APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1970

UNITED STATES OF AMERICA,
APPELLEE

v.

JOSEPH R. JOHNSON, JR.,
APPELLANT

Filed: August 21, 2024

Before: CHAGARES, Chief Judge, PORTER and SCIRICA, Circuit Judges.

OPINION OF THE COURT

PORTER, Circuit Judge.

Before we vacated Joseph Johnson's criminal conviction and directed his acquittal, he spent fifteen months in federal prison. He now seeks compensation as a "person unjustly convicted of an offense against the United States and imprisoned." 28 U.S.C. § 1495. But the District Court found that Johnson could not prove that "he did not by

misconduct or neglect cause or bring about his own prosecution[,]" which is a requirement for receiving compensation under § 1495. 28 U.S.C. § 2513(a)(2).

We will affirm. Johnson committed "misconduct" by using a lawyer's signature without her consent to file an exhibit in federal court, which was a but-for "cause" of the government's decision to "prosecut[e]" him. If he had not filed the exhibit, the government would not have prosecuted him. He therefore cannot satisfy the requirements for compensation under § 2513(a).

I. FACTS AND PROCEDURAL BACKGROUND

A plaintiff sued Bill Cosby for sexual assault in the United States District Court for the Eastern District of Pennsylvania. Johnson, who was not involved with the case, filed an exhibit using a copy of the plaintiff's lawyer's signature without her consent. The Clerk's Office added the exhibit to the docket. The exhibit contained a document accusing the plaintiff of underreporting her taxable income. The plaintiff's lawyer recognized the exhibit as fraudulent, and the presiding judge (the "Judge") quickly struck it from the docket upon the lawyer's request.

The government prosecuted Johnson for making a false statement under 18 U.S.C. § 1001 and aggravated identity theft under 18 U.S.C. § 1028A.[1] To convict Johnson for making a false statement under § 1001, the government was required to prove: "(1) that [Johnson] made a statement or representation; (2) that the statement or representation was false; (3) that the false statement was made knowingly and willfully; (4) that the statement or

[1] Each count of the indictment also charged Johnson with aiding and abetting the commission of the primary offense under 18 U.S.C. § 2.

representation was *material*; and (5) that the statement or representation was made in a matter within the jurisdiction of the federal government." *United States v. Moyer*, 674 F.3d 192, 213 (3d Cir. 2012) (emphasis added). To convict Johnson for aggravated identity theft under § 1028A, the government was required to prove that Johnson made a false statement under § 1001. So for both counts, the government was required to prove the five elements articulated in *Moyer*, including the materiality of Johnson's false statement.

A jury convicted Johnson on both counts, but we overturned his conviction on direct appeal. *See United States v. Johnson*, 19 F.4th 248, 252 (3d Cir. 2021). On materiality, the government was required to prove that Johnson's false statement—using the lawyer's signature without her consent—was "of a type capable of influencing a *reasonable* decisionmaker." *United States v. McBane*, 433 F.3d 344, 351 (3d Cir. 2005). At trial, the government's theory was that "the Judge alone was the governmental decisionmaker." *Johnson*, 19 F.4th at 261. But the government "failed to identify a single decision entrusted to the Judge . . . that could have been influenced by" Johnson's false statement. *Id.* at 258. For example, the government did not show "that the Judge would need to make a credibility determination as to [the plaintiff], to which the [false statement] arguably could have been relevant." *Id.* at 257 n.9. Because the government failed to prove that Johnson's false statement was material, we vacated his conviction and directed his acquittal. *Id.* at 263–64.

Before we directed his acquittal, Johnson spent more than fifteen months in prison. After his release, he sought compensation from the government under 28 U.S.C. § 1495, for which he is required to obtain a "certificate" of

his innocence, 28 U.S.C. § 2513(b). He petitioned for a certificate under his original criminal docket number. The District Court denied his petition. It found that Johnson had not proved that "he did not by misconduct or neglect cause or bring about his own prosecution[,]" which is a requirement for obtaining a certificate of innocence. § 2513(a)(2).

Johnson appealed. We appointed David R. Roth and Tadhg Dooley as Amici Curiae to submit briefs regarding Johnson's entitlement to a certificate of innocence.[2]

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction over Johnson's criminal case under 18 U.S.C. § 3231. Johnson was permitted to petition for a certificate of innocence in the District Court—"the court" where "the requisite facts" for a certificate "are alleged to appear"—under 28 U.S.C. § 2513(b). *See Abu-Shawish v. United States*, 898 F.3d 726, 736 (7th Cir. 2018). We have appellate jurisdiction because the District Court's denial of Johnson's petition was a "final decision[]" under 28 U.S.C. § 1291. *Cf. United States v. Rodriguez*, 855 F.3d 526, 531 (3d Cir. 2017) (recognizing that, in the context of "sentencing judgments," district court decisions are "final" if "they close . . . criminal cases once again" (quoting *United States v. Jones*, 846 F.3d 366, 369 (D.C. Cir. 2017))).

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[2] Amici were assisted on their briefs by student members of the Yale Law School Advanced Appellate Litigation Project, two of whom presented oral argument. Amici and their students discharged their duties admirably. We thank them for their excellent oral and written advocacy.

Several courts have stated that a district court's denial of a certificate of innocence is reviewed for abuse of discretion. *See, e.g., United States v. Davis*, 16 F.4th 1192, 1193 (5th Cir. 2021). This would differ from our typical standard of review in civil appeals, for which "we review a district court's findings of fact for clear error and its conclusions of law *de novo*." *McCutcheon v. Am.'s Servicing Co.*, 560 F.3d 143, 147 (3d Cir. 2009); *see also Abu-Shawish*, 898 F.3d at 731 (describing a § 2513 petition as "a new civil case embedded within a closed criminal case"). But to resolve Johnson's appeal, we need not decide which standard of review is generally applicable to § 2513 appeals. This appeal turns on the correct interpretation of § 2513(a)(2), which is a pure question of law. The District Court necessarily abused its discretion if it interpreted § 2513(a)(2) incorrectly, so we review its interpretation de novo. *See In re Bayer AG*, 146 F.3d 188, 191 (3d Cir. 1998) ("Where the district court misinterpreted or misapplied the law . . . our review is plenary.").

III. DISCUSSION

To obtain a "certificate" of his innocence, Johnson must "allege and prove" the following:

> (1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and
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> (2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United

> States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

§ 2513(a). Courts break these provisions into three elements, each of which is required to obtain a certificate of innocence. *See, e.g., United States v. Moon*, 31 F.4th 259, 262 (4th Cir. 2022). Only the third requirement is contested in this appeal. But to understand how the third requirement works, it is necessary to canvas all three.

First, under § 2513(a)(1), a petitioner must show that his conviction was reversed based on his innocence, or that he was acquitted in any new trial or rehearing, or that he was pardoned for his innocence. Essentially, this element requires the petitioner to show that his conviction was vacated based on his innocence of the charged offense, not for reasons "unrelated to his culpability." *Betts v. United States*, 10 F.3d 1278, 1284 (7th Cir. 1993).

Second, under the first clause of § 2513(a)(2), a petitioner must show that "[h]e did not commit any of the acts charged or [that] his acts, deeds, or omissions in connection with such charge" did not constitute any crimes. Because this requirement is disjunctive, it may be satisfied in two independent ways. The first option is satisfied "only in cases of mistaken identity or the like, when the petitioner simply did none of the acts charged in an indictment." Amicus Br. 28. The second option is satisfied if the petitioner's conduct does not satisfy the elements of any crime, regardless of whether it was charged. *See United States v. Racing Servs., Inc.,* 580 F.3d 710, 712–13 (8th Cir. 2009).

Finally, under the second clause of § 2513(a)(2), Johnson must show that "he did not by misconduct or neglect cause or bring about his own prosecution."

A. Johnson Caused His Own Prosecution By Misconduct.

To interpret § 2513(a)'s third requirement, we begin with the text. *See Ross v. Blake*, 578 U.S. 632, 638 (2016) ("Statutory interpretation . . . begins with the text."). Under a straight-forward reading of the text, Johnson must prove a negative to satisfy the third requirement. He must show that he did not commit "misconduct or neglect" that "cause[d] or br[ought] about" the government's decision to "prosecut[e]" him. § 2513(a)(2). Our analysis begins and ends with the ordinary meaning of "cause or bring about."

1. Factual Causation Differs From Proximate Causation.

The phrase "cause or bring about" refers to a causal relationship between a petitioner's "misconduct or neglect" and his "prosecution." *Id.* To interpret statutory language that refers to causation, courts consider the standards for causal relationships in other legal contexts, such as tort law and criminal law. *See Burrage v. United States*, 571 U.S. 204, 210 (2014). Broadly speaking, tort law and criminal law distinguish between two concepts of causation: "actual" or "factual" causation, and "legal" or "proximate" causation. *See id.* ("The law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause."); H.L.A. Hart & Tony Honoré, Causation in the Law 110 (2d ed. 1985) (describing the law's "bifurcation of causal questions").

Factual causation entails "an ordinary, matter-of-fact inquiry into the existence . . . of a causal relation as laypeople would view it." *Paroline v. United States*, 572 U.S. 434, 444 (2014) (ellipsis in original) (internal quotation marks and quoted source omitted). Often, courts equate factual causation with "but-for" causation. *See Univ. of*

Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346–47 (2013) ("In the usual course," factual causation "requires the plaintiff to show that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct." (internal quotation marks and quoted source omitted)). But not always. In the tort context, "[i]f multiple acts occur, each of which . . . alone would have . . . cause[d] . . . [a] physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm." Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm § 27 (Am. L. Inst. 2010). In such circumstances, an act may factually cause an injury even if the injury would have occurred absent the act. *Id.* § 27 cmt. a. More broadly, courts have considered alternatives to but-for causation as standards for factual causation, including whether an act is a "contributing," "substantial," or "sole" factor in producing an injury. *See* James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 Ind. L.J. 957, 974–77 (2019) (canvasing these alternatives).

In contrast, "the phrase 'proximate cause' is shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 701 (2011). Because an injury may have infinite factual causes, "courts and legislatures" use proximate cause principles to "place limits on the chain of causation that may support recovery on any particular claim." *Id.* The phrase "proximate cause" is "notoriously confusing" because there is no "consensus on any one definition." *Id.* (listing various "[c]ommon-law formulations" for limiting liability to a subset of factual causes). Regardless, courts sometimes read statutory causal language as incorporating proximate causation principles. *See, e.g., Staub v.*

Proctor Hosp., 562 U.S. 411, 419–20 (2011); *see also* Sandra F. Sperino, *Statutory Proximate Cause*, 88 Notre Dame L. Rev. 1199, 1218 n.79 (2013) (collecting cases).

With this clarification, we must interpret § 2513(a)(2)'s causal language in two steps. First, we must determine the correct standard for factual causation under § 2513(a)(2)—the ordinary meaning of "caus[ing] or bring[ing] about [one's] own prosecution." Second, we must determine whether § 2513(a)(2) incorporates proximate causation principles. At both steps, we must be attentive to statutory context. "When a statutory provision includes an undefined causation requirement, we look to context to decide whether the statute demands only but-for cause as opposed to proximate cause or sole cause." *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 769 (2018).

2. Factual Causation Under § 2513(a)(2) Equals But-For Causation.

Amici did not distinguish between factual and proximate causation in their briefs. But they seem to argue that Johnson's false statement did not factually cause the government to prosecute him, based on their "commonsense interpretation" of § 2513(a)(2)'s "ordinary meaning." Amicus Br. 35; *see Paroline*, 572 U.S. at 444; Macleod, *supra*, at 982 ("Many commentators . . . treat[] the concept of factual causation in law as a matter of 'common sense.'"). Amici note that "[o]nly the Government can begin a prosecution, and it can do so only when Government attorneys have a good-faith belief [that] each element of the charged offense is met." Amicus Br. 3. They argue that Johnson's false statement did not cause government attorneys to have a good-faith belief that each element of §§ 1001 and 1028A was satisfied because "the Government identified

nothing Johnson ever did that somehow caused it to erroneously conclude his [false] statement was material." *Id.* at 59. Thus, Amici conclude that Johnson satisfies the third requirement of § 2513(a). *Id.* at 38 ("[A] person 'by misconduct or neglect cause[s]' the federal government to initiate a criminal prosecution only if the person intentionally or negligently makes the Government believe that *each* element of the offense is satisfied." (emphasis added)).[3] Amici's interpretation finds support in *Betts*, where the Seventh Circuit held that a petitioner fails § 2513(a)'s third requirement only if he "act[s] or fail[s] to act in such a way as to mislead the authorities into thinking he . . . committed an offense." 10 F.3d at 1285.

Amici's argument fails because it does not reflect the ordinary meaning of factually "caus[ing]" a "prosecution." § 2513(a)(2). In recent years, the Supreme Court has consistently interpreted statutory causal language as denoting but-for causation. *See Nassar*, 570 U.S. at 346–47; *Burrage*, 571 U.S. at 210–11 (defining the "ordinary meaning" and "traditional understanding" of factual causation as but-for causation); *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 332 (2020) (equating factual causation under the Civil Rights Act of 1866 with but-for causation because the "ancient and simple 'but for' common law causation test . . . supplies the default or background rule against which Congress is normally presumed to have legislated when creating its own new causes of action" (internal quotation marks and

[3] Amici describe § 2513(a)'s third requirement as embedding an "estoppel principle" because a petitioner fails to satisfy it only if his deceitful conduct is responsible for the government's good-faith belief that each element of the charged crime is satisfied. Amicus Br. 36; *see Estoppel*, Black's Law Dictionary (9th ed. 2009) ("An affirmative defense alleging good-faith reliance on a misleading representation.").

quoted source omitted)). The Court's consistency in equating factual causation with but-for causation has led one commentator to describe it as a canon of interpretation. *See* Sandra F. Sperino, *The Causation Canon*, 108 Iowa L. Rev. 703, 704 (2023) ("When a statute uses any language that might relate to factual cause, the Court will assume that Congress meant to require the plaintiff to establish 'but-for' cause.").

Amici's argument to the contrary depends on a different form of factual causation than the "ancient and simple" but-for. *Comcast*, 589 U.S. at 332. Amici interpret the third requirement as embedding a standard that approximates sole causation. Under their theory, a petitioner fails § 2513(a)'s third requirement only if his misconduct was the sole cause of the government's belief that each element of the charged crime is satisfied. That is, if the government mistakenly believes that an element of the charged crime is satisfied for reasons other than the petitioner's misconduct—like the government's independent misinterpretation of law—the third requirement is satisfied.[4]

The Supreme Court sometimes interprets statutory causal language as incorporating a different kind of factual causation than but-for, but only if statutory context requires it. In *Husted*, the Court interpreted causal language in the National Voter Registration Act ("NVRA").

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[4] Technically, Amici's theory does not require sole causation because the government must exercise its discretion to prosecute, even if it reasonably believes that each element of a crime is satisfied. *See United States v. Nixon*, 418 U.S. 683, 693 (1974) (referring to the government's "absolute discretion to decide whether to prosecute a case"). But regardless of its characterization, Amici's theory depends on a standard for factual causation that is stricter than but-for causation.

584 U.S. at 768. Under the NVRA, state policies "shall not result in the removal of the name of any person from the official list of voters registered to vote . . . by reason of the person's failure to vote[.]" 52 U.S.C. § 20507(b)(2) (emphasis added). The Court interpreted this provision as "forbid[ding] the use of nonvoting as *the sole criterion* for removing a registrant," not merely as a but-for cause of removal. *Husted*, 584 U.S. at 768. It chose this interpretation because of the NVRA's statutory context. A separate provision of the NVRA allows "removal if a registrant did not send back a return card and also failed to vote," so nonvoting was a permissible reason for removal if accompanied by another permissible reason. *Id.* And Congress clarified § 20507(b)(2) in a third provision, stating that "no registrant may be removed *solely* by reason of a failure to vote." § 21083(a)(4)(A) (emphasis added). Combining these provisions, the Court concluded that the causal language in § 20507(b)(2)—"by reason of"—requires sole causation, not mere but-for causation. *See Husted*, 584 U.S. at 769.

Amici do not point to any similar contextual evidence in § 2513 to support their strict theory of factual causation.[5] Instead, adopting their theory would require us to

[5] As we previously mentioned, Amici's theory coheres with the Seventh Circuit's decision in *Betts v. United States*, 10 F.3d 1278 (1993). But we do not find *Betts* textually persuasive. The Seventh Circuit considered the possibility that § 2513(a)(2)'s causal language denotes but-for causation: "In a moral sense, perhaps, a person who engages in conduct that a prosecutor . . . mistakenly believes to constitute a crim[e] . . . might be said to have 'brought about' his own prosecution, on the theory that he would not have been charged had he comported himself in a more upstanding fashion." *Betts*, 10 F.3d at 1285. It rejected this interpretation purely on policy grounds, hesitating to "require courts to assess the virtue of a petitioner's behavior even when

rewrite the statute. *See* Jeffrey S. Gutman, *Are Federal Exonerees Paid?: Lessons for the Drafting and Interpretation of Wrongful Conviction Compensation Statutes*, 69 Clev. St. L. Rev. 219, 263 (2021) ("The statute does not by its terms qualify the term 'prosecution' with words like 'fair,' 'just,' 'proper,' or 'lawful.'"). The statute requires Johnson to prove that his misconduct did not cause his prosecution, full stop—not that his misconduct did not cause the government to prosecute him fairly, reasonably, or lawfully. Absent contextual evidence favoring the latter interpretation, we interpret § 2513(a)(2) as equating factual causation with but-for causation, consistent with Supreme Court precedent regarding factual causation.[6] We thus align ourselves with the Fourth Circuit, in conflict

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it does not amount to a criminal offense." *Id.* But such "policy concerns cannot trump the best interpretation of the statutory text," so we decline to follow *Betts. Patel v. Garland*, 596 U.S. 328, 346 (2022).

[6] If anything, the ordinary meaning of causal language is more permissive than but-for causation, not stricter like Amici's interpretation of § 2513(a)(2). *See* James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 Ind. L.J. 957, 1006 (2019) (conducting a survey and concluding that "a clear majority" of respondents deemed statutory causal language satisfied even "absent but-for causation"); Sandra F. Sperino, *The Causation Canon*, 108 Iowa L. Rev. 703, 707 (2023) (critiquing the Supreme Court's tendency to equate factual causation with but-for causation because "courts [sometimes] relax the standard for proving factual cause from 'but-for' to a looser 'substantial factor' standard"). As a result, departing from Supreme Court precedent regarding factual causation would favor the government, not Johnson. But because the government interprets § 2513(a)(2) as denoting but-for causation, we have not been asked to consider whether a looser standard is appropriate. *See* Oral Arg. Tr. 18:16–17 ("I think the best reading is the plain reading, and that's . . . but for.").

with the Seventh. *Compare Moon*, 31 F.4th at 266 (considering whether a petitioner's "misconduct . . . was a but-for cause of his conviction"), with *Betts*, 10 F.3d at 1285.

3. Section 2513(a)(2) Does Not Incorporate Proximate Causation Principles.

Amici did not mention proximate causation in their briefs, but they contended at oral argument that § 2513(a)(2) incorporates proximate causation principles. *See* Oral Arg. Tr. 5:22–25 ("If this Court wanted to consider elementary principles of tort causation in the common law, we believe our interpretation fits with a pproximate [sic] cause standard."). Amici described the government's mistake regarding the materiality of Johnson's false statement as a "superseding cause of the resulting injury . . . that cuts off the causal chain from" Johnson's misconduct. *Id.* 6:1–3. Under Amici's view, Johnson satisfies § 2513(a)'s third requirement because his misconduct did not proximately cause his prosecution, regardless of whether his misconduct factually caused his prosecution.

We disagree because § 2513's "context" does not suggest that it incorporates proximate causation principles. *Husted*, 584 U.S. at 769. Courts typically apply proximate causation principles to statutes that condition remedies on plaintiffs showing that defendants caused their injuries by unlawful conduct. *See, e.g.*, *Apple Inc. v. Pepper*, 587 U.S. 273, 279 (2019) (applying "principles of proximate cause" to limit recovery under the Clayton Act for injuries caused by antitrust violations); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014) ("incorporat[ing] a requirement of proximate causation" into a private cause of action for Lanham Act violations); *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 267–68 (1992) (limiting civil recovery for Racketeer Influence and Corrupt

Organizations Act ("RICO") violations to proximately injured plaintiffs). The "premise" underlying these cases is that "when Congress creates a federal tort" or cause of action, "it adopts the background of general tort law[,]" including proximate causation principles. *Staub,* 562 U.S. at 417. For similar reasons, courts apply principles of proximate causation to suits brought for constitutional violations under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971). *See Egervary v. Young,* 366 F.3d 238, 246 (3d Cir. 2004) (proclaiming as a "self-evident principle that . . . tort law causation must govern" *Bivens* claims because they are analogous to "any tort case").

The "premise" underlying these cases does not justify incorporating proximate cause principles into § 2513, which does not create a cause of action mirroring common-law tort remedies. Unlike a common-law tort, § 2513 does not require Johnson to prove that the government negligently or intentionally caused his injury—his allegedly "unjust" prosecution and imprisonment. Instead, it requires Johnson to "allege and prove," § 2513(a), three "requisite facts" about his own conviction, acts, and misconduct or neglect, § 2513(b), regardless of the government's negligence or misconduct regarding his prosecution. If a petitioner proves these facts about himself, his prosecution and imprisonment are deemed "unjust" and he is entitled to recover damages; his entitlement to recovery does not depend on proof of the government's unlawful conduct. Because § 2513 creates a system for recovery that differs significantly from common-law tort remedies, we see "little reason . . . to hark back to stock, judge-made proximate-cause formulations." *CSX,* 564 U.S. at 702–03. We also hesitate to read proximate causation into § 2513(a)(2) because Congress "has written the words 'proximate cause' into a number of statutes." *Id.* at 702 &

n.11 (collecting examples). Congress knows how to create a tort-like remedy and how to expressly require proximate cause showings, but it did neither in § 2513. *See Sanofi Aventis U.S. LLC v. HHS,* 58 F.4th 696, 704 (3d Cir. 2023) (considering the implications of Congress's failure to use language that it "knew how to" use).

Section 2513(a)(2) also is disanalogous to the tort law concept of contributory negligence, although it bears a superficial similarity thereto. "Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause . . . in bringing about the plaintiff's harm." Restatement (Second) of Torts § 463 (Am. L. Inst. 1965). "At common law, of course, a plaintiff's contributory negligence operated as an absolute bar to relief." *Norfolk S. Ry. Co. v. Sorrell,* 549 U.S. 158, 166 (2007). And "the causation standards for negligence and contributory negligence were the same," including proximate causation. *Id.* Section 2513(a)(2) is superficially similar to contributory negligence because it bars recovery if a petitioner's "misconduct or neglect" caused his injury. But the two differ significantly because "[t]he burden of establishing the plaintiff's contributory negligence rests upon the defendant." Restatement (Second) of Torts § 477. That is, contributory negligence is an affirmative defense that must be raised and proved by the defendant. *See, e.g., Saporito v. Holland-Am. Lines,* 284 F.2d 761, 765 (3d Cir. 1960). Section 2513(a)(2) is disanalogous because it places the burden squarely on Johnson to prove that his "misconduct or neglect" did not cause his prosecution; it does not make Johnson's contributory "misconduct or neglect" an affirmative defense that must be raised and proved by the government. *See United States v. Grubbs,* 773 F.3d 726, 732 (6th Cir. 2014) ("The person seeking the certificate bears the burden of

proof."). As a result, Johnson's petition for a certificate of innocence is not "akin to a 'tort action,'" so proximate causation principles are inapposite. *Bank of Am. Corp. v. City of Miami,* 581 U.S. 189, 201 (2017).

Finally, § 2513(a)(2)'s use of the doublet "cause or bring about" also cuts against reading proximate cause principles into the provision. Ordinarily, "terms connected by a disjunctive ['or' should] be given separate meanings." *Reiter v. Sonotone Corp.,* 442 U.S. 330, 339 (1979). But "cause" and "bring about" have essentially the same meaning. This suggests that § 2513(a)(2) uses repetitive causal language "*ex abundanti cautela* ([out of an] abundance of caution)," a canon of statutory interpretation "which teaches that Congress may on occasion repeat language in order to emphasize it." *Marx v. Gen. Revenue Corp.,* 668 F.3d 1174, 1183 (10th Cir. 2011); *see King v. Burwell,* 576 U.S. 473, 502 (2015) (Scalia, J., dissenting) ("Lawmakers sometimes repeat themselves . . . out of a desire to add emphasis[.]"). By repeating causal terms and connecting them with a disjunctive "or," § 2513(a)(2) emphasizes the breadth of Johnson's burden regarding causation. *Cf. Frias-Camilo v. Att'y Gen.,* 826 F.3d 699, 703 (3d Cir. 2016) (recognizing that disjunctive language typically has the effect of "broaden[ing]" statutory scope).[7] Amici's interpretation—that Johnson must prove only that he did not proximately cause his prosecution, not that he did not factually cause his own prosecution—conflicts with Congress's emphasis because it lightens Johnson's burden regarding causation.

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[7] Congress's emphasis is compounded by its use of "less legalistic [causal] language" like the phrase "bring about," which suggests that Johnson's burden extends beyond "judge-made proximate-cause formulations" to factual causation more broadly. *CSX Transp., Inc. v. McBride,* 564 U.S. 685, 702 (2011).

4. Johnson's Misconduct Was A But-For Cause Of His Prosecution.

We therefore conclude that § 2513(a)(2) requires Johnson to prove that his misconduct did not factually cause his own prosecution, with factual causation equaling but-for causation. The District Court correctly concluded that Johnson cannot prove this negative.

First, he cannot show that he did not commit "misconduct or neglect" because he used a lawyer's signature without her consent to file an exhibit in federal court. That false statement falls squarely within the ordinary meaning of "misconduct." *See Misconduct,* Black's Law Dictionary (9th ed. 2009) ("A dereliction of duty; unlawful or *improper* behavior." (emphasis added)); *see also Johnson,* 19 F.4th at 264 (describing "Johnson's actions" as "malicious"). As Amici conceded at oral argument, "nobody here is denying that Mr. Johnson engaged in misconduct." Oral Arg. Tr. 23:6.

Second, Johnson cannot show that his misconduct did not "cause or bring about" the government's decision to "prosecut[e]" him. § 2513(a)(2). His misconduct was a but-for cause of his prosecution. If Johnson had not used the lawyer's signature to file the exhibit, the government would not have prosecuted him. *See But-for cause,* Black's Law Dictionary (9th ed. 2009) ("[A] cause without which the event could not have occurred."). Put differently, the government would not have prosecuted him "but for" his misconduct, so his misconduct factually "cause[d] . . . his own prosecution." § 2513(a)(2). As a result, Johnson cannot satisfy the third requirement for obtaining a certificate of innocence.

B. Johnson And Amici's Counterarguments Fail.

Johnson and Amici advance several additional text- and policy-based arguments to combat our reading of § 2513(a)(2), but none is successful.

1. "Misconduct Or Neglect" Includes Charged Mis-conduct Or Neglect.

First, Johnson argues that under § 2513(a)(2), "misconduct or neglect" does not cover the conduct for which he was criminally charged. He argues that his false statement does not fall within the meaning of "misconduct" in § 2513(a)(2) because that provision separately refers to "the acts charged" and "acts, deeds, or omissions in connection with such charges." The latter phrases cover Johnson's false statement because that was the "act[]" for which he was "charged." Because § 2513(a)(2) uses different phrases than "misconduct or neglect" to refer to charged conduct, Johnson reasons that "misconduct or neglect" must not refer to charged conduct. *See United States v. Graham,* 608 F.3d 164, 180 (4th Cir. 2010) (Gregory, J., dissenting) ("It must follow that to give meaning to all words in the statute, one cannot 'cause' one's own prosecution by engaging in the very conduct which was found to be non-criminal in the first part of the inquiry."). Examples of misconduct other than charged conduct would include "an attempt to flee, a false confession, the removal of evidence, or an attempt to induce a witness or an expert to give false testimony or opinion, or an analogous attempt to suppress such testimony or opinion." *Betts,* 10 F.3d at 1285 (quoting *United States v. Keegan,* 71 F. Supp. 623, 638 (S.D.N.Y. 1947)).

This argument fails because the phrase "misconduct or neglect" sweeps broadly. Without a modifier like "sep-

arate" or "other," the phrase necessarily covers *all* misconduct, including misconduct that was the basis for criminal charges. In reading "misconduct or neglect" to exclude charged misconduct, relying on *Betts,* Johnson is inserting a modifier into § 2513(a)(2) that does not exist. *See Graham,* 608 F.3d at 175 ("To make its argument then, the dissent must (and does) insert a modifier—'other,' 'additional,' 'subsequent,' or 'separate'—before 'misconduct' in the second clause of § 2513(a)(2)."); *United States v. Valle,* 467 F. Supp. 3d 194, 204 (S.D.N.Y. 2020) ("*Betts* reads into the statute a restriction that simply is not there."). We lack the power to insert such a modifier, so we reject Johnson's interpretation. *See Baker Botts L.L.P. v. ASARCO LLC,* 576 U.S. 121, 134 (2015) ("[W]e . . . lack the authority to rewrite the statute.").

In any event, an interpretation of "misconduct" that includes charged misconduct gives independent meaning to each phrase in § 2513(a)(2). In some cases, "misconduct or neglect" may cover "the acts charged" and the "acts . . . in connection" with the charges. *Id.* But in other cases, the phrases may not overlap. Consider a petitioner who is convicted of forging a check but whose conviction is vacated because the check was later found to be legitimate. There, the "acts . . . in connection" with the charges might not be "misconduct or neglect." *Id.* But the petitioner may have committed other "misconduct" unrelated to the check's legitimacy that "br[ought] about his own prosecution," such as witness tampering. *Id.* Thus, the meanings of the phrases do not completely overlap, insofar as they may refer to different acts in some cases. We need not adopt Johnson's strained interpretation to "give effect . . . to every clause and word of [the] statute." *Advoc. Health Care Network v. Stapleton,* 581 U.S. 468, 478 (2017) (internal quotation marks and quoted source omitted).

2. The First And Second Elements Of § 2513 Are Not Superfluous.

Second, Amici argue that our interpretation of § 2513(a)'s third requirement renders the first two requirements superfluous. They describe our reading of the third requirement as "subsum[ing]" the first and second: any failure to satisfy the first or second requirement entails failure of the third. Amicus Br. 42. For example, if a petitioner has not been acquitted for innocence, failing the first requirement, his misconduct necessarily was a but-for cause of his prosecution, failing the third requirement. And if a petitioner's acts constituted a crime that was not charged, failing the second requirement, he likewise fails the third. Because our reading of the third requirement does not give the first and second independent meanings, according to Amici, it should be rejected.

But Amici are wrong. Our interpretation gives independent meaning to each of § 2513(a)'s requirements. A petitioner may satisfy the third requirement but not the first: if he is innocent of the charged crime and has not committed any misconduct or neglect in connection with his prosecution, but he has not been officially acquitted or pardoned. A petitioner may satisfy the third requirement but not the second: if one of his charged acts was criminal, but he shows that a corrupt prosecutor was planning to frame and prosecute him regardless of his misconduct, such that his misconduct was not a but-for cause of his prosecution. And, of course, a petitioner may satisfy the first and second requirements but not the third: Johnson fits this profile.

Thus, our interpretation of § 2513(a)'s third requirement does not subsume the first and second. Contrary to Amici's argument, a petitioner's failure of the first or second does not entail failure of the third—and failure of the

third does not entail failure of the first or second, as Johnson's own petition demonstrates.

3. Our Interpretation Does Not Produce An Absurd Result Here.

Third, Amici argue that our reading of § 2513(a)(2) would lead to absurd results. Suppose that a man commits a minor traffic violation, and a police officer initiates a traffic stop. During the stop, the officer mistakenly identifies the man as a bank robber. The man is eventually prosecuted for and wrongfully convicted of bank robbery. Amici suggest that this man would fail the third requirement under our reading: his traffic violation was misconduct that was a but-for cause of the traffic stop, which was a but-for cause of the misidentification, which was a but-for cause of the prosecution. By the transitive property, his misconduct was a but-for cause of his prosecution, so he fails the third requirement. Amici argue that this is an absurd result, such that our reading of the third requirement should be rejected.

Even if our interpretation of the third requirement leads to unpalatable results in a small fraction of cases, we will not reject it on that basis. We must resolve Johnson's appeal, not a hypothetical bank robbery petition, and our interpretation of § 2513(a)(2) does not produce absurd results here. *See United States v. Moreno,* 727 F.3d 255, 259 (3d Cir. 2013) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (alteration in original) (quoting *Lamie v. U.S. Trustee,* 540 U.S. 526, 534 (2004))). Johnson is not like a man whose minor traffic violation indirectly leads to his prosecution; his false statement "disrupted the administration of justice, interfered with the orderly work of the federal courts," and directly led to his prosecution, such

that it is not absurd to deny him a remedy. Johnson, 19 F.4th at 263; *see Riccio v. Sentry Credit, Inc.*, 954 F.3d 582, 588 (3d Cir. 2020) (recognizing that a "result cannot be absurd" if "Congress could have any conceivable justification for" it). In a future case, a court may determine that applying our reading of § 2513(a)(2) requires an absurd "disposition." *Moreno,* 727 F.3d at 259. But such a case is not before us, so we need not address that potentiality.

4. Section 2513's Statutory History Does Not Support Johnson.

Fourth, Amici argue that the statutory history of § 2513(a)(2) supports their strict interpretation of its causal language. The first version of the third requirement, enacted in 1938, barred recovery if a petitioner "either intentionally, or by willful misconduct, or negligence, contributed to bring about his arrest or conviction." Act of May 24, 1938, Pub. L. No. 75–539, § 2, 52 Stat. 438, 438. Amici highlight two differences between this language and the current version of the third requirement. First, the old language referred to the petitioner's "arrest or conviction," whereas § 2513(a) refers to his "prosecution." The government must have a good-faith belief that each element of a crime is satisfied before initiating prosecution, but it needs only probable cause to make an arrest. So Amici argue that this change supports their interpretation of § 2513(a)(2), denying relief only if the petitioner's misconduct causes the government's good-faith belief that each element of the charged crime is satisfied. Second, the old provision required only that the petitioner's misconduct "contributed" to his arrest, whereas § 2513(a)(2) requires that it "cause or bring about" his prosecution. According to Amici, this strengthening of the causal language supports their strict interpretation.

Neither change in the statutory language supports Amici's reading of § 2513(a)(2) over ours. First, our reading of § 2513(a)(2) accommodates Congress's use of "prosecution" instead of "arrest." Because Johnson's misconduct was a but-for cause of his prosecution, he fails the third requirement, regardless of the relationship between his misconduct and his arrest. Second, our reading of § 2513(a)(2) accommodates Congress's use of "cause or bring about" instead of "contributed." Congress's use of "contributed" in the old provision suggests that it required less than but-for causation. *See* Macleod, *supra,* at 974–75 (describing "contributing factor" causation as an "alternative" and more "permissive" standard for factual causation than but-for). The change from "contributed" to "cause or bring about" is consistent with a change to traditional but-for causation. It does not imply that § 2513(a)(2) requires a standard stricter than but-for causation or incorporates proximate causation principles, so Amici's statutory history argument fails.

* * *

Finally, Amici appeal to legislative history to support their understanding of § 2513(a)(2). Because we conclude that the text is clear, we need not consider this evidence. *See S.H. ex rel. Durrell v. Lower Merion Sch. Dist.,* 729 F.3d 248, 259 (3d Cir. 2013) ("Legislative history has never been permitted to override the plain meaning of a statute.").[8]

[8] Even if we considered Amici's evidence, it does not support Johnson. Amici note that § 2513 had its origins in a 1912 bill supported by Edwin Borchard. *See* Edwin M. Borchard, *State Indemnity for Errors of Criminal Justice,* S. Doc. No. 62-974, at 32 (1912) (requiring "the claimant [to] show that he has not, by his acts or failure to act, either intentionally or by willful misconduct or negligence, contributed to bring about his arrest or conviction"). Borchard observed that

IV. CONCLUSION

Johnson cannot prove that "he did not by misconduct or neglect cause or bring about his own prosecution" because his false statement in federal court was a but-for "cause" of the government's decision to "prosecut[e]" him. § 2513(a)(2). Johnson and Amici's arguments to the con-

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a "limitation almost uniformly expressed in [similar] [European] statutes is that the claimant shall not have intentionally or by gross negligence caused his detention." *Id.* at 17. And he associated this limitation with misconduct like "an attempt to flee, a false confession, the removal of evidence, or an attempt to induce a witness or an expert to give false testimony or opinion." *Id.* at 18. These examples are consistent with Amici's "estoppel" theory of § 2513(a)'s third requirement, so Amici conclude that the legislative history cuts decisively in Johnson's favor. But Amici's description of Borchard's report is misleading. Borchard listed examples like flee attempts and false confessions because "[t]he statutes of some of the countries, such as Germany, Hungary, Norway, and Sweden, specifically mention [those] limitations" on relief. *Id.* at 17–18. The Norwegian statute, for example, explicitly barred relief "for detention pending examination which has occurred because the accused has attempted to flee or has so acted that the conclusion had to be drawn that he has sought to remove traces of the deed, or induce others to bear false witness, or to suppress their testimony." *Id.* at 25. But Borchard recognized that some countries did not explicitly bar relief in those circumstances. *Id.* at 18 ("France expressly declines to specify any limitations on the right, leaving it to the judge to determine what acts . . . shall constitute a sufficient objection to the payment of an indemnity."). And he concluded his report by noting that Congress could structure such limitations as it pleased. *Id.* at 21 ("[W]ithin what limits and under what conditions the indemnity shall be awarded, are matters which legislatures can work out with little difficulty."). Thus, Borchard never stated that a limitation like § 2513(a)'s third requirement covers only false confessions and other "estoppel" misconduct. False confessions were merely among a few "example[s]" of misconduct for which European countries had specifically chosen to withhold relief. *Id.* at 18.

trary fail. The phrase "misconduct or neglect" is unqualified, so it covers charged misconduct like Johnson's false statement. Our interpretation gives independent meaning to each of § 2513(a)'s three requirements, does not produce an absurd result in this case, and coheres with § 2513(a)'s statutory history. We will therefore affirm the District Court's order denying Johnson's petition for a certificate of innocence.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

No. 19-367

UNITED STATES OF AMERICA

v.

JOSEPH R. JOHNSON, JR.

Filed: May 09, 2022

MEMORANDUM

BARTLE, United States District Judge.

Joseph R. Johnson, Jr. has filed a motion for a certificate of innocence pursuant to the Unjust Conviction and Imprisonment Act, 28 U.S.C. § 2513. Our Court of Appeals reversed his convictions for making a false statement to the court in violation of 18 U.S.C. § 1001 and for aggravated identity theft under 18 U.S.C. § 1028A. It directed entry of judgment of acquittal. The basis for the Court of Appeals' decision was the failure of the Govern-

ment to prove the materiality element for the false statement offense. *United States v. Johnson*, 19 F.4th 248 (3d Cir. 2021).

I

The evidence presented at trial, taken in the light most favorable to the Government, established the following facts.

On or about October 26, 2015, a Philadelphia based attorney named Dolores M. Troiani filed a complaint for defamation in the United States District Court for the Eastern District of Pennsylvania on behalf of Andrea Constand against the former Montgomery County District Attorney, Bruce Castor. *See Constand v. Castor*, Civil Action No. 15–5799 (E.D. Pa. Oct. 26, 2015). The case was assigned to the Honorable Eduardo C. Robreno.

On January 3, 2016, Troiani received three emails with various attachments from the email address of devoutplayerhater@yahoo.com. These emails threatened the release of certain personal information of Constand, who had previously accused former actor and comedian Bill Cosby of sexual assault. Evidence presented at trial also established that an individual employing the username "Devout Player Hater" generated several internet postings voicing support for Bill Cosby and questioning the motives of Cosby's accusers.

On February 1, 2016, an unknown individual hand-delivered to the Clerk's Office in the Eastern District of Pennsylvania an envelope containing a document that read "PRAECIPE TO ATTACH EXHIBIT "A" TO PLAINTIFF'S COMPLAINT." The praecipe appeared to be signed by Troiani. The attachments to the praecipe mirrored the attachments to the series of January 3, 2016

emails to Troiani that were generated from the devoutplayhater@yahoo.com account. Troiani testified at trial that she had neither submitted nor authorized the filing of the document in question and had not signed it. She immediately informed Judge Robreno of the fraudulent document, and he struck it from the record as a fraud.

Yahoo provided subscriber records for the "devoutplayerhater" email, which included an Internet Protocol ("IP") address used to establish the account. Evidence was also presented of records from Verizon, the Internet Service Provider ("ISP") for the IP address. Verizon identified devoutplayerhater's subscriber username as "jjohnson531@dslextreme.com." Verizon revealed that during the relevant time frame, the subscriber account had been maintained by a third-party ISP, IKANO d/b/a DSL Extreme.

DSL Extreme provided records associated with its registered customer "jjohnson531," who was identified as Joe Johnson, with an alternate email address jjohnson531@gmail.com and a residential address of [redacted]. Maryland Department of Motor Vehicles ("DMV") records identify Joe Johnson of [redacted], with a date of birth of [redacted]. The photograph on the DMV records for Joe Johnson depicts defendant Johnson.

The Government also presented records from the United States Courts' electronic document filing system, Public Access to Court Electronic Records ("PACER") for a registered user named Joseph Johnson, Jr. with a username of "jjohnson531." Johnson admitted to FBI special agent Kurt Kuechler prior to his arrest that he had a PACER account. The "jjohnson531" account had accessed the *Constand* docket at issue before and after the

praecipe was filed. The "devoutplayerhater" email account was deleted shortly after "jjohnson531" accessed Judge Robreno's February 2, 2016 order striking the praecipe as fraudulent.

The Government also identified another IP address used by the "jjohnson531" PACER account to access the *Constand* docket as belonging to Alion Science and Technology, where defendant Johnson was employed. Alion confirmed that the IP address was registered to it and connected Johnson's employee profile at Alion with the PACER access. Alion also provided Johnson's internet history, which showed that Johnson had searched for the words "Cosby" and "Constand" over 10,000 times.

The original envelope including its contents, which was received by the Clerk's Office, was sent to the Federal Bureau of Investigation ("FBI") for fingerprint analysis. The FBI's analysis revealed the presence of at least six fingerprints belonging to "Joseph Johnson Jr." on the envelope and on the adhesive side of the tape used to affix the address label to the envelope.

On June 28, 2019 Johnson was arrested by the FBI. During processing, Johnson was fingerprinted and provided his [redacted] birthdate. Johnson's fingerprints matched the fingerprints recovered from the envelope and adhesive tape recovered in this investigation.

Johnson was indicted under 18 U.S.C. § 1001 for making a false statement to the United States District Court for the Eastern District of Pennsylvania and under 18 U.S.C. § 1028A for using the identity belonging to another person in connection with making the false statement. The Court of Appeals characterized the evidence before the Grand Jury as "piled high in hand." *Johnson,* 19 F.4th at 254.

Johnson was found guilty by a jury and sentenced to thirty-two months in prison. Thereafter, as noted above, the Court of Appeals reversed his conviction and directed the entry of a judgment of acquittal. As a result, he was released from prison. The Court of Appeals determined that the Government had not proven the element of materiality of the false statement as required under 18 U.S.C. § 1001. The conviction under § 1028A for aggravated identity theft fell as the result of the failure of proof under § 1001. The issue of lack of proof of materiality was first raised on appeal. The Court of Appeals held that waiver was not applicable since plain error had occurred. *Id.* at 26

II

Under 28 U.S.C. § 1495, a person "unjustly convicted of an offense against the United States and imprisoned" may file a claim for damages in the Court of Federal Claims. Nonetheless, said person must first obtain a certificate of innocence. To do so, that person must prove under 28 U.S.C. § 2513 that: (1) "[h]is conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted"; (2) "[h]e did not commit any of the acts charged or his acts . . . in connection with such charge constituted no offense against the United States"; and (3) "he did not by misconduct or neglect cause or bring about his own prosecution."[9]

The Government, in opposing Johnson's motion for a certificate of innocence, argues that Johnson cannot establish that his own misconduct did not cause or did not bring about his own prosecution.

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[9] The statute contains other provisions which are not relevant here.

The persuasive case law provides that the misconduct to which the statute refers includes and is not separate from the conduct charged. Thus if the underlying conduct of the defendant, although ultimately insufficient to convict, caused or brought about his prosecution, he is not entitled to a certificate of innocence. *United States v. Graham,* 608 F.3d 164, 175 (4th Cir. 2010); *United States v. Valle,* 467 F. Supp. 3d 194, 204–05 (S.D.N.Y. 2020). *Contra Betts v. United States*, 10 F.3d 1278 (7th Cir. 1993).

There is no doubt that the Government proved that Johnson committed all the elements necessary for conviction under 28 U.S.C. § 1001 except for materiality. It was clearly his misconduct in the filing of a false document on the docket of this court which caused or brought about his prosecution. The reversal of his conviction does not alter this fact. As the Court of Appeals aptly stated in the conclusion of its opinion:

> Johnson's conduct was not just a waste of public time and resources. It disrupted the administration of justice, interfered with the orderly work of the federal courts, and flouted the respect due to judges and attorneys sworn to uphold the law. Much more than a warning about our internet-addicted culture, Johnson's actions are a reminder that respect for the rules that support the law is inseparable from the rule of law itself.

Johnson, F.4th at 26.

Johnson has come forward with no proof that his misconduct did not cause or bring about his prosecution. As a result, it is not necessary to be concerned about the other requirements of § 2513. The motion of Joseph J. Johnson, Jr. for certificate of innocence will be denied.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1449

UNITED STATES OF AMERICA,
APPELLEE

v.

JOSEPH R. JOHNSON, JR.,
APPELLANT

Filed: November 23, 2021

Before: SMITH, Chief Judge, MATEY and FISHER, Circuit Judges.

OPINION OF THE COURT

MATEY, Circuit Judge.

Joseph Johnson developed an unusual fascination with the allegations of sexual assault against entertainer Bill Cosby. Hoping to cast doubt on the accusers, Johnson posed as an attorney and filed a fabricated document on the civil docket of one of the lawsuits against Cosby. His trick was quickly discovered, and the Government brought criminal charges against Johnson for making a

false statement and identity theft, leading to a conviction after a jury trial. Johnson now appeals, arguing that the Government failed to prove that his statements were material.

We agree. Johnson's behavior wasted public time and resources and distracted court officials from their work. But only Congress enjoys the authority to turn conduct into a federal crime. And while the Government presented plenty showing that Johnson's statements were false, it offered no evidence and elicited no testimony from the only individual it proposed as the government decisionmaker—the judge in the underlying litigation—to explain how the filing could influence a judicial decision. Because that evidence was necessary for the Government to establish liability under 18 U.S.C. § 1001, we will reverse Johnson's convictions and remand for entry of a judgment of acquittal.

I. BACKGROUND

The story of Johnson's false filing begins, as does much in our age, on the internet. Johnson became fixated on the claims against Cosby and decided to come to his defense. At first, his acts were no more distracting than most of the internet, largely posts about Cosby's innocence. Then, Johnson decided to leave the virtual world and insert himself into the real one.

A. The Civil Action

The rest of the story follows a winding road, and starts with Andrea Constand, who sued Cosby in 2005 alleging sexual assault. In 2015, Constand filed another lawsuit in the Eastern District of Pennsylvania, claiming defamation and invasion of privacy for Cosby-related claims. As in 2005, Constand was represented by attorney Dolores Troiani. When Troiani filed the 2015

Complaint, she inadvertently failed to attach an exhibit. The next day, Troiani filed a "Praecipe to Attach Exhibit 'A' to Plaintiff's Complaint," along with the omitted exhibit and a certificate of service.[10] The filing was docketed, and that appeared to be the end of the matter.

It was not. A few months later, Troiani received several emails from an individual using the name "Tre Anthony." All were sent on the same day, and all related to Constand's allegations against Cosby. In the first, "Tre Anthony" warned Troiani that her "client's physical street address . . . will be released to the media and published online unless you notify the undersigned of your objection to the same no later than close of business on January 4, 2015." (App. at 362.) A threat heightened by including Constand's residential address.

A second email followed, promising to "ma[ke] public through all media outlets and social media" the information in the first email, as well as information relating to other alleged Cosby victims, whom "Tre Anthony" declared to have made "false[] and fraudulent[]" allegations against Cosby. (App. at 367, 369.) And a third, sent to Troiani, other attorneys, and The New York Times, stated that "[t]he name, physical address and telephone number of each of the plaintiffs" would be "circulated on social media" and other outlets. (App. at 377.)

"Tre Anthony" attached several documents to his emails, including an unsigned Internal Revenue Service "Information Referral" form alleging that Constand had failed to report income derived from "baseless lawsuits"

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[10] A "praecipe" is a "written motion or request seeking some court action." *Praecipe*, Black's Law Dictionary (11th ed. 2019).

premised "on a decade old campaign of . . . false allegations." (App. At 371–73.) He also attached copies of the complaints from Constand's lawsuits.

All of which brings us to Johnson's alleged crime. Roughly a month later, someone hand-delivered an envelope to the Clerk of the United States District Court for the Eastern District of Pennsylvania. The envelope contained a document entitled "Praecipe to Attach Exhibit 'A' to Plaintiff's Complaint." It was a photocopy of the praecipe filed by Troiani, along with a photocopy of Troiani's original certificate of service. But this filing attached the unsigned IRS Information Referral form and complaints previously circulated by "Tre Anthony," in effect, accusing Constand of failing to report income obtained in connection with her lawsuits.

Following the customary course, the Clerk's office uploaded all the documents to the docket, triggering an automatic email notification to Troiani. Confused, Troiani called the Clerk's office, who directed her to the chambers of the presiding judge (the "Judge"). The Judge then entered an order striking the false praecipe and exhibit from the docket, explaining that the "filing [wa]s fraudulent and was not filed by the attorney whose purported signature appears on the document." (App. at 598.)

B. Johnson Is Discovered, Indicted, And Convicted

The "Case of the False Praecipe" was referred to the Federal Bureau of Investigation, and after an extensive inquiry, the Government determined that Johnson was the culprit. A chain of business records connected "Tre Anthony's" email account to Johnson. Johnson, the Government learned, used his work computer to repeatedly access the docket for Constand's lawsuit (including the or-

der striking the false praecipe), and to obsessively conduct internet searches relating to Constand and Cosby. And a forensic analysis conducted at the FBI's lab in Quantico, Virginia discovered Johnson's fingerprints on the tape used to seal the envelope containing the false praecipe.

Evidence piled high in hand, the Government persuaded a grand jury in the Eastern District of Pennsylvania to return an indictment charging Johnson with one count of knowingly and willfully making materially false, fraudulent, and fictitious statements and representations and aiding and abetting, in violation of 18 U.S.C. § 1001 and § 2 (Count 1);[11] and one count of knowingly and without lawful authority using a means of identification during and in relation to the false statements, and aiding and abetting, in violation of 18 U.S.C. § 1028A(a)(1), (c)(4) and § 2 (Count 2).

After a three-day trial, a jury found Johnson guilty on both counts. Johnson moved for a judgment of acquittal, and, in the alternative, a new trial. The District Court denied the motion, and sentenced Johnson to thirty-two

[11] The indictment did not specify a subsection of § 1001, but it mirrored the language of subsection (a)(2), which forbids the "mak[ing]" of "any materially false, fictitious, or fraudulent statement or representation." 18 U.S.C § 1001(a)(2). Subsection (a)(3), by contrast, prohibits "mak[ing] or us[ing] any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry," and (a)(1) proscribes "falsif[ying], conceal[ing], or cover[ing] up by any trick, scheme, or device a material fact." *Id.* § 1001(a)(1), (a)(3).

months of imprisonment and three years of supervised release, as well as a special assessment of $200. Johnson appealed.[12]

II. DISCUSSION

Johnson raises two challenges to his conviction. First, he argues that the Government's evidence cannot prove the materiality element of 18 U.S.C. § 1001. That the praecipe was struck from the docket, he contends, may have been proof of its falsity, but not its materiality. Second, Johnson claims that the District Court's jury instructions constructively amended the indictment. While the Government's indictment charged the "making" of a false statement, the District Court instructed the jury that it could convict Johnson for "making or using" a false document, which impermissibly broadened its scope.

We agree with Johnson's first argument, so we need not reach his second.[13] The Government's trial evidence was insufficient for a rational jury to conclude Johnson's misstatements were material to the Judge, the only pertinent governmental decisionmaker identified by the Government at trial. More, it would be a miscarriage of justice for his conviction to stand when the Government failed to prove all elements of the offense. As a result, Johnson's conviction for false statements must be reversed. And because Johnson's conviction for aggravated identity theft

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[12] The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291.

[13] Though we note that the Government concedes that the indictment was constructively amended, arguing only that Johnson suffered no prejudice.

depends on his false-statements conviction, we will reverse it as well.[14]

A. We Review Johnson's Sufficiency-of-the-Evidence Challenge for Plain Error

Johnson and the Government disagree on the standard of review for Johnson's sufficiency-of-the-evidence challenge. We conclude that plain-error review is required.

1. Preserving Issues on Appeal

Our standard of review turns on whether Johnson preserved his sufficiency challenge by "squarely" presenting the issue to the District Court. *United States v. McCulligan*, 256 F.3d 97, 101 (3d Cir. 2001). While preservation does "not require any particular incantation," *United States v. Miller*, 833 F.3d 274, 283 (3d Cir. 2016), it does demand that the defendant give the district court a chance to "consider and resolve" the question later raised on appeal. *Puckett v. United States*, 556 U.S. 129, 134 (2009). Preserving *arguments* is often key; "merely raising an *issue* that encompasse[d] the appellate argument" can be inadequate. *United States v. Joseph*, 730 F.3d 336, 337 (3d Cir. 2013); *see also id.* at 340 (distinguishing between "issues" and "arguments," and explaining that the former can encompass "more than one of the latter"). So "when a

[14] Aggravated identity theft prohibits identity theft "during and in relation to" any of the felonies enumerated in subsection (c), including material false statements. 18 U.S.C. § 1028A(a)(1); *id.* § 1028A(c)(4) (defining "felony violation" to include false statements). Conviction for aggravated identity theft depends on commission of an enumerated felony, so the reversal of a conviction for the predicate felony requires reversal of the aggravated identity theft conviction. *See, e.g., United States v. Camick*, 796 F.3d 1206, 1219 (10th Cir. 2015) (reversing aggravated identity theft conviction because of reversal of material false statements conviction).

Rule 29 motion raises specific grounds, or arguments . . . all such arguments not raised are unpreserved on appeal" and are reviewed for plain error. *United States v. Williams*, 974 F.3d 320, 361 (3d Cir. 2020). A sensible rule that encourages litigants to directly identify for the district court the purported grounds for error.

2. Johnson Did Not Raise Materiality

Johnson contends that he raised "a general Rule 29 motion," sufficient "to preserve all [his] sufficiency claims for appeal." (Reply Br. at 7–8.) Not so.[15] At the close of the Government's evidence, Johnson moved for a judgment of acquittal focusing "specifically" on the lack of "evidence provided" as to whether he had "caused" a false statement to be filed. (App. at 681.) As a result, Johnson argued, "the Government ha[d] not met [its] burden at this point to send th[e] case to the jury." (App. at 681.) Johnson did not mention materiality. The District Court denied the motion.

After trial, Johnson renewed his motion for acquittal. In a full supporting brief, he raised several specific challenges to his conviction[16] but, as before, he did not bring up materiality. Both motions thus "raise[d] specific

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[15] Putting to one side whether Johnson's Rule 29 motion was a "general motion," we note that we have not held that a "general" Rule 29 motion preserves all sufficiency arguments for appeal. To the contrary, in *United States v. Williams* we found it "unnecessary . . . to . . . hold that a broadly stated Rule 29 motion preserves all arguments bearing on the sufficiency of the evidence." 974 F.3d at 361.

[16] For example, Johnson argued that the Government presented no proof of aiding and abetting, that expert testimony and business records were improperly admitted, and that the evidence of his fingerprints on the envelope that contained the false praecipe was not sufficient to support the false statements conviction.

grounds, or arguments" about the sufficiency of the evidence. *Williams*, 974 F.3d at 361. And as neither alerted the District Court to any concerns about materiality, that argument is "unpreserved on appeal." *Id.* We therefore review it for plain error.

3. Plain-Error Review

Using the four-part framework of *United States v. Olano*, "we reverse only if (1) there was an 'error'; (2) the error was 'plain'; (3) the error prejudiced or 'affected substantial rights'; and (4) not correcting the error would 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Greenspan*, 923 F.3d 138, 147 (3d Cir. 2019) (quoting *United States v. Olano*, 507 U.S. 725, 732, 734–36 (1993)). Under plain-error review, insufficient evidence requires reversal when upholding the conviction would "result[] in a fundamental miscarriage of justice." *United States v. Castro*, 704 F.3d 125, 137–38 (3d Cir. 2013) (quoting *United States v. Barel*, 939 F.2d 26, 37 (3d Cir. 1991)).

Ordinarily, when the government has failed to prove each essential element of the crime charged, we will reverse under *Olano*'s fourth prong. *United States v. Jones*, 471 F.3d 478, 480 (3d Cir. 2006); *see also Castro*, 704 F.3d at 141 (explaining that the Government's "complete failure of proof" on the falsity element of a false-statements conviction required reversal, as "the conviction [was] infected with plain error and constitute[d] a miscarriage of justice"). As we will explain, that is the case here.

B. The Government Did Not Prove Materiality

Section 1001 proscribes, among other things, "knowingly and willfully . . . mak[ing] any materially false, fictitious, or fraudulent statement or representation" in a matter within the jurisdiction of the federal government.

18 U.S.C. § 1001(a)(2). Establishing a violation requires: "(1) that [the defendant] made a statement or representation; (2) that the statement or representation was false; (3) that the false statement was made knowingly and willfully; (4) that the statement or representation was material; and (5) that the statement or representation was made in a matter within the jurisdiction of the federal government." *United States v. Moyer*, 674 F.3d 192, 213 (3d Cir. 2012). Johnson argues that the Government's evidence did not prove materiality. We agree.

1. Materiality Under 18 U.S.C. § 1001

To be material, a false statement must have "a natural tendency to influence, or be capable of influencing, the decision of the decisionmaking body to which it was addressed." *United States v. Gaudin*, 515 U.S. 506, 509 (1995) (cleaned up). We have explained that a statement may be material "even if no agency actually relied on the statement in making a decision." *United States v. McBane*, 433 F.3d 344, 350 (3d Cir. 2005) (citing *In re Cohn*, 54 F.3d 1108, 1114 (3d Cir. 1995)). The issue is not actual reliance, but whether the false statement had a "natural tendency to influence" or was "capable of influencing" the governmental decisionmaking body at issue. *Gaudin*, 515 U.S. at 509.[17] But "[d]eciding whether a

[17] A now-canonical example is the very false, but very unsuccessful statement made by a suspect-turned-defendant to an FBI agent to put her off the scent. *See, e.g., United States v. Lupton*, 620 F.3d 790, 806 (7th Cir. 2010) (observing that "a frequent aim of false statements . . . is to cast suspicion away from the declarant"). That the defendant's statements did not actually influence the particular decisions of the particular agent is of no moment, so long as the "misrepresentation[], under normal circumstances, could cause FBI agents to redirect their investigation to another suspect, question their informant differently or more fully, or perhaps close the investigation altogether." *McBane*, 433 F.3d at 352.

statement is 'material'" still requires a court to determine the subsidiary question of "what decision was the agency trying to make?" *Id.* at 512.

Put differently, materiality requires evidence showing that "[the false statements] were 'of a type capable of influencing a reasonable decisionmaker,'" *Moyer*, 674 F.3d at 215 (quoting *McBane*, 433 F.3d at 351), and that the false statements could have bearing on an actual decision entrusted to the decisionmaker, *United States v. Litvak*, 808 F.3d 160, 173–4 (2d Cir. 2015). That is the key, and the key to the Government's case against Johnson is its singular focus at trial on the Judge as the pertinent decisionmaker. We turn next to that evidence.

2. The Evidence Presented

To prove materiality, the Government relied on the testimony and actions of the Judge. The Judge, and the Judge alone, was the pertinent "decisionmaker" in the Government's trial theory. This focus on the Judge, however, is ultimately fatal to the Government's case because the record contains no evidence that any decision entrusted to the Judge could have possibly been influenced by the praecipe. The praecipe filed by Johnson contained an unsigned exhibit that accused Constand of failing to report income. But given the subject matter of the underlying litigation and posture of the case, there is no evidence that this false statement, even if considered by the Judge, could have been relevant, much less material, to any decision.[18] And without evidence of some decision entrusted to

[18] The Government did not elicit testimony, for example, about the need for pretrial rulings on the authenticity or relevance of the documents filed pursuant to the praecipe or their admissibility under Rules 403 or 404(b) of the Federal Rules of Evidence. Nor does the record support an inference that the Judge would need to make a

the Judge that could have been affected by Johnson's no doubt false statement, the Government cannot establish materiality. *Gaudin*, 515 U.S. at 512; *Litvak*, 808 F.3d at 173–4.

> The Judge testified about the civil docket generally: [A] docket is the history of the case. Every action that has been taken either by the lawyers or by the court is recorded in the docket, so it's a memory of the case. So whenever I have a matter to be adjudicated or resolved in a particular case, I look at the docket to see what is the history of that and where it fits into the developments of that case.

(App. at 448.) "[E]very time I look at the docket," the Judge explained, "I extract information. And then, based on that information, I take action." (App. at 448.) The Judge then testified about the false praecipe in particular. He explained he first learned about it when his deputy told him there was "a paper of some sort" or "a paper in the docket" that was not filed by Troiani. (App. at 451). The Judge asked his staff to prepare an order striking the false praecipe. They did so, and the Judge entered the order,[19] deleting it from the docket.

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credibility determination as to Constand, to which the praecipe arguably could have been relevant. And without the Government identifying even what decision could be influenced, "a finder of fact reasonably could not have inferred from the government's evidence that" the praecipe materially influenced that unidentified decision. *United States v. Finn*, 375 F.3d 1033, 1040 (10th Cir. 2004).

[19] The order read: "This filing is fraudulent and was not filed by the attorney whose purported signature appears on the document. The matter will be referred to the appropriate authority for further action." (App. at 598).

This evidence—that the praecipe was false and that it was deleted—became the basis of the Government's materiality argument at summation:

> You know, in fact, that it was material, because it had to be capable of influencing the judicial branch. And that it was, because [the Judge], in fact, testified that, yeah. You know, I look at the docket. I look at the entries on the dockets. That's how I make my decisions, based on the entries on the docket. I consider those things, and in this case, there was an entry on the docket. There was a filing. It was a false filing. He took action in Filing Number 7 on February 2, 2016, and, in fact, struck it from the record. So he took action. So not only was it capable of influencing his decision, but it did. So it was, in fact, material.

(App. at 703.) That, as we explain, is insufficient.

3. The Evidence Does Not Prove Materiality

Johnson agrees that "[t]he materiality standard does not require that the statement actually influence the decisionmaker, but rather that it be capable of doing so." (Opening Br. at 17 (citing *McBane*, 433 F.3d at 350).) But, he argues, the Government did not meet this requirement.

He is correct. As noted above, the only evidence of materiality presented to the jury was: (1) that the false praecipe Johnson filed was on the docket, which the Judge consults generally to make decisions; and (2) that filing of the false praecipe prompted the Judge to strike it from the docket. But neither of those unremarkable observations show any decision entrusted to the Judge—the sole decisionmaker identified at trial—that could have been influenced by the praecipe. Considered both separately and in total, that evidence cannot clear even the low sufficiency bar on plain-error review.

i. Docket Entries

Start with dockets and judicial decisions. That the false praecipe made its way onto the Judge's docket established that Johnson made a statement (the filing) to a governmental decisionmaker (the Judge). And the Judge's testimony established that docket filings, in the abstract, might affect his decisionmaking process. (*See* App. at 448 ("Well, every time I look at the docket, I extract information. And then, based on that information, I take action.").) But the Government elicited no testimony about *how* those filings might affect that decisionmaking process. And regardless, the fact that the Judge considers items on the docket in the ordinary course cannot support a finding that *this* filing was material beyond a reasonable doubt, especially because the Government failed to identify a single decision entrusted to the Judge in *this* case that could have been influenced by the praecipe.

In short, the problem with the Government's proof is that not every misrepresentation presented to a governmental decisionmaker is inherently "material." A statement might be false, but still incapable of affecting anything, as seen in the Tenth Circuit's decision in *United States v. Camick*, 796 F.3d 1206 (10th Cir. 2015). There, the defendant posed as his brother and filed a provisional patent application with the U.S. Patent and Trademark Office. *Id.* at 1210–11. The government came calling with an indictment, leading to a conviction for making a false statement. *Id.* at 1212–13. The Tenth Circuit reversed, agreeing there was insufficient evidence of materiality. Camick made a false statement to a governmental decisionmaker. But the government offered no evidence explaining how the statement might have influenced the PTO because Camick filed only a provisional application.

Until the PTO reviewed for patentability, there was no decision to influence. *Id.* at 1218–19. Camick's statements were false, but still immaterial. So too here, as the Government failed to identify a decision entrusted to the Judge that the praecipe could influence.

At other times, information presented to the government is "relevant," but ultimately still immaterial—after all, "'relevance' and 'materiality' are not synonymous." *United States v. Rigas*, 490 F.3d 208, 234 (2d Cir. 2007). "To be 'relevant' means to relate to the issue. To be 'material' means to have probative weight, i.e., reasonably likely to influence the tribunal in making a determination required to be made." *Id.* (quoting *Weinstock v. United States*, 231 F.2d 699, 701 (D.C. Cir. 1956)).[20] Thus, to prove materiality, the government cannot simply present evidence that a statement was false and the information generally within the purview of the governmental decisionmaker to which it was addressed. Rather, it bears the burden of adducing testimony or other evidence explaining the purpose or use of the statement and some specific way or ways in which the statement might affect a particular decision of the decisionmaking body. Applying those principles here, the record contains evidence of no particular decision made by the Judge that was or could have been influenced by the praecipe.

Another Tenth Circuit decision, *United States v. Finn*, 375 F.3d 1033 (10th Cir. 2004), drives home this point. In

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[20] Dictionary definitions confirm this distinction. *Compare Relevant*, Black's Law Dictionary (11th ed. 2019) (defining "relevant" as "[l]ogically connected . . . to"), *with Material*, Black's Law Dictionary (11th ed. 2019) (defining "material" as, among other things, "[o]f such a nature that knowledge of the item would affect a person's decisionmaking; significant; essential").

Finn, a (now-former) special agent with the U.S. Department of Housing and Urban Development altered an official expense report to cover up an auto accident. *Id.* at 1036–37. A false statement, said the Tenth Circuit, but not a material one under § 1001. True, the testimony presented at trial established that the altered expense report "fell generally within the jurisdiction" of HUD. *Id.* at 1040. Meaning the reports were, in some sense, "relevant" to the pertinent governmental decisionmaker. But that was not enough. The government had failed to explain "the purpose or use of case expenditure forms from the agency's perspective," and how the altered expense report "could or would have examined the case expenditure form at issue for the purpose of determining the propriety of the underlying expense." *Id.* Without such a showing, the government had failed to prove materiality. *Id.*

So too here. The Government elicited generalized testimony from the Judge: that he usually looks to the civil docket in making decisions, and of course, that Johnson stuck a false praecipe on it. But, as *Finn* highlights, this established only relevance, not materiality. The Government did not present evidence connecting Johnson's filing to a specific decision by the Judge that might have been affected by Johnson's false statement. And "[t]o form the basis of a jury's conclusion, [the Government's] evidence . . . cannot be purely theoretical and evidence of such a capability to influence must exceed mere metaphysical possibility." *Litvak*, 808 F.3d at 172–73. All of which left materiality unproven.

ii. The Deleted Filing

Nor is materiality shown by the Judge's decision to delete the false praecipe from the docket. This was the Government's trial theory, as it explained: "[the Judge] struck [the false praecipe] from the record. So he took action. So

not only was it capable of influencing his decision, but it did. So it was, in fact, material." (App. at 703.)

We fail to see the connection. That the praecipe was struck could be evidence that it was false; in fact, the order deleting the filing noted specifically that the "filing [wa]s *fraudulent* and was *not filed by the attorney* whose purported signature appears on the docket." (App. at 598 (emphases added)). But "falsity and materiality [are] separate requirements of misrepresentation." *Kungys v. United States*, 485 U.S. 759, 781 (1988); *see also Gaudin*, 515 U.S. at 509 (citing and quoting from *Kungys*, 485 U.S. at 770, to define the materiality element of 18 U.S.C. § 1001). As Judge Easterbrook once remarked, "[d]eliberately using the wrong middle initial . . . is not a felony—not unless the right middle initial could be important." *United States v. Kwiat*, 817 F.2d 440, 445 (7th Cir. 1987). The "could be" is missing from the Government's evidence. The Government needed proof of an actual decision that could have been affected by the false praecipe. *See Gaudin*, 515 U.S. at 512 ("Deciding whether a statement is 'material' requires the determination of . . . [the] question[] . . . 'what decision was the agency trying to make?'").

The Judge's decision merely to delete a false filing is not the type of decision that, without more, itself gives rise to materiality, at least on the record here. This conclusion is informed by the Second Circuit's decision in *United States v. Litvak*, where the defendant was charged and convicted of making false statements to the Department of the Treasury. 808 F.3d at 166, 170. The government argued his statements were material because they caused Treasury to "actually refer[] the matter . . . for investigation." *Id.* at 173. The Second Circuit disagreed. After all, the court explained, "every prosecution for making a false

statement undoubtedly involves 'decisions' by the government to refer for investigation, investigate, and prosecute the defendant for making the false statement at issue." *Id.* (emphasis added). The government, rather, had to present evidence of a "decision" that could be influenced beyond the mere fact that "the [governmental decisionmaker] had received the misstatements and that its staff[] had reviewed" and reacted to them. Id. at 174 (citing *Rigas*, 490 F.3d at 236).

Johnson's case is even further afield. To conclude otherwise would be to render the materiality element meaningless, and the scope of § 1001 absurd. Suppose Johnson had submitted his false praecipe on December 31, with a message inarguably incapable of affecting the Judge's decisionmaking. "Happy New Year," perhaps. The filing was docketed, and after appreciating the well-wishes, the Judge struck it from the docket. Was this a "decision," in the ordinary sense of the word? Of course. But could this be a material decision supporting a conviction under § 1001? Of course not. Government decisionmakers perform all sorts of administrative and ministerial tasks. Sensibly, § 1001 focuses not on those workday activities, but on "misrepresentation[s] or concealment[s] . . . predictably capable of affecting, *i.e.*, ha[ving] a natural tendency to affect, *the official decision*" of a government agency. *Kungys*, 485 U.S. at 771 (emphasis added); *see also United States v. Richardson*, 676 F.3d 491, 505 (5th Cir. 2012) (relevant decision in 18 U.S.C. § 1001 case considering false statement made to judge was "whether to grant or to deny . . . motion for admission pro hac vice"). The Government cannot prove materiality simply by presenting evidence that Johnson's false filing was received and later deleted from the docket.

4. The Government's Unpersuasive Responses

Perhaps sensing the weakness of its trial case, the Government responds to all this with a new theory: that Johnson's false praecipe was "material" not because it was "capable of influencing [the Judge's] decision," (App. at 703), but because "by misrepresenting that the document was being filed by a party to the lawsuit, rather than a total stranger to the litigation, it *enabled the document to be filed*" by the Clerk in the first place, (Response Br. at 14 (emphasis added).) That the Government presented no evidence that Johnson's filing could influence a pertinent decision of the Judge in the litigation, it now argues, is of no moment.

Let us count the problems with this position. For one, the record makes clear this was not the theory presented at trial. When Johnson moved in limine to preclude the testimony of the Judge, the Government asserted quite the opposite, arguing the testimony was relevant to materiality because the Judge alone was the governmental decisionmaker:

> As the judicial decision maker in the civil case in which the false statement was filed, [the Judge] is in the best position to determine whether the false statement did, or was capable of affecting judicial action. *Within the context of this case, judicial non-decision making court personnel are not in a position to make this determination.*

(App. at 98 (emphasis added).) By contrast, the Government explained that staff personnel like the court clerks who accept and upload filings were not.

The Government's summation banged this drum loudly, repeatedly arguing that materiality is measured

by its ability to "affect[] judicial action," (App. at 98.)21 As the Government put it: "[the filing] was submitted to the judicial branch, because it was submitted . . . for [the] *Judge*[*'s*] . . . consideration." (App. at 703 (emphasis added).) The Government's trial theory was not that materiality was established by docketing the false document, but that it could (and did) influence an actual judicial decision by the Judge.

As the jury never heard the Government's new theory, we are loath to consider it. As the Second Circuit explained in *United States v. Rigas*, "[a]lthough a statement's materiality may present a question of law resolvable by an appellate court in some contexts, a criminal defendant is entitled to have a jury determine his guilt on every element of his alleged crime and the jury must pass on the materiality of a defendant's misrepresentations." 490 F.3d at 231 n.29 (citations omitted); *see also Chiarella v. United States*, 445 U.S. 222, 236 (1980) (stating that courts "cannot affirm a criminal conviction on the basis of a theory not presented to the jury"); *United States v. Farrell*, 126 F.3d 484, 491 (3d Cir. 1997) (noting that we do not ordinarily "independently review the record before us and attempt to assess the evidence relevant to an alternative theory . . . upon which to uphold a conviction"). "Accordingly, we will not consider in the first instance arguments regarding materiality that were not presented to the jury." *Rigas*, 490 F.3d at 231 n.29.

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[21] Examples abound: (a) "it had to be capable of influencing the judicial branch"; (b) "[the] Judge . . . , in fact, testified that, yeah. You know, I look at the docket. . . . That's how I make my decisions, based on the entries on the docket"; and (c) "[the Judge] took action in Filing Number 7 on February 2, 2016, and, in fact, struck it from the record," (App. at 703.)

And for another, this new theory is unsupported by the record. The Government's argument reduces to two points: Johnson filed a document that he claimed was made by Troiani, establishing "falsity"; and "only [Troiani] could make such a filing," establishing "materiality." (Response Br. at 25.) Or, as it asserts elsewhere, "[t]he misrepresentation of the filer's identity was material because by misrepresenting that the document was being filed by a party to the lawsuit, rather than a total stranger to the litigation, it enabled the document to be filed." (Response Br. at 14.)[22]

The problem, though, is that the evidence presented to the jury suggested just the opposite: that almost anything with a proper case number would be scanned and uploaded to the civil docket, regardless of the identity of the signatory. One civil docket clerk, for example, testified that "anyone can drop off filings for an attorney or anything at the front counter." (App. at 392.) No names are recorded, or, it appears, any signatures checked. Rather, when the Clerk's Office receives a paper filing, "[the clerks] scan in the filing and upload it to the ECF system." (App. at 398). Another clerk agreed: "if something comes in hard copy . . . the docket clerks downstairs will" simply "scan it and upload it to ECF." (App. at 432). Far from proving that masquerading as Troiani enabled the false praecipe to be filed, the record reveals that Johnson's identity was immaterial, and that Johnson could have filed the same documents under his, or any other, name. A point, Johnson dryly notes, illustrated by this case, where the District Court's docket, and our own, are littered with irrelevant filings made by a nonparty.

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[22] Arguments all briefed without a citation to any supporting evidence in the record.

Lacking support for both its trial and appellate theories, the Government seeks refuge in civil procedural rules and case law as proof of the centrality of the identity of the filer in civil proceedings.[23] But even assuming their relevance, the Government presented none of this to the jury. *See In re Winship*, 397 U.S. 358, 364 (1970) ("Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.") (citation omitted); *Gaudin*, 515 U.S. at 522–23 (explaining that the Constitution requires that a jury, not a judge, decide the materiality of a false statement). And while, as the Supreme Court has recently instructed, "an appellate court conducting plain-error review may consider the *entire* record—not just the record from the *particular proceeding* where the error occurred," the new supposed evidence the Government points us to was not a part of either. *Greer v. United States*, 141 S. Ct. 2090, 2098 (2021). The hour is too late for these theories to save the Government's case.

C. Johnson Prevails on Plain-Error Review

The Government's lack of evidentiary support as to "materiality" established, we turn last to the *Olano* factors, and conclude that relief is warranted. The first three are easily met, and, "[a]lthough Rule 52(b) is permissive, not mandatory," the Supreme Court has recently reminded us "that courts should correct a forfeited plain error that affects substantial rights," where it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Rosales-Mireles v. United States*, 138 S. Ct.

[23] In particular, the Government directs us to Rule 11 (which requires every filing to be signed by the filer and state the filer's contact information and provides for sanctions for false representations to the court), and Rule 24 (which sets out the requirements for intervention) of the Federal Rules of Civil Procedure.

1897, 1906 (2018) (cleaned up). Generally, the government's failure to prove an essential element of an offense is a miscarriage of justice—one sufficient to warrant reversal of the conviction for plain error. *See, e.g., United States v. Morton*, 993 F.3d 198, 206 (3d Cir. 2021); *Castro*, 704 F.3d at 138; *United States v. Retos*, 25 F.3d 1220, 1231– 32 (3d Cir. 1994); *United States v. Xavier*, 2 F.3d 1281, 1287 (3d Cir. 1993). Nothing here encourages us to depart from this general rule. To permit Johnson's conviction to stand, as we put it recently, "would be to endorse conviction merely for being bad—an outcome abhorrent to the tenet that, in our legal system, we convict people only of specific crimes." *United States v. Harra*, 985 F.3d 196, 211 (3d Cir. 2021) (internal quotation marks omitted). We will not do so.

III. CONCLUSION

Let there be no doubt on two points. First, Johnson's conduct was not just a waste of public time and resources. It disrupted the administration of justice, interfered with the orderly work of the federal courts, and flouted the respect due to judges and attorneys sworn to uphold the law. Much more than a warning about our internet-addicted culture, Johnson's actions are a reminder that respect for the rules that support the law is inseparable from the rule of law itself.

But a second follows: for bad acts to constitute crimes, at trial the Government must prove each element beyond a reasonable doubt. This is because the Government, through the United States Attorney, "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v.*

United States, 295 U.S. 78, 88 (1935). That is why the right to the jury trial "is justly esteemed one of the principal excellencies of our constitution." *Thompson v. Utah*, 170 U.S. 343, 350 (1898) (quoting Juries, 3 Matthew Bacon, A New Abridgment of the Law (1736)). A "great privilege," brought to the United States as a "birth-right and inheritance . . . against the approaches of arbitrary power" demands proof of each element specified by the people, through Congress, constituting a crime sufficient to forfeit liberty. 3 J. Story, Commentaries on the Constitution of the United States § 1773, at 652–53 (1833).

That ancient guarantee was not honored. While Johnson's actions were malicious, the Government failed to prove they were material to the only decisionmaker identified at trial, the Judge. And Congress requires both falsity and materiality to impose liability under 18 U.S.C. § 1001. As a result, we will reverse Johnson's false statement (Count 1) and aggravated identity theft (Count 2) convictions, remanding for the entry of a judgment of acquittal.