No. 23-927

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

JOSEPH SULLIVAN,

Defendant–Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
No. 3:20-cr-00337-WHO, Hon. William H. Orrick

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND DUE PROCESS INSTITUTE IN SUPPORT OF THE DEFENDANT APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the amici curiae National Association of Criminal Defense Lawyers and Due Process Institute state that they do not have parent corporations and no publicly held corporation owns 10% or more of their stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Nexus Requirement Is a Fundamental Element of Federal Obstruction Offenses. 4

A. A nexus requirement inheres in the language and structure of obstruction statutes generally..4

B. The language of § 1505 closely mirrors language that the Supreme Court has held includes a nexus requirement. 9

II. The Nexus Requirement for Obstruction Statutes Arises out of Fundamental Due Process Principles. 12

A. The principles of Due Process are particularly salient in the context of "process crimes" like obstruction. 13

B. The concerns animating the nexus requirements adopted in *Aguilar*, *Arthur Andersen*, and *Marinello* apply equally to § 1505...16

i. Deference to Congress supports a nexus requirement for § 1505...16

ii. Without a nexus requirement, § 1505 is dangerously vague and overbroad, and threatens to criminalize otherwise innocuous conduct. 17

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

Arthur Andersen LLP v. United States,
544 U.S. 696 (2005)....7, 8, 16, 17, 18, 19

Dubin v. United States,
599 U.S. 110 (2023)....13, 14, 18

Johnson v. United States,
576 U.S. 591 (2015)....13

Kolender v. Lawson,
461 U.S. 352 (1983)....3, 18

Marinello v. United States,
138 S. Ct. 1101 (2018)....7, 8, 10, 16

Nat'l Med. Enterprises, Inc. v. Sullivan,
957 F.2d 664 (9th Cir. 1992)....16

Pettibone v. United States,
148 U.S. 197 (1893)....5, 6

Smith v. City of Jackson,
544 U.S. 228 (2005)....10

United States v. Aguilar,
515 U.S. 593 (1995).... 2, 3, 6, 7, 8, 9, 16, 17, 18, 20, 21

United States v. Bhagat,
436 F.3d 1140 (9th Cir. 2006)....9, 10, 17

United States v. Callipari,
368 F.3d 22 (1st Cir. 2004), *cert. granted, judgment vacated on other grounds*, 543 U.S. 1098 (2005)....10

United States v. Friske,
640 F.3d 1288 (11th Cir. 2011)....8

United States v. Harriss,
347 U.S. 612 (1954) 13

United States v. Kirst,
54 F.4th 610 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 2681 (2023) 19

United States v. Laurins,
857 F.2d 529 (9th Cir. 1988) 10

United States v. Lonich,
23 F.4th 881 (9th Cir. 2022) 8, 9, 12

United States v. Reich,
479 F.3d 179 (2d Cir. 2007) 11

United States v. Senffner,
280 F.3d 755 (7th Cir. 2002) 11

United States v. Stockman,
No. 07-cr-220 (S.D.N.Y.) 14, 15

United States v. Wellman,
26 F.4th 339 (6th Cir. 2022) 8

Yates v. United States,
574 U.S. 528 (2015) 13

Constitution and Statutes

U.S. Const. amend. 5 12

U.S. Const., preamble 2

18 U.S.C. Ch. 73 4

18 U.S.C. § 1503 .... 4, 6, 9, 10, 11, 12, 16, 17, 18, 20

18 U.S.C. § 1503(a) 4

18 U.S.C. § 1505 .... 2, 3, 4, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21

18 U.S.C. § 1512(b)(2)(B) 7

18 U.S.C. § 1512(c)(2) 9, 12

18 U.S.C. § 1515(b) 20

26 U.S.C. § 7212(a) 4

Violent Crime Control and Law Enforcement Act of 1994, PL 103-322, September 13, 1994, 108 Stat. 1796 9

Witness Retaliation, Witness Tampering, and Jury Tampering, PL 104-214, October 1, 1996, 110 Stat. 3017 9

Other Authorities

Charles Doyle, Cong. Rsch. Serv., RL34303, Obstruction of Justice: An Overview of Some of the Federal Statutes That Prohibit Interference with Judicial, Executive, or Legislative Activities (2014) 4

Criminal Resource Manual § 1727, *available at* https://www.justice.gov/archives/jm/criminal-resource-manual-1727-protection-government-processes-omnibus-clause-18-usc-1505 12

Ellen S. Pogdor, *White Collar Shortcuts*, 2018 U. Ill. L. Rev. 925 (2018) 13, 14

Karen Patton Seymour et al., *Prosecution of Process Crimes: Thoughts and Trends*, 37 Geo. L.J. Ann. Rev. Proc. iii (2008) 13, 14

U.S. Sentencing Guidelines § 2J1.2 4

IDENTITY AND INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and more than 40,000 with affiliates.

NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole, such as the issue regarding nexus requirements in obstruction statutes presented by this appeal.

Due Process Institute is a nonprofit bipartisan public interest organization that works to honor, preserve, and restore procedural fairness in the criminal legal system because due process is the guiding principle that underlies the Constitution's solemn promises to "establish [j]ustice" and to "secure the

[b]lessings of [l]iberty." U.S. Const., preamble. Ensuring that criminal liability is not imposed on otherwise innocent conduct absent a showing of malicious intent and that individuals are provided constitutionally adequate notice of which actions are subject to criminal liability are among Due Process Institute's top priorities.[1]

SUMMARY OF ARGUMENT

For more than a century, courts have consistently recognized that offenses involving the obstruction of justice must include a close connection between a defendant's allegedly obstructive conduct and an underlying governmental proceeding. Accordingly, the Supreme Court has repeatedly held that modern federal obstruction statutes include a "nexus" requirement. That is, the government must show that the defendant's obstructive act had "a relationship in time, causation, or logic" with an official proceeding. *United States v. Aguilar*, 515 U.S. 593, 599 (1995). The Supreme Court, this Court, and other circuit courts have repeatedly applied that principle across a broad variety of obstruction offenses.

Title 18 Section 1505 should not be an exception. That statute imposes criminal penalties on anyone who "corruptly, or by threats or force, or by any

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[1] Counsel for the parties did not author this brief in whole or in part. The parties have not contributed money intended to fund preparing or submitting the brief. No persons other than the amici curiae or their counsel contributed money to fund preparation or submission of this brief. The amici curiae further represent that all parties have consented to the filing of this brief.

threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States . . . .” 18 U.S.C. § 1505. That language mirrors, nearly verbatim, language that the Supreme Court in *Aguilar* held includes a nexus requirement. The Supreme Court’s holding in *Aguilar* and its progeny is sufficient on its own to compel the conclusion that § 1505 incorporates a nexus element.

Even if *Aguilar* were not enough, fundamental Due Process principles would require a nexus element to cabin the otherwise broad, vaguely worded language of § 1505. The Supreme Court has held that federal obstruction statutes do not criminalize conduct just because of the potential for a downstream effect of impeding a federal proceeding. With no nexus requirement, § 1505 would do just that. Moreover, well-established precedent holds that “a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Without a nexus requirement, employees would be left to guess at the line between carrying out their job duties in good faith and criminally impeding the work of an agency proceeding—a violation of their due process rights. This Court

should hold that § 1505, like nearly every similar obstruction statute, includes a nexus requirement.

ARGUMENT

I. THE NEXUS REQUIREMENT IS A FUNDAMENTAL ELEMENT OF FEDERAL OBSTRUCTION OFFENSES.

A. A nexus requirement inheres in the language and structure of obstruction statutes generally.

The umbrella "obstruction of justice" encompasses several different statutes that criminalize the impediment of governmental activities. *See* Charles Doyle, Cong. Rsch. Serv., RL34303, Obstruction of Justice: An Overview of Some of the Federal Statutes That Prohibit Interference with Judicial, Executive, or Legislative Activities (2014); 18 U.S.C. Ch. 73 ("Obstruction of Justice"); U.S. Sentencing Guidelines § 2J1.2.

The various federal obstruction statutes share common language and purpose. For example, Title 18 Section 1503, which applies to judicial proceedings, makes it a crime to, "corruptly . . . influence[], obstruct[], or impede[], or endeavor[] to influence, obstruct, or impede, the due administration of justice." 18 U.S.C. § 1503(a). Using similar language in the tax context, § 7212(a) of the Internal Revenue Code prohibits any individual from "corruptly . . . obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, the due administration of [the Internal Revenue Code]." 26 U.S.C. § 7212(a). And Title 18 Section 1505 uses nearly identical language with regard to federal agency

proceedings, making it illegal to "corruptly . . . influence[], obstruct[], or impede[] or endeavor[] to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States."

Given this shared language and purpose, courts have interpreted obstruction statutes to incorporate similar core elements. From the earliest cases interpreting federal obstruction statutes, the Supreme Court has required a close connection between a defendant's alleged obstructive conduct and the governmental activity that is the subject of the statute. In *Pettibone v. United States*, 148 U.S. 197 (1893), for example, the Court considered whether three men had conspired to violate a statute prohibiting any person from "obstruct[ing] or imped[ing] the due administration of justice" in "any court of the United States." *Id.* at 202. There, a federal court had enjoined the defendants from interfering with work at a mine. They violated the injunction by strong-arming officers of the mining company into terminating the mine's employees and were indicted for obstructing the "due administration of justice" in the federal court. The Supreme Court held that the indictment was insufficient because it did not allege that the defendants "knew or had notice that justice was being administered." *Id.* at 207. It was not enough that the defendants had general "intent to commit an unlawful act"—the government

had to show that they specifically intended to disrupt a particular court proceeding. *Id.*

Consistent with this long-established principle, in interpreting modern obstruction statutes, the Supreme Court has consistently applied "a 'nexus' requirement—that the act must have a relationship in time, causation, or logic" with the proceedings alleged to have been corruptly obstructed. *Aguilar*, 515 U.S. at 599. The Court therefore held the government to prove that the defendant's allegedly obstructive conduct had "the natural and probable effect of interfering" with the governmental activity. *Id.* (internal quotation marks omitted).

At issue in *Aguilar* was the "Omnibus Clause" of § 1503, which "serves as a catchall" obstruction charge, "prohibiting persons from endeavoring to influence, obstruct, or impede the due administration of justice." *Id.* at 598. There, the defendant had made false statements to FBI agents, which the government alleged interfered with a grand jury proceeding. *Id.* at 601. The statements were not made directly within that proceeding. The Court noted the need to "exercise[] restraint in assessing the reach of a criminal statute" and to ensure that "fair warning" is "given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Id.* at 600. With these concerns in mind, the Court adopted "the 'nexus' requirement developed in the decisions of the Courts of Appeal." *Id.* Under that requirement, even if the defendant knew that a

grand jury had been convened in a matter related to the statements he had made to agents, his awareness did not prove that he also knew that the agents would be called to testify before the grand jury. *Id.* As a result, there was an insufficient nexus between his allegedly obstructive act and the governmental activity. *Id.*

Since deciding *Aguilar*, the Supreme Court has twice more reiterated the nexus requirement for federal obstruction statutes. First, in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), the Court interpreted a federal witness tampering statute to include a nexus element. The statute made it a crime to "knowingly . . . corruptly persuade[] another person . . . to . . . alter, destroy, mutilate, to conceal an object with intent to impair" an "official proceeding." 18 U.S.C. § 1512(b)(2)(B). Managers of the defendant company had directed employees to shred documents according to a document retention policy after the SEC notified the company that it had opened an investigation and requested certain documents. *Arthur Andersen*, 544 U.S. at 700. The Court held that that the government had to prove a "nexus between the obstructive act"—that is, "persuad[ing]" employees to destroy documents—and a *specific* official proceeding. *Id.* at 708. Merely directing employees to shred documents, even in the face of a known SEC investigation, was insufficient to clear that bar.

Second, in *Marinello v. United States*, 138 S. Ct. 1101 (2018), the Court considered a tax-specific obstruction provision, prohibiting individuals from

"corruptly or by force or threats of force (including any threatening letter or communication) obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, the due administration of [the Internal Revenue Code]." *Id.* at 1105. Following *Aguilar* and *Arthur Andersen*, the Court applied the nexus requirement to this tax obstruction statute. *See id.* at 1109. Critically, the Court held that there is no adequate nexus where a defendant's alleged conduct simply interferes with "routine, day-to-day work carried out in the ordinary course by" an agency, even where that routine work is "in some broad sense, a part of the administration of justice." *Id.* at 1110.

The courts of appeals have construed this body of Supreme Court case law as applying generally a "framework that typically utilizes a nexus test for measuring the evidentiary support for obstruction-type offenses." *United States v. Wellman*, 26 F.4th 339, 347 (6th Cir. 2022); *see also United States v. Friske*, 640 F.3d 1288, 1291 (11th Cir. 2011) ("The nexus limitation is best understood as an articulation of the proof of wrongful intent that will satisfy the *mens rea* requirement of 'corruptly' obstructing." (internal quotation marks and alterations omitted)). The courts of appeals – including this Court – have thus extended the nexus requirement to several other obstruction statutes. *See, e.g.*, *United States v. Lonich,* 23 F.4th 881, 905 (9th Cir. 2022) (applying the reasoning in *Aguilar* and

holding that 18 U.S.C. § 1512(c)(2) includes a nexus element). In so doing, this Court recognized that the "nexus requirement is firmly rooted in law." *Id.* at 905.[2]

Any obstruction statute—including § 1505—must be construed against this long-established, deeply rooted backdrop.

B. The language of § 1505 closely mirrors language that the Supreme Court has held includes a nexus requirement.

Section 1505 uses language virtually identical to the Omnibus Clause in § 1503 that the Supreme Court has held includes a nexus requirement. That provision of § 1503, as interpreted in *Aguilar*,[3] imposes penalties on "[w]hoever . . . corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, *the due administration of justice* . . . ." *Aguilar*, 515 U.S. at 598 (emphasis added). Similarly, Section 1505 imposes a penalty on:

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[2] In refusing to instruct the jury that § 1505 includes a nexus requirement, the district court in this case relied on this Court's decision in *United States v. Bhagat*, 436 F.3d 1140 (9th Cir. 2006). To the extent that the panel in *Bhagat* categorically rejected a nexus requirement under § 1505, that decision is incorrect and NACDL and Due Process Institute join Defendant-Appellant in urging its reconsideration. *See* Defendant-Appellant Br. at 29–33. The reasoning in *Bhagat* is in clear tension with the principles articulated by the Supreme Court, other circuits, and this Court's prior and subsequent decisions. As detailed below, there is no basis in the language of § 1505 to depart from well-settled principles guiding the interpretation of federal obstruction statutes.

[3] Section 1503 has twice been amended since *Aguilar*, adjusting the penalties for obstruction, but making no change to the relevant text interpreted in *Aguilar*. *See* Violent Crime Control and Law Enforcement Act of 1994, PL 103-322, September 13, 1994, 108 Stat. 1796; Witness Retaliation, Witness Tampering, and Jury Tampering, PL 104-214, October 1, 1996, 110 Stat. 3017.

> [w]hoever corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct, or impede *the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States* . . . .

18 U.S.C. § 1505 (emphasis added). Thus, the operative language of the two statutes is virtually identical, except that § 1503 relates to obstruction of judicial proceedings (*i.e.*, "the due administration of justice") while § 1505 relates to obstruction of administrative proceedings.

"[W]hen Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005). Apart from *Bhagat*, this Court has long recognized that "[s]ection 1505 is similar in language to 18 U.S.C. § 1503, the statute proscribing obstruction of justice in a judicial proceeding, and cases interpreting section 1503 are relevant to constructions of section 1505." *United States v. Laurins*, 857 F.2d 529, 536 (9th Cir. 1988). The directive to give similar effect to identical language in related statutes is particularly critical in the criminal context due to constitutional notice concerns. *See Marinello*, 138 S. Ct. at 1106.

Given the clear similarity between § 1503 and § 1505, and considering the Supreme Court's general approach imposing a nexus requirement for obstruction statutes, it is not surprising that this Court's sister circuits have adopted a nexus requirement for § 1505 with little fanfare. *See, e.g.*, *United States v. Callipari*, 368

F.3d 22, 42 (1st Cir. 2004) ("18 U.S.C. § 1503, requires proof that the defendant's actions have the 'natural and probable effect' of obstructing an investigative proceeding—in essence, a 'nexus' between the actions and the proceeding. . . . Other circuits have required the same showing for § 1505." (internal quotation marks and citation omitted)), *cert. granted, judgment vacated on other grounds*, 543 U.S. 1098 (2005); *United States v. Senffner*, 280 F.3d 755, 762 (7th Cir. 2002) (holding that, to establish obstruction of an SEC proceeding under § 1505, the government must show that the defendant's "actions had the 'natural and probable' effect of interfering with that proceeding").

The Second Circuit has not only applied a nexus requirement to § 1505, it has analogized from the language of § 1505 to apply a nexus requirement to other statutes. *See United States v. Reich*, 479 F.3d 179, 185 (2d Cir. 2007). In *Reich*, then-Judge Sotomayor relied on earlier Second Circuit precedent stating that "the only relevant distinction between the two statutes [§ 1503 and § 1505] . . . lies in the attendant circumstances of the obstruction." *Reich*, 479 F.3d at 186 (internal

quotation marks omitted).[4] She noted the Second Circuit had already adopted a nexus requirement for § 1505, then compared the language of § 1505 to a different obstruction provision—18 U.S.C. § 1512(c)(2)—holding that it, too, incorporated a nexus requirement. *See id.*[5]

Overall, the language of § 1505 provides no basis to depart from the approach applied by the Supreme Court and uniformly across other circuits, interpreting the statute to incorporate a nexus requirement.

II. THE NEXUS REQUIREMENT FOR OBSTRUCTION STATUTES ARISES OUT OF FUNDAMENTAL DUE PROCESS PRINCIPLES.

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law." U.S. Const. amend. 5. "[T]he Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary

[4] The Department of Justice previously provided similar guidance to its prosecutors. *See* Criminal Resource Manual § 1727, *available at* https://www.justice.gov/archives/jm/criminal-resource-manual-1727-protection-government-processes-omnibus-clause-18-usc-1505 ("The omnibus clause of 18 U.S.C. § 1505 parallels its counterpart in 18 U.S.C. § 1503 in language and purpose, and most of the law construing the latter is applicable to the former.").

[5] This Court recently reached the same conclusion with respect to § 1512(c)(2), albeit without traveling first through § 1505. *Lonich,* 23 F.4th at 905.

enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015); *see United States v. Harriss*, 347 U.S. 612, 617 (1954) ("The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."). As a result, "[t]ime and again" the Supreme Court "has prudently avoided reading incongruous breadth into opaque language in criminal statutes." *Dubin v. United States*, 599 U.S. 110, 130 (2023); *see, e.g.*, *Yates v. United States*, 574 U.S. 528, 546 (2015) ("[W]e are persuaded that an aggressive interpretation of 'tangible object' must be rejected. It is highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial recordkeeping.").

A. The principles of Due Process are particularly salient in the context of "process crimes" like obstruction.

Crimes like obstruction under § 1505 are sometimes referred to as "process crimes" because they relate to a defendant's conduct *during* an investigation or proceeding rather than the conduct that gave rise to the investigation or proceeding itself. *See generally* Karen Patton Seymour et al., *Prosecution of Process Crimes: Thoughts and Trends*, 37 Geo. L.J. Ann. Rev. Proc. iii, iii (2008). Some commentators have argued that process crimes are used as prosecutorial "shortcuts." Ellen S. Pogdor, *White Collar Shortcuts*, 2018 U. Ill. L. Rev. 925, 953 (2018). That is, where an intricate fraudulent scheme is difficult to investigate and

explain to a jury, obstructive conduct may be easier to understand and simpler to describe. For example, "Prosecutors may use obstruction of justice charges for the destruction of documents without charging the underlying fraudulent conduct that might have been the impetus of the investigation." *Id.* at 954–55. But these "shortcuts" pose serious due process concerns. While a "person of ordinary intelligence" might be expected to recognize the line between, for example, appropriate investment advice and financial fraud, those lines are far less clear for process crimes.

Further, broadly worded obstruction statutes like § 1505 may invite prosecutorial overreach. If you "squint your eyes, you can stretch (or shrink) [the statute's] meaning to convict . . . just about anyone. Doubtless, creative prosecutors and receptive judges can do the same." *Dubin*, 599 U.S. at 133 (Gorsuch, *J.*, concurring). "We have a term for laws like that. We call them vague. And in our constitutional order, a vague law is no law at all." *Id.* (internal quotation marks and alterations omitted). With no nexus requirement, § 1505 would give the government leeway to charge employees engaged in otherwise legal conduct simply because the conduct makes an agency's job harder.

Most troublingly, prosecutors have applied obstruction statutes in the context of allegedly false statements made during internal corporate investigations. *See* Seymour et al., *supra* at iv. In *United States v. Stockman*, No. 07-cr-220

(S.D.N.Y.), for example, four employees of a company were charged with obstructing an SEC investigation in violation of § 1505 in part because they allegedly made misstatements to the company's own Audit Committee, which in turn communicated false information to the SEC. *See* Indictment ¶ 34, *United States v. Stockman*, No. 07-cr-220 (S.D.N.Y. Mar. 21, 2007), ECF No. 1-2.[6] Sweeping conduct during internal investigations into the ambit of § 1505 in this way poses significant policy risks:

> [W]hen obstruction statutes are applied too aggressively and used to capture conduct occurring in the context of internal corporate investigations, the result is likely that employees may choose not to cooperate with future internal investigations. This chilling effect hampers a company's ability to gather facts, which may be critical to a company's ability to ferret out, correct, and sanction misconduct, as well as to the government's ability to rely on corporate cooperation in its own efforts to investigate and prosecute such misconduct.

Seymour et al., *supra* at ix.

Applying a nexus requirement to § 1505 ameliorates these concerns by ensuring that employees can participate in internal investigations without worrying that a tenuous connection between the investigation and an agency proceeding could result in federal criminal charges.

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[6] After nearly two years of litigation, the government conducted "a renewed assessment of the evidence" and "concluded that further prosecution of [the defendants] would not be in the interests of justice," therefore recommending an order of *nolle prosequi*. *United States v. Stockman*, No. 07-cr-220 (S.D.N.Y. Jan. 9, 2009), ECF No. 70.

B. The concerns animating the nexus requirements adopted in *Aguilar*, *Arthur Andersen*, and *Marinello* apply equally to § 1505.

Consistent with these concerns, the Supreme Court emphasized two key considerations animating its adoption of nexus requirements in *Aguilar*, *Arthur Andersen*, and *Marinello*:

> We set forth two important reasons for [adopting a nexus requirement]. . . . [W]e have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress and out of concern that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.

Marinello, 138 S. Ct. at 1106 (internal quotation marks omitted). Those considerations apply with equal force to § 1505.

i. Deference to Congress supports a nexus requirement for § 1505.

It is significant that Congress has amended § 1503 since the Supreme Court decided *Aguilar*, but made no changes that would undermine the Court's decision in that case. This strongly suggests that the nexus requirement is an element Congress intended. *See Nat'l Med. Enterprises, Inc. v. Sullivan*, 957 F.2d 664, 668 (9th Cir. 1992) ("Where Congress has reenacted or amended a statute . . . congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." (internal quotation marks omitted)).

Absent a nexus requirement under § 1505, however, the very conduct the Court considered in *Aguilar* might fall within the scope of federal obstruction statutes. This Court characterized the FBI investigation at issue in *Aguilar* as "an agency proceeding." *Bhagat*, 436 F.3d at 1147. Declining to read a similar nexus requirement into § 1505 would yield an incongruous result: the same conduct the Supreme Court expressly held did not constitute obstruction under § 1503 could nevertheless constitute obstruction under § 1505, *without* proof of a nexus to the government proceeding, based on the way that prosecutors choose to identify and characterize the governmental activity at issue, even though the two statutes use virtually identical language. That result is particularly unreasonable given Congress's apparent acquiescence to the Court's interpretation of § 1503. Deference to Congress thus counsels in favor of interpreting the language of § 1505 to have the meaning that the Supreme Court ascribed to the similar language of § 1503 in *Aguilar*.

ii. Without a nexus requirement, § 1505 is dangerously vague and overbroad, and threatens to criminalize otherwise innocuous conduct.

As the Supreme Court has repeatedly emphasized, it is vital to read criminal statutes like § 1505 with restraint where a broad reading risks criminalizing otherwise "innocuous" conduct. *Arthur Andersen*, 544 U.S. at 703 ("Such restraint is particularly appropriate here, where the act underlying the conviction . . . is by

itself innocuous."). Criminal laws must be interpreted to avoid the "standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358 (internal quotation marks omitted); *see also Dubin*, 599 U.S. at 131 ("To rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language places great power in the hands of the prosecutor." (internal quotation marks and alterations omitted)).

For these reasons, the Court has read nexus requirements into obstruction statutes that might otherwise be interpreted to apply to conduct far attenuated from the governmental context in which the statute was intended to apply. In *Aguilar*, the Court noted that without a nexus requirement, a man could "be found guilty under § 1503 if he knew of a pending investigation and lied to his wife about his whereabouts at the time of the crime, thinking that an FBI agent might decide to interview her and that she might in turn be influenced in her statement to the agent by her husband's false account of his whereabouts." 515 U.S. at 602. In *Arthur Andersen*, the Court observed that an overbroad reading of an obstruction statute would place at risk "a mother who suggests to her son that he invoke his right against compelled self-incrimination … or a wife who persuades her husband not to disclose marital confidences." 544 U.S. at 704.

Similar consequences could follow from an interpretation of § 1505 that rejects a nexus requirement in the context of obstruction of an agency proceeding. Absent such a requirement, the same conduct that the Court held in *Arthur Andersen* did not violate § 1512(b)(2)—*i.e.*, applying a routine document retention policy in the face of an SEC investigation—could nevertheless be swept within the ambit of § 1505's broad reference to "any pending proceeding . . . before any department or agency of the United States." See *United States v. Kirst*, 54 F.4th 610, 621-23 (9th Cir. 2022) (holding that an agency investigation constitutes a proceeding under § 1505 even where the agency would not have "authority to enforce any judgment or decision resulting from the proceeding"), *cert. denied*, 143 S. Ct. 2681 (2023). As a result, a low-level employee deleting documents as part of their regular job duties could be held guilty of obstructing that investigation.

Government agencies conduct numerous types of proceedings of varying scope and length, not always discernable to the public. Supervisors *and* their supervised employees, even if generally aware of government scrutiny of their industry practices, may be completely unaware of an ongoing agency proceeding directed at their company—whether an FTC proceeding, SEC investigation, or some other proceeding that falls within the ambit of § 1505. Indeed, knowledge of

that type of proceeding could be *more* difficult to ascertain than knowledge of an existing *judicial* proceeding such as those covered by § 1503.

Company employees up and down the corporate ladder may be tangentially aware of agency investigations, but it may not be clear where their work obligations and duty to their employer end and their duty to avoid impeding an investigation begins. That is especially important under § 1505 because that statute can encompass not only affirmative acts but also the withholding of information. *See* 18 U.S.C. § 1515(b) (defining "corruptly" as used in § 1505). The nexus requirement ensures that employees who may merely be following company rules or guidance cannot be held criminally liable for carrying out their ordinary job duties simply because those activities are later alleged to have a downstream effect on the administrative process.

There is no sound interpretation and application of § 1505 that bypasses the interpretive standards that *Aguilar* and numerous cases applying *Aguilar* have imposed on a variety of obstruction statutes. In some cases, perhaps, the Government might find it difficult to satisfy the nexus requirement—but that requirement is necessary to ensure fundamental fairness in the application of a criminal statute as broad and vague as § 1505. The Supreme Court has given "fair warning" of how federal obstruction statutes should be construed. *Aguilar*, 515 U.S. at 600. To now apply § 1505 without the nexus requirement held necessary in

Aguilar and its progeny deprives reasonable people of the guidance needed to order their conduct to avoid a criminal penalty.

CONCLUSION

This Court should hold that 18 U.S.C. § 1505, like other similarly worded federal obstruction statutes, includes a nexus requirement.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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