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

REPLY BRIEF FOR THE PETITIONER

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This Court should grant review to resolve the circuit split over whether 18 U.S.C. 514 prohibits only the use of nonexistent types of securities or financial instruments, or whether it also prohibits fakes of existing financial documents like those long covered by a host of federal counterfeiting statutes.

The government struggles to downplay the growing split (Opp.15-21) as merely courts "express[ing] different formulations of the precise reach of [Section 514]." Opp.9. The government's grudging concessions doom that effort. It acknowledges that in *United States* v. *Howick*, the Ninth Circuit "interpret[ed] * * * Section 514 to refer to nonexistent instruments" and *not* "doctored up versions of obligations that truly exist." Opp.16 (quoting 263 F.3d 1056, 1067 (2001)). The government does not deny that the Fifth, Sixth, and Eighth Circuits "ha[ve] 'adopted the Ninth Circuit's definition' " of Section 514, Opp.9 (quoting App.8a n.2), and that the Fifth Circuit "has relied on the distinction drawn in *Howick* to vacate Section 514 convictions," Opp.18. And it *cannot* deny that the court below was "not persuaded" by *Howick*'s interpretation, App.8a, instead following the Eleventh Circuit's construction, under which Section 514 also prohibits use of "inauthentic" documents that "purport to be a type of instrument that actually exists." App.7a (quoting *United States* v. *Williams*, 790 F.3d 1240, 1246 (2015)). Whatever the government calls it, that is a circuit split.

On the merits, the government cannot explain away Section 514's distinctive language. Section 514 does not prohibit using "false or fictitious" instruments *simpliciter*, but instead targets "false or fictitious" instruments *purporting* to be "*actual*" instruments. That language, distinguishing between fake and actual instruments, dif-

fers fundamentally from counterfeiting prohibitions. Congress presumptively used different language because it wanted to prohibit something not already covered, and the government's reading would render those prohibitions surplusage. At the very least, Section 514's starkly different text, accompanied by historical evidence that Section 514 was a surgical fix for invented instruments, creates ambiguity that must be resolved in petitioner's favor.

Finally, the government never disputes that this case presents an important and recurring question about a frequently used criminal statute. Under the Second and Eleventh Circuits' test, hundreds of defendants charged with counterfeiting offenses each year could face an additional felony charge—one that almost always carries a longer maximum sentence and longer term of supervised release than counterfeiting provisions. Nor does the government dispute the significance of this issue to petitioner, who faces years of additional, burdensome supervised release. The government's sole vehicle argument is that petitioner's conviction would stand even under the rule he advocates. Opp.21-22. But the Second Circuit rejected that argument. See pp.6-7, *infra*. Because "[i]nstruments such as Jones's * * * actually exist," App.9a n.3, the court recognized that petitioner could be convicted only if Section 514 proscribes "fake versions of existing documents," App.2a-3a. This Court's review is warranted.

A. The Split Is Real

1. The government asserts that *Howick*'s interpretation of Section 514 was mere "dicta" "not necessary to its holding." Opp.15-16, 19. Nonsense. The Ninth Circuit did not exhaustively analyze Section 514—its text, its key "differences" from counterfeiting statutes, and its history, 263 F.3d at 1066-1068—on a frolic; that analysis was central to *Howick*'s holding. The defendant had ar-

gued that his documents were so "clearly fake" that they lacked "similitude" with real notes. *Id.* at 1066. That argument would have prevailed had Section 514 required similitude, so the court first decided the "unsettled" question of "to what degree[] the relevant documents must appear genuine." *Ibid.* It concluded that Section 514 "was intended to criminalize * * * behavior not reached by" the counterfeiting statutes, and "the notion of similitude" was "ill-suited to the fictitious obligation statute." *Id.* at 1066-1067. The government's suggestion that *Howick*'s construction was *dicta* is belied by its admission that the Ninth Circuit has repeatedly treated *Howick* as definitive. Opp.17; see Pet.12-13; *United States* v. *Hall*, 681 Fed. Appx. 621, 623 (9th Cir. 2017) ("In [*Howick*], we defined a 'fictitious' obligation [as] a bogus document contrived to appear to be a financial instrument, where there is in fact no such genuine instrument.").

The same goes for the Fifth, Sixth, and Eighth Circuits, which the government concedes each invoked "*Howick*'s framing of Section 514(a)'s scope." Opp.17; see Opp.18. The government admits (Opp.18-19) that the Fifth Circuit has repeatedly applied *Howick* to vacate Section 514 convictions. *United States* v. *Morganfield*, 501 F.3d 453, 460-461 (2007); *United States* v. *Kittelberger*, 595 Fed. Appx. 355, 361 (2014). It did so after consciously rejecting the government's argument—indistinguishable from its argument here—"that the dichotomy between existent and nonexistent securities is too formalistic." *Morganfield*, 501 F.3d at 459. The government's description of the instruments in those cases belies that they meaningfully differ from those here. Opp.18-19. Defendants there passed "worthless checks" that although facially "genuine" drew on accounts from "nonexistent shell companies." Opp.18. Petitioner passed "government transportation requests ('GTRs') and pur-

chase orders," which "do exist and are used by the government," App.3a, 6a, from a nonexistent United Nations entity. The Fifth Circuit would have vacated petitioner's conviction.

The government claims that in the Sixth and Eighth Circuits, *Howick*'s framing was not "outcome determinative." Opp.18. But both courts explicitly indicated that *Howick's* test governs the inquiry and affirmed the convictions at issue only because those cases involved "'fictitious' instruments, as opposed to 'counterfeit' instruments." *United States* v. *Anderson*, 353 F.3d 490, 500 (6th Cir. 2003) (quoting *Howick*). In *Anderson*, the defendant argued "that it was obvious from the face of the sight draft that it was not an 'actual' financial instrument." *Ibid.* As in *Howick*, that argument would have warranted reversal if Section 514 covered conduct akin to counterfeiting. But because Section 514 covers "fictitious" instruments, "[i]n contrast with counterfeit statutes, § 514(a)(2) [could not] be interpreted to include a 'similitude' requirement." *Id.* n.7. The Sixth Circuit has since confirmed that it "adopted the * * * definition of a fictitious instrument * * * articulated in [*Howick*]." *United States* v. *Heath*, 525 F.3d 451, 458 (2008). So too in the Eighth Circuit, which recently reaffirmed that *Howick*'s interpretation is the law. *United States* v. *Gibson*, 729 Fed. Appx. 488, 490 (2018) ("Section 514(a) 'covers wholly nonexistent types of financial instruments.'" (quoting *United States* v. *Getzschman*, 81 Fed. Appx. 619, 622 (8th Cir. 2003))).

Given the number of definitive precedents over more than a decade in jurisdictions that have followed *Howick*, it is hardly surprising that many of their decisions have affirmed rather than reversed convictions. Opp.17-18. That the reach of Section 514 has been settled in these circuits for years makes the division of authority *more* intractable (and worthy of review), not less.

2. More recently, the Second and Eleventh Circuits have adopted a different construction, under which Section 514 *also* prohibits use of "inauthentic" documents that "purport to be a type of instrument that actually exists." App.7a (quoting *Williams*, 790 F.3d at 1246); Pet.15-16; Opp.19. The government acknowledges that the Second Circuit "did not * * * attempt to reconcile" its decision with those of the Fifth, Sixth, Eighth, and Ninth Circuits. Opp.20. That is an understatement. Both it and the Eleventh Circuit expressly considered and rejected decisions of the other circuits. App.8a ("not persuaded"); *Williams*, 790 F.3d at 1249 (rejecting *Howick*'s and *Morganfield*'s "more narrow interpretation"). Both denied rehearing en banc, confirming that only this Court can resolve the division. Pet.16.

The government's strained efforts to reconcile *Williams* with other courts' decisions (Opp.19-20) do not survive even momentary scrutiny. Like the defendants whose convictions the Fifth Circuit vacated, the *Williams* defendant passed "illegal checks" that appeared to be issued by real banks. 790 F.3d at 1243. *Williams* held that Section 514 "unambiguously" encompassed those documents, adopting the precise construction that other circuits have rejected: that Section 514 covers "a type of instrument that actually exists." *Id.* at 1245-1246; compare *Morganfield*, 501 F.3d at 460 (Section 514 draws "distinction between nonexistent and existent instruments"). The government claims *Williams* is "consistent" with *Howick* and *Morganfield* because the checks "purport[ed] to be drawn from one account while containing the routing/account numbers for a different account." Opp.20 (quoting *Williams*, 790 F.3d at 1248). But if the alteration of account numbers makes documents fictitious, then Section 514 covers garden-variety counterfeiting. That is exactly what the Fifth, Sixth, Eighth, and Ninth Circuits have rejected.

3. The government asserts that petitioner's case would not "have come out differently in any other circuit." Opp.21. That was the government's sole argument below: Petitioner's documents were "fictitious obligations" under *Howick* because they bore "passing similarity in name only and no similarity in form." Gov't C.A. Br. 16-21. The Second Circuit emphatically disagreed. "[T]he evidence * * * established that legitimate GTRs and purchase orders do exist and are used by the government." App.6a; accord App.4a ("legitimate government forms"). Thus, the Second Circuit held that evidentiary sufficiency "turn[ed] on what properly constitutes a 'false or fictitious' instrument or document." App.6a. The court *could not* affirm without rejecting the narrower interpretation adopted in four other circuits, explicitly linking the two: "We hold that the term 'false or fictitious' as used in 18 U.S.C. § 514 refers to both wholly contrived types of documents or instruments and fake versions of existing documents or instruments. *Therefore, the evidence was sufficient to support Jones's conviction.*" App.2a-3a (emphasis added). If the split were immaterial, the court could have summarily affirmed under *Howick*'s standard. Instead, the court consciously deepened the circuit split.

The Second Circuit was correct that petitioner would have prevailed under *Howick*. Petitioner's false transportation requests and purchase orders closely resembled real ones. Even in the government's telling, the differences were minor: Real forms "do not contain logos" and "include spaces for various entries missing from petitioner's documents." Opp.6. Such formatting discrepancies are nothing like the features of the fictitious instruments in *Howick* (denominations "thousands of times higher" than any currency ever used, 263 F.3d at 1061) or *Anderson* (instruments not used "in modern history," 353 F.3d at 500). The government does not con-

tend that such inconsistencies made petitioner's documents "nonexistent" or "imaginary," as would be required in the Fifth, Sixth, Eighth, and Ninth Circuits. *Morganfield*, 501 F.3d at 460. Because "[i]nstruments such as Jones's * * * actually exist," App.9a n.3, petitioner could not have been convicted under the majority rule.

B. The Decision Below Is Wrong

By its plain terms, structure, and history, Section 514 punishes only the use of nonexistent types of obligations. If those sources left doubt, lenity would demand the narrower reading. Pet.16-22.

1. The government, echoing the court below, rests its broad interpretation on Section's 514's disjunctive use of "false *or* fictitious," contending that "false" necessarily expands Section 514 to cover existing instruments. Opp.10. That theory disregards half the statutory text.

Section 514 does not proscribe the use of "false or fictitious" documents standing alone. If it did, Section 514 would resemble the many counterfeiting statutes that have long targeted "false, forged, counterfeited, or altered" documents of a wide range of existing types, from "obligation[s] or other securit[ies] of the United States," 18 U.S.C. 471, 472, 473, to the *very type* of document at issue here: "form[s] or request[s] in similitude of the [Government] form or request * * * for requesting a common carrier to furnish transportation," 18 U.S.C. 508; see Pet.17. Instead, Section 514 prohibits using "false or fictitious" documents "*appearing, representing, purporting, or contriving through scheme or artifice, to be an actual security or other financial instrument*."

The italicized words are entirely novel, appearing in no other provision of Chapter 25. The government's reading renders them meaningless. Prohibiting the use of "false or fictitious" government instruments, full stop, would cover all manner of fake securities, both common

forgeries and wholly fictitious instruments. Congress in Section 514 chose a fundamentally different structure, prohibiting the use of fake instruments that *emulate* "actual" ones. Pet.17-18. The ordinary presumption—central to the government's own theory—is that Congress used different language for a reason. Opp.10; *Nat'l Ass'n of Manufacturers* v. *Dep't of Defense*, 138 S. Ct. 617, 632 (2018). As Judge Higginbotham explained in *Morganfield*, "false or fictitious" cannot, by definition, refer to an "actual" obligation; the statute prohibits only documents "that *purport*[] to be an existing type of security." 501 F.3d at 460 (emphasis added). The novelty of the language reflects the fact that Congress was attempting to prohibit an entirely new category of documents: "fictitious instruments [that] are not counterfeits of any existing negotiable instrument." 141 Cong. Rec. S9533 (statement of Sen. D'Amato).

Because the government cannot account for *18 words* in the statutory text, its argument that the majority rule renders "false" superfluous (Opp.11) rings hollow. *Microsoft Corp.* v. *i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011) (competing interpretation must "give[] effect 'to every clause and word of a statute'"). Regardless, the government is wrong that that *Howick*'s interpretation renders "false" superfluous: Congress may well have included both "false" and "fictitious" obligations because documents bearing some "family resemblance" to an actual document arguably are not "fictitious." Pet.20; see *Anderson*, 353 F.3d at 500 (addressing similar argument). It could be just another example of a "redundant doublet," rather than independent means of violating the statute. Bryan A. Garner, *Garner's Dictionary of Legal Usage* 294-297 (3d ed. 2011). Such "redundancies are common in statutory drafting" for many reasons, including "a congressional effort to be doubly sure." *Barton* v. *Barr*, 140 S. Ct. 1442, 1453 (2020).

2. The government's reading creates far more serious surplusage problems. See *Marx* v. *General Revenue Corp.*, 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."). Under its interpretation, Congress at a stroke rendered redundant many or most counterfeiting provisions. Pet.17-20. At the same time, Congress subjected many of those established offenses to new, higher maximum penalties and longer periods of supervised release. Pet.19. For many provisions, Congress bypassed longstanding "similitude" requirements that courts have read into them. Pet.6, 23. And Congress did all that *without saying that it was doing so*. The problem with the government's interpretation is not a minor case of "overlap" (Opp.13), but *incoherence*. Pet.19. It is not credible that Congress revamped all of Chapter 25 by tacking a new prohibition on "fictitious" documents onto the end. "Fundamental changes in the scope of a statute are not typically accomplished with so subtle a move." *Kellogg Brown & Root Servs., Inc.* v. *U.S. ex rel. Carter*, 575 U.S. 650, 661 (2015).

Nor do concerns about a supposed "loophole, for fake versions of existing documents that *** fail the 'similitude' requirement" (Opp.11) warrant expanding Section 514. The government does not even pretend to face an epidemic of criminals attempting to pass copies so inauthentic that they are not even "calculated to deceive a[] *** person of ordinary observation and care." *Howick*, 263 F.3d at 1065-1066; Pet.19. If there were such a "loophole," the solution is not to stretch Section 514 beyond its textual limits, but to ask Congress for new legislation—like when the government urged Congress to prohibit use of nonexistent securities.

3. The government accepts that nothing in the legislative record suggests Congress intended Section 514 to

duplicate existing prohibitions or to provide enhanced penalties for offenses involving fake versions of existing instruments. Opp.14. The government cannot deny that Congress focused on a "narrow but growing" class of fraud involving "completely fictitious financial instruments" that "do[] not even exist." Pet.7, 21. While not dispositive, Congress's repeated statements focusing on closing that particular loophole confirm the overwhelming textual evidence derived from Section 514's distinctive language. Pet.21-22.

4. "[A]ny doubt" about Section 514's reach must be resolved in petitioner's favor. *Yates* v. *United States*, 574 U.S. 528, 547 (2015) (plurality opinion). "[I]t is appropriate, before [a court] choose[s] the harsher alternative, to require that Congress have spoken in language that is clear and definite." *Ibid.* (quoting *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000)); Pet.22.

Without analysis, the government asserts that lenity is inappropriate because no "grievous ambiguity" is present. Opp.15. But "the term 'grievous ambiguity' provides little more than atmospherics, since it leaves open the crucial question *** of how much ambiguousness" suffices. Antonin Scalia & Bryan A. Garner, *Reading Law* 299 (2012). Section 514 clearly meets this Court's more specific guidance. "Even if [the government] think[s] it's *possible* to read the statute" to reach petitioner's conduct, "it's *impossible* to say that Congress surely intended that result." *United States* v. *Davis*, 139 S. Ct. 2319, 2333 (2019). At worst, the statute "present[s] *** two 'fair alternatives,'" triggering a duty to construe the statute not "to penalize conduct it does not clearly proscribe." *Id.* at 2332-2333. The government's strained efforts fail to demonstrate that the interpretation adopted by four circuits is plainly wrong. Any "tie must go to the defendant." *United States* v. *Santos*, 553 U.S. 507, 514 (2008) (plurality opinion).

C. This Case Presents An Ideal Vehicle For Resolving An Important And Recurring Question

The government never disputes that this case presents an important and recurring question about a frequently charged crime. Given the number of recent cases involved, it scarcely could. Nor does the government dispute that the issue matters greatly to petitioner, who faces additional years of supervision that present a significant challenge (and risks returning him to prison) given his mental health issues. Pet.24. And the government identifies no antecedent issue that would prevent this Court from reaching the question presented.

The government's sole vehicle argument is that the evidence "was sufficient to support [petitioner's] conviction even under [his] preferred reading of the statute." Opp.21. The Second Circuit plainly disagreed. See pp.6-7, *supra*. Because "[i]nstruments such as Jones's * * * actually exist," App.9a n.3, the court recognized that petitioner could not have been convicted under a statute proscribing only the use of nonexistent instruments. But having rejected that narrower interpretation as "not persua[sive]" and held that Section 514 instead applies to "fake versions of existing documents," "*[t]herefore*, the evidence was sufficient to support Jones's conviction." App.2a-3a, 8a (emphasis added). Reversal would afford petitioner relief.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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