No. 18-601

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

BRIEF OF *AMICUS CURIAE* COOLIDGE-REAGAN FOUNDATION IN SUPPORT OF PETITIONER

DAN BACKER
Counsel of Record
POLITICAL.LAW PLLC
441 North Lee St.,
Suite 300
Alexandria, VA 22314
(202) 210-5431
Dan@political.law

Counsel for Amicus Curiae
Coolidge-Reagan Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions, Statutes, and Rules

Other Sources

INTERESTS OF *AMICUS CURIAE*[1]

The Coolidge-Reagan Foundation ("CRF") is a § 501(c)(3) non-profit corporation whose mission is to defend, protect, and advance liberty, particularly the principles of free speech enshrined in the First Amendment of the U.S. Constitution. It seeks to protect the marketplace of political ideas by promoting vigorous political expression, thereby contributing to open, fair, and free elections.

CRF files this brief to protect open and robust political debate by ensuring political actors such as candidates, political action committees, and their employees and agents are regulated by the finely tuned bipartisan system set forth in the Federal Election Campaign Act ("FECA"), Pub. L. No. 92-225, 86 Stat. 3 (Feb. 7, 1972), as amended by the Bipartisan Campaign Reform Act ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (Mar. 27, 2002), rather than the patently inapplicable Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 802(a), 116 Stat. 745, 800 (July 30, 2002), which was not crafted with an eye toward the uniquely sensitive concerns of political speech and disclosures.

---

[1] Counsel for all parties have consented in writing to the filing of this brief. Pursuant to S. Ct. R. 37.6, *amicus curiae* certifies that no counsel for a party authored the brief in whole or part, and no party, counsel for a party, or person other than *amicus*, its members, or its counsel made any monetary contributions to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court should grant *certiorari* to ensure political speech, and disclosures concerning such speech, remains primarily regulated by the carefully tailored bipartisan system set forth in the Federal Election Campaign Act ("FECA"), Pub. L. No. 92-225, 86 Stat. 3 (Feb. 7, 1972), as amended by the Bipartisan Campaign Reform Act ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (Mar. 27, 2002). The Executive Branch should not have unilateral discretion to determine, on a case-by-case basis, without any limiting principles or guiding standards, to apply the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 802(a), 116 Stat. 745, 800 (July 30, 2002), to particular campaign disclosure reports. Sarbanes-Oxley lacks the FECA's bipartisan structural protections, was not intended to apply to the constitutionally sensitive area of political speech and disclosures, features a reduced *mens rea* requirement and, perhaps most troublingly, carries penalties four times as severe as the FECA.

Under the lower court's ruling, when a person files an allegedly false campaign finance report with the Federal Election Commission ("FEC"), the Government may choose to prosecute him under three different statutes: (i) the FECA, 52 U.S.C. §§ 30104(a)(1), (b)(5)(A), 30109(d)(1)(A)(i), the statute specifically tailored to apply to such conduct; (ii) the general federal false-statements statute, 18 U.S.C. § 1001(a)(2), which lacks the FECA's protections but carries the same *mens rea* requirements and sentence; and (iii) Sarbanes-Oxley, 18 U.S.C. § 1519,

which carries a maximum sentence four times as long yet reduced *mens rea* requirements. This statutory scheme effectively empowers the Attorney General to decide, on a case-by-case basis, both the *mens rea* requirement and maximum penalty for filing a false campaign finance report. Federal law neither cabins this authority nor provides any standards by which the Attorney General must make this decision.

The non-delegation doctrine prohibits Congress from delegating such uncabined discretion to the Attorney General to effectively determine the maximum penalty for filing false campaign finance reports. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928); *see, e.g.*, *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935). This Court recently granted *certiorari* in *Gundy v. United States*, 138 S. Ct. 1260 (2018), to consider a materially equivalent issue concerning a standardless grant of discretion to determine the retroactive applicability of the Sex Offender Registration and Notification Act ("SORNA"), 34 U.S.C. § 20913(a). This Court should grant *certiorari* in this case on the same grounds.

This Court should also consider whether the Government should be permitted to circumvent the FECA's carefully tailored, bipartisan protections against the unfair or partisan enforcement of campaign finance requirements. When a person or committee is accused of filing incomplete or false campaign finance reports, the bipartisan FEC must affirmatively vote multiple times to proceed with an investigation and civil litigation or make a criminal

referral to the U.S. Department of Justice. *See* 52 U.S.C. § 30109(a); *FEC v. Dem. Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). Congress deliberately tailored the system to ensure disclosure requirements would not be applied in a partisan or unfair manner, and that enforcement matters are not timed or implemented so as to potentially influence an election's outcome. The Sarbanes-Oxley Act was enacted to reform the financial services industry and reinforce the integrity of financial markets and has absolutely nothing to do with campaign finance. This Court should not construe the Act as permitting the Government to unilaterally circumvent FECA's protections and subject defendants to maximum sentences four times as long with less *mens rea* evidence. Individuals and groups seeking to exercise their fundamental First Amendment rights to engage in political expression or association, *see Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), should not be expected to parse the Sarbanes-Oxley Act to discover their legal obligations and potential liability.

For these reasons, this case presents the perfect opportunity to reconsider *United States v. Gilliland*, 312 U.S. 86 (1941), and its progeny, which allow the Government to prosecute people under general false-statements prohibitions such as 18 U.S.C. § 1001 even when Congress has enacted more specific statutes deliberately tailored to prohibit false statements concerning particular issues.

ARGUMENT

I. THIS CASE PRESENTS THE SAME NONDELEGATION CONCERNS AS *GUNDY V. UNITED STATES*, CURRENTLY PENDING BEFORE THIS COURT

This Court should grant certiorari because this case involves an issue structurally identical to the nondelegation question presented in *Gundy v. United States*, 138 S. Ct. 1260 (2018). Congress has created three separate statutes that the Government contends prohibits filing false reports with the Federal Elections Commission ("FEC").

First, the Federal Election Campaign Act ("FECA") itself provides that any person who "knowingly and willfully" violates any provision which involves the reporting of expenditures totaling more than $25,000 in a year is subject to a fine or imprisonment for up to five years. 52 U.S.C. § 30109(d)(1)(A)(i); *see also id.* § 30104(a)(1), (b)(5)(A) (requiring candidate committees to truthfully report expenditures to the FEC)

Secondly, the general federal false-statements statute provides in relevant part, "[W]hoever, in any matter within the jurisdiction of the executive . . . branch of the Government of the United States, *knowingly and willfully* . . . makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement" shall be fined under this title, [and] imprisoned not

more than 5 years." 18 U.S.C. § 1001(a)(2) (emphasis added).

Finally, the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 802(a), 116 Stat. 745, 800 (July 30, 2002), provides in relevant part,

> Whoever *knowingly* . . . falsifies, or makes a false entry in any record, [or] document . . . 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 . . . shall be fined under this title, imprisoned not more than 20 years, or both.

18 U.S.C. § 1519 (emphasis added).

All three statutes apply to false reports to the Government and, under the Government's theory, any of the three could apply to a person who files an allegedly false campaign finance report with the FEC. In the Government's view, it should be entirely and exclusively up to the Executive Branch—with no statutory limits on its discretion—to decide the law under which a person who allegedly files a false FEC report should be prosecuted, whether prosecutors must demonstrate the person acted "willfully," and whether that person will face a maximum of five years or twenty years in federal prison.

This Court has held Article I's grant of legislative power to Congress means Congress may not confer unlimited discretionary authority to the Executive Branch. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001); *Loving v. United States*, 517 U.S. 748,

758 (1996). When Congress allows the Executive Branch to make an essentially legislative-type determination, it must "lay down by legislative act an intelligible principle" to cabin that discretion. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928); *see also Am. Power & Light Co v. SEC*, 329 U.S. 90, 105 (1946) (explaining Congress must establish "the boundaries of this delegated authority"). When Congress has "declared no policy, has established no standard, [and] has laid down no rule," the delegation of authority to the Executive Branch is unconstitutional. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935) (invalidating § 9(c) of the National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (June 16, 1933), which empowered the President to prohibit the transportation of petroleum and petroleum products in excess of state-set limits); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935) (invalidating § 3 of the National Industrial Recovery Act, which delegated "virtually unfettered" authority to the President to establish "codes of fair competition" for various industries).

If Congress enacted a statute specifying the Attorney General, in his sole discretion, shall determine whether the maximum penalty for a certain offense shall be five years or twenty years, or whether the Government shall be required to prove the defendant acted willfully, such a delegation would likely violate the nondelegation doctrine. Even assuming the Government is interpreting the Sarbanes-Oxley Act correctly—it is not, *see infra* Part II—this Court should not permit Congress to evade

this critical separation-of-powers restriction by granting the Attorney General untrammeled discretion to choose between multiple substantively identical laws with dramatically different penalties and *mens rea* requirements on a case-by-case basis.

This Court has granted *certiorari* in *Gundy v. United States*, 138 S. Ct. 1260 (2018), specifically limited to the question of whether "SORNA's delegation of authority to the Attorney General to issue regulations under [34 U.S.C. § 20913(d)] violates the nondelegation doctrine." Petition for Certiorari, *Gundy v. United States*, No. 17-6086, at i (Sept. 20, 2017). The Sex Offender Registration and Notification Act ("SORNA") requires sex offenders to register where they live, work, and attend school with the authorities. 34 U.S.C. § 20913(a).

The Act did not specify whether these requirements apply to people who were convicted before its enactment. Rather, it provides, "The Attorney General shall have the authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act . . . ." *Id.* § 20913(d). The Petitioner argued—and this Court has granted *certiorari* to determine whether—this provision violates the nondelegation doctrine because it "fails to provide a sufficiently intelligible principle to cabin and direct the Attorney General's exercise of the delegated powers." Brief of Petitioner, *Gundy v. United States*, No. 17-6086, at 23 (May 25, 2018). Rather, SORNA grants the Attorney General uncabined exclusive authority to decide whether SORNA's registration requirements should apply retroactively.

Under the Government's view (and lower court's interpretation) of the Sarbanes-Oxley Act, this case presents a parallel fundamental nondelegation issue. The plethora of statutes prohibiting precisely the same conduct gives the Attorney General uncabined exclusive authority to determine whether the maximum penalty for making a false statement to the Government in general, or filing a false FEC Report in particular, will be five years or twenty years, and whether the Government must prove the defendant acted willfully. Though this discretion is seemingly conferred through the enactment of three separate statutes, rather than a single provision as in SORNA, the substantive outcome is the same—the Executive Branch making a quintessentially subjective, value-based, legislative determination, unguided by any statutory standards or restrictions. The fact that this Court singled out this issue for *certiorari* in *Gundy*—in which the Petition for Certiorari dismissively alluded to it in less than two full pages as the fourth Question Presented, *see* Petition for Certiorari, *Gundy v. United States*, No. 17-6086, at 17-19 (Sept. 20, 2017)—underscores its importance. In light of *Gundy*, this Court should either grant *certiorari* in this case to consider the issue on its merits, or hold the petition until *Gundy* is resolved and then remand for further consideration in light of that ruling. *See* Eugene Gressman et al., Supreme Court Practice 345-49 (9th ed. 2007).

II. THE SARBANES-OXLEY ACT SHOULD NOT BE INTERPRETED TO ALLOW THE DEPARTMENT OF JUSTICE TO CIRCUMVENT THE FEDERAL ELECTION CAMPAIGN ACT WHEN PROSECUTING ALLEGEDLY FALSE CAMPAIGN FINANCE REPORTS

This Court should also grant *certiorari* to determine whether, as a matter of statutory interpretation, the Sarbanes-Oxley Act, 18 U.S.C. § 1519, applies to allegedly false campaign finance disclosure reports filed with the FEC. This Court has recognized the Sarbanes-Oxley Act "was prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Anderson LLP, had systematically destroyed potentially incriminating documents." *Yates v. United States*, 135 S. Ct. 1074, 1081 (2015). This Court and the Government concur § 1519 "was intended to prohibit, in particular, corporate document-shredding to hide evidence of financial wrongdoing." *Id*. This Court should not permit the Government to apply Sarbanes-Oxley, which Congress intentionally and specifically crafted in the context of the financial services industry, to the dramatically different, far more constitutionally sensitive area of campaign expenditures, political speech, and disclosure. *See Buckley v. Valeo*, 424 U.S. 1, 75 (1976) (per curiam) (recognizing expenditure reporting requirements trigger a "strict standard of scrutiny" because they impinge "the right of associational privacy").

The FECA provides a more specific and directly applicable provision that prohibits a person from "knowingly and willfully" filing false campaign expenditure reports with the FEC and imposes a maximum sentence of only five years. 52 U.S.C. § 30109(d)(1)(A)(i); *see also id*. § 30104(a)(1), (b)(5)(A). That statute also establishes a comprehensive, carefully tailored, pervasively bipartisan process for investigating and determining whether to pursue such allegations. As this Court has recognized, the FEC "is inherently bipartisan in that no more than three of its six voting members may be of the same political party, and it must decide issues charged with the dynamics of party politics, often under the pressure of an impending election." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (citation omitted; citing 52 U.S.C. § 30106(a)(1)).

Any person who believes any provision of the FECA, including its expenditure reporting requirements, has been violated may file an administrative complaint with the FEC. 52 U.S.C. § 30109(a)(1). Prior to investigating any such complaint, the FEC must notify the respondent, who has an opportunity to "demonstrate, in writing . . . that no action should be taken against such person on the basis of the complaint." *Id*. In the absence of any such complaint, the FEC may also "ascertain[]" information "in the normal course of carrying out its supervisory responsibilities" that suggests the FECA may have been violated. *Id*. § 30109(a)(2).

Whether a potential FECA violation comes to the FEC's attention through an administrative complaint

or in the course of fulfilling its ordinary responsibilities, the Commission may not proceed unless it determines, "by an affirmative vote of 4 of its members, that it has reason to believe" that a person violated, or is about to violate, the FECA or related provisions of campaign finance law. *Id.* This four-vote requirement is an important cornerstone of the FECA because it prevents members of a single political party from using the FEC as a tool to persecute or embarrass their political opponents. It ensures all FEC actions occur with at least a minimal degree of bipartisan cooperation. *See Democratic Senatorial Campaign Comm.*, 454 U.S. at 37.

Upon determining reason to believe exists that the FECA may have been violated, the FEC must notify the respondent and commence an investigation, "which may include a field investigation or audit." *Id.* Following the investigation, the general counsel of the FEC must then prepare a recommendation as to whether probable cause exists to believe the FECA has been violated. *Id.* § 30109(a)(3). The recommendation must include a brief setting forth the general counsel's position "on the legal and factual issues of the case." *Id.* The respondent may submit a written response to the recommendation. *Id.* The Commission must then vote on the probable cause issue—again requiring four affirmative votes to proceed. *Id.*

If the FEC determines, by an affirmative vote of four members, that probable cause exists to believe the FECA was violated, it generally must attempt "to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to

enter into a conciliation agreement with any person involved." *Id.* § 30109(a)(4)(A)(i). Conciliation agreements may require payment of civil penalties up to statutorily specified limits. *Id.* § 30109(a)(5)(A)-(B). If the Commission determines by four affirmative votes the violation was "knowing and willful," it may "refer such apparent violation to the Attorney General." *Id.* § 30109(a)(5)(C). The Attorney General must periodically update the Commission about any actions the Department of Justice takes concerning such potential violations "until the final disposition." *Id.* § 30109(c).

In the event the FEC is unable to reach a conciliation agreement with the respondent, it must then determine, by at least four affirmative votes, whether to file a civil action in U.S. District Court for an injunction, restraining order, or civil penalty. *Id.* § 30109(a)(6)(A). In any such suits, the court may impose enhanced civil penalties if it concludes the violation was knowing and willful. *Id.* § 30109(a)(6)(C). Such judgments are subject to appeal in the U.S. Circuit Courts of Appeals and, ultimately, this Court. *Id.* § 30109(a)(9). Throughout the entire administrative process, the Commission is forbidden from publicizing any pending complaints, investigations, or other such proceedings until after their conclusion. *Id.* § 30109(a)(12)(A). "[I]t is a commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amal. Bank*, 566 U.S. 639, 645 (2012); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007) ("[N]ormally the specific governs the general."); *see also Morales v. TWA*, 504 U.S. 374, 384

(1992). The lower court here did not point to anything in the legislative history of the Sarbanes-Oxley Act to suggest Congress even recognized, much less intended, the Government would be able to use the Act to circumvent this detailed, comprehensive, carefully designed procedure for considering allegations concerning the veracity of campaign finance reports. *Cf. United States v. Benton*, 890 F.3d 697, 711 (8th Cir. 2018).

The FECA ensures politically sensitive allegations concerning candidates' expenditures and the veracity of FEC reports are repeatedly considered by a bipartisan entity before public proceedings that could potentially affect the outcome of an election are commenced. This Court should not construe general language in legislation concerning the integrity of the financial system—a wholly unrelated field—as allowing the Government to circumvent this detailed, specific system Congress crafted specifically to address the unique, constitutionally sensitive field of campaign finance. The Government should not be permitted to tear Sarbanes-Oxley "loose from its financial-fraud mooring" to extend it to campaign finance law, *Yates*, 135 S. Ct. at 1079, avoid the FECA's structural bipartisan protections, reduce the applicable *mens rea* requirement, and impose a penalty four times as harsh as the FECA itself for false expenditure reports. *Compare* 52 U.S.C. § 30109(d)(1)(A)(i) *with* 18 U.S.C. § 1519.

III. THIS COURT SHOULD TAKE THIS OPPORTUNITY TO OVERTURN *UNITED STATES V. GILLILAND*

Finally, this case presents a perfect vehicle through which this Court can reconsider its pernicious decision in *United States v. Gilliland*, 312 U.S. 86 (1941). *Gilliland* established the foundation for sweeping grants of prosecutorial discretion to circumvent finely wrought specialized legislative schemes, such as the FEC's administrative system for adjudicating alleged campaign finance violations. *Gilliland* and its progeny are among the doctrinal underpinnings that allow the Executive Branch to exercise near-limitless authority in the modern administrative state. *Cf. Chevron U.S.A., Inc. v. Nat. Res. Def. Coun. Inc.*, 467 U.S. 837 (1984). Allowing federal officials to ignore complex regulatory apparatus Congress establishes with specific functions allows the Executive Branch to frustrate Congressional intent.

In *Gilliland*, the Government indicted the defendants for violating 18 U.S.C. § 80, the forerunner to the modern false statements statute, § 1001. The indictment alleged the defendants filed reports that falsified the amount of petroleum the defendants had produced from certain oil wells. 312 U.S. at 89. The defendants pointed out another federal statute, the "Hot Oil" Act of 1935, specifically required them to file truthful reports about their oil production, and argued any prosecutions for filing false reports should occur under the law Congress specifically enacted to combat hot oil frauds—the

particular type of conduct of which they were accused. *See id.* at 90 (citing Act of Feb. 22, 1935, Pub. L. No. 74-14, 49 Stat. 30, 31, *codified at* 15 U.S.C. §§ 715-715d). "'Hot oil frauds' were schemes in which petroleum producers falsify shipping documents by stating that their in-state oil wells are producing a certain amount of oil, when in fact they are producing less oil and supplementing it with contraband oil purchased from out of state." Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 192 n.125 (2001).

The Court rejected that argument, concluding the 1935 hot oil act did not implicitly repeal any portion of the general false statements statute. *Gilliland*, 312 U.S. at 95. It concluded, "There is no indication of an intent to make the Act of 1935 a substitute for any part of the" false-statements act. *Id.* at 96.

Applying the *Gilliland* principle, this Court has consistently allowed the Government to prosecute defendants under the generally applicable background false statements statute, 18 U.S.C. § 1001, rather than the more specific statutes Congress has enacted to specifically address false statements or other type of wrongdoing in particular fields or concerning particular issues. *See, e.g.*, *United States v. Beacon Brass Co.*, 344 U.S. 43, 46 (1952) (holding the Government may prosecute defendants for making false statements concerning corporate tax returns under the general false-statements statute, despite the existence of 26 U.S.C. § 145(b), the tax fraud statute); *see also United States v. Woodward*, 469 U.S. 105, 108-09 (1985) (holding a person may be

prosecuted under § 1001 for failing to report currency they are bringing into the country, rather than solely 31 U.S.C. § 1058, 1101, which specifically prohibits willful failure to report transportation of currency into the country); *cf. United States v. Naftalin*, 441 U.S. 768, 777-78 (1979) (holding the Government may prosecute securities fraud relating to the securities aftermarket under § 17(a) of the Securities Act of 1933, which generally prohibits all types of securities fraud, rather than under the Securities Act of 1934, which specifically "regulate[s] abuses in the trading of securities in the 'aftermarket'").

This Court should grant *certiorari* to take this opportunity to consider ending the *Gilliland* principle. This case presents an especially attractive vehicle since it involves political speech and campaign expenditures relating to the political system, which lies at the heart of the First Amendment. *See Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). *Gilliland* erroneously enhances the Executive Branch's power at the expense of structural protections for individual liberty. First, *Gilliland* and its progeny frame the issue as whether specific statutes precisely tailored to target particular kinds of false statements implicitly repeal § 1001's more general default prohibition, consistently refusing to find any such implied repeals. *See Gilliland*, 312 U.S. at 95 ("[T]here was no repugnancy in the subject matter of the two statutes which would justify an implication of implied repeal."); *see also Beacon Brass*, 344 U.S. at 46.

This approach ignores other, more applicable canons of statutory interpretation. As noted earlier, this Court has consistently held specific language in

statutes takes precedence over, and implicitly limits, more general or vaguer language. *See RadLAX Gateway Hotel, LLC*, 566 U.S. at 645; *Long Island Care at Home, Ltd.*, 551 U.S. at 170; *see also Morales v. TWA*, 504 U.S. 374, 384 (1992).

> This guide to statutory construction has special cogency where a court is called upon to determine the extent of the punishment to which a criminal defendant is subject for his transgressions. In this context, the principle is a corollary of the rule of lenity, an outgrowth of our reluctance to increase or multiply punishments absent a clear and definite legislative directive.

Simpson v. United States, 435 U.S. 6, 15-16 (1978). Where Congress enacts a statute specifically prohibiting certain conduct, courts should presume Congress intended for them to apply that provision—rather than other, unrelated statutes—to such circumstances.

This Court has also cautioned against interpreting statutes in ways that render certain provisions unnecessary, redundant, or mere surplusage. *See Dunn v. CFTC*, 519 U.S. 465, 472 (1997) ("[L]egislative enactments should not be construed to render their provisions mere surplusage."); *cf. Mackey v. Lanier Coll. Agency & Serv.*, 486 U.S. 825 (1988) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law."). If § 1001 is construed to prohibit the same false statements as

other, narrower, more specific provisions, then those provisions are superfluous.

Finally, the Constitution's Due Process and Ex Post Facto guarantees require the Government to put people on notice not only about the types of conduct that are prohibited, but the consequences for violating those prohibitions. *See Collins v. Youngblood*, 497 U.S. 37, 43 (1990) (quoting *Beazell v. Ohio*, 269 U.S. 167 (1925)). Allowing the Government to construe two, three, or a potentially unlimited number of statutes with differing penalties as prohibiting exactly the same conduct—conduct that Congress precisely crafted only one of those statutes to specifically address—undermines and effectively circumvents these fundamental protections. This Court should grant *certiorari* to reconsider *Gilliland* and its progeny in light of these constitutional concerns, structural separation-of-powers considerations, and the canons of statutory construction they contradict.

CONCLUSION

For these reasons, this Court should grant the Petition for Certiorari in this case.

Respectfully submitted,

DAN BACKER
Counsel of Record
POLITICAL.LAW PLLC
441 North Lee St., Suite 300
Alexandria, VA 22314
(202) 210-5431
Dan@political.law
Counsel for Amicus Curiae
Coolidge-Reagan Foundation

DECEMBER 2018