No. 19-783

IN THE

Supreme Court of the United States

NATHAN VAN BUREN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR *AMICUS CURIAE* COMMITTEE FOR JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 2002, the Committee for Justice (CFJ) is a nonprofit, nonpartisan legal and policy organization dedicated to promoting the rule of law and preserving the Constitution's limits on federal power and its protection of individual liberty. CFJ is particularly concerned with the preservation of these principles at the intersection of law and technology. Several of the issues at stake in this case – including overcriminalization, fair notice, the rule of lenity, and the federal-state balance in criminal law – are at the heart of CFJ's mission. CFJ advances its mission by, among other things, filing amicus curiae briefs in key cases and educating government officials and the American people.

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[1] No counsel for any party authored this brief in any part, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to fund its preparation or submission. Counsel for petitioner has filed a blanket consent to the filing of amicus briefs at the merits stage, and counsel for respondent consented to the filing of this brief.

INTRODUCTION & SUMMARY OF ARGUMENT

At issue in this case is whether the Computer Fraud and Abuse Act (CFAA) makes it a federal crime to use a computer to obtain information for an improper purpose, even if one is otherwise permitted to access that information. This brief discusses two of the many reasons to reject this startlingly broad interpretation of the CFAA. First, the government's approach would undo decades of this Court's overcriminalization jurisprudence; and second, it relies on an improper use of legislative history to resolve statutory ambiguity against a criminal defendant.

I. Throughout the past few decades—and as recently as the unanimous decision in *Kelly v. United States*, 140 S. Ct. 1565 (2020)—this Court has consistently cut back on the government's overbroad interpretations of federal criminal statutes. The Court has been especially wary of federal prosecutions of state and local officials, refusing to read the federal criminal code as a handbook of "standards of . . . good government for local and state officials." *McNally v. United States*, 483 U.S. 350, 360 (1987). However, if the decision below is correct, the conduct that was declared non-criminal in *each* of those cases could potentially constitute a CFAA violation.

For example, this Court rejected the government's theory that the email sent by Bridget Kelly—"Time for some traffic problems in Fort Lee"—amounted to property fraud. *Kelly*, 140 S. Ct. at 1569, 1571-74. But that same email would still be a federal crime, in the government's view, as long as it was sent on a work computer and violated any provision of the New Jersey

Governor's Office guidelines for using that computer. In other words, the federal handbook of good government standards has been with us all along—it was simply hiding in the nation's internet use manuals.

By eviscerating this Court's overcriminalization cases, the broad reading of the CFAA would invite *all* of the dangers those cases sought to avert. It would upset the federal-state balance in criminal law; invite selective targeting by opportunistic or politically-motived prosecutors; criminalize a vast swath of ordinary behavior; and deprive the public of adequate notice as to what the law requires. Even worse, the government's approach to the CFAA would cause criminal liability to turn on subjective purpose, which is notoriously "easy to allege and hard to disprove." *Crawford-El v. Britton*, 523 U.S. 574, 584-85 (1998). In short, the government's reading of the CFAA would lead to a "ballooning of federal power," *Kelly*, 140 S. Ct. at 1574, that exceeds anything that was contemplated (and rejected) in this Court's prior cases. Such a reading cannot be correct.

II. Because the language of the statute is (at best for the government) ambiguous as to whether it criminalizes access for an improper purpose, the government has relied on legislative history. As petitioner has explained, the government's invocation of legislative history is unpersuasive on its own terms. But the case also presents an opportunity to clarify an important methodological point, which is dispositive here: if a criminal statute is otherwise ambiguous, that ambiguity *cannot be resolved* against the defendant by an appeal to legislative history. *See Hughey v. United States*, 495 U.S. 411, 422 (1990)

(noting that "longstanding principles of lenity … preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the … legislative history").

The rule of lenity serves two fundamental purposes: it ensures that "legislatures, not courts, define criminal liability," and it provides "fair warning of the boundaries of criminal conduct." *Crandon v. United States*, 494 U.S. 152, 158 (1990). The use of legislative history to resolve ambiguity is contrary to these purposes, because legislative history does not suffice to demonstrate that Congress chose to criminalize a particular action, and it certainly does not provide adequate notice to the public. As Justice Scalia has put it, the "necessary fiction" that the public is on notice of statutory text "descends to needless farce when the public is charged even with knowledge of Committee Reports." *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring); *see id.* at 311 (Thomas, J., concurring) ("I agree with Justice Scalia that the use of legislative history to construe an otherwise ambiguous penal statute against a criminal defendant is difficult to reconcile with the rule of lenity."); *see also United States v. Hayes*, 555 U.S. 415, 437 (2009) (Roberts, C.J., dissenting) ("If the rule of lenity means anything, it is that an individual should not go to jail for failing to … comb through obscure legislative history.")

In short, even if the legislative history favored the government in this case, it could not overcome the rule of lenity—and this Court should clarify as much.

ARGUMENT

I. THE GOVERNMENT'S READING OF THE CFAA WOULD EVISCERATE THIS COURT'S OVERCRIMINALIZATION JURISPRUDENCE

A. The Government's Approach Would Criminalize the Very Conduct This Court Has Declared Non-Criminal in Many of Its Recent Cases

As petitioner correctly notes (Pet. 2), the consequences of adopting the government's view of the CFAA would be enormous. One way of illustrating this point is to consider the impact of the government's rule on this Court's recent cases.

For decades, this Court has cut back on aggressive interpretations of vague criminal laws put forward by overzealous federal prosecutors. The government's approach to the CFAA would essentially undo that entire body of law by allowing prosecutors to indict individuals for the very conduct this Court has declared to be non-criminal, using the surprising vehicle of their employers' internet use policies.

1. Take for example the Court's unanimous decision in *Kelly v. United States*. The government argued that state officials committed property fraud by redirecting toll lanes on the George Washington Bridge in order to punish a political opponent. 140 S. Ct. at 1568. This Court firmly rejected that theory, explaining that the officials' scheme was not directed at the state's property (and instead involved only a regulatory choice). *Id.* at 1572. The Court noted that a contrary decision "would undercut this Court's oft-repeated instruction: Federal prosecutors may not use property fraud statutes to 'set[] standards of

disclosure and good government for local and state officials.'" *Id.* at 1574 (quoting *McNally*, 483 U.S. at 360). The Court declined to sanction "a sweeping expansion of federal criminal jurisdiction," *id.* (quoting *Cleveland v. United States*, 531 U.S. 12, 24 (2000)), or to tolerate a "ballooning of federal power," *id.*

And yet, the very conduct held *not* to be a crime in *Kelly* would likely amount to a crime under the government's interpretation of the CFAA. Unsurprisingly, given the realities of modern communications, the lane-reassignment scheme was carried out in part by email. Indeed, the Court's opinion quotes Bridget Kelly's "admirably concise email," which read: "Time for some traffic problems in Fort Lee." *Id.* at 1569.

Under the broad reading of the CFAA, this email was in and of itself a crime if it was authored on Ms. Kelly's work computer and violated her employer's internet use policy. And such policies routinely include vague terms that limit computer use, for example, to "legitimate [employer] business." *United States v. Nosal*, 676 F.3d 854, 866 (9th Cir. 2012) (Silverman, J., dissenting); *see also* David J. Rosen, *Limiting Employee Liability Under the CFAA: A Code-Based Approach to "Exceeds Authorized Access*," 27 Berkeley Tech. L.J. 737, 756 (2012); *United States v. Valle*, 807 F.3d 508, 527 (2d Cir. 2015) (referring to "the typical corporate policy that computers can be used only for business purposes"). A prosecutor could therefore indict—and a jury could convict—an official like Ms. Kelly on the theory that exercising the state's regulatory power for political gain and on false pretenses does not constitute legitimate government business.

If this were so, the Court's effort to limit federal criminal jurisdiction in *Kelly* would have been for naught, and the Court's concern that "U.S. Attorneys could prosecute … every lie a state or local official tells in making [a regulatory] decision," 140 S. Ct. at 1574, would be realized—at least as long as the official told the lie over email.[2]

2. *Kelly* is no outlier. Consider the Court's earlier decision in *McDonnell v. United States*, which rejected the government's "boundless" understanding of the term "official act" in a bribery statute. 136 S. Ct. 2355, 2375 (2016). The Court once again refused to allow federal prosecutors to prescribe a code of behavior for state and local officials, and noted that the government's approach would subject public officials "to prosecution, without fair notice, for the most prosaic interactions." *Id.* at 2373.

But once again, the defendant's conduct could potentially subject him to criminal prosecution under the CFAA. The opinion notes that Governor McDonnell accomplished some of the relevant acts through email—for instance, he emailed his counsel about the drug studies that the bribe-payer was interested in. *Id.* at 2364. A prosecutor could resurrect the government's "boundless" theory simply

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[2] A defendant could attempt to argue that sending an email, by itself, does not involve "obtain[ing] information." 18 U.S.C. § 1030(a)(2)(C). But in light of the basic nature of connected computing, which involves a constant exchange of information between connected devices, this argument may be difficult to make. *See* Pet. Br. 27. And indeed, it has been widely understood that the broad reading of the CFAA would prohibit *any* violation of a computer use policy. *See, e.g.*, *Nosal*, 676 F.3d at 859; *Valle*, 807 F.3d at 528.

by asserting that those emails violated the applicable internet use manual. A similar analysis would apply to *McCormick v. United States*, 500 U.S. 257, 271 (1991), which held that Hobbs Act extortion requires the government to prove a quid pro quo. Of course, no quid pro quo requirement would be required in a CFAA prosecution—instead, it would be enough to show that the defendant used a computer and violated an applicable access policy.

The examples can be effortlessly multiplied. In *Cleveland*, the Court held that false statements made in an application for a state license to operate poker machines did not amount to property fraud. 531 U.S. at 15. But those same statements could constitute CFAA violations if they were made through a form on a government website, or on a computer kiosk provided by a government agency.

In *Skilling v. United States*, the Court held that Jeffrey Skilling did not violate the honest services statute by misrepresenting the company's fiscal health in order to inflate its stock price, because he did not solicit or accept side payments in exchange for doing so. 561 U.S. 358, 413 (2010). But a prosecutor could easily argue that such misrepresentations violate the company's internet policy.

3. The pattern is the same outside of the fraud and public corruption context. For example, in *Bond v. United States* the Court held that a criminal statute implementing a chemical weapons treaty did not apply to a purely local offense: Ms. Bond's attempt to use chemicals to cause another individual to develop a rash. 572 U.S. 844, 852 (2014). But the opinion notes that Ms. Bond ordered one of the chemicals on

Amazon.com. *Id.* If this was done on a work computer, the government would regard it as a federal crime—at least if Ms. Bond's employer prohibited online shopping.

Or take *Yates v. United States*, 574 U.S. 528 (2015). There, the Court concluded that fish were not a "tangible object" for purposes of the Sarbanes-Oxley Act's provision concerning the spoliation of evidence. 574 U.S. at 532 (plurality op.); *id.* at 549 (Alito, J., concurring). But if Mr. Yates had used his work computer to instruct his subordinates to dispose of the undersized grouper, *see id.* at 533-34, he would likely have been a criminal anyway.

By way of a final example, consider *United States v. Kozminski*, 487 U.S. 931, 949-50 (1988), which held that the federal statutes prohibiting "involuntary servitude" did not reach psychological coercion. Such a reading would have "criminalize[d] a broad range of day-to-day activity," and would have "delegate[d] to prosecutors and juries the inherently legislative task of determining what type of coercive activities … should be punished as crimes." *Id.* at 949. But the government's reading of the CFAA would accomplish the same result, as long as an applicable internet use policy prohibits bullying or other forms of coercive behavior.

In short, the government's interpretation of the CFAA functions as its own reductio ad absurdum. It readily invites the very consequences this court has rejected as unacceptable. To return briefly to *Kelly*, this Court illustrated the excesses of the government's theory by using a hypothetical posed by Judge Easterbrook. 140 S. Ct. at 1573 n.2 (citing *United*

States v. Walters, 997 F.2d 1219, 1224 (7th Cir. 1993)). In the hypothetical, as updated by the Court for the modern age, one friend emails another an invitation to a nonexistent surprise party as a practical joke. The Court explained that, even if the target of the joke spends money on gasoline to get to the "party," those expenditures do not—and could not—turn the practical joke into federal wire fraud. According to the government, however, the practical joker is not out of the woods; the fact that he sent the joke *by email* may still make him a federal criminal. This cannot be right.

B. The Government's Reading of the CFAA Invites All of the Dangers Noted in This Court's Overcriminalization Decisions

As noted above, this Court has consistently cabined overbroad interpretations of federal criminal statutes. This effort has been animated by a number of important concerns, from maintaining the proper balance between the federal and state governments, to ensuring that constitutional safeguards of due process are satisfied. Because the government's reading of the CFAA would potentially criminalize *all* of the conduct that this Court has held to be non-criminal in those decisions, it would bring about *all* the dangers those decisions sought to avoid.

1. Start with federalism. This Court has repeatedly said that it is reluctant to upset the state-federal balance by endorsing the "stark intrusion into traditional state authority" that can result from significantly "reallocat[ing] … criminal law enforcement authority between the Federal Government and the States." *Bond*, 572 U.S. at 866; *see id.* at 857-60; *Cleveland*, 531 U.S. at 24 (rejecting

"a sweeping expansion of federal criminal jurisdiction"); *id.* at 25.

The Court has been especially concerned about efforts by federal prosecutors to "set[] standards of disclosure and good government for local and state officials." *McNally*, 483 U.S. at 360; *see Kelly*, 140 S. Ct. at 1574 (expressing concern over the possibility that "the Federal Government could use the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking"); *McDonnell*, 136 S. Ct. at 2373.

Here, as shown above, the government's reading would vastly expand federal criminal jurisdiction *and* erect a code of conduct for state and local officials (as well as private citizens) through the obscure vehicle of little-read computer policy manuals. This is an affront to this Court's precedents.

2. More generally, this Court has been wary of reading criminal statutes in a manner that would "criminalize a broad range of day-to-day activity." *Kozminski,* 487 U.S. at 949. And once again, this concern is particularly pointed with respect to public officials. The Court has been reluctant to "cast a pall of potential prosecution" over "commonplace" behavior by officials, for fear that it would "chill [their] interactions with the people they serve and thus damage their ability effectively to perform their duties." *McDonnell*, 136 S. Ct. at 2372 (internal quotation marks omitted); *see McCormick*, 500 U.S. at 272 (declining to criminalize "conduct that in a very real sense is unavoidable").

There is much wisdom in this approach. Public officials are perpetually at risk of being targeted by

opportunistic prosecutors who disagree with them or the administration they serve politically, or are simply eager for publicity. And unbounded criminal laws make the prosecutor's task an easy one. A law that "delegate[s] to prosecutors and juries the inherently legislative task of determining what … activities are so morally reprehensible that they should be punished as crimes" also inevitably "subject[s] individuals to the risk of arbitrary or discriminatory prosecution and conviction." *Kozminski*, 487 U.S. at 949.

The government's reading of the CFAA would do this in spades. By weaponizing every set of computer use guidelines and every website's terms of service, it would make a criminal of nearly everyone—public officials and ordinary citizens alike. *See Nosal*, 676 F.3d at 859-60 (noting that, if the CFAA were interpreted to incorporate the commonplace employer prohibitions on such activities as shopping and checking sports highlights, "millions of unsuspecting individuals would find that they are engaging in criminal conduct").

3. In addition, this Court has been concerned that overbroad readings of federal criminal statutes would fail to give the public the constitutionally required fair notice of what is permitted and what is prohibited. In *McDonnell*, for example, the Court noted that the government's view would subject public officials "to prosecution, without fair notice, for the most prosaic interactions." 136 S. Ct. at 2373. This "raise[d] the serious concern that the provision does not comport with the Constitution's guarantee of due process." *Id.* (internal quotation marks omitted); *see also McNally*, 483 U.S. at 375; *Kozminski*, 487 U.S. at 949-50; *Skilling*, 561 U.S. at 408-09 ("Reading the statute to

proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine.")

The government's reading of the CFAA would create a particularly shapeless and capricious set of prohibitions. Instead of creating just one vague rule, it would incorporate all of the vagueness and ambiguity contained in every provision of every applicable policy on computer and internet use.

4. Finally, all of these dangers are further amplified by the fact that the government's reading of the CFAA turns on the defendant's subjective *purpose* for accessing the information. And an individual's state of mind is notoriously "'easy to allege and hard to disprove.'" *Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019) (quoting *Crawford-El*, 523 U.S. at 585).

Thus, all that would be needed for a prosecutor to obtain an indictment and throw the case to a jury is for the prosecutor to *allege* that a public official or ordinary citizen used a computer with an improper purpose. This severely amplifies the threat of targeted, selective, and politically motivated prosecutions.[3]

The Court has been sufficiently concerned about inquiries into officials' motives that it has sought to avoid them even in civil cases. *See Nieves*, 139 S. Ct. at 1725; *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 367-77 (1991).

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[3] It is no answer to suggest that the inquiry could be cabined by focusing on the defendant's *objective* purpose. As explained above, the broad reading of the CFAA, in effect, incorporates every computer use policy. Under that reading, if a provision in such a policy calls for a subjective inquiry, so must the CFAA.

Needless to say, this concern is *more* pointed in a criminal case, where an individual's freedom is potentially at stake.

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In sum, the government's approach to the CFAA would re-criminalize much of the conduct this Court has declared to be non-criminal, thereby inviting all of the consequences this Court has consistently sought to avoid. This is untenable, and the Court should not allow it.

II. LEGISLATIVE HISTORY CANNOT RESOLVE STATUTORY AMBIGUITY AGAINST A CRIMINAL DEFENDANT

A. This case also provides an opportunity to clarify the relationship between legislative history and the rule of lenity.

Because the language of the statute is (at best for the government) ambiguous as to whether it criminalizes access for an improper purpose, *see, e.g., Valle*, 807 F.3d at 523, the government has sought to rely on the CFAA's legislative history. This argument is unpersuasive on its own terms, as the legislative history also does not favor the government. *See, e.g.*, *id.* at 524-27; *Nosal*, 676 F.3d at 858 (noting that the statute was enacted "primarily to address the growing problem of computer hacking" and was not intended to function as "a sweeping Internet-policing mandate"); Orin S. Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes*, 78 N.Y.U. L. Rev. 1596, 1617, 1630-31 (2003). Petitioner has ably articulated these arguments. Pet. Br. 17-26.

But the Court can bypass the legislative history altogether by adopting a rule that it has hinted at in

majority opinions, and which several justices have expressly endorsed: If a criminal statute is ambiguous, legislative history cannot overcome the rule of lenity. *See Hughey*, 495 U.S. at 422 ("Even were the statutory language … ambiguous, longstanding principles of lenity … preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute *and legislative history*" (emphasis added)); *Ratzlaf v. United States,* 510 U.S. 135, 148 (1994) (approvingly citing *Hughey* on this point); *R.L.C.*, 503 U.S. at 307 (Scalia, J., concurring, joined by Kennedy and Thomas, JJ.) ("'[I]t is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history."); *id.* at 311 (Thomas, J., concurring) ("[T]he use of legislative history to construe an otherwise ambiguous penal statute against a criminal defendant is difficult to reconcile with the rule of lenity."); *see also Hayes*, 555 U.S. at 437 (Roberts, C.J., dissenting) ("If the rule of lenity means anything, it is that an individual should not go to jail for failing to … comb through obscure legislative history.")

B. This rule follows naturally from the twin goals of the rule of lenity: providing adequate notice to the public, and ensuring that Congress (rather than the courts) decides what is criminal. *See, e.g.*, *Crandon,* 494 U.S. at 158; *see also United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (Marshall, C.J.) (noting that the rule of lenity is "perhaps not much less old than construction itself" and that it is based "on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial

department"). The use of legislative history serves neither of those purposes. *See, e.g.*, David S. Romantz, *Reconstructing the Rule of Lenity*, 40 Cardozo L. Rev. 523, 573 (2018) (noting that legislative history "is neither an authoritative source of substantive law nor is it available to the average person").

First, it is exceedingly unrealistic to insist that the public is on notice of legislative history. As Justice Scalia noted in his *R.L.C.* concurrence, the "necessary fiction" that citizens are on notice of statutory text "descends to needless farce when the public is charged even with knowledge of Committee Reports." 503 U.S. at 309. Justice Thomas has taken the same view. *Id.* at 312 (Thomas, J., concurring) (rejecting a rule "that would … require knowledge of committee reports and floor statements" because there is "scant justification for extending the necessary fiction that citizens know the law … to such extralegal materials" (internal quotation marks omitted)). And Judge Sutton has made a similar point, noting that "no one can plausibly conclude that a committee report or the floor statements of selected legislators provides [fair warning as to what conduct is illegal]," and that therefore "the use of such material seems utterly incompatible with the purposes of the rule [of lenity]." *United States v. Laton*, 352 F.3d 286, 314 (6th Cir. 2003) (Sutton, J., dissenting).

A leading criminal-law treatise makes the same observation. If the public is entitled to fair warning, then it "should be able to ascertain the line between permitted and prohibited conduct from the statute itself." Wayne R. LaFave, *Substantive Criminal Law* § 2.2(e) (3d ed. 2019). "It is too much to expect the public to delve studiously into drafts of bills,

committee hearings and reports and debates on the bill in order to understand the statute." *Id.*

Importantly, this notice-based argument should be compelling regardless of whether one is ordinarily skeptical of the use of legislative history. *See* Marie Gryphon, *The Better Part of Lenity*, 7 J.L. Econ. & Pol'y 717, 721 (2011). The bottom line is that legislative history simply is not known to the ordinary citizen—and that means it cannot supply the notice that the rule of lenity demands.

Second, legislative history cannot provide a clear statement of congressional intent to impose criminal liability. *See Cleveland*, 531 U.S. at 24 (noting that a "clear statement" is necessary to accomplish a significant "expansion of federal criminal jurisdiction"). For one thing, "when clarity in the text of a law is required, legislative history by definition cannot supply it." *Laton*, 352 F.3d at 313 (Sutton, J., dissenting) (collecting cases from various doctrinal areas indicating that legislative history cannot make statutory text clear).

More broadly, legislative history cannot demonstrate that *Congress* chose to criminalize the conduct at issue. As Justice Scalia put it, legislative history does not prove that "society, through its representatives, has genuinely called for the punishment to be meted out," because society's judgment "is no more reflected in the views of a majority of a single committee of congressmen (assuming, of course, they have genuinely considered what their staff has produced) than it is reflected in the views of a majority of an appellate court." *R.L.C.*,

503 U.S. at 309-10; *id.* at 312 (Thomas, J., concurring) (noting that legislative history is "not law").

* * *

Under current doctrine, the relationship between the rule of lenity and legislative history is somewhat unsettled. *See, e.g.*, *United States v. Santos*, 553 U.S. 507, 513 n.3 (2008) (treating this as an open question).[4] But, as shown above, the correct approach follows inescapably from the basic structure of the rule of lenity. Accordingly, this Court should forthrightly adopt the principle that legislative history cannot resolve a statutory ambiguity against a criminal defendant. Doing so would provide a simple resolution to this case, and answer an important methodological question for future cases.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

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[4] To be sure, the Court has already made clear that, at most, legislative history might overcome the rule of lenity only in "rare" cases. *Crandon*, 494 U.S. at 160. The legislative history identified by the government in this case does not come close to satisfying even that (too generous) standard.

July 8, 2020

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