IN THE
SUPREME COURT OF THE UNITED STATES

No. 24A712

LOUIS CIMINELLI, STEVEN AIELLO, JOSEPH GERARDI, ALAIN KALOYEROS AKA DR. K,

Applicants,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF APPLICATION FOR STAY OF MANDATE OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT PENDING DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

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The government's submission only heightens the need for a stay of the Second Circuit's mandate. The government stakes out and defends an extreme position: that when a criminal defendant challenging the sufficiency of the evidence against him obtains a ruling from this Court admonishing that the government and the lower courts are dead wrong about the meaning of a statute, the sufficiency review on remand should proceed based on the incorrect and repudiated understanding, rather than on this Court's construction of the statute. That rule, giving the government a do-over and denying the defendant the benefit of the correct construction that he procured, is one that only the government could love. It is also flat wrong. It violates the Double Jeopardy Clause and the fundamental principles that this Court does not "change the law," but clarifies what it has always meant, and that a criminal defendant always gets the benefit of clarified law on direct appeal. It also makes the remand instructions in *McDonnell* incoherent and implicates a circuit split. All of that demonstrates that there is (more than) a reasonable probability of certiorari and a fair prospect of reversal in this case. Because a stay is necessary to avoid the irreparable injury of a second jeopardy and the public interest strongly favors relief, it is plain that a stay of the mandate is warranted pending the filing and disposition of Applicants' forthcoming petition for certiorari.

But the government's submission accomplishes much more, as it confirms that this Court should in fact grant certiorari and reverse in due course. The parties provide the Court with a stark choice. On the one hand, Applicants offer a world where there are clear and coherent distinctions between trial errors and sufficiency-

of-evidence errors that mirror the distinctions enshrined in Rules 29 and 33; courts never need to apply wrong and outdated law on sufficiency review; and the remand in *McDonnell* made perfect sense and reflected principles that apply to all criminal defendants. On the other hand, the government offers a world where there are different "senses" of sufficiency challenges; the Second Circuit had a duty to apply its own mistaken law on remand notwithstanding this Court's unanimous reversal; and the *McDonnell* remand instructions amounted to an inexplicable one-off gift to Governor McDonnell. That is a stark choice that favors not only a stay of the mandate, but a grant of certiorari and reversal.

I. There Is A Reasonable Probability That The Court Will Grant Certiorari In This Case Again And A Fair Prospect That The Court Will Reverse Again.

The Second Circuit held below that it could remand this case to the district court for a second trial, while bypassing Applicants' preserved challenge to the sufficiency of the existing trial evidence, to avoid measuring that evidence against the statutory requirements that this Court set forth in *Ciminelli*. As Applicants have explained, that holding not only implicates a circuit split, but is plainly inconsistent with this Court's precedent generally and this Court's mandate in *Ciminelli* specifically. *See* Appl.15-28. At a bare minimum, there is both "a reasonable probability" that the Court will grant certiorari in this case again and a "fair prospect" that the Court will reverse the Second Circuit again. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). The government's counterarguments are meritless and underscore the need for a stay and plenary review.

1. The government first asserts that "certiorari and reversal are unwarranted and unlikely" because the Second Circuit's decision below is "correct on the merits." U.S.Br.12, 20 (capitalization altered). According to the government, in the sufficiency context, the Double Jeopardy Clause precludes retrial *only* when the trial evidence is "insufficient as measured against *the standards on which the jury was charged*"—and here, the Second Circuit "determined that the trial evidence was sufficient to convict applicants under" the "'right to control' theory" that this Court repudiated (and the Solicitor General refused to even defend) in *Ciminelli*. U.S.Br.1-3 (citing *Burks v. United States*, 437 U.S. 1 (1978)). But when the "legal standard" is "elucidated" by a higher court "after the trial concluded," the government says, the defendant does not get to enjoy the benefit of that ruling when pressing a preserved sufficiency challenge on appeal, because such legal "clarifi[cations]" transform those preserved sufficiency challenges into claims involving "trial errors," which "warrant[] a new trial" so the government can have a second chance to present a sufficient case under the "new" law. U.S.Br.2, 14, 16.

Like the Second Circuit's decision below, the government's submission is flawed on multiple levels. It erases the fundamental dichotomy between sufficiency-of-evidence errors warranting acquittals (the province of Rule 29) and trial errors warranting new trials (the province of Rule 33)—two different classes of errors that this Court has taken pains to "distinguish[]" to preserve the basic guarantee of the Double Jeopardy Clause, *Burks*, 437 U.S. at 15—and creates a brave new world where there are multiple "sense[s]" of sufficiency review. U.S.Br.19 n.1. But even more

fundamentally, the government misunderstands sufficiency review. Reviewing courts do not (or at least should not) assess the sufficiency of the evidence "standing in the shoes of the jury and applying the same standard, to the same evidence, that the jury applied." *Contra* U.S.Br.17. Indeed, this Court could hardly have said so any clearer: "A reviewing court's … determination on sufficiency review … does *not* rest on how the jury was instructed." *Musacchio v. United States*, 577 U.S. 237, 243 (2016) (emphasis added). Accordingly, if the jury received an "erroneous[] … jury instruction," it has no bearing whatsoever on a court's sufficiency review, as the reviewing court's job is to assess the evidence against the *correct* "elements of the charged crime." *Id.* Notably, the government itself emphasized this very point during the *Ciminelli* proceedings in this Court two years ago. *See, e.g.*, *Ciminelli*.U.S.Br.31 ("In assessing sufficiency challenges, this Court does not consider the jury instructions, but instead simply asks whether the evidence was sufficient to carry the government's burden on each of the 'elements of the charged crime.'" (quoting *Musacchio*, 577 U.S. at 243)).

Determining the correct law that a reviewing court must apply in the sufficiency context is a straightforward exercise: Courts should abide by the "general rule" recognized by this Court that, on "direct appellate review," "an appellate court must apply the law in effect at the time it renders its decision." *Henderson v. United States*, 568 U.S. 266, 269, 271 (2013); *see also Griffith v. Kentucky*, 479 U.S. 314 (1987). The government does not and cannot dispute the existence of this rule, which "has governed '[j]udicial decisions … for near a thousand years,'" *Harper v. Va. Dep't*

of Tax'n, 509 U.S. 86, 94 (1993), and applies even if a judicial decision could be described in some sense as a "new rule" that "constitutes a 'clear break' with the past," *Johnson v. United States*, 520 U.S. 461, 467 (1997). The government further acknowledges the proposition that this Court's "decisions interpreting the elements of a federal statute are 'clarifying what the statute '*always* meant'" since the date of enactment. U.S.Br.17.

Nevertheless, the government dismisses these bedrock principles as "no answer" in this so-called "change in law" context, in which statutes of conviction are clarified "post-trial" while a sufficiency challenge is pending. U.S.Br.17, 24. Of course, no matter how many times the government talks about the law changing, "it is not accurate to say" that a decision from this Court "finally decid[ing] what [a statute] had *always* meant" is a "change[]" in the law. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994). That would be true in any case, and it is particularly true here—where, once the government left the friendly confines of the Second Circuit, it declined to even defend the right-to-control theory before this Court. The simple reality is that the law did not change here. The right-to-control theory was never correct. Applicants took that position in sufficiency challenges at trial and on appeal, and prevailed in this Court. Unless there is sufficient evidence in the first trial record to sustain a conviction under the correct understanding of the law, this case should be over.

That was the clear import of the remand instructions in *McDonnell*, and the government has no coherent explanation for the remand instructions there,

essentially treating them as a one-off gift to Governor McDonnell. As in *Ciminelli*, *McDonnell* elucidated and clarified the understanding of a federal criminal statute—there, the meaning of "official act" in the federal bribery statute. *See* 579 U.S. 550, 567-77 (2016). Far from suggesting that the Fourth Circuit should refrain from applying that clarified legal standard on remand when addressing Governor McDonnell's still-pending sufficiency challenge, the Court directed exactly the opposite: If, in light of the interpretation" of the bribery statute just "adopted" in *McDonnell*, "the court below determines that there is sufficient evidence for a jury to convict Governor McDonnell of committing or agreeing to commit an 'official act,' his case may be set for a new trial," but "[i]f the court instead determines that the evidence is insufficient, the charges against him *must be dismissed*," *id.* at 580 (emphasis added)—so that the government could not have "the proverbial 'second bite at the apple,'" *Burks*, 437 U.S. at 17.

The government does not dispute that, if those remand instructions reflect generally applicable principles, then the Second Circuit erred. The government claims only that nothing in *McDonnell* suggests that the "remand instructions in that case were the result of a constitutional imperative." U.S.Br.18. That reasoning does not appear in the Second Circuit's decision below,[1] and for good reason, as there is no plausible explanation for those instructions except that they reflect a proper

[1] In a footnote, the Second Circuit dismissed *McDonnell* as "inapposite" on the ground that (supposedly unlike the government here vis-à-vis the wire fraud statute) the government in *McDonnell* "had notice that it needed to adduce evidence of an 'official act' at trial." Appl.Ex.1 at 22 n.4. The government does not defend that reasoning; instead, it concedes that "notice"-based concerns are "not" "relevant" or "administrable." U.S.Br.17.

understanding of what should happen in cases like this in order to conform to basic principles of retroactivity and avoid double-jeopardy violations. *See* U.S.Br.2. Indeed, if the remand instructions in *McDonnell* were not an explication of what should generally happen on remand where the Court reverses a criminal conviction and remands for disposition of a preserved sufficiency challenge, then there is no coherent explanation for those instructions. To the extent that the government is intimating that the Court decided to make Governor McDonnell the "chance beneficiary" of a rule that does not apply to other "similarly situated" criminal defendants, such "selective application" would "violate[] basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 322-23. There is no reason to treat the remand instructions as one final gratuity to the Governor.

Presumably recognizing that the Second Circuit's decision is irreconcilable with *McDonnell*, the government shifts to arguing that this Court in *Ciminelli* did not, in fact, view this case as a "sufficiency-of-the-evidence dispute," but rather viewed it as one involving "instructional error," which "has long been understood to permit a retrial." U.S.Br.19 & n.1. The government concedes that such a framing would directly contradict everything that the parties—and the government in particular—told this Court in *Ciminelli*, since both sides "characterized the case as a sufficiency-of-the-evidence dispute and not one concerning instructional error."[2]

[2] The government says that, although it "characterized the case as a sufficiency-of-the-evidence dispute," it "did not represent that Ciminelli was asserting a sufficiency-of-the-evidence challenge in the sense relevant to the *Burks* exception." U.S.Br.19 n.1. That the government's position involves multiple "senses" of sufficiency challenges is all the more reason to reject it.

U.S.Br.19 n.1; *see* Appl.9-10. But the government claims that this Court "appeared to disagree with that understanding," ostensibly because the Court "[c]it[ed] cases addressing erroneous jury instructions" when it "declined the government's request to 'affirm [the] convictions on the alternative ground that the evidence was sufficient to establish wire fraud under a traditional property-fraud theory.'" U.S.Br.19 & n.1 (quoting *Ciminelli v. United States*, 598 U.S. 306, 316-17 (2023)). But merely because the Court declined to *affirm* the convictions based on the government's late-breaking theory does not mean that the sufficiency issue that everyone agreed existed here somehow disappeared. To the contrary, as in *McDonnell*, *Ciminelli* left room for sufficiency review at the appellate level for the court to decide whether—in light of the standard adopted in *Ciminelli*—the evidence in the first trial record sufficed to allow the government to pursue a retrial before a properly instructed jury, or instead whether the evidence came up short and mandated an acquittal. Indeed, that is exactly what this Court had in mind when—after granting a "petition focus[ing] on the sufficiency issue alone," *Ciminelli*.Cert.Reply.3—it repudiated the right-to-control theory, confirmed that the wire fraud statute requires a traditional property-fraud theory, and told the court below to conduct "further proceedings consistent with this opinion." *Ciminelli*, 598 U.S. at 316-17.[3]

Without a coherent explanation for *McDonnell*, the government diverts attention elsewhere, pointing to pre-*McDonnell* decisions like *Richardson v. United*

[3] Instead of looking to *McDonnell* for guidance about the meaning of *Ciminelli*'s remand instructions, the government looks to Justice Alito's concurring opinion in *Ciminelli*. *See* U.S.Br.19 & n.1. But no other Justice joined that opinion.

States, 468 U.S. 317 (1984), *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984), and *Lockhart v. Nelson*, 488 U.S. 33 (1988). None of those decisions advances the ball for the government.[4] *Richardson* simply held that the government can retry a defendant after a hung jury, which this case does not involve. *See* 468 U.S. at 322-23. Furthermore, the *Richardson* Court rooted its holding in the "settled line of cases" going back "160 years" establishing that retrial is permitted when "the jury is unable to agree on a verdict"—a line of precedents with "its own sources and logic." *Id.* at 323-24. *Lydon* addressed Massachusetts' unusual "'two-tier' system for trying minor crimes," which involved a first tier in which the government placed the defendant in "'jeopardy' in only a theoretical sense." 466 U.S. at 296-99, 310. That obviously does not describe Applicants' first trial here, which resulted in punishments that sent Applicants to prison. And *Lockhart* held only that "a reviewing court must consider all of the evidence admitted by the trial court in deciding whether retrial is permissible," even when a trial court "erroneously admitted" evidence. 488 U.S. at 40-41. Applicants have never disputed the point; their sufficiency challenge welcomes all of the evidence admitted at trial, as that evidence comes up far short when measured against the standards articulated in *Ciminelli*.

Indeed, despite the government's cherry-picked quotations, the reasoning of *Lockhart* cuts against the government. *Lockhart* emphasized the Court's distinction

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[4] The government also relies heavily on pre-*McDonnell* appellate decisions, like the Sixth Circuit's decision in *United States v. Houston*, 792 F.3d 663 (6th Cir. 2015). *See* U.S.Br.16. Even before *McDonnell*, Judge Sutton described the notion that appellate courts performing sufficiency review should apply the "wrong" law as "[o]dd[]." *Houston*, 792 F.3d at 670. As *McDonnell* subsequently confirmed, it is not only odd, but incorrect.

in *Burks* between sufficiency challenges (at issue here), and challenges to "ordinary 'trial errors' such as the 'incorrect receipt or rejection of evidence,'" at issue in *Lockhart*, 488 U.S. at 40-41, or jury instruction error, *see Burks*, 437 U.S. at 14-16. In assessing whether retrial would implicate "the sort of governmental oppression at which the Double Jeopardy Clause is aimed," the Court observed that allowing retrial after reversal for evidentiary error "merely recreates the situation that would have been obtained if the trial court" had ruled correctly in the first place—the government could have cured any hole in its case by offering different competent evidence. *Lockhart*, 488 U.S. at 42. By contrast, where the issue is the sufficiency of the government's evidence under the correct understanding of the statutory elements, the trial court's ruling was made after the close of the government's case, and if the evidence was insufficient, acquittal was mandatory under Rule 29(a). Had the trial court ruled correctly, acquittal would have been granted. Requiring sufficiency review after the lower courts' erroneous legal interpretation is corrected would "merely recreate" the result had the court ruled correctly in the first instance. "Because the Double Jeopardy Clause affords the defendant who obtains a judgment of acquittal at the trial level absolute immunity from further prosecution for the same offense, it ought to do the same for the defendant who obtains an appellate determination that the trial court *should* have entered a judgment of acquittal." *Lockhart*, 488 U.S. at 33 (citing *Burks*, 437 U.S. at 10-11, 16). The fact that entitlement to acquittal results from a higher court's determination does not change the result; "to hold otherwise 'would create a purely arbitrary distinction' between

defendants based on the hierarchical level at which the determination was made." *Id.* Protecting defendants' double-jeopardy rights after an erroneous denial of their Rule 29(a) motions thus requires review of their preserved sufficiency challenge on appeal.

In the end, the government invokes fairness concerns, protesting the supposed injustice of measuring the sufficiency of the evidence against the *Ciminelli* standard when it "did not know it had to satisfy" that standard while assembling its evidence in the trial court. U.S.Br.16. That assertion contradicts the government's concession that "notice" is irrelevant. U.S.Br.17. It is also hard to take seriously when the government's original indictments invoked the traditional property-fraud theory that *Ciminelli* eventually confirmed, *see* 598 U.S. at 310 n.1, but the government then abandoned and forswore that theory because it thought that it could ease its evidentiary burden by proceeding exclusively under the right-to-control theory, *see* Appl.7-8. Regardless, the government's concerns about fairness to the prosecution is hardly the animating force behind the Double Jeopardy Clause. As this Court has explained, "where the Double Jeopardy Clause is applicable, its sweep is absolute": "There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." *Burks*, 437 U.S. at 11 n.6. And that constitutional policy is clear: "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Id.* at 11. That perfectly describes what the government proposes to do here. There is nothing unfair

about denying the government a second bite at the apple—especially when it tactically narrowed its indictment. To the contrary, denying that second bite is the *raison d'être* of the Double Jeopardy Clause.

2. There is a reasonable probability of certiorari even apart from a circuit split, as the Second Circuit's decision below is impossible to square with this Court's mandate in *Ciminelli* and the bedrock double-jeopardy principles that it embodies. Regardless, the government also misses the mark in claiming that "[t]he decision below does not conflict with the decisions of other circuits." U.S.Br.20. In reality, the conflict is real and undeniable, further increasing the probability of certiorari (and eventually reversal).

The lower-court conflict is clear from the D.C. Circuit's decision in *United States v. Barrow*, 109 F.4th 521 (D.C. Cir. 2024), alone. As even the government admits, "[i]n *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." U.S.Br.22. That holding is well-nigh the opposite of what the Second Circuit held below, which concluded that intervening legal clarifications produce "trial errors warranting a new trial," not a basis for sufficiency review and acquittals. U.S.Br.14.

The government's effort to resist that conclusion is unavailing. The government observes that its "appellate brief in *Barrow* did not request the opportunity to retry the defendant," U.S.Br.22-23, but it does not explain why that

prosecutorial restraint is missing here. Nor is there any indication that the D.C. Circuit decision rested on the absence of an express retrial request, rather than the application of bedrock principles of retroactivity and double jeopardy. As the government agrees, "'[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,'" which "*prohibits a successive prosecution*." U.S.Br.13 (emphasis added). Thus, given the *Barrow* court's sufficiency analysis, a retrial request would not have moved the needle. The government also theorizes that *Barrow* involves an "intra-circuit conflict" with *United States v. Reynoso*, 38 F.4th 1083 (D.C. Cir. 2022), and that "[t]his Court does not grant certiorari to address" such conflicts. U.S.Br.22. But the *Barrow* court made clear that its decision coexists with *Reynoso*, *see Barrow*, 109 F.4th at 527 n.3, and to state the obvious, a conflict between the Second Circuit and the D.C. Circuit is hardly "intra-circuit."

But the conflict runs much deeper. After all, as the government itself repeatedly emphasizes, several "sister circuits" have taken the Second Circuit's position and have refused to apply clarified legal standards when resolving sufficiency-of-evidence disputes (albeit largely in cases that predate *McDonnell*). U.S.Br.3, 20. Not even those circuits, however, are completely in sync. Some consider their misguided approach to sufficiency review mandatory as a constitutional matter. *See, e.g.*, *United States v. Simpson*, 910 F.2d 154, 159 (4th Cir. 1990); *United States v. Ford*, 703 F.3d 708, 711 (4th Cir. 2013); *Houston*, 792 F.3d at 669-70; *United States v. Weems*, 49 F.3d 528, 530 (9th Cir. 1995); *United States v. Wiles*, 106 F.3d 1516,

1518-19 (10th Cir. 1997); *United States v. Wacker*, 72 F.3d 1453, 1465 (10th Cir. 1995). Others believe that their misguided approach to sufficiency review is simply a matter of discretion. *See, e.g.*, *United States v. Miller*, 952 F.2d 866, 874 (5th Cir. 1992); *United States v. Gonzalez,* 93 F.3d 311, 322-23 (7th Cir. 1996); *United States v. Douglas*, 874 F.2d 1145, 1150 (7th Cir. 1989); *United States v. Robison,* 505 F.3d 1208, 1224 (11th Cir. 2007); *United States v. Bobo*, 419 F.3d 1264, 1268 (11th Cir. 2005).

There is no reason to allow this confusion to fester. There is no disputing that the issue here—how courts should go about conducting sufficiency review after a higher court has clarified what the law has always been—is frequently recurring. Nor is there any disputing that the issue is important, as it concerns the scope of core constitutional protections. Only this Court can bring national uniformity.

3. Lacking compelling arguments on the merits, and unable to refute the circuit split, the government posits that there is not a reasonable probability of certiorari here (and no fair prospect of reversal) because this case supposedly poses two "vehicle" problems. U.S.Br.24. Those problems are illusory.

The first alleged vehicle problem is that the Second Circuit had an "apparent understanding" based on its reading of *Ciminelli* that it could not "evaluate the sufficiency of the existing trial evidence against a legal standard that was not expressly presented to the jury." U.S.Br.24-25. If true, that is just another way of saying that the court below misinterpreted *Ciminelli*, which is a reason in favor of this Court's review. *See* S. Ct. R. 10(c).

The other alleged vehicle problem is that, even if this Court grants review and reverses and therefore orders the Second Circuit to conduct sufficiency review, that court will still "remand for retrial" to the district court because the government claims there is "more than sufficient" evidence in "the existing record" to support of a traditional property-fraud theory. U.S.Br.25-26. But the government's confidence that it will prevail on the sufficiency review that the Second Circuit expressly bypassed is both misplaced and no obstacle in any event. If this Court clarifies that the instructions for further proceedings consistent with its opinion in *Ciminelli* involved the two options laid out in *McDonnell*—and not a third option allowing bypass of sufficiency review entirely—the government can make its case that there is sufficient evidence in the first trial record to support a conviction under *Ciminelli*. But any fair reading of that trial record will lead to the opposite conclusion. After all, having deliberately narrowed its indictment to drop a traditional property-fraud theory and put all its eggs in the right-to-control basket for the purpose of lightening its trial burdens, it would be surprising to find that the trial record serendipitously contained sufficient evidence to sustain the theory the government expressly abandoned. Indeed, even the court below seemed to indicate that the government's evidence here "was rendered insufficient" by *Ciminelli*. Appl.Ex.1 at 16. Perhaps that is why the government so strenuously objects to sufficiency review.

In sum, there is both a reasonable probability of certiorari and a fair prospect of reversal. Nothing in the government's submission demonstrates otherwise.

II. Applicants Will Suffer Irreparable Harm In The Absence Of A Stay, And The Equities Favor A Stay.

The government's arguments regarding the final two stay factors—"a likelihood that irreparable harm will result from the denial of a stay" and the "balance [of] equities," *Hollingsworth*, 558 U.S. at 190 (per curiam)—are no more persuasive. The government acknowledges that, as soon as the Second Circuit's mandate issues, Applicants will have to begin undergoing "pretrial proceedings" and preparations for another criminal trial for the same alleged offenses for which they already stood trial (and served prison time) once before. U.S.Br.27. Those proceedings will involve precisely the sort of "personal strain, public embarrassment, and expense" that the Double Jeopardy Clause is designed to protect against. *Abney v. United States*, 431 U.S. 651, 661 (1977).

Undeterred, the government suggests that Applicants "cannot show irreparable harm" because they would endure those pretrial proceedings only for "a few short months," while the main event will not happen until after this Court issues its decision in *Kousisis v. United States*, No. 23-909 (argued Dec. 9, 2024). U.S.Br.26-27. But if this Court agrees with Applicants' double-jeopardy arguments, these months of proceedings would violate their constitutional rights. The length of time that those violations persist does not matter. As this Court has explained, the "loss" of other constitutional rights "for even minimal periods of time[] unquestionably constitutes irreparable injury." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020). That is equally true of double-jeopardy rights, which is why this Court has long allowed interlocutory appeals to protect the right and prevent the

irreparable injury of a second jeopardy. *See, e.g., Abney*, 431 U.S. 651; *Richardson*, 468 U.S. at 321-22.

All that leaves the government contending that the "harm" to "the United States and the public" that would arise from any "further delay" in its ability to pursue a traditional property-fraud theory against Applicants is simply too much to bear. U.S.Br.12, 28. Nonsense. As the government recently told this Court, it "could have" pursued that theory nearly a decade ago, U.S.Br.46-47, *Kousisis v. United States*, No. 23-909 (U.S. filed Oct. 2, 2024), but it instead chose to gamble with a right-to-control theory, *see* D.Ct.Dkt.319-2. The government's asserted delay-based harm thus is entirely "self-inflicted"—and "[n]o [government] can be heard to complain about damage inflicted by its own hand." *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam).

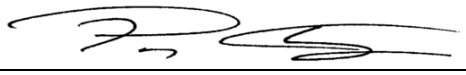
* * *

Simply put, all four stay factors are amply satisfied. The Court thus should stay the mandate pending the filing and disposition of Applicants' petition for certiorari—and promptly grant and reverse thereafter.

CONCLUSION

The Court should grant this application for a stay of the Second Circuit's mandate pending the timely filing and disposition of a petition for writ of certiorari.

Respectfully submitted,



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