No. 18-601

IN THE

Supreme Court of the United States

JOHN F. TATE,

Petitioner,

v.

UNITED STATES.,

Respondents.

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

REPLY FOR PETITIONER

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INTRODUCTION

This petition raises important questions about the government's overreach in charging the defendants with a variety of federal felonies in an attempt to punish conduct that is legal—the payment of an Iowa politician for his endorsement. In its opposition, the government cannot resist repeatedly and falsely characterizing the payment as a "bribe." *See* Br. in Opp. 4, 18. But this was not a bribery case. Petitioner's convictions arise from the government's effort to punish *legal* conduct by stretching inapplicable statutes beyond their breaking point. This Court has often and recently rejected similar attempts to use federal obstruction and false-statement offenses in this precise way. *See, e.g.*, *Yates v. United States*, 135 S.Ct. 1074 (2015); *Maslenjak v. United States*, 137 S.Ct. 1918 (2017); *Marinello v. United States*, 138 S.Ct. 1101 (2018). It should do so here, too—especially given the constitutional sensitivities associated with regulating political campaigning. *See* Amicus Br. of Lee Goodman, 23-25; Amicus Br. of Institute for Free Speech (IFS) 4-20, 23-25.

First, as the Petition explained, the Eighth Circuit's interpretation of the phrase "matter within the jurisdiction" in section 1519 conflicts with the decisions of three other courts of appeals. The government conceded this point below, but it now (for the first time) contends that those decisions can be distinguished because most of them involved false statements that were originally made to parties other than the federal government. But section 1519 does not contain any "direct report" requirement, and the

government's new rationale to explain the split cannot be reconciled with the text of those opinions or the decision below. And the government's reading of section 1519 to cover any false report made to the government is circular: one does not *obstruct* an inquiry into a false report by making the false report in the first place. The government's arguments read a critical element (and restraint on federal prosecutors) out of the United States Code.

Second, the government mischaracterizes Petitioner's dispute over the Eighth Circuit's application of this Court's precedents regarding the materiality prong of section 1001. Petitioner challenges the Eighth Circuit's failure to apply the traditional legal test for materiality, which (as the government concedes) has long been considered a "demanding" and "rigorous" requirement. *Univ. Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S.Ct. 1989, 2002-03 (2016). Petitioner's dispute is thus not "primarily … a factual one," Br. in Opp. 17, because the evidence below was uncontested that the Federal Election Commission ("FEC") would not have reported anything differently if the expense reports had listed "payment for Sorensen endorsement," rather than "audio/visual expenses."

Finally, this case is an appropriate vehicle to reach the questions presented. Petitioner asserted all of his arguments below, and if successful they would reverse his two most serious convictions. Moreover, as amici emphasize, the Petition raises issues of substantial importance in an area fraught with constitutional significance: the regulation of campaign-related activities.

I. This Court Should Grant Review To Resolve The Split Over The Meaning Of A "Matter Within" The Agency's Jurisdiction.

A. Section 1519 makes it a crime when a person "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." 18 U.S.C. § 1519 (emphasis added). Here, the purported false entry was a campaign report identifying certain expenditures as "audio/visual expenses," rather than as a payment to secure an endorsement. Because payments made for an endorsement are not illegal, the FEC had no power to act over that transaction. The alleged false report, then, could not possibly obstruct any "matter within the jurisdiction" of the FEC.

The Eighth Circuit's decision conflicts with three other circuits, which have held that false statements do not implicate a federal agency's jurisdiction when the agency is "not authorized to act in response" to the false information. *United States v. Facchini*, 874 F.2d 638, 642 (1989). *See* Pet. 11-14 (citing *United States v. Holmes*, 111 F.3d 463, 466 (6th Cir. 1997) and *United States v. Blankenship*, 382 F.3d 1110, 1136-41 (11th Cir. 2004)). The government conceded below that those decisions could not be reconciled with its arguments—which is why it only argued that the other circuits were wrong. *See* Pet. 14.

The government still resists any suggestion that the other circuits' interpretation of section 1519 is

correct. *See* Br. in Opp. at 15. But, for the first time, it attempts to distinguish those cases on the most technical of grounds: that the false statements in the other cases were not made *directly* to the federal agency. *See id.* at 13. This new-found distinction cannot withstand scrutiny, for several reasons.

To begin, the Sarbanes-Oxley Act's obstruction provision does not condition criminal liability upon any "direct contact" with a federal officer. Section 1519 applies to any acts of obstruction, whether they manifest themselves in a report to the federal government, a state agency, a private party, or even in acts committed alone in a room. The provision was, after all, "intended to prohibit, in particular, corporate document-shredding to hide evidence of financial wrongdoing." *Yates*, 135 S.Ct. at 1081.

The relevant statutory question is not the identity of the party that first *receives* the false report, but instead whether that report *obstructs* the "proper administration of any matter within the jurisdiction" of that agency. The answer here is "no," because the FEC was powerless to act over the payment of Sorensen for his endorsement.[1] The government's focus on the FEC's "direct" receipt of these reports ignores that section 1519 is an *obstruction* statute. The filing of a false report alone may violate other statutes, such as FECA. But it is utterly circular—and nonsensical—to suggest that a person can file a false

[1] As the Petition explains, a different result would follow if a campaign's report was intended to cover up a violation over which the FEC does have authority to act—for example, a donation in excess of the statutory limits. *See* Pet. 14.

statement with the FEC "with the intent to impede, obstruct, or influence" the FEC's jurisdiction to prosecute him for filing that false statement. *See United States v. Litvak*, 808 F.3d 160, 173 (2d Cir. 2015). The Petition raised this point, *see* Pet. 16-17, and the government's failure to respond to it underscores the weakness of its argument.

The government also suggests that the decision below distinguished the other circuit decisions on the same basis—that Petitioner's statements were made directly to the federal agency. *See* Br. in Opp. 13, 15. In fact, the Eighth Circuit merely described the background of the *Facchini* case; it did not adopt a "direct report" analysis. *See* Pet. 21a. And the Eighth Circuit did not make any effort at all to distinguish *Holmes* and *Blankenship*; neither case is even mentioned in the opinion below.

In fact, none of the relevant decisions turns on the government's arguments about "direct contact with a federal agency" Br. in Opp. 13. Instead, "the key issue in determining whether a statement is within the government's jurisdiction is *the authority of the agency to act*." *Blankenship*, 382 F.3d at 1137 (emphasis added). Here, it is undisputed that the federal government lacked the authority to punish the campaign for purchasing an endorsement. As a result, three circuits would have held that the report could not have obstructed any "matter within the jurisdiction" of the FEC. The Eighth Circuit's contrary

interpretation creates a split in the courts of appeals.[2] Review is warranted.

B. The government's other arguments against review of this question are unavailing.

First, the government contends that Tate's argument is inconsistent with *Rodgers*. Br. in Opp. 11. In fact, *Rodgers* recognizes that jurisdiction is "the power to exercise authority in a particular situation." *United States v. Rodgers*, 466 U.S. 475, 479 (1984). But it does not include "matters peripheral to the business of" the FEC. *Id.* That is precisely what Petitioner is arguing here: that a statement designed to conceal a transaction over which the FEC is powerless to act is necessarily peripheral to the agency's authorized functions. Petitioner cited and relied upon *Rodgers* below, and the Eighth Circuit's failure to heed its teaching weighs in favor of review.

Second, the government misses the mark in attempting to refute Petitioner's argument that the Eighth Circuit's decision gives FECA no independent purpose because 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." Pet. 15. The government's response is to argue that it is actually *easier* to bring section 1519

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[2] The government incorrectly contends that the Eighth Circuit's reading of section 1519 "is consistent with" *United States v. Rowland*, 826 F.3d 100, 107-11 (2d Cir. 2016), and *United States v. Smukler*, 330 F. Supp.3d 1050 (E.D. Penn. 2018). In fact, neither of those decisions even discusses the meaning of the phrase "matter within the jurisdiction."

charges because there is no monetary threshold, as there is in FECA. Br. in Opp. 11-12. This underscores Petitioner's point: that there is no reason to stretch section 1519 to cover conduct already prohibited by the far more reticulated enforcement scheme of FECA, because "Congress ordinarily does not intend to punish the same offense under two different statutes." *Ball v. United States*, 470 U.S. 856, 861 (1985). And the government does not dispute that prosecutors already have begun using section 1519 instead of FECA to police campaign-finance practices. *See* Pet. 15 n.8.

Third, and finally, the government quibbles with Petitioner's reliance on *Marinello*, 138 S. Ct. at 1101, noting that it interpreted the tax obstruction statute, not section 1519. But in *Marinello*, the Court noted that it has "traditionally exercised restraint in assessing the reach of a federal criminal statute," and that a "broader statutory context … also counsels against adopting the Government's broad reading," in part because it would convert numerous misdemeanors into felonies. *Id.* at 1106-08 (citations omitted). Those same considerations apply here and support this Court's review.

II. The Court Should Grant Review To Correct The Eighth Circuit's Misapplication Of Law Regarding Materiality Under 18 U.S.C. § 1001.

As the Petition explains, 18 U.S.C. §1001 requires a false statement to be "material," which means it has "a natural tendency to influence, or [was] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Kungys v. United States*,

485 U.S. 759, 770 (1988) (quotation omitted). The Eighth Circuit failed to identify *any* federal decision that would have been affected by the purported false statement here,[3] and the evidence below made clear that the FEC's reporting of campaign expenditures is automatic regardless of the content of an expenditure's description. In other words, there was no decision that could conceivably have been influenced by the alleged misstatement. *See* Pet. 21-23.

In response, the government attempts to minimize the legal error below. It argues that "[i]t has never been the test of materiality that the misrepresentation or concealment would more likely than not have produced an erroneous decision, or even that it would more likely than not have triggered an investigation." Br. in Opp. 16 (quoting *Kungys*, 485 U.S. at 771). And the government contends that the other circuit decisions identified by Petitioner apply the same standard to varying facts. *See id. at* 19-20.

None of that is responsive to Petitioner's point. Petitioner is *not* arguing that the government was required to prove that truthful information would have undoubtedly led to different government action.

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[3] Petitioner does not concede that "endorsement" was the appropriate descriptive label to use in the report. Sorensen in fact provided services that could accurately be described as audio/visual. *See* Pet. 16a ("Sorenson performed some work for the campaign that might arguably be described as an audio/visual expense..."). Moreover, the FEC has in the past accepted flexible descriptions of disbursements, consistent with the report at issue here. *See* Goodman Amicus Br. 4-22; IFS Amicus Br. 14-20.

Instead, Petitioner is arguing that there was no "specific action or decision that a false statement was *capable* of influencing," and that the Eighth Circuit's failure to identify any "is inconsistent with this Court's materiality jurisprudence," including *Kungys*. Pet. 22 (emphasis added).

The Eighth Circuit's misapplication of the materiality element also contradicts this Court's recent decisions emphasizing the "demanding" and "rigorous" requirements of materiality. *Escobar*, 136 S.Ct. at 2002-03. The government insinuates that *Escobar* does not apply here because it involves the False Claims Act. Br. in Opp. 16. But materiality has the same meaning in the FCA, in federal criminal statutes, and under the common law. *Escobar*, 136 S.Ct. at 2002; *see also id.* at 2004 n.6 ("The standard for materiality that we have outlined is a familiar … one."). The false-statements statute uses that same definition. *Kungys*, 485 U.S. at 769-70; *see also Maslenjak*, 137 S.Ct. at 1932 (Alito, J., concurring) (describing "the familiar materiality requirement that applies in other contexts").

As the Petition noted, the Eighth Circuit utterly failed to explain how a truthful report could have been capable of influencing any decision by the FEC. *See* Pet. 22-24. Indeed, both the Eighth Circuit, Pet. 22a, and the government below, Govt. Br. 35, conceded that the FEC would have made the exact same decision: to publish the reports with the information provided by the campaign. The trial testimony confirmed as much; the government's witness testified that the FEC publishes reports regardless of their contents, so long as they are complete. "Whatever the

committee files," Hartsock explained, "will be available for the public to see." Tr. 550).[4]

In an attempt to explain the Eighth Circuit's failure to apply the *Kungys* standard, the government makes several scattershot arguments about the materiality of the false statement at issue here. It first contends that the purpose of the expenditure is required by the statute governing the reports. Br. in Opp. 17 (citing 52 U.S.C. § 30104(b)(5)(A)). But this is insufficient; as this Court has explained, 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. The effect here is zero.

The government's argument also proves too much. The same statute also requires reporting of names, dates, addresses, and amounts. *See* 52 U.S.C. § 30104(b)(5). If that was all it took to render the information in the reports material, then a mis-reported middle initial, street address, or zip code would also be material. Such an expansive interpretation "reads materiality out of the statute." *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 660 (4th Cir. 2004).

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[4] The government mischaracterizes the testimony of its agent below. *See* Br. in Opp. 18. In fact, the witness was clear that posting of the report is automatic and that the only action the FEC takes in response to a statement of purpose occurs when the field is incomplete. *See* Tr. 550, 558-567.

The same is true for the government's reliance on the fact that "the reporting form itself admonished filers that accurate information was important and that false information could lead to criminal penalties[.]" Br. in Opp. 17. This admonishment applies to *all* information on the relevant form; if that warning established materiality, then all false statements are material, and materiality means nothing.[5]

Finally, the government wrongly suggests that Petitioner's "materiality argument would mean that individuals could lie with impunity to agencies like the FEC … that collect and publish information." Br. in Opp. 18. Again, this overstatement misses the point. The government has little interest in prosecuting non-material deceptions, and Congress is perfectly capable of imposing strict liability if it wishes to do so. FECA itself reflects a highly attuned remedial scheme that balances the circumstances under which willful and non-willful, and major and modest dollar amounts, may be pursued through civil or criminal sanctions. *See* 52 U.S.C. § 30109. It is the *government's* arguments that frustrate that scheme. They seek the felony sledgehammer of section 1001 even when, as here, it is undisputed that no government decision could have been affected if the purpose of the payments had mentioned an endorsement.

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[5] Moreover, there was no evidence at trial that any of the defendants had even seen the form. Tr. 1294.

III. This Case Is An Appropriate Vehicle For Addressing The Question Presented.

The government does not dispute that Petitioner raised all of his arguments below, that the Eighth Circuit passed on them, or that they are necessary to uphold Petitioner's convictions under sections 1519 and 1001. *See* Pet. 20. Instead, the government minimizes the "practical importance" of the case, noting that Petitioner's other convictions may stand regardless of the outcome here. Br. in Opp. 22-23. Petitioner disagrees that the reversal of his two most serious felony convictions is not important. And Petitioner stands by his argument that the overlapping nature of the evidence for each conviction warrants a remand of the entire case to the Eighth Circuit. *See* Pet. 28-29.

In any event, this Court had not hesitated to grant petitions that meet its requirements for review in similar circumstances. Indeed, in *Yates* the petitioner challenged only one of his two convictions, 135 S.Ct. at 1079. Here, too, the fact that the Petition focuses on the two most serious convictions is no impediment to this Court's review—especially given the overwhelming importance of this case for current and future prosecutions, *see* Pet. 18-20, 27-28, and the need to rein in attempts to override FECA's careful balance through the misapplication of other statutes. *See* IFS Amicus Br. 12-25.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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