No. 20-1092

In the Supreme Court of the United States

BRANDON JONES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether sufficient evidence supports petitioner's conviction for using a "false or fictitious instrument, document, or other item appearing, representing, purporting, or contriving through scheme or artifice, to be an actual security or other financial instrument," in violation of 18 U.S.C. 514(a), when he passed off documents that purported to be, but did not share the form of, legitimate payment vouchers.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 965 F.3d 190.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2020. A petition for rehearing and rehearing en banc was denied on September 8, 2020 (Pet. App. 11a). On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on February 5, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

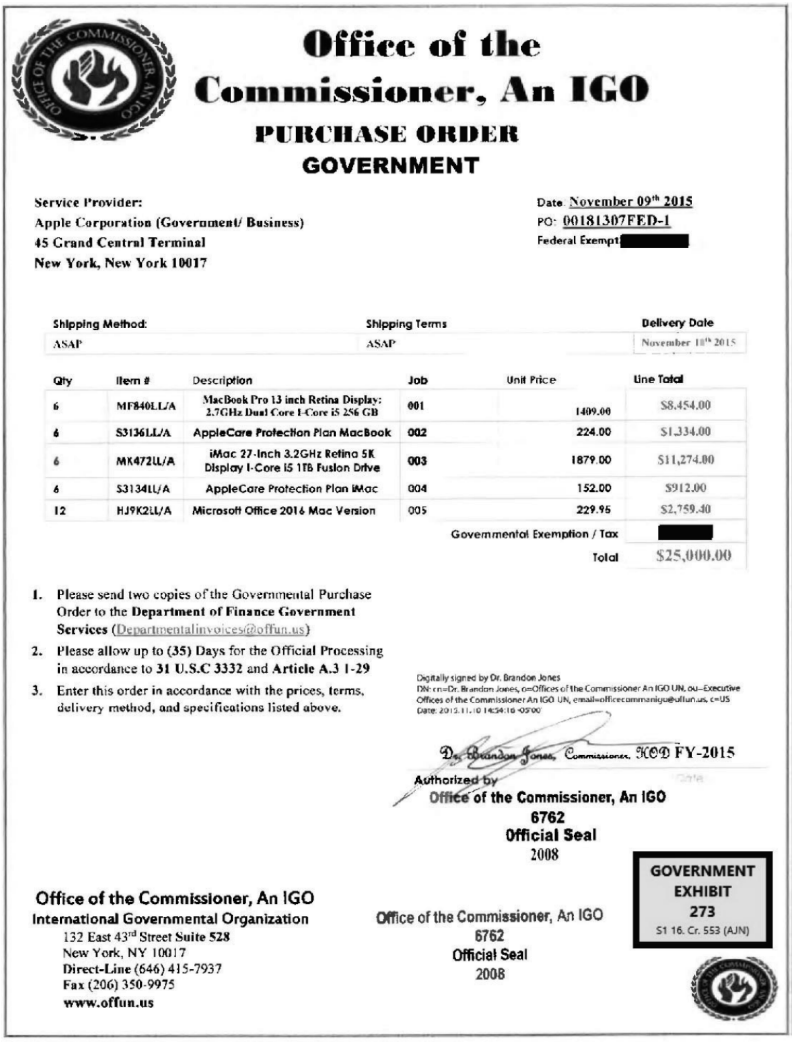
STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of wire fraud, in violation of 18 U.S.C. 1343 and 2; one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 1349; and one count of using false or fictitious government documents, in violation of 18 U.S.C. 514(a)(2) and 2. Amended Judgment 1-2. He was sentenced to 50 months of imprisonment, to be followed by five years of supervised release. *Id.* at 3-4. The court of appeals affirmed. Pet. App. 1a-10a.

1. As early as 2010, petitioner created an organization called the "Office of the Commissioner for Burns" —or sometimes just the "Office of the Commissioner"— which he falsely described as an "international governmental organization" affiliated with the United Nations. Pet. App. 3a & n.1. He referred to himself as "Commissioner and Head of Delegation," and typically dressed in uniform, including a white hat and United Nations badges. *Id.* at 3a; Trial Tr. 724-725; Presentence Investigation Report (PSR) ¶ 11. In truth, petitioner was not a delegate or employee of the United Nations. Pet. App. 3a. The United Nations did not recognize the "Office of the Commissioner" as an intergovernmental organization, and it had barred petitioner from its premises in 2014. *Ibid.*

Between 2013 and 2016, petitioner used his organization to perpetrate a series of frauds against at least 24 companies. Pet. App. 3a-4a; PSR ¶ 27. One such fraud involved fabricated "purchase orders" that petitioner used to obtain a variety of goods and services. Pet. App. 4a. He bought Apple products, for example,

using a "purchase order" purportedly issued by the "Office of the Commissioner, An IGO":



Office of the Commissioner, An IGO

PURCHASE ORDER

GOVERNMENT

Service Provider:
Apple Corporation (Government/ Business)
45 Grand Central Terminal
New York, New York 10017

Date: November 09th 2015
PO: 00181307FED-1
Federal Exempt [redacted]

Shipping Method:	Shipping Terms	Delivery Date
ASAP	ASAP	November 18th 2015

Qty	Item #	Description	Job	Unit Price	Line Total
6	MF840LL/A	MacBook Pro 13 inch Retina Display: 2.7GHz Dual Core I-Core i5 256 GB	001	1409.00	$8,454.00
6	S3136LL/A	AppleCare Protection Plan MacBook	002	224.00	$1,334.00
6	MK472LL/A	iMac 27-Inch 3.2GHz Retina 5K Display I-Core i5 1TB Fusion Drive	003	1879.00	$11,274.00
6	S3134LL/A	AppleCare Protection Plan iMac	004	152.00	$912.00
12	HJ9K2LL/A	Microsoft Office 2016 Mac Version	005	229.95	$2,759.40
				Governmental Exemption / Tax	[redacted]
				Total	$25,000.00

1. Please send two copies of the Governmental Purchase Order to the **Department of Finance Government Services** (Departmentalinvoices@offun.us)
2. Please allow up to **(35)** Days for the Official Processing in accordance to **31 U.S.C 3332** and **Article A.3 1-29**
3. Enter this order in accordance with the prices, terms, delivery method, and specifications listed above.

Digitally signed by Dr. Brandon Jones
DN: cn=Dr. Brandon Jones, o=Offices of the Commissioner An IGO UN, ou=Executive Offices of the Commissioner An IGO UN, email=officecommunique@offun.us, c=US
Date: 2015.11.10 14:54:16 -05'00'

Dr. Brandon Jones, Commissioner, HOD FY-2015

Authorized by
Office of the Commissioner, An IGO
6762
Official Seal
2008

GOVERNMENT EXHIBIT 273
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Office of the Commissioner, An IGO
International Governmental Organization
132 East 43rd Street Suite 528
New York, NY 10017
Direct-Line (646) 415-7937
Fax (206) 350-9975
www.offun.us

Office of the Commissioner, An IGO
6762
Official Seal
2008

C.A. Supp. App. 33; see Pet. App. 4a. Similarly, he paid for accommodations using a "purchase order" purportedly issued by the "Office of the Commissioner International Mission," located at "845 United Nations Plaza."

C.A. Supp. App. 34; see Pet. App. 4a. Each of those documents, printed on a single white page, bore the title "Purchase Order" and subtitle "Government," a logo for petitioner's organization, and instructions for the recipient to email the order for billing to either the "Department of Finance Government Services" or the "Executive Services Department of the EOCBHD" at "Departmentalinvoices@offun.us." C.A. Supp. App. 33-34 (capitalization altered); see Pet. App. 4a-5a.

To pay for travel expenses, petitioner used a second kind of fraudulent document: a so-called "Governmental Transportation Request." Pet. App. 4a. For example, petitioner obtained more than $100,000 in airline tickets from American Airlines using documents claiming to have been issued by the "Office of the Commissioner, An IGO," and $9000 to rent a car from Enterprise Rent-A-Car using documents claiming to have been issued by the "Office of the Commissioner for Burns," all of which were purportedly authorized by

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Office of the Commissioner for Burns

Official Governmental Transportation Request (GTR)

DEPT: EXECUTIVE SERVICES DEPARTMENT (OFFICIAL GOVERNMENTAL TRAVEL)			NO.E20138322
Bill Charges to (Department agency, bureau office, address including ZIP code) **The Executive Offices of the Director of Finance Section: Executive Principal (EP) Transportation** 845 United Nations Plaza New York, NY 10021	FISCAL DATA (Appropriation, authorization etc.) **Authorization:** Executive Services Department **(EP Governmental Travel Services)** **Acct**: 2579287579		
TRAVELER (Type or Print) H.E Brandon McGeer	**ISSUING GOVERNMENT (SIGNATURE AND OFFICE)** (United States Offices of the O.C. Administration)		**PLACE AND DATE OF ISSUE** 29th of November 2013 NY-HQ Offices
TRAVELER ID **UN ID:** **0044246**	**CARRIER OR AGENT TENDERED TO** **Enterprise Rental Services** **U.S Federal Government** **(GOV-P.O E001083993)** **H.E Brandon McGeer**		**DEPENTENTS CHILD - SPOUSE** Yes: / No: X
	CONFIRMATION: JNP146 **U.S GOVERNMENT TRAVEL ORDERS AND PURCHASE ORD**		E001083993 P.O
	FOR CARRIER USE ONLY		
	FORM AND TICKET NUMBER	**AGENT** / **AUDITORS**	**STOP OVER-AUTH**
			Yes
	TOTALS:	$9,000.00 / $9,000-	

DEPT: ESD-OGT-GTR	NO. E20138322
Bill Charges to (Department agency, bureau office, address including ZIP code) **Executive Offices of the Director of Finance Section: Executive Principal (EP) Transportation** 845 United Nations Plaza New York, NY 10021	
DATE OF TRAVEL OR VEHICLE PICKUP 30th of November 2013 Any-Location	**ISSUING GOVERNMENTAL OFFICER:** H.E Brandon C. Jones McGeer
CARRIER AND CLASS OF SERVICE (FIRSTCLASS COACH, CHARTER, RENTAL CAR SERVICES, ETC) **Official Car Rental Services** **June 26th 2014** **Renewable until 12th of September 2014**	

LOCATION CITIES	WEIGHT	PIECES
FROM: N/A		
TO: N/A	SPECIAL ACCOMMODATIONS AND REQUIREMENTS	
TO: N/A	N/A	

DO NOT fold, spindle or mutilate 1169-04-OCB Admin: **OFFICIAL GOVERNMENT TRANSPORTATION REQUEST**

"EP Governmental Travel Services." C.A. Supp. App. 7-8; see Pet. App. 3a-4a. Those documents bore the same logo of the "Office of the Commissioner for Burns," as well as instructions for the recipient to bill charges to "The Executive Offices of the Director of Finance" at a United Nations address. *Ibid.*

2. A federal grand jury in the Southern District of New York charged petitioner with wire fraud, in violation of 18 U.S.C. 1343 and 2; conspiring to commit wire fraud, in violation of 18 U.S.C. 1349; and using false or fictitious government documents, in violation of 18 U.S.C. 514(a)(2) and 2. Superseding Indictment 1-3; see Pet. App. 3a. As relevant here, Section 514(a)(2) makes it a crime to pass, present, or offer, within the United States,

> any false or fictitious instrument, document, or other item appearing, representing, purporting, or contriving through scheme or artifice, to be an actual security or other financial instrument issued under the authority of the United States, a foreign government, a State or other political subdivision of the United States, or an organization.

18 U.S.C. 514(a).

At trial, the government introduced many of the fraudulent documents petitioner created, as well as several form documents issued by the federal General Services Administration (GSA), an agency of the United States government. Pet. App. 4a-5a; see, *e.g.*, C.A. Supp. App. 5-38, 47-53. One such GSA form, titled "Solicitation/Contract/Order for Commercial Items," allows certain federal employees to execute purchases on behalf of the United States government. Pet. App. 5a (citation omitted); see C.A. Supp. App. 52-53; Trial Tr. 1469-1470.

Another GSA form, titled "U.S. Government Transportation Request" (GTR), allows employees of federal agencies to purchase transportation services. Pet. App. 4a (citation omitted); see C.A. Supp. App. 47 (version in use before February 2013); C.A. Supp. App. 48-49 (version in use since February 2013); Trial Tr. 1460, 1464-1465. Those standardized, two-page forms do not contain logos and include spaces for various entries missing from petitioner's documents. C.A Supp. 47-49, 52-53; see Pet. App. 4a-5a. For example, here is what the current version of the first page of a GTR looks like:

U.S. GOVERNMENT TRANSPORTATION REQUEST
NONTRANSFERABLE - PENALTY FOR FRAUDULENT OR PRIVATE USE

CONTROL NUMBER B-

BILL CHARGES TO: *(Department/Agency, Bureau/Office, address including ZIP Code)*

FISCAL DATA *(Appropriation, authorization, etc.)*

PLACE OF ISSUE

ISSUING GOVERNMENT OFFICER *(Signature and Office)*

DATE OF ISSUE

TRAVELER *(Type or Print)*

OTHERS *(Number)*

DEPENDENT TRAVEL CHILDREN *(Names and Ages)*

☐ SPOUSE

CARRIER OR AGENT TENDERED TO

FOR CARRIER USE ONLY

FORM AND TICKET NUMBER	AGENT'S VALUE	AUDITOR'S VALUE	STOP OVER AUTHORITY	CITIES	CARRIER AND CLASS OF SERVICE *(First class, coach, charter, etc.)*	EXCEESS BAGGAGE AUTHORIZED WEIGHT	PIECES
				FROM:			
				TO:			
				TO:			
				TO:			
				TO:			
				TO:			
				TO:			
				TO:			
				TO:			
TOTAL ▷				*(Continue service required on the reverse)*			

SPECIAL ACCOMMODATIONS AND REQUIREMENTS

GOVERNMENT EXHIBIT 332 S1 16 Cr 553 (AJN)

AUTHORIZED FOR LOCAL REPRODUCTION
PREVIOUS EDITIONS ARE NOT USABLE

THIS IS AN ACCOUNTABLE FORM

OPTIONAL FORM 1169 (REV. 2/2013)
PRESCRIBED BY GSA FMR 41 CFR PART 102-118

C.A. Supp. App. 48.

At the close of trial, the district court instructed the jury that a "false or fictitious instrument" under Section 514(a) is "a bogus financial document made to look like a real financial document which could be used for payment when, in fact, there is no such genuine financial

instrument. As a result, the document has no value, but that fact is presumably unknown by, and not revealed to, the person or entity receiving the document." Trial Tr. 1729-1730; see Pet. App. 5a. That instruction accorded with petitioner's own proposal, and petitioner's brief in the court of appeals agreed that it was correct. Pet. C.A. Br. 11.

The jury found petitioner guilty on all counts. Pet. App. 5a. After calculating an advisory guidelines range of 87 to 108 months, Sent. Tr. 13, the district court sentenced petitioner to concurrent terms of 50 months of imprisonment on each count, to be followed by five years of supervised release, Am. Judgment 3-4.

3. The court of appeals affirmed. Pet. App. 1a-10a. Petitioner argued that the evidence supporting his Section 514(a)(2) conviction was insufficient, asserting that the term "false or fictitious instrument, document, or other item" in 18 U.S.C. 514(a) refers only to "documents that purport to be types of financial instruments that do not actually exist," and that the fraudulent documents he produced "purported to be types of financial instruments that do exist." Pet. C.A. Br. 10 (emphasis omitted). The government responded that no "actual governmental documents * * * correspond to the fake documents [petitioner] created," and that fraudulent documents like petitioner's qualify as "false or fictitious instruments" even if "similarly named or 'types' of financial instruments exist." Gov't C.A. Br. 14, 16.

The court of appeals rejected petitioner's argument that Section 514(a) applies only to documents "that purport to be entirely contrived or extremely rare types of financial instruments," observing that the jury instructions had in fact been "overly favorable" to petitioner in that respect. Pet. App. 6a. The court explained that

Section 514(a) proscribes the use of "false *or* fictitious" documents, 18 U.S.C. 514(a) (emphasis added), and thus "calls for some distinction to be made between a false instrument and a fictitious one," Pet. App. 7a (quoting *United States* v. *Williams*, 790 F.3d 1240, 1246 (11th Cir. 2015), cert. denied, 577 U.S. 1111 (2016)). The court noted distinct dictionary definitions of "fictitious" as "'something invented by the imagination or feigned,'" and "false" as something "'not genuine.'" *Ibid.* (citations omitted). The court accordingly determined that construing the expressly disjunctive phrase "false or fictitious" to "refer[] only to purely contrived types of documents and instruments 'would render the term "false" mere surplusage.'" *Ibid.* (quoting *Williams*, 790 F.3d at 1246).

The court of appeals further observed that petitioner's proposed interpretation would conflict with the statutory definitions incorporated by reference in Section 514. Pet. App. 8a. Section 514(a)(2) prohibits, for example, use of a "false or fictitious" document purporting to be an "actual security"; Section 514(b) expressly incorporates "[f]or purposes of this section" the definitional provisions in 18 U.S.C. 513(c); and Section 513(c), in turn, defines the term "security" to include, among other things, "commonly used obligations" like checks and bonds. Pet. App. 8a. The court of appeals thus reasoned that Section 514 must cover more than just "fake versions of * * * nonexistent or extremely rare types of documents." *Ibid.*

The court of appeals noted that the Ninth Circuit, "[r]elying on legislative history," had concluded that Section 514 "'refer[s] to nonexistent instruments.'" Pet. App. 8a (quoting *United States* v. *Howick*, 263 F.3d 1056, 1067 (9th Cir. 2001), cert. denied, 535 U.S. 946

(2002)). The court also stated that three other circuits had "adopted the Ninth Circuit's definition." *Id.* at 8a n.2. But the court saw "no reason to examine legislative history" given the "plain language" of the statute. *Id.* at 8a. The court added that in any event, the legislative history would not alter its interpretation of the text because even accepting that Section 514 was "intended to 'close[] a loophole in Federal counterfeiting law'" involving "'fictitious instruments [that] are not counterfeits of any existing negotiable instrument,'" Congress chose to enact "a more capacious statute that covers a broader variety of conduct." *Id.* at 9a n.3 (quoting 141 Cong. Rec. 18,055 (1995)). The court further explained that petitioner's interpretation would itself give rise to a loophole: instruments that correspond to an existing type of instrument but differ markedly from the genuine instruments might not be covered by any federal counterfeiting law. *Ibid.*

Finally, the court of appeals rejected petitioner's sufficiency challenge. Pet. App. 9a-10a. The court explained that "[t]he record is replete with evidence establishing that [petitioner] passed inauthentic GTRs and purchase orders." *Id.* at 9a.

ARGUMENT

Petitioner contends (Pet. 11-22) that the court of appeals erred in understanding 18 U.S.C. 514(a) to proscribe false versions of actual financial instruments, and that the decision below conflicts with decisions of four courts of appeals. The court of appeals correctly affirmed petitioner's conviction, and although the courts of appeals have expressed different formulations of the precise reach of that provision, petitioner overstates the scope and practical effect of any disagreement. Moreover, this would not be an appropriate vehicle in which to

address the question presented because the evidence was sufficient to sustain petitioner's Section 514(a) conviction even under the construction that he proposes. Further review is unwarranted.

1. The court of appeals correctly affirmed petitioner's conviction. The plain text of Section 514(a) covers "false *or* fictitious" documents that appear or purport to be "actual securit[ies] or other financial instrument[s]." 18 U.S.C. 514(a) (emphasis added). As the court of appeals explained, the disjunctive framing of "false or fictitious" indicates that Congress contemplated application of Section 514 both to documents that are "false" ("not genuine") as well as to documents that are "fictitious" ("invented by the imagination or feigned"), so long as the documents *purport* to be "actual securit[ies] or other financial instrument[s]" issued by a government or an organization. Pet. App. 6a-7a (citations omitted); see *National Association of Manufacturers* v. *Department of Defense*, 138 S. Ct. 617, 632 (2018) ("As this Court has noted time and time again, the Court is 'obliged to give effect, if possible, to every word Congress used.'") (citation omitted). The statute thus covers not only "purely contrived categories of obligations," Pet. App. 8a, but also documents that "purport to be a type of instrument that actually exists, but are still 'false' in the sense that they are wholly inauthentic," *id.* at 7a (citation omitted).

That conclusion is reinforced by the other words of the statute. Section 514(a) proscribes the use of a false or fictitious document purporting to be, among other things, an "actual security." 18 U.S.C. 514(a). Section 514(b) states that any term used in Section 514 "has the same meaning given such term in section 513(c),"

18 U.S.C. 514(b), and Section 513(c)(3) defines "security" to include, among other things, a "stock certificate," "bond," or "check," 18 U.S.C. 513(c)(3)(A). That express incorporation makes clear that Section 514(a) covers fake replicas of the "actual" versions of "existent and commonly used obligations." Pet. App. 8a. If petitioner were correct that Section 514 criminalizes only the use of fake versions of *nonexistent types* of documents, a defendant could not be convicted under Section 514 for using fake versions of existing securities cross-referenced in Section 514 itself. See *United States* v. *Williams*, 790 F.3d 1240, 1246 (11th Cir. 2015) ("To interpret § 514 to criminalize the passing of only nonexisting *types* of documents would be to disregard the statutory definitions set forth by Congress in § 513(c), as it strains the imagination to think of a scenario where anything other than a document bearing the usual indicia of a personal check could purport to be an 'actual' personal check."), cert. denied, 577 U.S. 1111 (2016).

Petitioner nevertheless contends (Pet. 16-22) that Section 514 "covers only the use of nonexistent types of obligations." But the plain text of Section 514 makes no mention of "nonexistent" types of obligations. And petitioner appears to acknowledge that his construction of the statute renders the terms "false" and "fictitious" "'redundan[t],'" Pet. 20 (quoting *Barton* v. *Barr*, 140 S. Ct. 1442, 1453 (2020)), and he does not directly address the anomalies that it would create. Rather, petitioner principally asserts (Pet. 17-18) that Section 514(a) distinguishes between "false or fictitious" documents, on the one hand, and "actual" documents, on the other. From that asserted distinction, petitioner would infer that the statute does not proscribe the use of doc-

uments corresponding to those "existing in fact or reality," on the theory that such documents would be "actual" documents rather than "false or fictitious" ones. Pet. 18 (quoting *United States* v. *Morganfield*, 501 F.3d 453, 459 (5th Cir. 2007), cert. denied, 553 U.S. 1067 (2008)).

That theory misconstrues the statute. Section 514(a) covers "any false or fictitious instrument, document, or other item *appearing, representing, purporting, or contriving* through scheme or artifice, to be an actual security or other financial instrument." 18 U.S.C. 514(a) (emphasis added). The relevant question therefore is not, as petitioner contends, whether the false or fictitious document itself "exist[s] in fact or reality." Pet. 18 (citation omitted). Rather, it is whether the false or fictitious document appears, represents, purports, or contrives to be an actual—that is, genuine—security or financial instrument. A fake treasury bond, for example, can purport to be an "actual" treasury bond issued under governmental authority. That a financial instrument "exist[s] in fact or reality" does not preclude a document *purporting to be* that financial instrument from being "false or fictitious."

Petitioner asserts (Pet. 18-19) that Congress need not have used the word "actual" in Section 514(a) to capture fake versions of existing obligations, as several other provisions in Chapter 25 of Title 18 prohibit counterfeiting without using that word. See, *e.g.*, 18 U.S.C. 472 (prohibiting the use of "falsely made, forged, counterfeited, or altered obligation[s] or other securit[ies] of the United States"). But petitioner agrees (Pet. 16) that Section 514(a) at least proscribes the use of fake versions of nonexistent types of obligations, which are not covered by the other provisions he cites. See Pet. 21

(noting that other prohibitions in Chapter 25 do not cover "completely fictitious financial instruments") (citation omitted). And it is unremarkable that Congress would use different terms to proscribe a broader set of conduct. See *DePierre* v. *United States*, 564 U.S. 70, 83 (2011) (noting that Congress sometimes has "good reason to employ" different terms to cover even the same conduct). And any such "overlap" (Pet. 19-20) in the coverage of the counterfeiting laws "is beside the point." *Pasquantino* v. *United States*, 544 U.S. 349, 358 n.4 (2005).

As this Court has explained, "[t]he Federal Criminal Code is replete with provisions that criminalize overlapping conduct. The mere fact that two federal criminal statutes criminalize similar conduct says little about the scope of either." *Pasquantino*, 544 U.S. at 358 n.4 (citations omitted); see *Loughrin* v. *United States*, 573 U.S. 351, 358 n.4 (2014) (explaining that even "substantial" "overlap" is "not uncommon in criminal statutes"). Moreover, as the court of appeals observed (Pet. App. 9a n.3), petitioner's contrary interpretation of Section 514 would give rise to a new loophole, for fake versions of existing documents that differ sufficiently from the actual instruments as to fail the "similitude" requirement imposed by some courts of appeals under the counterfeiting prohibition in 18 U.S.C. 472. *United States* v. *Howick*, 263 F.3d 1056, 1067 (9th Cir. 2001), cert. denied, 535 U.S. 946 (2002). Petitioner does not explain how his amorphous limitation of Section 514(a) to "nonexistent" types of documents would cover that scenario, or how courts or juries might coherently determine when a poor attempt at replicating an existing document becomes so divorced from the original that it would be covered by Section 514(a).

Petitioner's reliance (Pet. 21) on legislative history is unsound. He asserts that "nothing in the legislative record suggest[s] that Congress intended Section 514 to duplicate existing prohibitions or to provide enhanced penalties for offenses involving fake versions of existing instruments." *Ibid.* But "silence in the legislative history * * * cannot defeat the better reading of the text and statutory context," because "[i]f the text is clear, it needs no repetition in the legislative history." *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1143 (2018); see *Whitfield* v. *United States*, 543 U.S. 209, 215 (2005) ("Because the meaning of § 1956(h)'s text is plain and unambiguous, we need not accept petitioners' invitation to consider legislative history.").

In any event, none of the snippets of legislative history on which petitioner relies is inconsistent with, much less forecloses, the court of appeals' recognition, based on the plain text of Section 514, that Congress ultimately chose to enact "a more capacious statute that covers a broader variety of conduct," even if "some overlap or duplication results." Pet. App. 9a n.3. Indeed, the legislator whose statements petitioner repeatedly cites (Pet. 4, 7, 12, 21), Senator D'Amato, elsewhere described Section 514 in capacious terms: "This bill makes it a violation of Federal law to possess, pass, utter, publish, or sell, with intent to defraud, *any* items purporting to be negotiable instruments of the U.S. Government, a foreign government, a State entity, or a private entity." 141 Cong. Rec. at 18,055 (emphasis added); cf. *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005) ("Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in

'"looking over a crowd and picking out your friends."'") (citation omitted).

Finally, petitioner invokes (Pet. 22) the rule of lenity. But that rule applies only if, after the application of the traditional tools of statutory construction, a court concludes that a statute contains "'grievous ambiguity,'" such that the court "can make 'no more than a guess as to what Congress intended.' " *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (citations omitted). No such grievous ambiguity exists here.

2. Petitioner suggests (Pet. 11-16) that further review is warranted because the courts of appeals are divided on the question presented. But although courts of appeals have described the reach of Section 514(a) in different ways, petitioner overstates the scope and practical effect of any disagreement, and no court of appeals would have reached a different result in this case.

a. Petitioner contends (Pet. 11) that the Ninth Circuit has held that Section 514 covers only fictitious or nonexistent types of securities or other financial instruments, and that the Fifth, Sixth, and Eighth Circuits have followed suit. Although each court has made statements to that effect, only one (the Fifth Circuit) has actually vacated a Section 514(a) conviction, and in doing so, that court stressed that it was not deciding whether the statute would apply in circumstances similar to those presented here.

The case on which petitioner principally relies is the Ninth Circuit's opinion in *United States* v. *Howick*, *supra*. There, the defendant was convicted under Section 514 for possessing phony federal reserve notes (that is, paper currency) in denominations of $100,000,000 and $500,000,000. *Howick*, 263 F.3d at 1066. The defendant argued that because the notes were so obviously fake,

he could not be convicted of possessing anything purporting to be an *actual* security or other financial instrument. *Ibid.* The question before the court of appeals, therefore, was whether Section 514 "contains a threshold requirement with respect to the credibility of the contrived documents." *Id.* at 1067. The court concluded that a document purports to be an "actual" instrument under Section 514 if it "include[s] enough of the various hallmarks and indicia of financial obligations" that it "bears a family resemblance to genuine financial instruments." *Id.* at 1068. The court then affirmed the defendant's conviction, finding that the notes "contained many of the indicia of genuine financial instruments," including presidential portraits, official seals, and signatures, and did not include any "disqualifying marks." *Id.* at 1069.

Although not necessary to its holding, the court of appeals also stated its view as to the difference between "counterfeit" obligations, proscribed by 18 U.S.C. 472, and "false or fictitious" obligations under Section 514. *Howick*, 263 F.3d at 1066-1067. Based on its review of Section 514's legislative history, the court stated that whereas a "counterfeit" obligation is a "bogus document contrived to appear similar to an existing financial instrument," a "fictitious" document is a "bogus document contrived to appear to be a financial instrument, where there is in fact no such genuine instrument." *Id.* at 1067; see *ibid.* ("[W]e interpret the phrase 'false or fictitious instrument' in section 514 to refer to nonexistent instruments, whereas the phrase 'falsely made, forged, counterfeited, or altered obligation' in section 472 refers to doctored up versions of obligations that truly exist.").

Petitioner states that the Ninth Circuit has since relied on that language in other opinions involving prosecutions under Section 514. Pet. 12-13 (citing *United States* v. *Salman*, 531 F.3d 1007, cert. denied, 555 U.S. 1008 (2008); *United States* v. *Hall*, 681 Fed. Appx. 621 (per curiam), cert. denied, 138 S. Ct. 141 (2017); and *United States* v. *Murphy*, 824 F.3d 1197 (2016)). But none of those opinions vacated or reversed a Section 514 conviction on the grounds petitioner urges here. For example, the defendant in *United States* v. *Salman* did not argue that the "sight drafts" that he presented to the IRS were counterfeits rather than "false or fictitious" documents, and the court of appeals did not address that question in affirming his convictions. 531 F.3d at 1011, 1015. Likewise, although the defendant in *United States* v. *Hall* argued that the "money orders" he used were not "false or fictitious," the court affirmed his conviction, finding that "there is no such thing as a money order that promises payment from a United States Treasury account." 681 Fed. Appx. at 622-623. And *Murphy* did not even address *Howick*'s discussion of the term "false or fictitious"; instead, the court there rejected the defendant's argument that the "bonded promissory notes" he sent to the IRS did not purport to have been "issued under the authority of the United States." 824 F.3d at 1203-1204. Thus, petitioner has not identified a case in which the Ninth Circuit vacated a defendant's conviction on the ground that the defendant used only a fake version of an existing document or instrument.

Similarly, although petitioner is correct (Pet. 14-15) that the Sixth and Eighth Circuits have cited *Howick*'s framing of Section 514(a)'s scope, he has not identified

a case in which that framing was outcome determinative. In *United States* v. *Anderson*, 353 F.3d 490 (2003) (per curiam), cert. denied, 541 U.S. 1068 (2004), the Sixth Circuit affirmed the defendants' Section 514 convictions based on their use of sight drafts purporting to be drawn on the United States Treasury. *Id.* at 497, 499-501. The court recognized that "there is a legitimate financial instrument known as a sight draft," but found that the sight drafts constituted "fictitious instruments" because "the United States Treasury has not used sight drafts in modern history" and "maintains no depository accounts against which an individual could draw a check, draft, or any other financial instrument." *Id.* at 500. And in *United States* v. *Getzschman*, 81 Fed. Appx. 619 (2003) (per curiam), the Eighth Circuit (in an unpublished decision) rejected a defendant's constitutional vagueness challenge to Section 514, observing that the money orders and sight drafts at issue in that case purporting to be drawn on the United States Treasury "clearly fall within the meaning of § 514(a)." *Id.* at 622.

The Fifth Circuit has relied on the distinction drawn in *Howick* to vacate Section 514 convictions, but only in cases involving substantially different facts. In *United States* v. *Morganfield*, *supra*, the defendants were convicted under Section 514 for passing worthless checks drawn on checking accounts that they had created for nonexistent shell companies. 501 U.S. at 456-457. The court of appeals vacated the defendants' convictions on the ground that the checks were not "false or fictitious," but "genuine" in the sense that they were "actual negotiable instruments that were issued by legitimate banks where actual checking accounts existed." *Id.* at 460.

The court later applied that holding in another case involving "facially genuine checks." *United States* v. *Kittelberger*, 595 Fed. Appx. 355, 361 (5th Cir. 2014). The court specifically noted, however, that it was not addressing the question whether "a scheme that involves wholly fake 'checks' necessarily falls outside § 514(a)." *Morganfield*, 501 F.3d at 461.

b. Petitioner asserts (Pet. 15) that the Eleventh Circuit and the court of appeals below "have reached the opposite conclusion" from that of the circuits discussed above. That is an overstatement. Although both courts cast doubt on *Howick*'s dicta concerning Section 514's scope, the Eleventh Circuit expressly stated that its approach was consistent with both *Howick* and *Morganfield*, and the same can be said of the decision below.

In *United States* v. *Williams*, *supra*, the defendant was convicted of passing fake checks he had created using blank check stock and check-writing software. 790 F.3d at 1243. He sought to vacate his convictions on the theory that the legislative history of Section 514 indicates that the statute applies only to "non-existent *types* of instruments, such as a three dollar bill or a wholly made-up type of government bond." *Id.* at 1245. The court of appeals rejected that argument, explaining that the statute by its terms "contemplates documents that are not 'fictitious' since they purport to be a type of instrument that actually exists, but are still 'false' in the sense that they are wholly inauthentic." *Id.* at 1246. The court further noted that the defendant's interpretation would "render the term 'false' mere surplusage" and "disregard the statutory definitions" in Section 513(c). *Ibid.*

Williams further explained that its decision was consistent with both *Howick* and *Morganfield*. 790 F.3d at

1247-1249. As to *Howick*, the court observed that the Ninth Circuit's statements defining "fictitious" obligations were dicta, and that even under *Howick*'s framework, the fake checks at issue in *Williams* would still be "false or fictitious" because they were "not copies of any existing check, but instead purport[ed] to be drawn from one account while containing the routing/account numbers for a different account." *Id.* at 1248. Thus, the court of appeals determined that the checks were, "to borrow from *Howick*, 'bogus documents contrived to appear to be a financial instrument, *where there is in fact no such genuine instrument* in existence.'" *Ibid.* (quoting *Howick*, 263 F.3d at 1067) (brackets omitted). And the court observed that in *Morganfield*, "the Fifth Circuit went to great lengths to distinguish the checks at issue in that case (facially genuine, but used in a fraudulent scheme) from wholly fabricated 'checks' like those in the instant case." *Id.* at 1249.

Although the court of appeals in this case did not similarly attempt to reconcile its decision with *Howick* and *Morganfield*, the outcome here is consistent with those and the other cases on which petitioner relies (Pet. 13-15). As in this case, the decisions in *Howick*, *United States* v. *Hall*, *United States* v. *Anderson*, and *United States* v. *Getzschman* all affirmed Section 514 convictions when, as here, the defendant sought to pass off a wholly falsified instrument as an "actual" (meaning genuine or legitimate) one. See *Howick*, 263 F.3d at 1061, 1069 ("federal reserve notes" in "improbable" denominations); *Hall*, 681 Fed. Appx. at 622-623 ("money orders" promising payment from a United States Treasury account); *Anderson*, 353 F.3d at 500 ("sight drafts" that purported to draw on United States Treasury accounts); *Getzschman*, 81 Fed. Appx. at 622 ("sight

drafts" and "money orders" purporting to draw on United States Treasury accounts).

And in stark contrast with *Morganfield*, which involved "actual negotiable instruments that were issued by legitimate banks where actual checking accounts existed," 501 F.3d at 460, petitioner here used wholly falsified purchase orders and transportation requests that were never issued by any legitimate governmental entity. Petitioner thus provides no sound basis to believe that his case would have come out differently in any other circuit.

3. Even if the question presented otherwise warranted further review, this case would not be a suitable vehicle in which to address it. As the government argued below, see Gov't C.A. Br. 13-21, the evidence at petitioner's trial was sufficient to support his conviction even under petitioner's preferred reading of the statute. Just as a $100,000,000 federal reserve note qualifies as a fictitious obligation even though federal reserve notes actually exist, see *Howick*, 263 F.3d at 1069, and just as a sight draft drawn on the United States Treasury qualifies as a fictitious obligation even though "there is a legitimate financial instrument known as a sight draft," *Anderson*, 353 F.3d at 500, a purchase order or transportation request purportedly issued by the "Office of the Commissioner" qualifies as a fictitious obligation even though such things as government purchase orders and transportation requests exist.

Even under petitioner's construction of the statute, the mere fact that the documents petitioner fabricated purported to serve a *function* that existing financial instruments also serve would not preclude those documents from being "fictitious." At that level of generality, the same would be true of *all* documents covered by

Section 514. Merely serving the same general function as an actual financial instrument does not make a document "real" (as opposed to fictitious). Nor can approximating the name—but not the form—of an existing document suffice to render it an "actual" financial document on petitioner's reading. The jury in this case—instructed with language drawn from *Howick*, see C.A. App. 36, 38—correctly found that petitioner created "bogus financial document[s] made to look like * * * real financial document[s] which could be used for payment when, in fact, there is no such genuine financial instrument." Pet. App. 5a (citation omitted). That is sufficient to support the conviction here even under petitioner's cramped reading of the statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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