No. 19-433

In the Supreme Court of the United States

PATRICK EMANUEL SUTHERLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that the evidence was sufficient to support petitioner's conviction for obstructing an official proceeding, in violation of 18 U.S.C. 1512(c)(2), where the evidence showed that petitioner, shortly after receiving grand jury subpoenas for financial records, sent fabricated records to the U.S. Attorney's Office in charge of presenting evidence to the grand jury.

2. Whether the court of appeals erred in determining, on plain-error review, that petitioner did not meet his burden of showing that allegedly improper statements during the government's closing argument affected his substantial rights.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 18

TABLE OF AUTHORITIES

Cases:

Coleman v. *Johnson*, 566 U.S. 650 (2012) 9
Darden v. *Wainwright*, 477 U.S. 168 (1986) 15
Jackson v. *Virginia*, 443 U.S. 307 (1979) 9
Rosales-Mireles v. *United States*, 138 S. Ct. 1897 (2018) 14
Rosemond v. *United States*, 572 U.S. 65 (2014) 12
United States v. *Aguilar*, 515 U.S. 593 (1995) 6, 8
United States v. *Bedoy*, 827 F.3d 495 (5th Cir. 2016) 13
United States v. *Davis*, 863 F.3d 894 (D.C. Cir. 2017) 16, 17
United States v. *Desposito*, 704 F.3d 221 (2d Cir.), cert. denied, 569 U.S. 995 (2013) 13
United States v. *Fassnacht*, 332 F.3d 440 (7th Cir. 2003) 13
United States v. *Furkin*, 119 F.3d 1276 (7th Cir. 1997) 13
United States v. *Mageno*:
762 F.3d 933 (9th Cir. 2014), vacated, 786 F.3d 768 (9th Cir. 2015) 15, 16
786 F.3d 768 (9th Cir. 2015) 16

Cases—Continued: Page

United States v. *Martinez*, 862 F.3d 223 (2d Cir.), cert. denied, 138 S. Ct. 489 (2017), and cert. granted, judgment vacated, and remanded on other grounds, 139 S. Ct. 2772 (2019) 12

United States v. *Reich*, 479 F.3d 179 (2d Cir.), cert. denied, 552 U.S. 819 (2007) 13

Statutes and rule:

18 U.S.C. 2 4

18 U.S.C. 1503(a) 8

18 U.S.C. 1512 8

18 U.S.C. 1512(c)(2) .... *passim*

18 U.S.C. 1515(a)(1)(A) 8

26 U.S.C. 7206(1) 2, 4

Fed. R. Crim. P. 52(b) 14

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 921 F.3d 421.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 2019. A petition for rehearing was denied on May 17, 2019 (Pet. App. 46a). On August 7, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 30, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of North Carolina, petitioner was convicted on three counts of filing false tax

returns, in violation of 26 U.S.C. 7206(1), and one count of obstructing an official proceeding, in violation of 18 U.S.C. 1512(c)(2). Judgment 1. The district court sentenced petitioner to 33 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-19a.

1. Petitioner "owned or operated several insurance businesses that sold products out of the United States and Bermuda." Pet. App. 3a. One of those businesses was Stewart Technology Services (STS), a Bermuda company. *Ibid.* Between 2007 and 2010, STS transferred via wire about $2.1 million in fees and other income to petitioner, his wife, and various U.S. businesses wholly owned by petitioner. *Id.* at 54a; Supp. C.A. App. 2-3; Pet. 8.

For tax years 2008, 2009, and 2010, petitioner filed joint federal income tax returns with his wife. C.A. App. 104, 108-109, 112. Those returns included income from petitioner's U.S. businesses, which were pass-through entities for tax purposes. Pet. 8. Although most of the $2.1 million that STS had transferred appeared on STS's ledger as fees or without any description at all, petitioner recorded nearly all of the transfers on his ledger as loan proceeds or as capital contributions to his U.S. businesses, neither of which are ordinarily taxable to the recipient. Pet. App. 3a, 54a. Thus, when petitioner filed his tax returns, he reported only $88,979 in taxable income in 2008, $16,669 in 2009, and $72,415 in 2010. *Id.* at 4a.

In April 2012, a federal grand jury in the Western District of North Carolina issued subpoenas seeking the financial records of petitioner's U.S. businesses that

had received transfers from STS. Pet. App. 5a; Indictment ¶ 18. Three months later, petitioner's attorney sent a letter to the U.S. Attorney's Office for the Western District of North Carolina. C.A. App. 1306-1311. The letter claimed that "[t]he amounts that [petitioner] and his businesses" had received "from STS" were "loans and not income." *Id.* at 1310. The letter asserted that STS was owned by petitioner's sister, not petitioner, *id.* at 1309, and that STS had agreed to loan "more than $2 million" to petitioner, *id.* at 1310. The letter further asserted that "[a]ll loans from STS to [petitioner] were contemporaneously documented by written and fully-executed loan agreements." *Id.* at 1309.

Attached to the letter were six documents, fabricated after the fact by petitioner, that purported to be loan agreements between petitioner and his sister. Pet. App. 5a-6a; C.A. App. 1279, 1281, 1283, 1285, 1287, 1305. In each of the purported agreements, petitioner promised to pay STS 20% of the proceeds from the sale of any of his businesses, C.A. App. 1279, 1281, 1283, 1285, 1287, 1305; "[r]ead together, the documents implausibly pledged that [petitioner] would give STS 120% of the proceeds," Pet. App. 5a. The documents also purported to bear the signature of petitioner's sister, when they were actually signed by someone else. *Id.* at 5a-6a, 72a-73a. And they were inconsistent with internal STS accounting records. *Id.* at 6a. The letter to which the fabricated documents were attached "request[ed] that, after evaluating the relevant evidence, [the U.S. Attorney's Office] decline prosecution of th[e] matter." C.A. App. 1311.

2. A federal grand jury in the Western District of North Carolina returned a four-count indictment charging petitioner with three counts of filing false tax

returns, in violation of 26 U.S.C. 7206(1), and one count of obstructing, influencing, or impeding an official proceeding—namely, a grand jury proceeding—in violation of 18 U.S.C. 1512(c)(2) and 2. Indictment ¶¶ 22-25. The obstruction count was based on the "fraudulent documents, including purported loan agreements," that petitioner had provided to the U.S. Attorney's Office after receiving the grand jury's subpoenas for financial records. Indictment ¶ 18.

The case proceeded to trial. See Pet. App. 5a. Following the presentation of evidence, the district court informed the jury that the parties would give their closing arguments. *Id.* at 62a. The court instructed the jury that, although the parties "can argue what they say you should think the evidence shows," "[w]hat the evidence does show is up to you." *Ibid.* The court further instructed the jury that, "[i]f [the parties] argue something that your memory differs from, you take your memory, not their memory." *Id.* at 63a. The court reminded the jury that "what the attorneys say is not evidence." *Ibid.*

The parties then delivered their closing arguments. Pet. App. 64a-112a. The government argued that petitioner "lied on his tax returns," *id.* at 64a, because the transfers from STS were income, "not loans," *id.* at 69a. The government stated that petitioner "never paid [the money] back," *id.* at 70a, and that "[m]illions of dollars [had] com[e] into his account marked as fees but [were] treated as nontaxable," *id.* at 111a-112a. The government further contended that, after the grand jury issued its subpoenas, *id.* at 64a, petitioner obstructed the "grand jury's investigation" by "fabricat[ing] documents to cover" up his failure "to report all of his income," *id.* at 84a. Petitioner made no objection to the

government's closing argument. See *id.* at 64a-85a, 105a-112a.

Following the parties' closing arguments, the district court instructed the jury on the elements of each count charged in the indictment. C.A. App. 1051-1069. The district court instructed the jury that, in order to find petitioner guilty on the obstruction count, it had to find, among other things, that petitioner "knew of or had notice of the grand jury investigation," and that he "intended or knew his actions"—namely, "provid[ing] false and misleading documents"—"would have the natural and probable effect of interfering with the grand jury." *Id.* at 1066.

The jury found petitioner guilty on all counts. Pet. App. 6a; Judgment 1. The district court sentenced petitioner to 33 months of imprisonment on each count, to be served concurrently. Judgment 2.

3. The court of appeals affirmed. Pet. App. 1a-19a.

a. The court of appeals rejected petitioner's challenge to his conviction on the obstruction count. Pet. App. 6a-15a. The court recognized that 18 U.S.C. 1512(c)(2) requires proof of a "nexus" between the obstructive act and an "official proceeding." Pet. App. 7a. The court then explained that, although "the U.S. Attorney's investigation is not by itself an official proceeding," *ibid.*, a "federal grand jury investigation" is such a proceeding, *id.* at 10a. And it determined that the jury instructions comported with, and the evidence was sufficient to prove, the requisite nexus between petitioner's actions and mental state, on the one hand, and the grand jury proceeding, on the other. *Id.* at 10a-15a.

The court of appeals found that the jury instructions "properly stated the nexus requirement that the jury had to apply in [petitioner's] case." Pet. App. 12a. The

court explained that, in *United States* v. *Aguilar*, 515 U.S. 593 (1995), this Court construed the "nexus" requirement of a similar obstruction statute to mean that "obstruction must have been 'the natural and probable effect' of the defendant's actions." Pet. App. 11a (quoting *Aguilar*, 515 U.S. at 599). And the court of appeals observed that "the district court crafted an instruction on the nexus requirement straight from *Aguilar*: 'The government must prove that the defendant . . . intended or knew his actions would have the natural and probable effect of interfering with the grand jury.'" *Id.* at 12a (quoting C.A. App. 1066).

The court of appeals then found that, when viewed "in the light most favorable to the government as the prevailing party," the evidence was sufficient to support petitioner's conviction on the obstruction count. Pet. App. 13a. The court emphasized that petitioner "distributed the false loan documents just months after the grand jury subpoena was served upon him, and those documents attempted to explain away transactions reflected in the subpoenaed documents." *Ibid.* The court also emphasized that petitioner had given the "false documents" to the U.S. Attorney's Office—an office "tasked with presenting to the grand jury." *Id.* at 14a. The court explained that "a rational jury could find that [petitioner's] giving false evidence to the U.S. Attorney's office in charge of presenting evidence to the grand jury in fact had one intended and foreseeable consequence: transmission of those documents to the grand jury." *Id.* at 15a.

b. The court of appeals also rejected petitioner's contention that, during closing argument, "the prosecution improperly suggested that all $2.1 million in wire

transfers from STS to [petitioner] or his domestic entities should have been treated as income." Pet. App. 16a. The court observed that, "[b]ecause [petitioner] failed to object at the time, the matter [wa]s before [it] on plain error review." *Ibid.* The court then determined that petitioner had "failed to identify any error, much less a plain one." *Ibid.* The court found that "[t]he evidence supported the government's closing argument that [petitioner] should have reported the STS wire transfers as income." *Ibid.* The court also found that the government had "plainly discredited the fabricated loan documents during trial." *Ibid.*

The court of appeals further determined that, "[e]ven if the closing argument had somehow been improper, * * * it did not affect [petitioner's] 'substantial rights.'" Pet. App. 16a (citation omitted). The court reasoned that "[c]losing arguments are just that—arguments." *Ibid.* And it emphasized that, although "[t]hey are prone to exaggeration," "we rely on juries and the adversarial process to place them in perspective." *Ibid.* The court observed that "[t]he district court instructed the jury to trust its own recollections of the evidence, and that closing arguments were not evidence themselves." *Ibid.* The court of appeals also noted that, although petitioner "had the opportunity to respond to arguments he felt were unsupported by the evidence with objections or better arguments of his own," "[h]e did neither." *Ibid.*

ARGUMENT

Petitioner renews his contentions that the evidence was insufficient to support his conviction for obstructing an official proceeding, Pet. 23-30, and that allegedly improper statements during the government's closing argument affected his substantial rights, Pet. 30-34.

The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. The court of appeals' circumstance-specific determination that the evidence was insufficient to support petitioner's conviction for obstructing an official proceeding under 18 U.S.C. 1512(c)(2) is correct and does not warrant this Court's review.

a. Section 1512(c)(2) imposes criminal penalties for "corruptly * * * obstruct[ing], influenc[ing], or imped[ing] any official proceeding, or attempt[ing] to do so." 18 U.S.C. 1512(c)(2). For purposes of Section 1512, the term "official proceeding" is defined to include "a proceeding before * * * a Federal grand jury." 18 U.S.C. 1515(a)(1)(A).

In *United States* v. *Aguilar*, 515 U.S. 593 (1995), this Court construed 18 U.S.C. 1503(a)—which imposes criminal penalties on anyone who "corruptly * * * influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice," *ibid.*—to require proof of a "nexus" between a defendant's obstructive conduct and a specific judicial proceeding (including a grand jury proceeding) that he intends to obstruct, 515 U.S. at 599-600 (citation omitted). The Court explained that the defendant's obstructive conduct "must have the 'natural and probable effect' of interfering with" the judicial proceeding, *id.* at 599 (citation omitted), and that "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct" and has not violated Section 1503(a), *ibid.*

The court of appeals in this case accepted that the "*Aguilar* nexus requirement" likewise applies to prosecutions under Section 1512(c)(2), Pet. App. 11a; see *id.* at 10a-12a, and determined that the jury instructions "properly stated" that requirement, *id.* at 12a. In particular, the court determined that the jury was correctly instructed that "[t]he government must prove" that petitioner "intended or knew his actions would have the natural and probable effect of interfering with the grand jury." *Ibid.* (quoting C.A. App. 1066).

Petitioner does not dispute that the jury instructions "properly stated the nexus requirement." Pet. App. 12a. Rather, petitioner contends that the evidence in this case was insufficient to satisfy that requirement. See, *e.g.*, Pet. 23 (arguing that the court of appeals erred in finding "sufficient the very facts this Court determined were insufficient in *Aguilar*"); Pet. 29 (arguing that the court of appeals "erred in concluding the nexus requirement was met").

The court of appeals correctly rejected that contention. Pet. App. 13a-15a. "[E]vidence is sufficient to support a conviction if, 'after 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.'" *Coleman* v. *Johnson*, 566 U.S. 650, 654 (2012) (per curiam) (quoting *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979)). Viewed "in the light most favorable to the government," Pet. App. 13a, the evidence here showed that petitioner intended or knew that giving "phony loan documents to prosecutors" would have the natural and probable effect of interfering with the grand jury, *id.* at 15a. As the court explained, petitioner's obstructive conduct had both a "temporal" and a "logical" connection with the

grand jury: petitioner "distributed the false loan documents just months after the grand jury subpoena was served upon him, and those documents attempted to explain away transactions reflected in the subpoenaed documents." *Id.* at 13a.

The evidence showed that petitioner's obstructive conduct had a "causal relationship" with the grand jury as well. Pet. App. 13a. As the court of appeals observed, petitioner "gave false documents to the U.S. Attorney's office"—the very office "tasked with presenting to the grand jury." *Id.* at 14a. "As with a subpoenaed witness, there is a strong likelihood that the U.S. Attorney's office would serve as a channel or conduit to the grand jury for the false evidence or testimony presented to it." *Ibid.*

Given that petitioner's obstructive conduct was "related to the grand jury in time, causation, *and* logic," Pet. App. 13a, "a rational jury could find that [petitioner's] giving false evidence to the U.S. Attorney's office in charge of presenting evidence to the grand jury in fact had one intended and foreseeable consequence: transmission of those documents to the grand jury," *id.* at 15a. And even if the U.S. Attorney's Office did not directly present that evidence to the grand jury, petitioner's transmission of it could "obstruct[]," "influence[]," or "impede[]" the grand jury investigation in other ways, 18 U.S.C. 1512(c)(2), such as by causing the U.S. Attorney's Office *not* to present to the grand jury the truthful evidence of petitioner's guilt. Indeed, the cover letter for the fabricated documents affirmatively urged the U.S. Attorney's Office to decline prosecution, C.A. App. 1311, which as a practical matter would lead it to discontinue its efforts before the grand jury. The

court of appeals therefore correctly rejected petitioner's challenge to the sufficiency of the evidence supporting his conviction for obstructing an official proceeding under Section 1512(c)(2).

Petitioner contends that the court of appeals erred in focusing on the "institutional relationship" between the U.S. Attorney's Office and the grand jury, rather than on whether petitioner "subjectively knew, understood, or believed the false documents would be given to the grand jury." Pet. i; see, *e.g.*, Pet. 28 (arguing that the court of appeals erred by not "focusing on the record evidence of [p]etitioner's subjective intent"). Contrary to petitioner's contention (Pet. 16, 21, 27, 28), however, the court did not disregard petitioner's "subjective intent" in considering whether the nexus requirement was met. Rather, the court recognized the government's burden to prove that petitioner "intended or knew his actions would have the natural and probable effect of interfering with the grand jury." Pet. App. 12a (quoting C.A. App. 1066). It then reasoned that, in determining whether the government met that burden, the jury was entitled to consider the fact that petitioner gave the false loan documents to the very prosecutors "in charge of presenting evidence to the grand jury." *Id.* at 15a. And the cover letter suggests that what petitioner wanted was not to be indicted, and was submitting the fabricated documents precisely to derail the U.S. Attorney's presentation to the grand jury.

To the extent petitioner is suggesting that the jury could not find him guilty without direct evidence of his mindset, that suggestion is misplaced. Nothing in *Aguilar* displaces the bedrock principle that, "[i]n any criminal case * * * , the factfinder can draw inferences

about a defendant's intent based on all the facts and circumstances of a crime's commission." *Rosemond* v. *United States*, 572 U.S. 65, 78 n.9 (2014).

b. Contrary to petitioner's contention (Pet. 15-21), the court of appeals' decision does not conflict with any decision of another court of appeals. Petitioner's assertion of a circuit conflict (Pet. 20) rests on his characterization of the court of appeals' decision as eliminating any requirement that "the defendant subjectively knew, understood, or believed that the false information would likely be conveyed to the official proceeding." As explained above, that characterization of the court's decision is incorrect. See p. 11, *supra*. Far from eliminating such a requirement, the court affirmed that the government was required to prove that petitioner "intended or knew his actions would have the natural and probable effect of interfering with the grand jury." Pet. App. 12a (citation omitted). And the court upheld petitioner's conviction under Section 1512(c)(2) only after finding the evidence sufficient to show that the "transmission" of false information "to the grand jury" was the "intended and foreseeable consequence" of his obstructive conduct. *Id.* at 15a; see *ibid.* (finding the evidence sufficient to show that petitioner acted "with the intent to influence an ongoing federal grand jury proceeding that was closing in on him"). Because the court did not disregard petitioner's subjective intent in considering whether the nexus requirement was met, petitioner's assertion of a circuit split is mistaken.

In any event, each of the decisions of other circuits that petitioner cites (Pet. 18-19) *upheld* the sufficiency of the evidence to establish the requisite nexus to a judicial or official proceeding under *Aguilar*. See *United*

States v. *Martinez*, 862 F.3d 223, 238 (2d Cir.), cert. denied, 138 S. Ct. 489 (2017), and cert. granted, vacated, and remanded on other grounds, 139 S. Ct. 2772 (2019); *United States* v. *Desposito*, 704 F.3d 221, 231-232 (2d Cir.), cert. denied, 569 U.S. 995 (2013); *United States* v. *Reich*, 479 F.3d 179, 186 (2d Cir.) (Sotomayor, J.), cert. denied, 552 U.S. 819 (2007); *United States* v. *Bedoy*, 827 F.3d 495, 506-507 (5th Cir. 2016); *United States* v. *Fassnacht*, 332 F.3d 440, 451 (7th Cir. 2003); *United States* v. *Furkin*, 119 F.3d 1276, 1282-1283 (7th Cir. 1997). And none involved—as this case does—the submission of false information to a U.S. Attorney's Office in charge of presenting evidence to a grand jury. See *ibid.* The decisions petitioner cites (Pet. 18-19) therefore provide no basis to conclude that another court of appeals would have found the evidence insufficient to support his Section 1512(c)(2) conviction on the particular facts of this case.

2. Petitioner also contends that the court of appeals erred in determining that any "improper" statements during the government's closing argument did "not affect [his] 'substantial rights.'" Pet. App. 16a (citation omitted); see Pet. 30-34. That contention likewise does not warrant this Court's review.

a. Petitioner claims (Pet. 31) that the government "misstated the evidence" during its closing argument. In particular, petitioner asserts that he "repaid a portion" of the $2.1 million that STS had wired to him and his U.S. businesses, *ibid.*, contrary to the government's statement during closing argument that he "never paid back" any of it, Pet. App. 70a. He also asserts that STS "had given no description at all for $1.6 million of the $2.1 million," Pet. 31, contrary to the government's

statement during closing argument that "[m]illions of dollars" had been "marked as fees," Pet. App. 111a.

Because petitioner did not object to those statements before the district court, see Pet. App. 64a-85a, 105a-112a, the court of appeals correctly reviewed petitioner's claim only for plain error, *id.* at 16a; see Fed. R. Crim. P. 52(b). On plain-error review, petitioner bears the burden of establishing (1) error that (2) was "clear or obvious," (3) "affected [his] substantial rights," and (4) "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1904-1905 (2018) (citations omitted).

The court of appeals correctly determined that petitioner did not meet his burden of showing that the government's allegedly improper statements affected his substantial rights. Pet. App. 16a. Petitioner contends that the government's statements during closing argument prejudiced him by suggesting that he "was obligated to report as income the *entire* $2.1 million that STS had wired." Pet. 10 (emphasis added). To find petitioner guilty of filing false tax returns, however, the jury did not have to find that he was obligated to report as income that *entire* amount; rather, the jury had to find only that, on each return, petitioner willfully underreported his income by *some* amount. See C.A. App. 1060, 1064. Thus, even assuming that the government's statements "exaggerat[ed]" the degree of petitioner's underreporting, that "exaggeration" had no reasonable probability of affecting the jury's verdict. Pet. App. 16a; see *Rosales-Mireles*, 138 S. Ct. at 1904-1905 (explaining that to show that an error "'affected the defendant's substantial rights,'" "the defendant ordinarily

must 'show a reasonable probability that, but for the error,' the outcome of the proceeding would have been different") (citations omitted).

Indeed, neither statement that petitioner alleges was improper would reasonably have been likely to change the outcome, given the district court's instructions to the jury and the strength of the government's evidence of underreporting. Pet. App. 16a; see *Darden* v. *Wainwright*, 477 U.S. 168, 181 (1986) (relying on similar considerations in concluding that a prosecutor's improper comments during closing argument did not deprive the defendant of a fair trial). As the court of appeals observed, the instructions directed the jury "to trust its own recollections of the evidence" and to not regard the closing arguments themselves as evidence. Pet. App. 16a; see *id.* at 62a-63a. And the evidence overwhelmingly showed that petitioner had underreported his income during the relevant tax years, refuting his contention that all of the money he and his businesses received from STS were loans, not income. *Id.* at 5a-6a. As the court of appeals found, the evidence demonstrated that the documents petitioner claimed to be the underlying loan agreements "had been fabricated," *id.* at 5a, and that the "documents in which [he] claimed to have made loan payments by transferring interests in his other businesses to STS" were "bogus and backdated," *id.* at 6a.

b. Petitioner asserts (Pet. 21-23) that the decision below conflicts with decisions of the Ninth and D.C. Circuits, in which those courts determined that improper statements by the government during closing argument affected a defendant's substantial rights, even though the jury had been instructed that closing arguments are not evidence. See *United States* v. *Mageno*, 762 F.3d

933, 945 (9th Cir. 2014) (*Mageno I*), vacated, 786 F.3d 768 (9th Cir. 2015); *United States* v. *Davis*, 863 F.3d 894, 903 (D.C. Cir. 2017). That assertion, however, rests on petitioner's characterization (Pet. i) of the decision below as announcing a categorical rule that "a standard instruction that 'arguments are not evidence' necessarily preclude[s] reversal on appeal for plain error based on [a] prosecutor's misconduct." The decision below did not in fact announce such a rule. Although the court of appeals gave weight to such an instruction in finding that petitioner had not shown prejudice here, Pet. App. 16a, it did not hold that such an instruction, by itself, would "necessarily preclude reversal on appeal for plain error" in every case involving a "prosecutor's misconduct," Pet. i.

In any event, petitioner's reliance (Pet. 21-23) on the decisions of the Ninth and D.C. Circuits is misplaced. The Ninth Circuit vacated its decision in *Mageno I*, *supra*, after a corrected trial transcript showed that "no misstatements actually occurred." *United States* v. *Mageno*, 786 F.3d 768, 770 (2015). *Mageno I* therefore is no longer Ninth Circuit precedent. Even if it were, it would not conflict with the decision below, because it did not involve circumstances similar to those here. Unlike this case, *Mageno I* involved a prosecution for participating in a drug conspiracy, 762 F.3d at 936, in which the government's "repeated misstatements," *id.* at 945, had the effect of transforming the testimony of a key witness for the defense into the only direct evidence of the defendant's mens rea, *id.* at 947, and of putting defense counsel in the position of having to challenge the credibility of that key witness during his own closing argument, *id.* at 946.

The D.C. Circuit's decision in *Davis* likewise did not involve circumstances similar to those here. In *Davis*, unlike in this case, the government's alleged misstatements of the evidence were "blatant" and "egregious," 863 F.3d at 903; the evidence the government allegedly misrepresented was "central[] to the issue of [the defendant's] mens rea," *id.* at 898; and the government's evidence on that issue was otherwise "minimal," *id.* at 903; see *id.* at 901-902 (describing the government's evidence against the defendant as "thin" and "equivocal, at best"). The D.C. Circuit's determination that reversal of the defendant's convictions was warranted under those circumstances, *id.* at 903, does not conflict with the decision below.

c. In all events, this case would not be a suitable vehicle for reviewing the court of appeals' determination that the government's statements during closing argument did not affect petitioner's substantial rights. The court's determination that those statements do not warrant reversal of petitioner's convictions for filing false tax returns rests on the independent ground that petitioner "failed to identify any error" in those statements in the first place. Pet. App. 16a. Although petitioner briefly challenges (Pet. 31-32) that independent ground in the body of his petition for a writ of certiorari, whether the government's statements were erroneous is not fairly encompassed within the questions presented, Pet. i, and the court's factbound determination that petitioner failed to identify any error would not warrant this Court's review at any rate. Thus, regardless of whether the court of appeals erred in its application of the "substantial rights" prong of plain-error review, Pet. App. 16a (citation omitted), petitioner's convictions for filing false tax returns would still stand.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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