No. 18-

IN THE

Supreme Court of the United States

JOHN F. TATE,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was convicted of multiple federal crimes for filing a report with the Federal Election Commission that allegedly misstated the purpose of an expenditure. In particular, the government argued that payments listed as "audio/visual" expenses were in fact expenditures in exchange for securing the endorsement of a state politician. But federal law does not prohibit making payments in exchange for an endorsement. The Government nonetheless pursued and obtained criminal convictions against Petitioner under the federal obstruction statute, 18 U.S.C. § 1519, and the false-statements statute, 18 U.S.C. § 1001. The Eighth Circuit affirmed the convictions, in direct conflict with decisions from other circuits and recent decisions of this Court.

The questions presented are:

1. Does an agency's receipt of information over which it has no authority to act implicate a "matter within" the agency's "jurisdiction" under 18 U.S.C. § 1519, as the Eighth Circuit held below in conflict with decisions from three other circuits?

2. Can a false statement be deemed "material" under 18 U.S.C. § 1001 even if the government would have acted no differently had the statement been true?

PARTIES TO THE PROCEEDING

Petitioner is John F. Tate, defendant in the proceedings below.

Respondent is the United States. Dimitrios N. Kesari and Jesse R. Benton, co-defendants below, are being served as co-respondents.

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INTRODUCTION

This case involves a paradigmatic example of federal prosecutorial overreach. Nobody disputes that the Ron Paul 2012 Presidential campaign paid an Iowa state senator to work for the campaign. The Government claimed the payment was for his endorsement rather than for any work he did for the campaign. But payments under either scenario do not violate federal law. The question here is whether the submission of federal campaign expenditure reports that identified the purpose of the payments as "audio/visual expenses" rather than "endorsement" can support felony convictions for obstructing a matter within the jurisdiction of the Federal Election Commission ("FEC"), 18 U.S.C. § 1519, and making material false statements, 18 U.S.C. § 1001.

This Court's intervention is plainly warranted. The Eighth Circuit affirmed Petitioner's section 1519 conviction on the ground that he obstructed a "matter within the jurisdiction" of the FEC by misstating the purpose of the expenditure. But, as the Government conceded below, three other circuits have held that an agency's receipt of information over which it has no power to act is not a "matter within" the agency's "jurisdiction." In holding to the contrary, the Eighth Circuit rendered the Federal Election Campaign Act of 1971 ("FECA")—the law that specifically makes it illegal to file false reports with the FEC—superfluous. This Court has made clear that section 1519 should not be interpreted so expansively, *see Yates v. United States*, 135 S.Ct. 1074, 1088 (2015), a point the lower courts acknowledged but failed to heed.

Certiorari is also warranted to address the Eighth Circuit's separate holding that the Government had proven materiality for purposes of section 1001. The Eighth Circuit concluded that the statements were material to the agency—*i.e.*, that the agency *would* have acted differently if the expenditure reports were accurate. *Kungys v. United States*, 485 U.S. 759, 775 (1988). But it is undisputed that the FEC invariably reports whatever information a campaign reports, regardless of its accuracy. Thus, even if the reported statements about the purposes of the expenditures had been accurate, this would not have resulted in a different action by the FEC. In holding to the contrary, the Eighth Circuit reached a decision directly at odds with decisions of this Court and several other circuits. The Court should grant certiorari on both questions presented.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eighth Circuit is reported at 890 F.3d 697 and is reproduced in the Appendix ("App.") at 1a-37a. The Eighth Circuit's order denying rehearing en banc is unreported and is reproduced at App. 38a-39a.

JURISDICTION

The Eighth Circuit issued its opinion on May 11, 2018, and denied a timely petition for rehearing and rehearing en banc on July 6, 2018. On September 14, 2018, Justice Gorsuch granted an extension of time to file a petition for writ of certiorari to November 5, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory provisions, 18 U.S.C. § 1001 and § 1519, are reproduced in the Appendix to this brief. App. 40a-42a.

STATEMENT OF THE CASE

A. Factual Background

John Tate was the campaign manager for Ron Paul's 2012 presidential campaign. Jesse Benton was Paul's campaign chairman, and Dimitri Kesari was a deputy campaign manager. App. 3a. In late 2011, Iowa state senator Kent Sorenson offered to leave the Michele Bachmann campaign—on which he served as Bachmann's state campaign chairman—and join the Paul campaign. Sorenson provided various services to Bachmann's campaign, for which he was compensated at a rate of $7,500 per month. App. 3a-4a. But the ethics rules of the Iowa Senate prohibit a senator from being paid by a PAC. *See* Iowa Senate Code of Ethics, Rule 6. To compensate Sorensen, the Bachmann campaign paid a company named C&M Strategies, which paid a company named Grassroots Strategies, which Sorensen owned. The payments were structured this way to "skirt" the ethics rules. TR, Vol. 5, 920, 960-62, 967.[1]

In October 2011, a person representing Sorenson emailed the Paul campaign to float the idea of Sorenson switching his allegiances from Bachmann to Paul.

1. "TR" refers to the Trial Record.

Subsequent negotiations resulted in an offer from Benton to "employ [Sorenson] at fair market value," which "Bachmann has set … at 8k per month," if Sorenson would agree to "lend [his] considerable talents to our winning team in Iowa." App. 4a; Gov't Tr. Ex. 10. Nothing came of this exchange.

Kesari, however, continued pursuing Sorenson. App. 4a-5a. The day after Christmas, Kesari had dinner with Sorenson and his wife in Altoona, Iowa. App. 6a. At the end of the dinner, Kesari gave the Sorensons a $25,000 check from a jewelry store that Kesari's wife owned, made out to Grassroots Strategies (the consulting company that Sorenson owned). *Id.* Sorenson initially rebuffed the offer, but changed his mind on December 28th and unexpectedly showed up at a campaign rally for Paul. *Id.* Kesari ushered Sorenson inside, and Sorenson publicly endorsed Paul. App. 6a-7a. Later that night, Kesari emailed Fernando Cortes, an assistant controller for the Paul campaign, requesting a $25,000 wire transfer the next morning. App. 7a. Benton and Tate approved that request. *Id.*

The Bachmann campaign quickly accused the Paul campaign of paying for Sorenson's endorsement. *Id.* On December 29th, Sorenson appeared on Fox News and asserted that the Paul campaign was not paying him and that the FEC expenditure reports for the fourth quarter of 2011 would prove it. TR, Vol. 3, 451-53. Later that day, Tate emailed Cortes, stating that "[t]here will not be the 25k dimitri wire for now. Wipe it off the books." App. 8a.[2]

2. Paying for an endorsement does not violate federal law. Neither does delaying a payment so that it shows up on a different expenditure report. But having the payment show up on the

Kesari subsequently worked with Sorensen to arrange another way to pay him. Because the Bachmann campaign had paid Sorensen through an intermediary to skirt the Iowa Senate ethics rules, Kesari and Sorensen agreed to a similar arrangement. TR, Vol. 5, 969. Kesari found an intermediary through his brother, who connected him with Noel "Sonny" Izon at Interactive Communications, Inc. ("ICT"). App. 8a-9a. Kesari, Sorensen, and Izon agreed that Grassroots Strategies would bill ICT, and ICT would draft invoices charging the Paul campaign for "production services." App. 9a. When the Paul campaign paid its invoices, ICT would deduct a small commission and send the rest of the money to Grassroots Strategies—*i.e.*, Sorensen. TR, Vol. 5, 1032-33. No one other than Kesari, Sorensen, and Izon was involved in setting up this scheme.

Meanwhile, Sorensen provided an array of services to the Paul campaign. He traveled to South Carolina shortly before that State's primary. While there, he met with state legislators to encourage them to endorse Paul and appeared at rallies. App. 10a. Sorensen also made several national television appearances, posed for photo opportunities, recorded "robo-calls," and sent email blasts under his name. *Id.*

From January to June 2012, ICT sent invoices to Kesari for "production services," and Kesari then sent the invoices to the Paul campaign. App. 8a-9a. Based on the way ICT characterized its services, Cortes and his

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next FEC filing would have been bad politics, as it would have contradicted Sorenson's statement to Fox News, confirmed the accusations of the Bachmann campaign, and exposed Sorenson's possible violation of the Iowa Senate ethics rules.

assistants classified the expenditures as "audio/visual expenses." App. 10a. The expenditures were then sent, like the numerous other expenditures made by the campaign, to Benton or Tate for approval. TR, Vol. 2, 122. If Benton or Tate approved, the expenditures would go to the campaign treasurer for final approval. *Id.* If the treasurer approved, the expenditures would be paid and reported to the FEC. *Id*. at 191. All told, the Paul campaign paid ICT $38,125 for January,[3] $8,850 for February, $8,850 for March, $8,850 for April, $8,850 for May, and $8,850 for June. TR, Vol. 5, 1040-45, 1053-55.[4]

Tate did not receive any invoices directly from ICT, and had no role in coding them or labelling them as "audio/visual expenses." Tate did not approve and had no involvement in the initial payment to ICT for $38,125. On February 7, 2012, Kesari emailed Tate, "Did Jesse get Kent paid?" Tate replied, "No idea. Ask him." App. 9a. Although Tate quickly approved payments to ICT for February and May, alongside the countless other expenditures he reviewed on a daily basis—Tate did not know what ICT was, whether it was associated with Sorenson, or how the expenses would be characterized on the FEC reports. App. 9a-10a.

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3. The January invoice for $38,125 included payment for the campaign's rental of microphones, speakers, and other audio equipment it had rented from another company. App. 9a; TR, Vol. 3, 590-94; TR Vol. 5, 1038-41.

4. The Ron Paul campaign raised and spent roughly $40 million during the 2012 presidential campaign cycle. FEC, Ron Paul 2012 Financial Summary, https://bit.ly/2qvC0IA.

Tate's emails reflect his lack of knowledge about the purpose of these payments. On February 16, Cortes emailed Tate a list of unpaid invoices. After listing several other payees, Tate replied, "Don't know what Interactive Communication Technology is." Gov't Tr. Ex. 58. On June 25, 2012, Cortes emailed Tate about the final payment to ICT. App. 10a. Tate wrote back, "I will find out what it is." *Id.* Tate then forwarded the email to Kesari, asking, "What is this? What is it for, who is it? Why do we keep paying them?" *Id.* Kesari responded, "This [is] the last payment for kent Sorenson, the deal jesse agreed to with kent." *Id.* After receiving Kesari's email, Tate approved one final payment to ICT for $8,850. *Id.*

The Paul campaign was required by FECA to report its expenditures to the FEC. *See* 52 U.S.C. § 30104(a)(1), (b)(5)(A). Consistent with the invoices it received and the payments it made, the campaign reported the payments in question as going to ICT for "audio/visual services." It is undisputed that federal law does not prohibit the use of intermediaries to pay vendors or reporting only the immediate, rather than ultimate, recipient of campaign expenditures. And, as noted, federal law does not prohibit paying an individual for his or her endorsement.

B. The Indictment And First Trial

The Government nonetheless charged three officials from the Paul campaign—Tate, Benton, and Kesari—with multiple felonies in an indictment filed on July 30, 2015. Because all of the conduct described above is legal, the charges were premised on a particularly narrow theory: that the defendants caused reports to be filed with the FEC that falsely described the *purpose* of the payments as

"audio/visual expenses." The Government alleged that this not only violated FECA, but also the statute prohibiting false statements to federal agencies (18 U.S.C. § 1001), the Sarbanes-Oxley Act (18 U.S.C. § 1519), and the conspiracy statute (18 U.S.C. § 371). App. 12a-16a.

The first trial was a disaster for the Government. All of the counts were dismissed against Tate because the Government presented statements from Tate's grand jury proffer in clear violation of the proffer agreement. And the jury deadlocked or acquitted Benton and Kesari on most of the remaining counts. App. 11a. Yet the Government forged ahead with another prosecution, filing a superseding indictment that charged Tate with the same four offenses as the first indictment: causing false statements to a federal agency; causing obstruction of justice in violation of the Sarbanes-Oxley Act; causing false expenditure reports in violation of FECA; and conspiracy to commit those offenses. App. 2a-3a, 12a. Benton, Kesari, and Tate were tried together, and Tate was ultimately convicted on all counts, as were Benton and Kesari.

C. The Eighth Circuit's Decision

On appeal, Tate raised a number of challenges to his convictions. As relevant here, he argued that (1) the FEC's receipt of information over which it has no authority to act did not implicate a "matter within the jurisdiction of" the agency under 18 U.S.C. § 1519; and (2) the Government failed to prove materiality for purposes of 18 U.S.C. § 1001, because the FEC would have acted no differently had the statement been true. App. 19a-22a. With respect to the section 1519 issue, the Government acknowledged that its

arguments conflicted with the decisions from three other circuits cited by Tate, but argued that those cases were simply wrong. Gov't Br. 32.[5] On the materiality issue, the Government likewise relied on an Eighth Circuit decision that it claimed "rejected th[e] premise" of the Second Circuit decision cited by Tate. *Id.* at 35.

The Eighth Circuit nonetheless affirmed Tate's convictions. With respect to the first issue—section 1519—the court concluded that the case involved a "matter within the jurisdiction" of the FEC because the agency is statutorily authorized to "make these reports available for public inspection." App. 20a-21a. Although Tate had identified decisions from three other circuits rejecting such an expansive view of the terms "matter within the jurisdiction," the Eighth Circuit nonetheless held that the FEC's mere receipt and publication of the information—which required no government decision at all—was sufficient to affirm the conviction.

As for the section 1001 conviction, the Eighth Circuit simply held in conclusory fashion that "the Commission might have taken different action had the reports truthfully described the disbursements' purpose." App. 22a.[6] But despite considerable briefing—which included

5. All references to "Gov't Br." refer to the Government's brief in the Eighth Circuit.

6. Ironically, the Eighth Circuit conceded that the work Sorenson performed for the campaign "might arguably be described as audio/visual"—i.e., recording robocalls, performing radio and television appearances, and appearing and campaigning with the candidate. App. 16a. But it then inexplicably brushed aside this observation on the ground that "the payments [to Sorenson] were arranged before Sorenson performed any services." *Id.*

a discussion of authority from other circuits endorsing Tate's position—on what it means for the government to "act" differently based on the truth or falsity of a statement, the Eighth Circuit held that the mere possibility that the government might not have posted the expenditure reports was sufficient. *Id.* The Eighth Circuit subsequently denied Tate's petition for rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because the Eighth Circuit "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. Rule 10(a).

I. This Court Should Grant Certiorari To Address Whether An Agency's Receipt Of Information Over Which It Has No Authority To Act Implicates A "Matter Within" The Agency's Jurisdiction.

This petition presents an important question of law about the meaning of the phrase "matter within the jurisdiction of any department or agency of the United States" in the Sarbanes-Oxley Act. 18 U.S.C. § 1519. This Court's intervention is needed to ensure uniform application of federal criminal law and prevent a capacious and atextual construction of Sarbanes-Oxley's obstruction provision.

A. The Eighth Circuit's Decision Conflicts With Decisions Of The Sixth, Ninth, And Eleventh Circuits.

Under section 1519, a person can be imprisoned for up to twenty years if he "knowingly … conceals, covers up, falsifies, or makes a false entry in any record … with the intent to impede, obstruct, or influence the investigation or proper administration of *any matter within the jurisdiction of* any department or agency of the United States …, or in relation to or contemplation of any such matter or case." 18 U.S.C § 1519 (emphasis added). Here, the FEC received false information about the purpose of a campaign expenditure. Yet the FEC had no power to act on the basis of that false information—the agency simply posted the expenditure reports online, just as it would have done if they were true. Despite considerable precedent suggesting that this is insufficient to implicate a matter "within the jurisdiction of" a federal agency, the Eighth Circuit upheld the conviction. That holding created a direct conflict with decisions of the Ninth, Sixth, and Eleventh Circuits.

In *United States v. Facchini*, the Ninth Circuit, sitting en banc, rejected the proposition that "the scope of jurisdiction … follows the federal government's access to information." 874 F.2d 638, 642 (1989). *Facchini* involved several individuals who submitted false statements in order to receive state unemployment benefits. They were convicted of submitting false statements concerning "any matter within the jurisdiction of any department or agency of the United States." The Department of Labor had "statutory access" to the state program's information and used it to "monitor[]" the program and ensure

appropriate use of federal funds. *Id.* Despite that access and monitoring, the Ninth Circuit held that the false statements did not implicate the agency's "jurisdiction" because DOL was "not authorized to act in response" to the false information. *Id.* The court made clear that false statements are within the jurisdiction of an agency only if that agency is authorized to act in response to the false information. *Id.*; *see also Ogden v. United States*, 303 F.2d 724, 743 (9th Cir. 1967) ("A false statement is submitted in a matter within the jurisdiction of a department or agency ... if it relates to a matter as to which the Department had the power to act.").[7]

The Sixth Circuit adopted the Ninth's Circuit's position in *United States v. Holmes*, 111 F.3d 463, 466 (6th Cir. 1997). Like *Facchini*, the case involved a federal false statement prosecution relating to state unemployment fraud. And like *Facchini*, the federal Department of Labor provided administrative funding for and oversight of the state program, but did not make benefit determinations. *Id.* at 465-66. The Sixth Circuit held that the test for

7. *Facchini* and the Sixth and Eleventh Circuit decisions discussed below addressed the meaning of "matter within the jurisdiction of" in 18 U.S.C. § 1001. But the "matter within the jurisdiction" language in section 1519 came directly from the false-statements statute, S. Rep. 107-146, at 15 & n.15, and the meaning of that phrase is the same under both statutes, *see Stribling v. United States*, 419 F.2d 1350, 1352 (8th Cir. 1969). Lower courts, including the Eighth Circuit here, have treated this Court's section 1001 case law as binding in interpreting section 1519's use of the identical phrase "matter within the jurisdiction." *See, e.g.*, App. 19a-21a. Thus, if this Court reverses Petitioner's section 1519 conviction on the ground that the statement did not concern a matter within the jurisdiction of the FEC, this Court should also reverse the section 1001 conviction.

whether false statements are "within the jurisdiction" of an agency is whether the agency has the power to act on the false information. *Id.* at 466.The court explained that since the federal government lacked "authority to act" upon discovering the false statements, "the matter cannot be said to come 'within the jurisdiction of any department or agency of the United States.'" *Id.*

Most recently, the Eleventh Circuit sided with the Sixth and Ninth Circuits in its interpretation of the phrase "within the jurisdiction." *United States v. Blankenship*, 382 F.3d 1110, 1136-41 & n.33 (11th Cir. 2004). In *Blankenship*, a defendant faced federal false statement charges for lying to the Florida Department of Transportation, which was fulfilling a contract with the U.S. Department of Transportation. *Id.* at 1136. The Eleventh Circuit reversed the conviction, explaining that "the key issue in determining whether a statement is within the government's jurisdiction is *the authority of the agency to act*." *Id.* at 1137 (emphasis added). Since the only thing the federal government could have done in response to the defendant's false statements was exert "pressure," the government lacked authority to act in any meaningful way, and therefore the matter was not within the federal government's jurisdiction. *Id.* The Eleventh Circuit further explained that "the fact that the defendant's lies may have formed the basis of … reports … sent to the government" is not "sufficient to bring the matter within the federal government's jurisdiction." *Id.* at 1140. The court warned that interpreting the phrase too broadly would lead to "shocking" and inappropriate results. *Id.* at 1137-38; *see also id.* ("While Congress may be constitutionally empowered to criminalize this broad range of conduct, we simply do not believe that it chose to do so ....").

Tate's conviction unquestionably would have been reversed had his appeal been brought in one of these circuits. The FEC has jurisdiction to bring civil-enforcement actions against individuals who violate federal campaign-finance laws. *See* 52 U.S.C. §§ 30106(b)(1); 30107(a)(6). If a person makes a false statement in an expenditure report to conceal a violation of the campaign-finance laws—for example, an evasion of the donation limits of 52 U.S.C. § 30116(a)(1)—then the false statement *could* implicate a "matter within the jurisdiction of" the FEC. But here, the Paul campaign's statement about "audio/visual expenses" does not implicate the FEC's jurisdiction because it is undisputed that paying for someone's endorsement does not violate federal law. Since there was no underlying violation of campaign-finance law, the false statement regarding the purpose of the expenditure cannot provide the FEC with a basis for action. There was simply no "matter within the jurisdiction of" the FEC.

In its briefing below, the Government did not dispute that a circuit split would be created if the Eighth Circuit affirmed Tate's conviction despite contrary authority from the Sixth, Ninth, and Eleventh Circuits. The Government merely argued that those circuits' decisions relied on an improperly "narrow and technical definition" of the terms "matter within the jurisdiction." Gov't Br. 32. The Government also asserted that the conflicting decisions were inconsistent with this Court's decision in *United States v. Rodgers*, 466 U.S. 475, 479 (1984)—a puzzling argument, given that each of the circuit decisions cited by Tate was decided *after* Rodgers. There is no question that Tate would have prevailed had this case arisen in one of the three circuits that applies the contrary rule.

B. The Decision Below Is Incorrect And Effectively Reads FECA And Its Higher Evidentiary Burden Out Of The Books.

Section 1519 was enacted as part of the Sarbanes-Oxley Act of 2002, "legislation designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation." *Yates*, 135 S.Ct. at 1079. This Court has cautioned against broad applications of section 1519. As the Court explained, section 1519 is not a "coverall" statute, *id.* at 1088; should not be "cut … loose from its financial-fraud mooring," *id.* at 1079; and should not be read as superfluous with other criminal statutes, *id.* at 1084-85 & n.6.

The Eighth Circuit failed to heed this Court's warning, holding that a false statement of purpose submitted to the FEC falls within section 1519's reach. But FECA already makes it illegal to falsely state the purpose of a campaign expenditure. If section 1519 punishes the same conduct, FECA serves no purpose. *See*, *e.g.*, *Ball v. United States*, 470 U.S. 856, 861 (1985) ("Congress ordinarily does not intend to punish the same offense under two different statutes."). And a prosecutor would always bring an obstruction charge because the *mens rea* requirement is lower than FECA ("knowingly" versus "knowingly and willfully") and the potential punishment is much higher (20 years versus 5 years).[8]

8. Prosecutors are starting to do just that. When attorneys in the Central District of Illinois indicted then-Congressman Aaron Schock on a charge of "falsification of [an] FEC filing," they charged him under § 1519, not the relevant FECA provision, 52 U.S.C. § 301014(b)(5). *See* 3:16-cr-30061-MFK-TSH, dkt. # 1 (Indictment, Nov. 10, 2016).

The textual differences between FECA and section 1519 underscore the flaws in the Eighth Circuit's approach. Unlike FECA, section 1519 requires a false statement to influence a "matter within the jurisdiction of" the agency. The word "matter" is "focused and concrete." *McDonnell v. United States*, 136 S.Ct. 2355, 2369 (2015). It requires "a formal exercise of governmental *power* that is similar in nature to a lawsuit, administrative determination, or hearing." *Id.* at 2370 (emphasis added); *accord* S. Rep. 107-146, at 27 (2002). Likewise, although "'the term 'jurisdiction' should not be given a narrow or technical meaning,'" "the scope of the term does have limits." *Blankenship*, 382 F.3d at 1136 (citation omitted); *accord United States v. Espy*, 145 F.3d 1369, 1374 (D.C. Cir. 1998) ("[J]urisdiction implies limited authority."). Jurisdiction is "the power to exercise *authority* in a particular situation." *Rodgers*, 466 U.S. at 479 (emphasis added). It does not include "matters peripheral to the business of" the agency. *Id.*[9]

The fact that the FEC *receives* the reports is not enough, as even the Eighth Circuit noted. *See* App. 21a (noting that "[m]ere access to information" is insufficient under section 1519) (citing *Facchini*, 874 F.2d at 642). And the Eighth Circuit's reliance on the FEC's civil jurisdiction to prohibit false statements in the reports is circular. It tortures logic and the English language to say that a person files a false statement with the FEC "with the intent to impede, obstruct, or influence" the

9. As noted above, *supra* n.7, section 1519's "matter within the jurisdiction" language came directly form from the false-statements statute, and thus the meaning of the phrase is the same for both statutes. *Id.*

FEC's jurisdiction to prosecute him for filing that false statement. *See United States v. Litvak*, 808 F.3d 160, 173 (2d Cir. 2015). If anything, the falsification *facilitates* the decision to prosecute; it does not obstruct it.

Although the FEC posts expenditure reports on its website, that act is "peripheral" and involves no exercise of governmental discretion or "authority." *Facchini*, 874 F.2d at 641. Indeed, the Government's own witness testified that the posting of this information is automatic and non-substantive. TR, Vol. 3, 550. Because the FEC "is not empowered to act" based on payments made for endorsements, the statements at issue "do not fall within [its] jurisdictional reach …." *Facchini*, 874 F.2d at 642.

The Eighth Circuit simply ignored the decisions of the Sixth Circuit in *Holmes* and the Eleventh Circuit in *Blankenship* that are contrary to the decision below. The court also failed to heed the admonishment that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Yates*, 135 S.Ct. at 1088 (citation omitted). This Court "has steadfastly insisted that 'doubt will be resolved against turning a single transaction into multiple offenses.'" *Simpson v. United States*, 435 U.S. 6, 15 (1978) (citation omitted).

A campaign treasurer attempting to decipher his legal duties would naturally turn to the *campaign-finance* laws (FECA), not the *Sarbanes-Oxley Act*, a statute addressing spoliation of evidence for financial crimes. *See United States v. Katakis*, 800 F.3d 1017, 1030 (9th Cir. 2015) ("Section 1519 was drafted to prevent corporate document shredding."). This Court has repeatedly refused to stretch criminal liability so broadly and so far beyond

the core offenses being criminalized. *See Yates*, 135 S.Ct. at 1087-88; *Bond v. United States*, 134 S.Ct. 2077, 2090.[10] Indeed, this Court recently applied these principles to narrow the reach of a similar obstruction statute, 26 U.S.C. § 7212(a). *See Marinello v. United States,* 138 S.Ct. 1101, 1107-08 (2018) (noting that the "broader statutory context … also counsels against adopting the Government's broad reading," in part because it would convert numerous misdemeanor offenses into felonies and that, had it intended such a result, Congress "would have spoken with more clarity than it did"). The Eighth Circuit's interpretation of "matter within the jurisdiction" is untenable.

C. The Question Presented Is An Important And Recurring One That Warrants The Court's Review.

The question presented in this case frequently recurs and has significant practical importance. The Court's intervention is needed to safeguard the proper but limited scope of Sarbanes-Oxley's obstruction provision and provide clarity and uniformity in federal criminal law.

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10. The legislative history confirms this interpretation. The only portion of the Senate report that attempts to define "matter within the jurisdiction" expresses "concern" that the phrase "could be interpreted more broadly than we intend." S. Rep. 107-146, at 27 (2002) (add'l views of Sens. Hatch, Thurmond, Grassley, Kyl, DeWine, Sessions, Brownback, McConnell). The phrase applies only to an "investigation, a formal administrative proceeding, or bankruptcy case"—not any "matter within the conceivable jurisdiction of an arm of the federal bureaucracy." *Id.*

As this Court's decision in *Yates* makes clear, the capacious language of section 1519 requires careful attention to ensure the government does not exceed its statutory authority. 135 S.Ct. at 1084-88. This case well illustrates that concern. Despite the existence of a more directly on point federal statute, FECA, federal prosecutors "cut [section] 1519 loose from its financial-fraud mooring" and used it to prosecute political wheeling and dealing. *Id.* at 1079. But just like section 1519 cannot be used to prosecute the spoliation of fish, the statute cannot be used as a "coverall" statute to target fishy political maneuvering. *Id.* at 1088 ("[W]e resist reading § 1519 expansively to create a coverall spoliation of evidence statute, advisable as such a measure might be."). Section 1519's "matter within the jurisdiction of" language limits the statute's scope to a narrow and specific type of harm—lies related to matters over which an agency has authority to act.

The deepening circuit conflict over what constitutes a "matter within the jurisdiction" of an agency has left prosecutors and citizens unsure of when a criminal violation has actually occurred. Given the millions of citizens who communicate with administrative agencies each year, clarity is badly needed. And the need for this Court's intervention is doubly important in light of the broad reach of section 1519. Given the vast number of individuals who communicate with federal agencies each year, any construction of the term "within the jurisdiction of" that is broader than Congress intended would criminalize countless interactions that Congress never intended to make illegal. For instance, an individual who lies about his height or weight on a government form despite knowing that the government publishes aggregate

height and weight data using the form might be guilty of a crime that carries up to twenty years in federal prison. This cannot be what Congress intended.

The split of authority discussed above has serious practical implications. As things stand, a federal prosecutor in Iowa might prosecute a candidate or campaign official for campaign-finance-related misconduct that is considered perfectly legal under circuit precedent in Ohio, Florida, and Nevada. Such disparities are untenable, and would open the door to confusion, discord, and uneven enforcement of the law.

Finally, this case squarely presents the question of whether an agency's receipt of information over which it has no authority to act implicates a "matter within the jurisdiction of" an agency under 18 U.S.C. § 1519 and is a pure question of law. The question was fully briefed below, and the Eighth Circuit unequivocally held that the matter was within the jurisdiction of the FEC in affirming Tate's section 1519 conviction. The circuit split is squarely presented and ripe for immediate resolution by this Court.

II. A False Statement Is Not "Material" Under 18 U.S.C. § 1001 When The Government Would Have Acted No Differently Had The Statement Been True.

This petition also presents an important question concerning whether a false statement is material if the government would have acted no differently had the statement been true. The Eighth Circuit held that prosecutors were not required to prove that the Government would have acted differently had the

statements been true. But that decision conflicts with rulings of the Third, Fourth, Fifth, Seventh, and Tenth Circuits, and is inconsistent with this Court's precedents.

A. The Eight Circuit's Decision Conflicts With The Decisions Of Several Other Circuits.

Tate's conviction for violating the false-statements statute required proof that he "knowingly and willfully … falsifie[d] … a *material* fact" in a "matter within the [FEC's] jurisdiction." 18 U.S.C. § 1001(a)(1) (emphasis added). Materiality is a key element of the crime that the Government must prove beyond a reasonable doubt, *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995). The Eighth Circuit concluded that the Government had satisfied the element of materiality, App. 21a-22a, even though it acknowledged there was no evidence the Government would have acted differently had the statement been true.

Under section 1001, a statement is material if it has "a natural tendency to influence, or [was] capable of influencing, the decision of the decision making body to which it was addressed." *Gaudin*, 515 U.S. at 509 (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988)). This turns on "two subsidiary questions of purely historical fact": (1) "What statement was made?"; and (2) "What decision was the agency trying to make?" *Id.* at 512. The upshot of this "rigorous" and "demanding" requirement, *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S.Ct. 1989, 2002-03 (2016), is that an agency must demonstrate that it would have acted differently if the defendant had told the truth. As this Court explained in *Kungys*, what must be "material" is the "fact" itself, not

its falseness *qua* falseness. 485 U.S. at 775. "Thus, for purposes of determining [materiality], what is relevant is what would have ensued from official knowledge of the misrepresented fact ... not what would have ensued from official knowledge of inconsistency between a posited assertion of the truth and an earlier assertion of falsehood." *Id.*[11]

The Eighth Circuit concluded that the Government had proven materiality despite a lack of any evidence that the FEC would have acted differently with respect to any agency decision or action. The *only* FEC "decision" identified by the Government at any point in this case was whether to publish the campaign's reports on its website (and keep them published). But the Eighth Circuit accepted that even if Tate had submitted accurate information, the "accurate reports would have been published, just as the false reports were." App. 22a. The court did not identify *any* FEC decision or action that the false statement of purpose was "capable of influencing." *Id.*

The Eighth Circuit's holding that the Government does not need to prove a specific action or decision that a false statement was capable of influencing is inconsistent with this Court's materiality jurisprudence. In *Kungys*, the Court noted that "*even a high probability*" that true information would have resulted in an "investigation" "does not establish that [a] misrepresentation was

11. The standard for materiality is thus *not* whether the agency's decision might have changed if it discovered the falseness of the defendant's statement, without more. The word "material" in the statute modifies the noun "fact," not the verb "falsifies." *See Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 656 (4th Cir. 2004).

material." 485 U.S. at 774-75 (emphasis added). Instead, the misrepresentation "must have a natural tendency to influence [an] *official decision*." *Id.* at 775-76 (emphasis added). If it does not, the decision is not material. It is the "effect" of a false statement on the "likely or actual behavior" of an agency that is crucial to determining whether a false statement is material; "statutory, regulatory, and contractual requirements are not automatically material." *Escobar*, 136 S.Ct. at 2001-02 (quoting 26 R. Lord, *Williston on Contracts* § 69:12, p. 549 (4th ed. 2003)). The Eighth Circuit deviated from this Court's precedent by failing to consider whether the false statement was likely to influence FEC behavior with respect to a *specific* act or decision. *See also Air Wis. Airlines Corp. v. Hoeper*, 134 S.Ct. 852, 863 (2014) (evaluating materiality by asking what the "truth would have produced").

The Eighth Circuit's decision conflicts with the decisions of other circuits holding that for a false statement to be material, the Government must show that it likely would have acted differently had it received a truthful statement. The Third, Fourth, Fifth, Seventh, and Tenth Circuits have all concluded that a false statement is material only if the Government shows it would have acted differently had it received truthful information. *See, e.g.*, *United States v. Moyer*, 674 F.3d 192, 208 n.8 (3d Cir. 2012) (asking what would have happened "if [the defendant] had truthfully reported" the information); *United States v. David*, 83 F.3d 638, 648 (4th Cir. 1996) (asking what would have happened "had [the defendant] responded truthfully"); *United States v. Evans*, 42 F.3d 586, 593 (10th Cir. 1994) (asking what would have happened "if the true purposes of the loans had been listed on the

funding sheets"); *United States v. Johnson*, 530 F.2d 52, 55 (5th Cir. 1976) (asking what would have happened "[h]ad the … affidavit been true"); *U.S. ex rel. Leibowitz v. Schlotfeldt*, 94 F.2d 263, 265 (7th Cir. 1938) (asking what would happened "if the truth had been stated").

B. The Eighth Circuit's Position Is Wrong on the Merits.

Under the correct approach, section 1001's materiality language should have required the Government to prove that the FEC would have made a different decision if the Paul campaign had reported the purpose of the payments to ICT as "Sorenson's endorsement," instead of "audio/visual expenses." The *only* FEC "decision" identified by the Government at any point in this case was whether to publish the campaign's reports on its website (and keep them published). But the Government *conceded* that, if the Paul campaign had reported the true purpose of the payments to ICT, then the FEC would have made the exact same decision: it "would have published the information that the campaign paid Sorenson for his endorsement." Gov't Br. 35.[12] If the FEC was going to publish whatever it was told, regardless of content, then the information cannot be considered "material" to the publication decision.

12. The Government's concession was compelled by the evidence at trial, where its agent testified that the FEC publishes reports so long as they are complete; the agency does not consider the substance of the information. "Whatever the committee files," Hartsock explained, "will be available for the public to see." TR, Vol. 3, 550.

The Government's other arguments to support the false-statements conviction are equally unavailing. For example, the Government contended that the Paul campaign caused the FEC to make a decision to post a report that said "audio/visual expenses" instead of one that said, "Sorenson's endorsement." Gov't Br. 35. But it was undisputed that the FEC does not decide *what* to list as the purpose of an expenditure; the campaign does. The only decision that the FEC makes is *whether* to post the campaign's report after reviewing it for completeness.

The Government's theory would mean that *every* false statement in an expenditure report is material. If an expenditure report misrepresented a person's zip code, the zip code would automatically be material because the FEC would "decide" to report the wrong zip code instead of "deciding" to report the right one. That interpretation "reads materiality out of the statute." *See Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 660 (4th Cir. 2004). As the Seventh Circuit has observed by way of another example, "[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) (emphasis added).

Nor does the listed purpose of expenditures satisfy the materiality requirement merely because the FEC asks for that information. Gov't Br. 34-35. The FEC acknowledged that it "rare[ly]" even *investigates* campaigns for inaccurately reporting the purpose of expenditures because prosecuting that conduct is "not ... a prudent use of Commission resources." FEC, Statement of Reasons at 5, Matter Under Review (MUR) 6698 (*Boustany for Congress*) (Dec. 5, 2016), goo.gl/VMlJ68.

And in any event, this Court has emphasized that false statements are not "automatically material," even when an agency "designates" them as such. *Escobar*, 136 S.Ct. at 2001, 2003. Materiality turns on the "'effect'" that a false statement has on an agency, not the "label[s]" that the agency attaches. *Id.* at 2001-02.[13] By the Government's own admission, the effect here is zero.

Nor is a false statement material simply because, as the Government argued, it might "trigger" an investigation by the FEC. Gov't Br. 34-35. The underlying conduct here—paying a state senator, regardless of whether it was for his endorsement or for work that could arguably be described as "audio visual"—does not violate federal law. FEC officials are not "detective hobbyists" who investigate anything that seems fishy. *Kungys*, 485 U.S. at 774 n.9. The only investigation that could be triggered by the campaign's false description of purpose is an investigation into the false statement itself. But a defendant's false statement cannot affect the FEC's "decision" to prosecute him for making false statements, as the Second Circuit has explained:

> [T]he materiality element would be rendered meaningless if it were sufficient for the government merely to establish the capability of the false statement to influence an agency staffer's, investigator's, or prosecutor's "decision" to refer for investigation, investigate,

13. For the same reason, the Government cannot establish materiality simply because the form on which campaign treasurers report expenditures says that that they can be prosecuted under FECA. *See* Gov't. Br. 34.

> or prosecute the defendant for the very statement at issue.

Litvak, 808 F.3d at 173.

In the decision below, the Eighth Circuit held in conclusory fashion that "the false statements in the reports satisfied § 1001(a)(1)'s materiality requirements." App. 22a. But that *ipse dixit* ignores altogether the critical question of what different action the FEC would have taken if the reports had been truthful.

This is no small oversight. The materiality requirement is a longtime fixture of the common law, which "could not have conceived of fraud without proof of materiality." *Escobar*, 136 S.Ct. at 2002 (quotation marks and citation omitted). It is meant to separate false statements that truly disrupt the proper functioning of government from those that pertain to "some trifling collateral circumstance, to which no regard is paid." *Kungys*, 485 U.S. at 769 (quoting 4 W. Blackstone, *Commentaries* *137). And this Court has often and recently emphasized the importance of holding the Government to its burden of proving materiality. *See, e.g.*, *Escobar*, 136 S.Ct. 1989, 2002-03 (explaining that the False Claims Act materiality requirement uses "language that we have employed to define materiality in other federal fraud statutes," and that the element is "demanding" and "should be enforced"); *Maslenjak v. United States*, 137 S.Ct. 1918, 1927-29 (2017) (interpreting a statute that revokes the citizenship of someone who "procure[d]" it by "mak[ing] [a] false statement" to the government as equivalent to the materiality requirement from *Kungys,* and explaining that ignoring the materiality requirement would "give prosecutors nearly limitless leverage").

Unlike the felony sledgehammer of section 1001, Congress in FECA set forth a far more reticulated statute that provides a range of sanctions, from civil to misdemeanors to felonies, depending on the seriousness of the offense. The existence of this statutory scheme, and the way in which the decision below undermines that scheme, further weigh in favor of granting the petition.

By limiting the Government's power of prosecution to *materially* false statements, Congress sought to avoid over-criminalizing American life. The Eighth Circuit's approach treats a liberty-protecting provision, deeply rooted in the common law, as a mere inkblot. This dangerous reinterpretation of section 1001 criminalizes conduct that Congress intended to protect. Section 1001 is already a broad statute, yet the decision of the Eighth Circuit makes it broader still. This Court should grant the petition for certiorari to correct the Eighth Circuit's error and resolve the division among the courts of appeals.

III. If This Court Reverses The Decision Below On Any Of The Questions Presented, A Remand On All Counts Is Appropriate.

As noted above, this case involved extensive overlap between the offenses charged. The section 1001 and 1519 counts were the most serious of the charged offenses, but the FECA and conspiracy counts were dependent upon the same evidence. The Eighth Circuit acknowledged this in its opinion, and only cursorily discussed the extent to which the evidence supported the conspiracy conviction (let alone which underlying illegal act was at issue). Under such circumstances, a remand following this Court's decision is appropriate to allow consideration of the

sufficiency of the evidence in light of this Court's ruling on the merits of the claims. *See, e.g.*, *Skilling v. United States*, 561 U.S. 358, 414-15 (2010); *Holmes v. South Carolina*, 547 U.S. 319 (2006).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED MAY 11, 2018

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16-3861

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JESSE R. BENTON,

Defendant-Appellant.

No. 16-3862

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN FREDERICK TATE,
ALSO KNOWN AS JOHN M. TATE,

Defendant-Appellant.

Appendix A

No. 16-3864

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DIMITRIOS N. KESARI,
ALSO KNOWN AS DIMITRI KESARI,

Defendant-Appellant

April 6, 2017, Submitted
May 11, 2018, Filed

Appeals from United States District Court for the Southern District of Iowa - Des Moines.

Before WOLLMAN and LOKEN, Circuit Judges, and NELSON,[1] District Judge.

WOLLMAN, Circuit Judge.

Jesse R. Benton, John Frederick Tate, and Dimitrios N. Kesari (Defendants) were convicted by a jury of causing false records, in violation of 18 U.S.C. §§ 2 and 1519

1. The Honorable Susan Richard Nelson, United States District Judge for the District of Minnesota, sitting by designation.

(Count 2); causing false campaign expenditure reports, in violation of the Federal Election Campaign Act (the Act), 52 U.S.C. §§ 30104(a)(1), (b)(5)(A), and 30109(d)(1)(A)(i) and 18 U.S.C. § 2 (Count 3); engaging in a false statements scheme, in violation of 18 U.S.C. §§ 2 and 1001(a)(1) (Count 4); and conspiring to commit the offenses listed above, in violation of 18 U.S.C. § 371 (Count 1). Defendants appeal, arguing that the district court[2] erred in denying their motions to dismiss, for judgment of acquittal, and for a new trial; in instructing the jury; in issuing certain evidentiary rulings; in denying Tate's motion for severance; and in issuing a discovery ruling. We affirm.

I. Background

Defendants were officials with Ron Paul's 2012 presidential campaign. Benton served as campaign chairman, Tate served as campaign manager, and Kesari served as deputy campaign manager. During the primary campaign for the Republican Party nomination, Defendants sought the endorsement of Iowa State Senator Kent Sorenson, who had previously endorsed rival Republican candidate Michelle Bachmann and was employed as Bachmann's Iowa campaign chairman, in which capacity he worked seventy to eighty hours a week and was paid $7,500 a month.

On October 29, 2011, Aaron Dorr, the brother of Sorenson's legislative aide, Chris Dorr, emailed Tate a

2. The Honorable John A. Jarvey, Chief Judge, United States District Court for the Southern District of Iowa.

proposal, which stated that Sorenson would need to be paid a salary of $8,000 a month to endorse Paul, Chris Dorr would need to be paid a salary of $5,000 a month, and a $100,000 donation would need to be made to a political action committee established by Sorenson. Tate shared the proposal with Benton, among others, describing it as "insulting," "offensive," and "unethical," and stating that the Paul campaign could make a counter-proposal, simply refuse the proposal, or communicate the proposal to the press, which he believed "would destroy the Bachman[n] campaign, Kent, and possibly Aaron." In reply, Benton sent an email on October 31 addressed to Sorenson and Aaron and Chris Dorr, stating that although he was pleased that Sorenson was considering supporting Paul, he was surprised by the proposal because it appeared to be "trying to sell Kent's endorsement for hundreds of thousands of dollars and other in-kind support for future political ventures," which "would be unethical and illegal." Benton further stated that the Paul campaign "would be happy to employ [Sorenson] at fair market value," which the Bachmann campaign had set at $8,000 a month for Sorenson and $5,000 a month for Chris Dorr, and that Sorenson should respond to this offer by November 2. Later the same day, Kesari told Tate in an email that he and Sorenson had arranged to meet for dinner the following week. Tate responded by saying that Kesari should not "firm up anything yet."

Aaron Dorr responded to Benton's counter-offer on November 2, stating that he alone was responsible for the earlier proposal and that Sorenson was unaware of its details. He also stated that Sorenson would be unable

to consider Benton's counter-offer until after November 8. Benton replied that the offer for Sorenson and Chris Dorr to join the Paul campaign remained open but that it would require a response by November 7.

On November 13, Benton emailed Tate and Kesari that he was considering telling the press about Sorenson's endorsement proposal in light of a "cheap shot" from Bachmann toward Paul. Tate replied that Benton should first contact Aaron Dorr regarding the possibility of Sorenson's endorsement. Kesari suggested that he could meet with Sorenson and Sorenson's wife, but Tate stated that Benton should contact Aaron Dorr instead, which Benton agreed to do that night. On November 15, after Dorr had failed to respond, Benton gave Kesari permission to meet with Sorenson and Sorenson's wife. Tate told Kesari, "Make sure you talk to Jesse about how we want to do this and what you are supposed to say. We need to be very careful." Kesari agreed to do so.

On November 21, Kesari emailed Tate and Benton that he had spoken with Sorenson and his family over dinner the previous evening and learned that Sorenson wanted to defect to the Paul campaign but in a way that would cause the least harm to Bachmann. Tate replied, "Seems to me, next step is to make him an offer (in person, not in writing) and give him a firm but polite deadline. In my view we would want it to occur after Christmas, a few days before Caucus." On December 23, Benton sent an email to Tate and others stating, "Sorenson is endorsing [Paul] on Monday. We have his statement already."

Sorenson requested a meeting with Kesari on December 26. Kesari, Sorenson, and Sorenson's wife met at a restaurant to discuss Sorenson's endorsement of Paul. In Sorenson's absence, Kesari gave Sorenson's wife a $25,000 check made out to Grassroots Strategy, a corporation owned by Sorenson. After the meeting, Kesari sent an email to campaign staffers saying, "The deal is done. Please draft a press release and send to me and Jesse." Attached to the email was Sorenson's draft statement endorsing Paul.

On December 27, however, Kesari sent an email to Tate, Benton, and others saying, "Hold the release. Kent is getting cold feet. He wants to meet with me in about 2 hours. Any advice? Damn I was afraid of this." Tate asked, "Why is he getting cold feet? What can we do, say to help him? What time are you meeting him, and where?" Benton replied, "I am not interested in this game any more. Dimitri, pull the offer. If we can't depend on him, I don't want him involved." Benton then sent another email, saying, "In all seriousness, I am [not] sure what to do about this. The DMR [*Des Moines Register*] has his statement, I sent last night since Kent said [he] [was] [c]omfortable." Benton told Tate and Kesari in subsequent emails that he was considering telling the press about Sorenson's request for payment if Sorenson did not uphold his agreement to endorse Paul.

According to Sorenson, he had a heated argument with Bachmann's campaign staff on December 28. Later that day, he drove to a rally for Paul at the Iowa State Fairgrounds in Des Moines. Sorenson met Kesari in the

parking lot and asked if Kesari, Benton, and Tate were still "on board" with his endorsement of Paul; Kesari replied that they were. Sorenson spoke with Benton and Kesari in the backstage area of one of the buildings at the Fairgrounds, where Tate was also present. Sorenson testified that Benton told him something to the effect of, "[Y]ou bled for us, we'll take care of you," which Sorenson understood to mean that he would be "financially taken care of and politically taken care of." Sorenson thereafter went on stage and publicly endorsed Paul. Shortly after Sorenson's endorsement, Kesari sent an email to Fernando Cortes, the Paul campaign's assistant controller, requesting a $25,000 wire transfer for the next morning. Copies of the email were sent to Benton and Tate and stated that Benton had approved the wire. Tate replied the following day that the wire was approved. The Paul campaign issued a press release announcing Sorenson's endorsement.

After Sorenson endorsed Paul, members of the Bachmann campaign began telling the press that the Paul campaign had paid Sorenson for his endorsement. Responding to media inquiries, Benton stated that Sorenson would not be paid by the Paul campaign, in one instance explicitly denying that Sorenson would be paid a salary by the campaign. Tate sent an email to Benton, saying, "We need to make sure anyone asked about this . . . is prepared to say the same thing. I would assume that is something like: The Ron Paul campaign has not and is not paying Kent for his endorsement. Kent decided to endorse Ron because blah blah blah. Short sweet and truthful."

On December 29, the Paul campaign issued a press release that included a statement from Sorenson that he "was never offered money from the Ron Paul campaign or anyone associated with them and certainly would never accept any." The statement further stated, "Financial reports come out in just days which will prove what I'm saying is true." Benton had approved this release before it was made public. In television interviews, Sorenson also denied being paid by the campaign. He had been urged by Kesari to support this denial by referring to the forthcoming financial reports and was told by Kesari not to cash the $25,000 check that Kesari had given to Sorenson's wife. Also on December 29, Cortes sent an email to Kesari, Benton, and Tate, with the subject line "25k wire," asking "Is this invoice still on for today? Please send when you get." Benton told Cortes to "[h]old for a couple days." Tate agreed that the wire should be held, and Kesari stated, "We are holding till after the filing." Kesari also explained that he did not want the wire "showing up on this quarter filings." Later that day, Cortes sent Tate a list of outstanding invoices, which included "$25k - Dimitri's mystery wire." Tate responded, "Thanks. There will not be the 25k dimitri wire for now. Wipe it off the books."

Kesari then arranged to pay Sorenson through a third party. He asked his brother, Pavlo Kesari, if Pavlo could pay, via Pavlo's video production company, a graphic designer who had done work for the campaign. Pavlo replied that he could not do so, but referred Kesari to his friend Sonny Izon, who owned a video production company called Interactive Communications Technology (ICT). On January 24, 2012, Sorenson sent Kesari an

invoice addressed to ICT from Grassroots Strategy Inc., the corporation owned by Sorenson, for "Consulting Services," consisting of $25,000 for "Retainer to provide services" and $8,000 for services provided during the month of January 2012. Kesari sent the invoice to Pavlo, saying, "Here is the invoice that needs to be taken care of. Send me an invoice for video services." Pavlo forwarded the invoice to Izon and added a $3,125 invoice for audio equipment that Pavlo had rented to the Paul campaign. On February 5, Izon sent Kesari an invoice charging the Paul campaign $38,125 for "Production Services."

After receiving the February 5 invoice, Kesari sent Tate an email asking "[d]id jesse get kent paid?" Tate replied, "No idea. Ask him." Kesari then emailed Benton, asking "Did you get kent paid? Or should I submit the payment and pay him?" Benton replied, "Yo[u] handle." Kesari forwarded the invoice to Cortes, saying "Please wire tomorrow morning[.] This is approved by jesse." On March 21, Izon sent Kesari an invoice charging the Paul campaign $8,850 for production services rendered in February. Kesari forwarded the invoice to Cortes, saying that it was "[a]pproved by jesse." Cortes forwarded the invoice to Tate, asking if the payment was approved, with Tate responding that it was. The same exchange took place regarding the invoice for services in March. After receiving the invoice for services in April, Kesari forwarded it to Benton, asking "Kent's bill[.] Pay?" Kesari then forwarded the invoice to Cortes, saying that it was "[a]pproved by Jesse." After receiving the May invoice, Kesari forwarded it to Cortes, saying, "This should be the last one." Cortes forwarded the invoice to Tate, asking

"[A]pproved? Dimitri said it is the last one." Tate approved the payment. After receiving the June invoice, Kesari forwarded it to Cortes, saying, "This is the last one." Cortes forwarded the invoice to Tate, saying, "According to dimitri [this is] the last one (again)[.] Approved? 8k." Tate told Cortes, "I will find out what it is." Tate emailed Kesari, asking, "What is this? What is it for, who is it? Why do we keep paying them? The last payment was supposedly the last." Kesari replied, "This [is] the last payment for kent Sorenson. The deal jesse agreed to with kent." Kesari sent Tate another email, saying, "I[t] was for 6 months." Tate then approved the payment.

Sorenson testified that he performed some services for the Paul campaign while being paid by it. He posed for photographs, made two television appearances, sent emails, and recorded a phone call on behalf of the campaign. He traveled to South Carolina and appeared at rallies in support of Paul, although he did not organize these rallies, as he had done while working for the Bachmann campaign. While in South Carolina he also met with state legislators and encouraged them to endorse Paul.

Based on the invoices, Cortes and other campaign staff prepared wire instructions for the payments to ICT, using a code designating the payments as "audio/visual expenses." The campaign used this information to report the payments to the Federal Election Commission (the Commission). The campaign reported the payments to ICT to the Commission as "audio/visual expenses," using the code assigned by Cortes.

In response to media reports regarding the $25,000 check that Kesari had given to Sorenson's wife, Sorenson sent Kesari a draft press release in August 2013, which stated that he had been offered the check but never cashed it and thus he "was never paid." Kesari told Sorenson to hold the release until after Kesari had returned from a trip abroad. Upon arriving in Toronto, Kesari placed phone calls to Sorenson, Tate, and Benton. He placed several more phone calls to Sorenson, Tate, and Benton after returning to Virginia. Kesari traveled to meet with Sorenson at his home. Sorenson testified that upon arriving, Kesari lifted up his shirt and asked Sorenson to do the same, to prove that neither was wearing a wire. Kesari asked Sorenson to give him the check back or to alter it to show either a smaller amount or to show "Loan" as the check's purpose. Sorenson refused these requests.

Defendants were indicted by a federal grand jury on Counts 1 through 4 as described above. Benton was indicted on a count of making false statements to law enforcement, in violation of 18 U.S.C. §§ 2 and 1001(a)(2) (Count 5) and Kesari was indicted on a count of obstruction of justice, in violation of 18 U.S.C. § 1512(b)(3) (Count 6). The district court dismissed without prejudice Counts 1 through 4 against Benton and Tate because the government had presented information to the grand jury that Benton and Tate had proffered to the FBI, in violation of their proffer agreements. The jury convicted Kesari of Count 2, causing false records; acquitted Kesari of Count 6, obstruction of justice; and acquitted Benton of Count 5, making false statements to law enforcement. The jury was unable to reach a verdict on the remaining counts.

By way of a superseding indictment, a grand jury again charged Defendants with Counts 1 through 4, except Kesari. who was not indicted on Count 2. After a second trial, the jury convicted Defendants on all counts.

II. Discussion

A. Statutory Construction and Sufficiency of the Evidence

Defendants argue that the district court erred in denying their motions for judgment of acquittal and for a new trial because the court misconstrued the relevant statutes and the evidence was insufficient to support Defendants' convictions.[3] "The district court's statutory construction is a legal determination that we review de novo." *United States v. Mack*, 343 F.3d 929, 933 (8th Cir. 2003). "A motion for judgment of acquittal should be granted only if there is no interpretation of the evidence that would allow a reasonable jury to find the defendant guilty beyond a reasonable doubt." *United States v. Boesen*, 491 F.3d 852, 855 (8th Cir. 2007) (quoting *United States v. Cacioppo*, 460 F.3d 1012, 1021 (8th Cir. 2006)). "This court views the entire record in the light most favorable to the government, resolves all evidentiary conflicts accordingly, and accepts all reasonable inferences supporting the jury's verdict." *Id.* at 856. "We review the district court's denial of a motion for new trial for abuse

3. Benton also appeals from the denial of his motion to dismiss the indictment, a ruling that we review *de novo*. *United States v. Sewell*, 513 F.3d 820, 821 (8th Cir. 2008).

of discretion." *United States v. Davis*, 534 F.3d 903, 912 (8th Cir. 2008).[4]

1. Federal Election Campaign Act

The Act requires the treasurer of a political campaign committee to file with the Commission a report disclosing "the name and address of each [] person to whom an expenditure in an aggregate amount or value in excess of $200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure." 52 U.S.C. § 30104(a)(1), (b)(5)(A). Violations of the Act's reporting requirements committed "knowingly and willfully" and "aggregating $25,000 or more during a calendar year" may be punished by up to five years' imprisonment. *Id.* § 30109(d)(1)(A)(i).

Defendants argue that the Act does not prohibit a campaign from paying a vendor, which in turn pays a sub-vendor, while reporting only the payment to the first vendor. As the district court noted in its order denying Defendants' motions, this argument is unavailing because Defendants were not charged with violating the Act

4. We reject at the outset Benton's argument that the evidence was insufficient because the district court erred in relying on Sorenson's testimony. In considering a motion for a new trial, "the district court may weigh the evidence and evaluate the credibility of the witnesses, but the 'authority to grant a new trial should be exercised sparingly and with caution.'" *Davis*, 534 F.3d at 912 (quoting *United States v. Sturdivant*, 513 F.3d 795, 802 (8th Cir. 2008)).

merely by failing to report Sorenson as the ultimate recipient of the campaign's payments to ICT. Rather, the government "was properly permitted to argue that [the] combination of a payee used to disguise the true payee, together with a false statement of purpose, was sufficient to violate the statutes alleged in the indictment." D. Ct. Order of Oct. 24, 2016, at 4-5.

The district court's analysis does not conflict with the Commission's decisions. In *Mondale for President*, the Commission advised that a campaign may report expenditures to a corporation it hired to provide media consulting services without reporting the corporation's expenditures to its sub-vendors. FEC Advisory Opinion 1983-25 (*Mondale for President*). And in *Kirk for Senate*, the Commission concluded that a campaign had not violated the Act's reporting requirements by paying a vendor for media services, who in turn paid a sub-vendor that allegedly used some of the funds to pay the personal expenses of the candidate's girlfriend. *Kirk for Senate*, Matter Under Review (MUR) 6510 (FEC July 16, 2013). In both matters, however, the Commission concluded that the vendors and sub-vendors had provided the services described by the campaign. Indeed, in *Mondale*, the Commission noted that itemization of the vendor's payments to sub-vendors would not be required because the campaign would report "specific information describing the various purposes of each expenditure made" to the vendor, such as "media consulting fees, media photocopy expenses, media buys, media production, and other similar descriptive language that reflects the actual purpose of each" of the campaign's expenditures to

the vendor. Here, by contrast, the government presented evidence that Defendants caused false reports to the Commission that the payments to ICT were for "audio/visual expenses," when in reality ICT had provided no such services to the campaign and the payments were instead for Sorenson's endorsement.

The Commission found a violation of the Act's reporting requirements in a matter whose facts are similar to those here, *In the Matter of Jenkins for Senate 1996 and Woody Jenkins*, MUR 4872 (FEC Feb. 15, 2002).[5] The campaign had contracted with a company called Impact Mail & Printing for computerized phone bank services. The campaign wanted to conceal its association with Impact Mail, however, and to that end it issued payments to its media firm, Courtney Communications, which then transmitted the payments to Impact Mail. The campaign's reports to the Commission reflected disbursements to Courtney Communications and not to Impact Mail. The Commission reasoned that because Courtney Communications "had no involvement whatsoever with the services provided by Impact Mail," and served only "as a conduit for payment to Impact Mail so as to conceal the transaction with Impact Mail," the campaign had violated the Act's reporting requirements.

5. Defendants contend that this matter lacks persuasive value because the Commission's views were set forth in a conciliation agreement reached by the Commission and Respondents. We note, however, that the conciliation agreement was accepted by majority vote of the Commissioners.

Defendants cite *Boustany, Jr. MD for Congress*, MUR 6698 (FEC Feb. 23, 2016), in support of their argument, but we do not find that case persuasive. The supplement to the complaint in that matter set forth allegations similar to those in this case, and in a three-to-three vote the Commission failed to find legal violations. Those Commissioners voting to take no action pointed to the campaign's descriptions of the disbursement's purpose as "[d]oor-to-door get-out-the-vote," and noted that while "a portion of the disbursement was ultimately used for another kind of [get-out-the-vote] activity," it would not be "a prudent use of Commission resources" to investigate such a "minor discrepancy." Here, by contrast, reporting the payments to ICT as "audio/visual expenses," when the actual purpose of the payments was for Sorenson's endorsement, can hardly be characterized as a "minor discrepancy."

We also reject Defendants' argument that the coding of the disbursements to ICT as "audio/visual expenses" did not render the reports false. That Sorenson performed some work for the campaign that might arguably be described as an audio/visual expense is beside the point. The government's theory was that the payments to Sorenson were for his endorsement and not for any audio/visual services, a theory bolstered by the fact that the payments were arranged before Sorenson performed any services. Based on Commission Branch Chief Michael Hartsock's trial testimony, Defendants contend that "a campaign is limited in the way that it can report disbursements and still comply with the Commission's facial review," that the Commission considers "audio/

visual" to be an adequate expenditure purpose, and that it considers "political consulting" or "endorsement" to be inadequate purposes. Benton Br. 28-29. Hartsock's testimony, however, was that the Commission's lists of adequate and inadequate disbursement purposes are non-exhaustive, and he agreed that "while consulting is not an acceptable purpose, specifying the type of consulting services provided can help to ensure that the purpose is considered adequate." He also testified that "audio/visual" does not appear on either the list of adequate or the list of inadequate purposes. This testimony thus did not establish that "audio/visual" was an accurate description of the purpose for the disbursements to ICT, nor did it establish that Defendants could not have accurately described the purpose for the disbursements in a manner that would have been accepted by the Commission.

Benton and Tate contend that the evidence was insufficient to support their convictions under the Act because it did not show that they were involved in preparing the false Commission reports. We disagree. The government presented evidence that Benton and Tate coordinated with Kesari to offer Sorenson money in return for endorsing Paul and that they approved a wire transfer to pay Sorenson after he had done so. After the Bachmann campaign claimed that Sorenson had been paid for his endorsement, Tate told Benton that everyone involved should be "prepared to say the same thing," namely, that Sorenson had not been paid for his endorsement. Benton told members of the media that Sorenson would not be paid by the Paul campaign. The Paul campaign issued a Benton-approved statement from Sorenson that Sorenson

would not be paid by the campaign and that the campaign's forthcoming Commission reports would bear out this claim. Tate and Benton instructed Cortes to hold the previously-approved wire, which, Kesari explained, was intended to prevent it from appearing on that quarter's Commission report. Later, Tate told Cortes to "[w]ipe [the wire] off the books." Benton told Kesari to handle the payments to Sorenson. Kesari sent several invoices from ICT to Cortes, saying in nearly every case that the disbursements had been approved by Benton. Kesari told Benton that the April invoice was for "Kent's bill." Tate approved the invoices after Cortes forwarded them to him. Although Tate asked what the June invoice was for, he approved the invoice immediately after Kesari told him that it was for "[t]he deal jesse agreed to with kent." The jury was entitled to infer from these facts that Benton and Tate had knowingly and willfully caused Commission reports to be filed which falsely reported the payments to Sorenson for his endorsement as payments to ICT for audio/visual services.

We reject Defendants' arguments that the reporting requirements are so vague or confusing that we should either apply the rule of lenity or determine that criminal enforcement is not appropriate in this case. As set forth above, Defendants were not convicted for an unsuccessful, good-faith attempt to accurately report the disbursements to ICT, but for knowingly and willfully causing false reports to be filed with the Commission, a conviction that we conclude finds ample evidentiary support in the record.

2. Causing False Records

Defendants challenge their convictions under 18 U.S.C. § 1519, which provides:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

Tate argues that applying § 1519 to false reports of campaign expenditures would render the Act superfluous. "Section 1519 was enacted as part of the Sarbanes-Oxley Act of 2002, 116 Stat. 745, legislation designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation." *Yates v. United States*, 135 S. Ct. 1074, 1079, 191 L. Ed. 2d 64 (2015). The Supreme Court has cautioned against "cut[ting] § 1519 loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent." *Id.* We conclude that applying § 1519 in the context of this case does not pose such a risk. In *Yates*, the Court held that § 1519 was not applicable to a fisherman's actions in throwing undersized fish overboard in order to evade punishment.

Id. at 1078-79. The Court concluded that "[a] tangible object captured by § 1519 . . . must be one used to record or preserve information." *Id.* at 1079. The production of false financial records by a political campaign falls within that framework. Accordingly, we join the Second Circuit in holding that a defendant may properly be convicted for violations of the Act and of § 1519. *See United States v. Rowland*, 826 F.3d 100 (2d Cir. 2016) (affirming convictions for violations of the Act and 18 U.S.C. §§ 371, 1001, and 1519), *cert. denied*, 137 S. Ct. 1330, 197 L. Ed. 2d 517 (2017).

Tate also argues that Defendants' § 1519 convictions fail because the false reports alleged in this case do not implicate a "matter within the jurisdiction of" the Commission. Regarding the identical phrase used in 18 U.S.C. § 1001, the Supreme Court has stated that "[t]he most natural, nontechnical reading of the statutory language is that it covers all matters confided to the authority of an agency or department." *United States v. Rodgers*, 466 U.S. 475, 479, 104 S. Ct. 1942, 80 L. Ed. 2d 492 (1984). "A department or agency has jurisdiction, in this sense, when it has the power to exercise authority in a particular situation." *Id.* "Understood in this way, the phrase 'within the jurisdiction' merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body." *Id.*

We conclude that the filing of campaign-expenditure reports constitutes a matter within the Commission's jurisdiction under § 1519. As set forth above, the Act requires campaigns to submit these reports and establishes penalties for their falsity. The Commission is

statutorily required to make these reports available for public inspection. 52 U.S.C. § 30111(a); 11 C.F.R. § 5.4(a). Accordingly, and in contrast to the situation that existed in *United States v. Facchini*, 874 F.2d 638 (9th Cir. 1989) (en banc), where the Department of Labor's authorization was only to monitor the administrative structure of the state's unemployment benefits program, here the false Commission reports did not constitute "[m]ere access to information," but rather "information received [that was] directly related to an authorized function" of the Commission. *Id.* at 642. We conclude that for the same reasons as described above regarding the violation of the Act, the evidence was sufficient for the jury to find that Defendants knowingly falsified documents with the intent to impede the Commission's administration of that matter.

3. False Statements Scheme

Under 18 U.S.C. § 1001(a)(1), "whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully [] falsifies, conceals, or covers up by any trick, scheme, or device a material fact" may be imprisoned for up to five years. Defendants argue that, even assuming that they caused false reports to be submitted to the Commission, the evidence was insufficient for the jury to convict them of violating § 1001(a)(1) because the false statements were not material. We disagree.

"A false statement is material if it has a natural tendency to influence or was capable of influencing the government agency or official to which it was addressed."

United States v. Chmielewski, 218 F.3d 840, 842 (8th Cir. 2000); *see also United States v. Gaudin*, 515 U.S. 506, 509, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) ("The statement must have 'a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed.'" (quoting *Kungys v. United States*, 485 U.S. 759, 770, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988))). Defendants contend that this standard was not met in light of Hartsock's testimony that a completed report filed with the Commission is automatically posted on the Commission's website and is taken down only if a subsequent review determines that the report is incomplete. Defendants argue that the false statements of purpose were not material because they did not influence the Commission in light of the fact that accurate reports would have been published, just as the false reports were.

Perhaps so, but that does not foreclose the possibility that the Commission might have taken different action had the reports truthfully described the disbursements' purpose. To prove materiality, the Commission needed to show only that the false reports were capable of influencing its decision and not that they succeeded in doing so. *United States v. Wintermute*, 443 F.3d 993, 1001 (8th Cir. 2006). We conclude that the false statements in the reports satisfied § 1001(a)(1)'s materiality requirements.

4. Conspiracy

Under 18 U.S.C. § 371, "[i]f two or more persons conspire [] to commit any offense against the United States . . . or any agency thereof . . . and one or more of such

persons do any act to effect the object of the conspiracy," each conspirator may be imprisoned for up to five years. "Conspiracy is an . . . agreement to commit an unlawful act." *United States v. Pullman*, 187 F.3d 816, 820 (8th Cir. 1999) (quoting *Iannelli v. United States*, 420 U.S. 770, 777, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975)). "Proof of a defendant's involvement in a conspiracy may of course be demonstrated by direct or circumstantial evidence." *United States v. Lopez*, 443 F.3d 1026, 1030 (8th Cir. 2006) (en banc).

We conclude that the evidence was sufficient for the jury to convict Defendants of conspiracy. The government presented evidence that Defendants coordinated with one another to conceal the payments to Sorenson by paying him through ICT and that Defendants knew that the purpose of those payments would ultimately be falsely reported to the Commission. That same evidence was sufficient to permit the jury to find that Defendants entered into an agreement to take such action.

B. Multiplicity

Kesari argues that Counts 2, 3, and 4 were multiplicitous and thus violated his rights under the Fifth Amendment's Double Jeopardy Clause. We review this claim *de novo*. *United States v. Emly*, 747 F.3d 974, 977 (8th Cir. 2014). Kesari argues that we must determine "whether Congress intended the facts underlying each count to make up a separate unit of prosecution." *Id.* (quoting *United States v. Chipps*, 410 F.3d 438, 447 (8th Cir. 2005)). This test applies, however, only when multiple counts of an indictment

charge the same statutory violation. *Id.* Here, each count charged a violation of a different statute. Accordingly, we apply the test derived from *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), which provides that "if each offense requires proof of an element not required by the other, the crimes are not considered the same, and a double jeopardy challenge necessarily fails." *United States v. Sandstrom*, 594 F.3d 634, 654 (8th Cir. 2010) (quoting *United States v. Gamboa*, 439 F.3d 796, 809 (8th Cir. 2006)). Each of the three counts requires proof of an element the others do not: the Act requires a monetary threshold to be met; § 1519 requires an intent to impede, obstruct, or influence a federal matter; and § 1001 requires a showing of materiality.

C. Severance

Prior to the second trial, Tate moved to sever his trial from his codefendants so that Kesari could testify on his behalf. A hearing was held before a magistrate judge,[6] during which Kesari's counsel stated that if Tate's trial were severed, Kesari would testify that on December 28, the day Sorenson endorsed Paul, Tate was told that Sorenson had not been promised anything in return for endorsing Paul; that Kesari did not tell Tate about the $25,000 check he gave to Sorenson's wife; that Kesari had no recollection of telling Tate about the $25,000 wire; that no deal to pay Sorenson existed until January 2012; that Kesari never passed on to Tate any information about

6. The Honorable Helen C. Adams, United States Magistrate Judge for the Southern District of Iowa.

ICT or the method of paying Sorenson; and that Kesari does not recall telling Tate anything about payments to Sorenson, including how they would be reported to the Commission, other than in the emails offered into evidence. In opposition, the government offered some of Kesari's emails and an interview with the FBI, in which Kesari stated that Paul and another campaign officer did not know about the deal to pay Sorenson but did not say the same about Tate. The district court adopted the magistrate judge's report and recommendation that the motion be denied in light of the equivocal nature of Kesari's testimony and the impeachment evidence available to the government.

"There is a preference in the federal system for joint trials of defendants who are indicted together." *United States v. Anderson*, 783 F.3d 727, 743 (8th Cir. 2015) (quoting *Zafiro v. United States*, 506 U.S. 534, 537, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993)). "This preference is 'especially compelling when the defendants are charged as coconspirators.'" *Id.* (quoting *United States v. Basile*, 109 F.3d 1304, 1309 (8th Cir. 1997)). "It is settled in this circuit that a motion for relief from an allegedly prejudicial joinder of charges or defendants raises a question that is addressed to the judicial discretion of the trial court, and this court will not reverse in the absence of a clear showing of abuse of discretion." *United States v. Starr*, 584 F.2d 235, 238 (8th Cir. 1978) (quoting *United States v. Rochon*, 575 F.2d 191, 197 (8th Cir. 1978)). "[I]n view of the strong policies favoring joint trials where permissible, the defendant must show that the co-defendant's testimony would be substantially exculpatory. The defendant must

show that the co-defendant's testimony would do more than 'merely tend to contradict a few details of the government's case against [him or her].'" *United States v. DeLuna*, 763 F.2d 897, 920 (8th Cir. 1985) (quoting *United States v. Garcia*, 647 F.2d 794, 796 (8th Cir. 1981)), *abrogated on other grounds by United States v. Inadi*, 475 U.S. 387, 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1986). In deciding whether a co-defendant's testimony would be substantially exculpatory, the district court was entitled to take into account "the other trial evidence and the impeachment evidence available to the government." *United States v. Oakie*, 12 F.3d 1436, 1441 (8th Cir. 1993).

Kesari's proffered statements that Tate was told that Sorenson was promised nothing for his endorsement, that Kesari could not recall telling Tate about the $25,000 wire, that no deal to pay Sorenson existed until January 2012, and that Kesari could not recall telling Tate about the payments to ICT or the method of paying Sorenson were contradicted by the record of emails between Benton, Tate, and Kesari. Accordingly, although some of Kesari's statements were unequivocal, and even though Kesari's failure to exonerate Tate during his interview with the FBI may have had only weak impeachment value, we conclude that the district court did not abuse its discretion in denying the motion.

D. Jury Instructions

Defendants argue that the district court erred in instructing the jury. "We review defense challenges to the district court's jury instructions for abuse of discretion."

United States v. Carlson, 810 F.3d 544, 554 (8th Cir. 2016). "The test is 'whether the instructions, taken as a whole and viewed in light of the evidence and applicable law, fairly and adequately submitted the issues in the case to the jury.'" *Id.* (quoting *United States v. Beckman*, 222 F.3d 512, 520 (8th Cir. 2000)). When review of jury instructions requires statutory interpretation, our review is *de novo*. *Id.* at 551.

Benton requested that the district court instruct the jury that it is not illegal: 1) for a campaign to pay for an endorsement; 2) for a campaign to delay the timing of payments from one reporting period to another; 3) for a campaign not to report payments from vendors to sub-vendors; 4) for a campaign to make an expenditure to a limited liability company without identifying its members or employees; or 5) for a campaign to pay a vendor more than market value for services. The district court instructed the jury on the first and third points. The court did not abuse its discretion in denying the proposed instructions because none of the issues set forth therein related to the government's proffered theory of conviction. *See United States v. Wisecarver*, 644 F.3d 764, 772 (8th Cir. 2011) ("A legally accurate but irrelevant jury instruction may be error to the extent it misleads the jury.").

Benton also requested that the district court instruct the jury that the term "willfully," which appears in both the Act and § 1001, should be defined as follows: "A person acts willfully if he acts voluntarily and intentionally to violate a known legal duty. It means that the defendant had knowledge of what the law required and acted with the

specific purpose to disobey the law." Instead, the district court issued the following instruction:

> A person acts willfully if he acts knowingly, purposely, and with the intent to do something the law forbids. That is, a person acts willfully when they act with the purpose to disobey or to disregard the law. A person need not be aware of the specific law or rule that his conduct may be violating, but he must act with the intent to do something that he knows the law forbids.

Benton argues that the term "willfully" is vague because this court recognizes more than one definition of the term and thus he was entitled to have the district court give his proposed instruction because it was the more lenient of the two. In *Bryan v. United States*, however, the Supreme Court approved nearly identical jury instructions, except with regard to "highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct." 524 U.S. 184, 194-95, 118 S. Ct. 1939, 141 L. Ed. 2d 197 (1998). Because Benton has not shown that this case falls within such an exception, we find no abuse of discretion in the district court's denial of his proposed jury instruction.

Likewise, the district court did not abuse its discretion in refusing to give Benton's proposed "debatable law" instruction, which stated:

> One factor for you to consider in deciding whether the defendants "knowingly and willfully" broke

> the law is whether the requirements of the law were vague or highly debatable. The more uncertain and debatable a law may be, the more difficult it may be to know whether certain conduct may violate the law. Sometimes the applicability of a law may be very clear in some instances, but not in others. If the law is so uncertain or highly debatable that reasonable persons could disagree, then the defendants could not knowingly and willfully violate the law and you must find them not guilty.

The district court instead issued the following instruction:

> Good-faith is a complete defense to Counts 1, 2, 3 and 4 in this case because good faith on the part of the defendants is inconsistent with willfulness as alleged in Counts 1, 3, and 4 and an intent to impede as alleged in Counts 1 and 2. If the defendants acted in good faith, sincerely believing themselves to be exempt by the law from the conduct constituting any of the above charges, then the defendants did not intentionally violate a known legal duty, that is, the defendants did not act "willfully." The burden of proof is not on the defendants to prove good-faith intent because the defendant does not need to prove anything. The government must establish beyond a reasonable doubt that the defendants acted willfully as charged.

The district court's instruction accurately set forth the law, and Benton did not show that the law was "vague or highly debatable" so as to warrant the issuance of his proposed instruction. *See United States v. Picardi*, 739 F.3d 1118, 1126-27 (8th Cir. 2014) (holding that district court did not abuse its discretion in refusing to issue "debatable law" instruction because the issue of vagueness was reserved for the court).

Kesari argues that the district court erred in failing to instruct the jury that a conviction for violation of § 1519 required a finding that the defendant acted willfully. Although Kesari concedes that the text of § 1519 includes no willfulness requirement, he contends that the relationship between the Act—which includes a willfulness requirement and authorizes comparatively lenient penalties—and § 1519—which includes no willfulness requirement yet authorizes comparatively harsh penalties—creates a "positive repugnancy" such that Congress must have intended for § 1519 to include a heightened *mens rea* requirement of willfulness. *United States v. Batchelder*, 442 U.S. 114, 122, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979). *Batchelder* undermines Kesari's argument, however, because there the Court held that without further evidence of inconsistency, two statutes authorizing different punishments for the same conduct may coexist. *Id.* Further, the Court considered whether a later-enacted, more lenient statute should be read to implicitly repeal an earlier-passed harsher one. *Id.; see also United States v. Richardson*, 8 F.3d 15, 17 (9th Cir. 1993) (per curiam) (holding that 18 U.S.C. § 1920 narrowed § 1001, which predated § 1920 by 40 years). Here, by

contrast, Kesari makes a far less intuitive argument—that § 1519, which was enacted after the Act and which, according to Kesari, is broader than the Act, must have been intended to include an implicit heightened *mens rea* element to avoid broadening the liability for conduct punishable under the Act. We decline to read § 1519 as including such an implicit element, all the more so because the cases Kesari cites in support of his argument included a willfulness requirement. *See Bryan*, 524 U.S. at 188-90; *Ratzlaf v. United States*, 510 U.S. 135, 138-40, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994); *Cheek v. United States*, 498 U.S. 192, 194, 111 S. Ct. 604, 112 L. Ed. 2d 617 (1991); *United States v. Curran*, 20 F.3d 560, 569 (3d Cir. 1994). Accordingly, we conclude that the district court did not err in refusing to give Kesari's proposed instructions.

E. Evidentiary Rulings

"We review evidentiary rulings for clear abuse of discretion, 'reversing only when an improper evidentiary ruling affected the defendant's substantial rights or had more than a slight influence on the verdict.'" *Anderson*, 783 F.3d at 745 (quoting *United States v. Henley*, 766 F.3d 893, 914 (8th Cir. 2014)).

1. Exclusion of Defense Experts

Defendants argue that the district court erred in excluding the testimony of two expert witnesses, David Mason and Jeff Link. Mason, a campaign consultant and former Commissioner and Commission Chairman, testified at the first trial in 2015. During direct examination,

defense counsel asked several questions regarding general campaign-finance legal requirements, to which the district court sustained several relevance-based objections saying to defense counsel,

> This is not the subject matter that you represented would be his testimony. You were very specific about what you wanted this for. . . . It was represented as associated with the campaigns, how hectic the campaigns and things like that were. That was the representation, and the organizational structure of campaigns, not the difficulty complying with the law.

After defense counsel asked Mason if there was "any confusion about the compliance issues with vendors and sub vendors," the court sustained another objection and called counsel to a sidebar conference, during which the court stated,

> Confusion goes to the state of mind of another, whether it's one person or a whole bunch. This gets back to the exact same concern I had last week about whether the Mondale Campaign sought an advisory opinion. Until I find out that that's—that your client heard it and relied upon it and bases a good faith defense on that, it's not relevant. Confusion generally is not relevant.

The district court sustained a relevance objection when government counsel asked Mason on cross-examination if he had ever advised a campaign that it could report

a disbursement to the Commission as an audiovisual expense when the disbursement was for something else. Government counsel then asked Mason a series of questions regarding the legality of paying sub-vendors through an "umbrella vendor," including whether the umbrella vendor would have to actually work with the sub-vendors. On redirect examination, defense counsel asked Mason about the rules regarding paying sub-vendors through an umbrella vendor and possible confusion surrounding those rules. The district court overruled the government's objections, ruling that the government had opened the door to the issue through its line of questioning on cross-examination. Mason continued to testify on this topic during the remainder of his testimony.

Prior to the beginning of the second trial, the district court granted the government's motion *in limine* to exclude Mason's testimony. It did so because Mason's testimony at the first trial "did not provide helpful context regarding the inner workings of federal campaigns at all, and only arguably touched on any relevant standard of care by alluding to general confusion," and instead offered an impermissible legal conclusion that the Commission regulations were confusing and that payments to sub-vendors through an umbrella vendor did not violate these regulations. *See S. Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F.3d 838, 841 (8th Cir. 2003) ("[E]xpert testimony on legal matters is not admissible."). The court accordingly excluded the evidence under Rule 403 of the Federal Rule of Evidence, finding that the "helpfulness of Mr. Mason's testimony to the jury's clear understanding of the general context of a

political campaign and how a political campaign operates is outweighed by the danger of confusion of the issues and impermissible instruction on the law." The court noted that it would instruct the jury that the use of an umbrella vendor to pay sub-vendors would not alone violate the Act and that Defendants were free to elicit testimony from other witnesses "regarding the hectic nature of political campaigns."

Benton served pretrial notice that he intended to call Link as an expert witness to testify regarding "the operating environment within federal candidate campaigns and the customs and practices and standards of care with respect to organizational structure;" "the customs and practices of federal candidate campaigns with respect to paying outside consultants through the use of corporations . . . and other similar entities;" and "the customs and practices of federal candidate campaigns with respect to the use of vendors who subcontract for services intended for the benefit of the federal candidate campaign." The government filed a motion *in limine* to exclude Link's testimony, which the court orally granted during trial.

Tate contends that the district court abused its discretion in excluding the experts' testimony because the impermissible legal testimony that the district court was concerned about was elicited by the government. The record shows, however, that the testimony was elicited by both sides. As the district court noted, testimony about the "hectic nature" and operational structure of the Paul campaign was available from other witnesses with direct

knowledge thereof, and so the court acted well within its discretion in excluding the proposed testimony.

2. Admission of the $25,000 Check

Benton argues that the district court abused its discretion in admitting evidence of the $25,000 check because it was not relevant to the theory of conviction and that any tangential relevance was outweighed by the danger of unfair prejudice. We disagree. The check was relevant to show that the purpose of the payments to Sorenson was to purchase his endorsement, rather than for "audio/visual expenses," as was reported to the Commission. Any potential prejudice resulting from admission of this evidence was mitigated by the district court's instruction that paying for an endorsement alone is not illegal.

3. Admission of Cortes Email

Kesari argues that the district court abused its discretion in admitting an email sent from Cortes to other campaign staff. The email stated that "Dennis is not a good guy . . . but neither is Dimitri IMO- but then again I don't know it all so I leave it to you." The email also included several attachments, including the ICT invoices; one attachment bore a lewd title. Cortes opined, "The last attachment is an email (sorry for the lewdness) I got about a month ago- not sure who its from- my two guesses-Dennis or Dimitri using dummy accounts." The district court did not abuse its discretion in admitting this evidence. In any event, any prejudice to Kesari was

so slight as to render any error harmless. *United States v. Falls*, 117 F.3d 1075, 1077 (8th Cir. 1997).

F. Impeachment Evidence

Kesari argues that the government withheld favorable information derived from an October 9, 2015, interview between Sorenson and agents of the FBI, in violation of the Jencks Act, 18 U.S.C. § 3500(b), and *Giglio v. United States*, 405 U.S. 150, 154-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

Kesari did not establish a violation of the Jencks Act because he has not shown that notes of this meeting exist. The Jencks Act requires a court to order the government, upon request by the defendant, to produce any statement in the government's possession which relates to the matter on which a witness called by the government has testified on direct examination. 18 U.S.C. § 3500(b). In response to subpoenas issued by Defendants, the government stated that Sorenson had met with FBI agents on October 9 and that no notes were taken at the meeting. Kesari argues that trial testimony established that notes were taken at the meeting, but that testimony was equivocal. During the first trial, Sorenson was asked if people at the meeting were taking notes, and he responded, "I don't recall." Then, when asked, "Were [note] pads out?" Sorenson said, "Yes." When asked "And were people writing on those pads as you spoke to them?" he replied, "I would assume so, yes." During the second trial, FBI Special Agent Karen LoStracco, who attended the October 9 meeting along with two other agents, testified, "I think I usually take at least

some notes. I don't recall an occasion where I didn't take notes. If I wasn't taking notes, somebody else was taking notes, meaning another agent." In the absence of any probative evidence that notes were taken at the October 9 meeting, no Jencks Act violation was established.

Kesari argues that even if no tangible notes exist, *Giglio* nonetheless entitled him to impeachment evidence from the meeting. As Kesari offers only the speculative claim that the October 9 meeting must have produced impeachment evidence in light of Sorenson's penchant for dishonesty, he has not shown that any impeachment evidence existed and thus has established no *Giglio* violation.

The judgments are affirmed.

APPENDIX B — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED JULY 6, 2018

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-3862

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN FREDERICK TATE,
ALSO KNOWN AS JOHN M. TATE,

Appellant.

Appeal from U.S. District Court for the
Southern District of Iowa - Des Moines
(4:15-cr-00103-JAJ-2)

ORDER

The petition for rehearing *en banc* is denied. The petition for rehearing by the panel is also denied.

Judge Kelly and Judge Stras did not participate in the consideration or decision of this matter.

July 06, 2018

Appendix B

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Michael E. Gans

APPENDIX C — 18 U.S.C. § 1001

18. U.S.C. § 1001

§ 1001. Statements or Entries Generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

APPENDIX D — 18 U.S.C. § 1519

18. U.S.C. § 1519

§ 1519. Destruction, Alteration, or Falsification of Records in Federal Investigations and Bankruptcy

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.