S. at 316-317. Citing cases addressing erroneous jury instructions, the Court explained that were it to do so, it would not only be acting as "a court of first view," but would also usurp the role of a "a jury." *Id.* at 317; see *McCormick* v. *United States*, 500 U.S. 257, 269-271 & n.8 (1991); *Chiarella* v. *United States*, 445 U.S. 222, 236 (1980).

As Justice Alito's concurrence reinforces, the Court did not suggest that the court of appeals must itself conduct sufficiency review under the new standard as a prerequisite to a retrial—let alone that the Double Jeopardy Clause requires that result. 598 U.S. at 317-318 (Alito, J., concurring) ("I do not understand the Court's opinion to address fact-specific issues on remedy * * * including * * * the Government's ability to retry petitioner on the theory that he conspired to obtain, and did in fact obtain, by fraud, a traditional form of property, viz., valuable contracts."). Instead, by framing the key dispute between the parties as akin to (or exactly) instructional error, the Court placed this prosecution in the class of cases in which the Double Jeopardy Clause has long been understood to permit a retrial.[1]

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[1] Applicants note (Appl. 10) that before this Court in *Ciminelli*, the government characterized the case as a sufficiency-of-the-evidence dispute and not one concerning instructional error. But as explained above, the Court appeared to disagree with that understanding. See 598 U.S. at 311, 316-317; *id.* at 317 (Alito, J., concurring) (explaining that because the jury instructions "embody [the right-to-control] theory" there had been reversible error unless the government could demonstrate harmlessness). Regardless, the government did not represent that Ciminelli was asserting a sufficiency-of-the-evidence challenge in the sense relevant to the *Burks* exception. See U.S. Br. at 32 in *Ciminelli*, *supra*; see also *Harrington*, 997 F.3d at 817.

### B. This Court Would Be Unlikely To Grant Certiorari

This Court's standard for granting "extraordinary relief" entails "not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review." *Does 1-3* v. *Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief). "Were the standard otherwise, applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take." *Ibid.* Applicants seeking a stay pending the filing of a petition for certiorari thus must make a "threshold" showing that "the underlying merits issue" will "warrant this Court's review." *Labrador* v. *Poe*, 144 S. Ct. 921, 931 (2024) (Kavanaugh, J., concurring in the grant of stay). Absent a showing that the case satisfies the Court's traditional certiorari standards, the Court "should deny the application and leave the question of interim relief to the court of appeals." *Ibid.* And this case falls short on multiple fronts. The decision below implicates no conflict among courts of appeals, is correct on the merits, and would be an unsuitable vehicle for addressing the question presented.

#### 1. The decision below does not conflict with the decisions of other circuits

Applicants contend (Appl. 28) that this Court will likely grant certiorari to resolve a split in the courts of appeals regarding "whether, consistent with the Double Jeopardy Clause, [courts of appeals] may remand for retrial in a direct appeal without considering a preserved challenge to the sufficiency of the evidence." But as the court of appeals recognized below, its approach to the situation at hand—*i.e.*, where the evidence presented at trial was sufficient under then-prevailing law, but a post-trial development changed the applicable law—was consistent with decisions of its sister circuits. See Appl. Ex. 1, at 18-19.

a. In addition to the Second Circuit, the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have all recognized that when a defendant is convicted under a legal standard that is later deemed erroneous, that is a trial error for which retrial is permissible, not a sufficiency-of-the-evidence problem triggering the *Burks* exception. See, *e.g.*, *United States* v. *Ford*, 703 F.3d 708, 711-712 (4th Cir.), cert. denied, 571 U.S. 832 (2013); *United States* v. *Miller*, 952 F.2d 866, 870-874 (5th Cir.), cert. denied, 505 U.S. 1220 (1992); *Houston*, 792 F.3d at 670 (6th Cir.); *Gonzalez*, 93 F.3d at 322-323 (7th Cir.); *Harrington*, 997 F.3d at 817-819 (8th Cir.); *Weems,* 49 F.3d at 530-531 (9th Cir.); *Wacker*, 72 F.3d at 1465 (10th Cir.); *United States* v. *Robison*, 505 F.3d 1208, 1224-1225 (11th Cir. 2007), cert. denied, 555 U.S. 1045 (2008); *Reynoso*, 38 F.4th at 1090-1091 (D.C. Cir.).

Consistent with the analysis above, see pp. 12-18, *supra*, those courts have recognized that the *Burks* exception applies only when the trial evidence was insufficient under the legal standards actually applied at trial, including any standard later found erroneous. See, *e.g.*, *Robison*, 505 F.3d at 1224-1225 (acquittal not appropriate in Clean Water Act prosecution that proceeded under a definition of "navigable waters" that was later invalidated by *Rapanos* v. *United States*, 547 U.S. 715 (2006)); *Houston*, 792 F.34d at 670. And drawing guidance from this Court's decision in *Lockhart*, those courts have reasoned that "[a]ny insufficiency in the proof was caused by the subsequent change in law * * *, not the government's failure to muster evidence." *Ford*, 703 F.3d at 711 (quoting *United States* v. *Ellyson*, 326 F.3d 522, 533 (4th Cir. 2003)); see, *e.g.*, *Wacker*, 72 F.3d at 1465; *Houston*, 792 F.3d at 670.

In *United States* v. *Harrington*, for example, the Eighth Circuit found that *Burks* did not preclude retrial where this Court's decision in *Burrage* v. *United States*, 571 U.S. 204 (2014), had clarified a "resulting in death" element in a manner that

invalidated the defendant's drug-distribution convictions. *Harrington*, 997 F.3d at 816-819. Reasoning that in such a change-in-law scenario, the "conviction is then set aside not because the government failed to prove its case but because the incorrect instructions allowed the jury to convict under the wrong legal standard," *id.* at 817, the Eighth Circuit explained that a retrial merely gives the government "a first opportunity to prove what it did not need to prove before but needs to prove now," *id.* at 818.

Similarly, in *United States* v. *Reynoso*, the D.C. Circuit considered how to proceed in the aftermath of this Court's decision in *Rehaif* v. *United States*, 588 U.S. 225 (2019), which held that under 18 U.S.C. 922(g), the government must prove the defendant's knowledge of the relevant status (like being a felon) that prohibited him from possessing a firearm. In reviewing a case that had gone to trial before *Rehaif*, Chief Judge Srinivasan explained that "insufficiency of the evidence is not 'the correct way to conceive of' the error," and observed that the Double Jeopardy Clause was no bar to retrial. *Reynoso*, 38 F.4th at 1091 (quoting *United States* v. *Johnson*, 979 F.3d 632, 636 (9th Cir. 2020), cert. denied, 141 S. Ct. 2823 (2021)).

Applicants' only arguably contrary authority (see Appl. 26) is *United States* v. *Barrow*, 109 F.4th 521 (D.C. Cir. 2024). This Court does not grant certiorari to address asserted intra-circuit conflicts, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam), and would have no reason to do so here. In *Barrow*, an intervening circuit decision invalidated the theory underlying the defendant's wire-fraud prosecution, and a panel of the D.C. Circuit concluded that because the trial evidence was insufficient under the new standard, acquittal was appropriate. 109 F.4th at 527-529 & n.3. But the government's appellate brief in *Barrow* did not request the opportunity to retry the defendant, see Gov't C.A. Br. at 18-27, *Barrow*,

*supra* (No. 21-308), or even mention the D.C. Circuit's earlier decision in *Reynoso*, see *Barrow*, 109 F.4th at 527 n.3. The *Barrow* court nonetheless recognized the tension between its decision and *Reynoso*. See *id.* at 527 n.3. To "alleviate[]" "any concerns regarding *Reynoso*'s applicability"—including whether the *Barrow* defendant's claim should instead have been understood "as a claim of trial error"—the court noted that the government had failed to cite *Reynoso* and therefore "forfeit[ed]" such arguments. *Ibid.*

b. Applicants claim an "acknowledged 'circuit split' on the * * * question whether appellate courts are obligated to conduct sufficiency-of-evidence review before remanding for retrial." Appl. 25 (quoting *Hoffler* v. *Bezio*, 726 F.3d 144, 161 (2d Cir. 2013), and citing LaFave § 25.4(c)). But that asserted conflict does not address the legal question presented here. Any disagreement identified in those authorities concerns whether appellate courts, faced with multiple challenges to a conviction, must first adjudicate a claim that the evidence was insufficient under *the law applied at trial* before assessing other claims of error. See *Hoffler*, 726 F.3d at 160-162; LaFave § 25.4(c).[2] Applicants here, however, are requesting sufficiency review under *new* law—a distinct question, and applicants identify no decision of another court of appeals establishing that the circuit would decide it in applicants' favor.

Applicants thus have not identified an acknowledged circuit split on whether, in a change-of-law situation like this, the Double Jeopardy Clause requires a court of appeals to first assess the trial evidence under a legal standard different from what was applied at trial. Cf. Appl. Ex. l, at 18 (court of appeals noting that its decision

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[2] Even on that question, "the federal 'courts of appeals . . . are unanimous in concluding that such review is warranted . . . as a matter of prudent policy.'" LaFave § 25.4(c) (quoting *Hoffler*, 726 F.3d at 161-162). That includes the Second Circuit. See *Hoffler*, 726 F.3d at 161-162; see also Appl. Ex. l, at 18.

was consistent with that of other circuit courts); *Ford*, 703 F.3d at 711 ("Other circuits considering this issue agree that where a reviewing court determines that the evidence presented at trial has been rendered insufficient only by a post-trial change in law, double jeopardy concerns do not preclude the government from retrying the defendant."); LaFave § 25.4(c) (noting that "lower courts have held that if the defendant challenges both the sufficiency of the evidence and the jury instructions as omitting or inaccurately describing an element of the offense, a reviewing court must review sufficiency using the instruction actually given, even if erroneous," without mentioning disagreement on this point).

There is no dispute that the Second Circuit already evaluated the sufficiency of the evidence at applicants' trial under the circuit law applicable at the time. See 13 F.4th 158, 170-173 (finding that the evidence was sufficient under the right-to-control theory). Applicants' case thus does not implicate the asserted conflict they invoke.

**2. This case would be a poor vehicle for review of any double-jeopardy issues**

Certiorari is unlikely for the further reason that even if there were a meaningful divergence in authority regarding the application of double-jeopardy principles when there has been change in law, two independent features of applicants' case make clear that it would not be a suitable vehicle for resolving that issue.

a. As discussed, in deciding how to proceed on remand, the Second Circuit was not writing on a blank slate. See pp. 18-19, *supra*. To the contrary, this Court did not appear to view this case as one in which the continuing dispute between the parties was one of sufficiency, such that appellate review under the Court's announced standard was warranted or appropriate. See 598 U.S. at 316-317. And in

light of this Court's discussion regarding the proper role of an "[a]ppellate court[]," *id.* at 317 (quoting *McCormick*, 500 U.S. at 270 n.8), it is understandable that the court of appeals declined to evaluate the sufficiency of the existing trial evidence against a legal standard that was not expressly presented to the jury. Appl. Ex. 1, at 21-22 (flagging and block-quoting the relevant *Ciminelli* passage); see *id.* at 21 (similarly observing that "it is unclear how this Court [the Second Circuit] could or would evaluate the sufficiency of the evidence of the wire fraud count and wire fraud conspiracy convictions based on a wire fraud theory that the government did not present to the jury").

Applicants now argue that it was unconstitutional for the Second Circuit to not undertake that analysis. Even if so, but see pp. 12-19, *supra*, the court of appeals could hardly be faulted for its apparent understanding of this Court's opinion in this very case. At minimum, the possibility that the Second Circuit was influenced by that portion of the *Ciminelli* opinion to forgo the type of sufficiency analysis that this Court had criticized would complicate the presentation of the Double Jeopardy issue applicants would have the Court resolve.

b. In addition, applicants' case is an unlikely candidate for certiorari because resolution of the question presented in their favor would lead to the same result: a remand for retrial. Again, applicants insist (Appl. 16) that the court of appeals was required to first evaluate the sufficiency of the existing trial record against a traditional theory of property fraud. As the United States maintained before this Court and again on remand before the Second Circuit, the existing record is more than sufficient. See U.S. Br. at 31-43, *Ciminelli*, *supra* (No. 21-1170); Gov't Remand Br. 20-41; Gov't C.A. Stay Opp. 9-10, 18; see also *Musacchio* v. *United States*, 577 U.S. 237, 243 (2016) (a sufficiency challenge must be rejected if "viewing the evidence

in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt") (citation omitted).

In particular, the evidence presented at trial conclusively showed that: (1) the object of applicants' scheme was to obtain hundreds of millions of dollars in contract funds from Fort Schuyler, see, *e.g.*, C.A. App. 1012, 1038-1039, 1172; see also Gov't C.A. Remand Br. 23-25; (2) applicants' misrepresentations to Fort Schuyler about the RFP process were material, inasmuch as the jury necessarily found that they were "capable of influencing * * * Fort Schuyler" and "affect[ed] the victim's assessment of the benefits or burdens of a transaction, or relate[d] to the quality of goods or services received or the economic risks of the transaction," C.A. App. 1554 (jury instructions); see Gov't C.A. Remand Br. 36-37; and (3) applicants possessed an intent to defraud Fort Schuyler by obtaining those valuable contracts through false and misleading statements, see Gov't C.A. Remand Br. 25-26, 29-30.[3]

As a result, even a decision by this Court that accepted applicants' mistaken view that sufficiency review must precede retrial would not change the outcome—making a grant of certiorari an inappropriate expenditure of this Court's resources.

## II. APPLICANTS ALSO FAIL TO SATISFY THE OTHER STAY FACTORS

Applicants' request for a stay should also fail because they cannot show irreparable harm or that the balance of the equities favors the extraordinary relief that they seek. None of the applicants is currently incarcerated. They assert (Appl. 28) that absent a stay pending this Court's disposition of their forthcoming petition for certiorari, "this case will return to the district court for a second trial." Applicants

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[3] Although the wire-fraud statute does not require the government to prove that applicants' scheme contemplated tangible economic harm to Fort Schuyler, the evidence was also sufficient to show that as well. See Gov't Remand Br. 37-41.

themselves anticipate, however, that this Court's resolution of their petition will only take "a few short months." Appl. 30. They do not show any likelihood that the case will actually proceed to trial in that short period.

The United States has acknowledged that this Court's forthcoming decision in *Kousisis* v. *United States*, No. 23-909 (argued Dec. 9, 2024), may contain reasoning that could bear on the jury instructions in the retrial in this case, as appellants emphasized before the court of appeals (Pet. C.A. Stay Mot. 19-20). See Gov't Stay Opp. 17. *Kousisis* presents the question whether wire fraud and wire-fraud conspiracy require the government to prove a net pecuniary loss to the victim. Pet. Br. at i, *Kousisis*, *supra* (No. 23-909). When applicant Ciminelli's case was previously before this Court, and again on remand, applicants argued that such a requirement exists. See Pet. Reply Br. 6-22, *Ciminelli*, *supra* (No. 21-1170); Pet. C.A. Remand Br. 19-32. For that reason, the United States will not seek a trial prior to the issuance of the *Kousisis* decision. And the government also does not anticipate substantial motion practice before that time.

This Court does not need to intervene and grant extraordinary relief to prevent *any* pretrial steps from commencing in the district court. This Court has observed that the rights conferred by the Double Jeopardy Clause "would be significantly undermined if appellate review of double jeopardy claims were postponed *until after conviction and sentence*." *Abney* v. *United States*, 431 U.S. 651, 660 (1977) (emphasis added); see Appl. 29. But that does not in itself warrant extraordinary relief from all pretrial proceedings when a double-jeopardy claim is denied. No one is proposing a lengthy postponement here, and applicants' rights would hardly be "eviscerate[d]" (Appl. 29 n.3) by "a few short months" (Appl. 30) of whatever pretrial preparations would be appropriate while awaiting the Court's decision in *Kousisis*. Applicants

likewise cannot support their extraordinary request by invoking (Appl. 29) this Court's observation in *Coinbase, Inc.* v. *Bielski*, 599 U.S. 736 (2023), that it "makes no sense for a trial to go forward while the court of appeals cogitates on whether there should be one." *Id.* at 741 (citation omitted). Here, "the court of appeals" did "cogitate" on that question and resolved it against applicants; they now intend to seek discretionary review of that determination from this Court, not appeal as of right.

On the other side of the ledger, granting a complete stay of all pretrial proceedings—in a case that this Court is unlikely to review, see pp. 12-26, *supra*—would harm the United States and the public. See *Nken* v. *Holder*, 556 U.S. 418, 435 (2009) (recognizing that the United States' interest and the public interest "merge"). The United States suffers an "injury to its sovereignty arising from violation of its laws," which a criminal prosecution seeks to remedy. *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). That interest in prompt criminal enforcement is no less significant in the context of individual prosecutions. Cf. *Nken*, 556 U.S. at 435-436 (explaining that "the Government's role as the respondent in every [immigration] removal proceeding does not make the public interest in each individual [case] negligible"). Nor is that interest any less weighty where, as here, the government originally proceeded under a theory of prosecution that was later deemed legally, but not factually, faulty.

Moreover, even if the Court were to take up this case and reverse, the consequence would be another remand to the court of appeals for review of the sufficiency of the existing record evidence—which would in turn produce the same ultimate result of a retrial. See pp. 25-26, *supra*. When all is said and done, this Court's review would simply prolong applicants' criminal proceedings further. Such unnecessary delay is unwarranted.

## CONCLUSION

The application for a stay of the mandate should be denied.

Respectfully submitted.

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