No. 21-

In the Supreme Court of the United States

BRANDON JONES, PETITIONER,

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

LUCAS ANDERSON
ROTHMAN, SCHNEIDER, SOLOWAY & STERN, LLP
100 Lafayette St., Suite 501
New York, New York 10013
(212) 571-5500

JOHN P. ELWOOD
Counsel of Record
ALLON KEDEM
SAMUEL F. CALLAHAN
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
john.elwood@arnoldporter.com

QUESTION PRESENTED

18 U.S.C. 514(a) prohibits the use of "any false or fictitious instrument, document, or other item appearing, representing, purporting, or contriving through scheme or artifice, to be an actual [government] security or other financial instrument."

The question presented is whether Section 514(a) prohibits only the use of nonexistent types of documents and instruments (as the Fifth, Sixth, Eighth, and Ninth Circuits have held), or whether it also covers the use of fake versions of actual, existing types of documents and instruments (as the Eleventh Circuit and the Second Circuit in this case have held).

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *United States* v. *Jones*, No. 16-cr-553, U.S. District Court for the Southern District of New York. Judgment entered January 8, 2019.
- *United States* v. *Jones*, No. 19-95, U.S. Court of Appeals for the Second Circuit. Judgment entered July 16, 2020; rehearing denied September 8, 2020.

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The opinion of the court of appeals (App. 1a-10a) is reported at 965 F.3d 190.

JURISDICTION

The court of appeals entered judgment on July 16, 2020. App. 1a. The court denied a timely petition for rehearing en banc on September 8, 2020. App. 11a. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

Title 18, Section 514 of the U.S. Code, entitled "Fictitious obligations," provides:

> (a) Whoever, with the intent to defraud—
>
> (1) draws, prints, processes, produces, publishes, or otherwise makes, or attempts or causes the same, within the United States;
>
> (2) passes, utters, presents, offers, brokers, issues, sells, or attempts or causes the same, or with like intent possesses, within the United States; or
>
> (3) utilizes interstate or foreign commerce, including the use of the mails or wire, radio, or other electronic communication, to transmit, transport, ship, move, transfer, or attempts or causes the same, to, from, or through the United States,
>
> any false or fictitious instrument, document, or other item appearing, representing, purporting, or contriving through scheme or artifice, to be an actual security or other financial instrument issued under the authority of the United States, a foreign government, a State or other political subdivision of the United States, or an organization, shall be guilty of a class B felony.

> (b) For purposes of this section, any term used in this section that is defined in section 513(c) has the same meaning given such term in section 513(c).

Title 18, Section 513(c) of the U.S. Code provides, in relevant part:

> (1) the term "counterfeited" means a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety;
>
> (2) the term "forged" means a document that purports to be genuine but is not because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine documents[.]

Title 18, Section 472 of the U.S. Code, titled "Uttering counterfeit obligations or securities," provides:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both.

Other relevant provisions of Title 18, Chapter 25 of the U.S. Code are reproduced in the appendix.

INTRODUCTION

This case presents an important and recurring question about the scope of a federal felony provision that has deeply divided the courts of appeals. The provision, 18 U.S.C. 514(a), prohibits the creation or use of a "false or fictitious" document that "purport[s] * * * to be an actual security or other financial instrument" issued by the United States, a foreign government, or an organization.

The Fifth, Sixth, Eighth, and Ninth Circuits have correctly interpreted Section 514(a)'s prohibition as limited to "nonexistent instruments"—*i.e.*, "bogus document[s] contrived to appear to be a financial instrument, when there is in fact no such genuine instrument, and where the fact of the genuine instrument's nonexistence is presumably unknown by, and not revealed to, the intended recipient of the document." *United States* v. *Howick*, 263 F.3d 1056, 1067 (9th Cir. 2001). These four circuits hold that the statute is limited to prohibiting "the passing of wholly nonexistent types of financial instruments," or an "imaginary type of instrument." *United States* v. *Morganfield*, 501 F.3d 453, 457, 460 (5th Cir. 2007) (quotation marks omitted); accord *United States* v. *Heath*, 525 F.3d 451, 458 (6th Cir. 2008); *United States* v. *Getzschman*, 81 Fed. Appx. 619, 622 (8th Cir. 2003). They hold that Section 514 has no application to "bogus document[s] contrived to appear" to be "an existing financial instrument"—documents already covered by the numerous counterfeiting and forgery provisions that predated Section 514's enactment. *Howick*, 263 F.3d at 1067; see also *Morganfield*, 501 F.3d at 460-461 ("§ 514(a) is not applicable" to documents that purport to be "any existing negotiable instrument") (quotation marks omitted).

These courts have focused on the text and structure of Section 514, which unlike the various counterfeiting statutes draws an express distinction between the "false or fictitious" instruments prohibited by the statute and "actual" instruments. *Morganfield*, 501 F.3d at 459-460. They have also explained that limiting Section 514 to invented categories of instruments most faithfully captures Congress's narrow purpose: Congress enacted Section 514 in 1996 "to 'close[] a loophole in Federal counterfeiting law,'" which did not then prohibit a growing type of fraud where individuals concocted and passed

off wholly nonexistent financial instruments. App. 9a n.3 (quoting 141 Cong. Rec. S9533-9534 (daily ed. June 30, 1995) (statement of Sen. D'Amato)). As the sponsor of the legislation explained, "[b]ecause these fictitious instruments are not counterfeits of any existing negotiable instrument, Federal prosecutors ha[d] determined that * * * these instruments d[id] not violate the counterfeit[ing] * * * provisions contained in chapter[] 25 * * * of title 18." *Id.* at S9533. Section 514 was designed to solve this "narrow but growing" problem. *The Financial Instruments Anti-Fraud Act: Hearing on S. 1009 Before the S. Comm. on Banking, Hous. & Urban Affs.*, 104th Cong., 2d Sess. 3 (1996) (*Senate Banking Committee Hearing*) (statement of Sen. Christopher S. Bond).

In the decision below, the Second Circuit expressly acknowledged that four courts of appeals have read Section 514 not to apply to conduct like petitioner's, but it was "not persuaded" by those decisions. App. 8a & n.2. It instead joined the Eleventh Circuit in holding that Section 514 covers not just "purely contrived types of documents and instruments" to close the loophole Congress identified in 1996, but also "fake versions of existing types of documents or instruments" that were already covered by a host of counterfeiting prohibitions. App. 8a-9a; see *United States* v. *Williams*, 790 F.3d 1240, 1246 (11th Cir. 2015). In the Second and Eleventh Circuits, a defendant can be convicted under Section 514 for making or using any document resembling any category of government or organizational financial instrument, whether real or invented.

The need for the Court's intervention to resolve these conflicting interpretations is urgent. The question presented implicates the hundreds of defendants charged with counterfeiting offenses each year, each of whom could face additional charges under Section 514 with increased maximum penalties under the broad in-

terpretation adopted below. In recent years, the split over Section 514's scope has only deepened, and the two courts that consciously broke from the consensus view have refused to bring themselves back into alignment through rehearing.

The minority rule is also wrong. The Second Circuit's interpretation broadens Section 514 not just beyond its plain text, which intentionally diverged from the language Congress repeatedly used for the many counterfeiting prohibitions already in Chapter 25; it stretches it beyond what Congress possibly could have intended, simultaneously capturing swathes of mine-run counterfeiting offenses already covered by other criminal statutes, raising the maximum sentence, while also effectively relaxing those counterfeiting statutes' requirement that the fake instrument be sufficiently similar to a genuine document to be capable of fooling a reasonable person. Congress did not direct that result, much less do so *clearly*. And this Court has consistently reaffirmed the law's "distaste[] against men languishing in prison unless the lawmaker has clearly said they should." *United States* v. *R.L.C.*, 503 U.S. 291, 305 (1992) (quoting *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting Henry Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, Benchmarks 196, 209 (1967))); accord *United States* v. *Rentz*, 777 F.3d 1105, 1113 (10th Cir. 2015) (en banc) (Gorsuch, J.).

STATEMENT

Legal Background

1. A prohibition on counterfeiting was among the first criminal laws enacted by the first Congress. That prohibition provided penalties for any person who "shall falsely make, alter, forge or counterfeit * * * or shall utter, put off, or offer * * * any such false, forged, altered or counterfeited certificate, indent, or other public secu-

rity [of the United States], with intention to defraud." *An Act for the Punishment of Certain Crimes Against the United States*, § 14, 1 Stat. 112, 115 (Apr. 30, 1790). Though the penalties have changed, the substantive prohibitions remain largely the same. Section 471 of Title 18 punishes anyone who, "with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States," while Section 472 covers those who "pass[], utter[], publish[], or sell[] * * * any falsely made, forged, counterfeited, or altered obligation or other security of the United States."

During the intervening two centuries, Congress added a host of other anticounterfeiting provisions to create Chapter 25 of the criminal code, entitled "Counterfeiting and Forgery." Those prohibitions address copying a broad variety of genuine items—foreign bank notes; coins or bars; lending agency bonds; contractor's bonds, bids, and public records; contracts, deeds, and powers of attorney; letters patent; military or naval discharge certificates; military, naval, or official passes; money orders; postage stamps; postage and revenue stamps of foreign governments; postmarking stamps; seals of departments or agencies; ship's papers; transportation requests of the U.S. government; endorsements on Treasury checks; and securities of the states and private entities. But they overwhelmingly use the language of the first Congress: "false" (or "falsely made"), "forged," "counterfeited," or "altered." App. 12a-18a. Counterfeiting prohibitions are "reserved for 'an imitation or replica markedly close or faithful to an original.'" *United States* v. *Gomes*, 969 F.2d 1290, 1293 (1st Cir. 1992) (quoting *Webster's Third New International Dictionary* 519 (1981)). In other words, the fake instruments must have "similitude" with genuine instruments. *Ibid.*; *Howick*, 263 F.3d at 1067; see also Counterfeit, *Black's Law Dictionary* (11th ed. 2019)

("Literally a *counterfeit* is an imitation intended to pass for an original.") (quotation marks and citation omitted); *Forgery*, *id.* ("The act of fraudulently making a false document or altering a real one to be used as if genuine.").

2. Despite the breadth of the federal counterfeiting prohibitions, by the mid-1990s Congress and law-enforcement agencies perceived a "loophole." *Senate Banking Committee Hearing* at 1 (statement of Chairman D'Amato). Existing law did not cover "completely fictitious financial instruments"—documents that "do[] not even exist." *Ibid.*; accord 141 Cong. Rec. S9533 (daily ed. June 30, 1995) (statement of Sen. D'Amato) ("Because these fictitious instruments are not counterfeits of any existing negotiable instrument, Federal prosecutors have determined that the[y] * * * do[] not violate the counterfeit * * * provisions contained in chapter[] 25 * * * of title 18 of the United States Code."). As a key example of conduct not covered by existing law, the bill's sponsors and law enforcement officials cited successful schemes by antigovernment groups like the Montana Freemen to pass tens of millions of dollars' worth of "fictitious instruments called 'Comptroller Warrants.'" *Senate Banking Committee Hearing* at 2; see also *id.* at 13 (statement of Charles L. Owens, Section Chief, Criminal Investigative Div., FBI).

In 1996, Congress enacted Section 514 to "attack[] th[is] narrow but growing sector of securities fraud." *Senate Banking Committee Hearing* at 3 (statement of Sen. Christopher S. Bond); see Pub. L. No. 104-208, § 648(b), 110 Stat. 3009, 3009-367 to -369 (Sept. 30, 1996). The new provision, titled "Fictitious obligations," prohibited the creation, passing, or interstate transmission of "any false or fictitious instrument, document, or other item appearing, representing, purporting, or contriving through scheme or artifice, to be an actual security or

other financial instrument issued under the authority of the United States, a foreign government, a State or other political subdivision of the United States, or an organization." *Ibid.*

Courts applying the fictitious-obligation statute have declined to impose a "similitude" requirement to genuine documents akin to that imposed under the counterfeiting statutes. *Howick*, 263 F.3d at 1067-1068. Instead, the fictitious obligation must only "appear[] to be 'actual' in the sense that it bears a family resemblance to genuine financial instruments." *Ibid.* ("The offending document must, in other words, include enough of the various hallmarks and indicia of financial obligations so as to appear to be within that class."). Because Section 514 is a Class B felony rather than a Class C felony (as are both Section 471 or 472), it has a longer maximum sentence (25 versus 20 years), and a longer maximum supervised release period (5 versus 3 years). See 18 U.S.C. 3581(b), 3583(b).

Proceedings Below

1. As a child, petitioner Brandon Jones was repeatedly sexually and physically abused by several relatives. In one episode, petitioner suffered serious burns requiring multiple skin grafts, which continue to cause him health issues to this day. C.A. App. 269-270. As a result of that trauma, petitioner has been diagnosed with post-traumatic stress disorder with post-traumatic-related grandiose fantasy and impaired reality testing. Def.'s Sentencing Submission, Dist. Ct. Dkt. 153, at 5 (Dec. 10, 2018). As the government has acknowledged, "it is undeniable that [petitioner] has suffered severe trauma in his life and that he has significant mental health issues as a result." Gov't Sentencing Submission, Dist. Ct. Dkt. 154, at 5 (Dec. 12, 2018).

2. In February 2018, petitioner was indicted for wire fraud (18 U.S.C. 1343 and 2), conspiracy to commit wire

fraud (18 U.S.C. 1349), and use and attempted use of fictitious government documents (18 U.S.C. 514(a)(2) and 2). The superseding indictment charged that petitioner had "created and tendered false and fictitious purchase orders and government travel requests purporting to be issued under the authority of the United States government." App. 19a.

At trial, the government introduced evidence that petitioner created a nongovernmental organization called "the Office of the Commissioner for Burns" that purported to advocate for burn victims. App. 3a. The government's evidence showed that petitioner, as the organization's Commissioner, used fake documents resembling legitimate financial instruments to obtain goods and services. App. 3a. Witnesses testified, for example, that petitioner tried to purchase an airline ticket and a rental car using fake Government Transportation Requests (or "GTRs"). App. 3a-4a. The government also presented evidence that petitioner presented fake government purchase orders as payment for accommodations, rental cars, and electronics. App. 4a-5a. The government established that the federal government issues real GTRs to pay for the travel expenses of "federal or quasi-governmental agencies," App. 4a, and that the government creates real purchase orders to pay for goods and services at pre-negotiated prices. *Ibid.*

The court instructed the jury that a "false or fictitious instrument" for purposes of Section 514 is "a bogus financial document made to look like a real financial document which could be used for payment when, in fact, there is no such genuine financial instrument." App. 21a. The jury convicted petitioner on all counts. The district court determined that the Guidelines sentencing range was 87-108 months. The government agreed that the Guidelines sentence "[wa]s greater than necessary" and that a downward variance was warranted given petition-

er's "significant mental health issues." Gov't Sentencing Submission at 5, *supra*. The district court agreed, sentencing petitioner to 50 months' imprisonment followed by the maximum five years' supervised release available under Section 514. App. 5a; see 18 U.S.C. 3583(b)(1).

3. The court of appeals affirmed. App. 1a-10a. The court began by noting that the sufficiency of the evidence to support petitioner's conviction "turns on what properly constitutes a 'false or fictitious' instrument or document for purposes of Section 514." App. 6a. The court agreed with petitioner that the "the evidence at trial established that legitimate GTRs and purchase orders do exist and are used by the government." App. 6a; see App. 4a ("GTRs are legitimate government forms"); App. 5a ("[t]he Government introduced into evidence legitimate purchase orders"); App. 9a n.3 ("[i]nstruments such as Jones's * * * actually exist"). The court also acknowledged that the Ninth Circuit had held that "the phrase 'false or fictitious instrument' in section 514 * * * refer[s] to nonexistent instruments," not "doctored up versions of obligations that truly exist," App.8a (quoting *Howick*, 263 F.3d at 1067), and that "[o]ther circuits, including the Fifth, Sixth, and Eighth Circuits, have adopted" that rule. App. 8a n.2. And the court acknowledged that the government itself agreed Section 514 covered only "entirely contrived or extremely rare types of financial instruments," and not fake versions of "legitimate" instruments. App. 6a.

The court rejected that position, stating, "[w]e are not persuaded." App. 8a. Instead, the court agreed with the Eleventh Circuit that Section 514 extends not only to fictitious documents, but also "to fake versions of existing types of documents or instruments." App. 9a. The court reasoned that the majority rule did not give the words "false" and "fictitious" independent meanings. App. 7a-8a. "Having determined that Section 514 applies

to fake versions of existing types of documents or instruments," the court concluded, App. 9a, "[t]herefore, the evidence was sufficient to support Jones's conviction." App. 3a. The court denied petitioner's request for rehearing. App. 11a.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Deepens A Circuit Split Over The Scope Of The Prohibition On Using Fictitious Instruments

The court below consciously deepened a circuit split over the reach of an important federal felony provision with significant penalties. Four circuits now hold that Section 514 covers only the use of nonexistent types of documents and instruments. The court below joined the Eleventh Circuit in holding that Section 514 is a broader prohibition that covers not just the use of nonexistent instruments, but also a wide range of conduct long prohibited by the counterfeiting statutes—namely, the use of fabricated versions of real documents and instruments. This Court's review is necessary to resolve this deep division.

1. At Least Four Circuits Hold That Section 514 Covers Only Nonexistent Instruments

The Fifth, Sixth, Eighth, and Ninth Circuits hold that Section 514 covers only the use of nonexistent types of documents or instruments. *United States* v. *Morganfield*, 501 F.3d 453, 459-460 (5th Cir. 2007); *United States* v. *Heath*, 525 F.3d 451, 458 (6th Cir. 2008); *United States* v. *Getzschman*, 81 Fed. Appx. 619, 622 (8th Cir. 2003); *United States* v. *Howick*, 263 F.3d 1056, 1066-1067 (9th Cir. 2001). Petitioner would not have been convicted under the interpretation applied in those circuits.

The Ninth Circuit in *Howick* "interpret[ed] the phrase 'false or fictitious instrument' in section 514 to refer to nonexistent instruments." 263 F.3d at 1067. The

court observed that Section 514 was "[p]lainly * * * intended to criminalize a range of behavior not reached by section 472," the counterfeiting prohibition. *Id.* at 1066. The court also noted that Section 514's text "differs from the preexisting counterfeit statute, section 472, which reaches 'falsely made, forged, [and] counterfeit' obligations, in that section 514[] reaches 'false or fictitious' obligations, so long as they appear to be 'actual.'" *Ibid.* Section 514's legislative history—which focused on the pressing need for a prohibition covering "fictitious instruments [that] are not counterfeits of any existing negotiable instrument"—was "helpful in illuminating more precisely the differences between that provision and section 472." *Id.* at 1066-1067 (emphasis omitted) (quoting 141 Cong. Rec. S9533-9534 (daily ed. June 30, 1995) (statement of Sen. D'Amato)).

Drawing on Section 514's text and history, the Ninth Circuit reasoned that a "distinction * * * emerge[d]": A "'counterfeit' obligation is a bogus document contrived to appear similar to an existing financial instrument," whereas "a 'fictitious' obligation is a bogus document contrived to appear to be a financial instrument, where there is in fact no such genuine instrument, and where the fact of the genuine instrument's nonexistence is presumably unknown by, and not revealed to, the intended recipient of the document." 263 F.3d at 1067. "In keeping with this distinction," the Ninth Circuit "interpret[ed] the phrase 'false or fictitious instrument' in section 514 to refer to nonexistent instruments, whereas the phrase 'falsely made, forged, counterfeited, or altered obligation' in section 472 refers to doctored up versions of obligations that truly exist." *Ibid.*; *see id.* at 1068 ("section 514 was enacted to reach documents not striving to duplicate any existing obligation"). The Ninth Circuit has repeatedly reaffirmed *Howick*'s interpretation: Section 514 covers only "nonexistent instruments." *United*

States v. *Salman*, 531 F.3d 1007, 1011 (2008); see *United States* v. *Hall*, 681 Fed. Appx. 621, 623 (2017) ("Because there is no such thing as a money order that promises payment from a United States Treasury account, Hall's 'money orders' are 'bogus' instruments of which there is, and cannot be, any 'genuine' version."); *United States* v. *Murphy*, 824 F.3d 1197, 1200, 1204 (2016) ("bonded promissory notes" payable "to the order" of the Treasury Secretary could support conviction under Section 514(a)).

As the Second Circuit recognized, the Fifth, Sixth, and Eighth Circuits have expressly adopted the Ninth Circuit's interpretation of Section 514. App. 8a n.2.

The Fifth Circuit in *Morganfield* agreed with *Howick* that Section 514 draws a "distinction between nonexistent and existent instruments" and held categorically that "where the underlying instruments are facially genuine checks, § 514(a) is not applicable." 501 F.3d at 460-461. On that basis, the Fifth Circuit reversed the two defendants' convictions under Section 514. While the defendants' actions were "plainly illegal," the government had "charged [defendants] under the wrong section" because the checks they had written and attempted to cash "were, on their face, genuine." *Id.* at 460.

The Fifth Circuit rejected the government's argument "that the dichotomy between existent and nonexistent securities is too formalistic." 501 F.3d at 459. Writing for the court, Judge Higginbotham focused on "[t]he text of § 514(a)," which, "while not an exemplar of precise drafting, supports the Ninth Circuit's, and other courts', view that the statute's concern is nonexistent instruments." *Ibid.* The statutory text "contemplates two universes of instruments: [1] 'false or fictitious' ones and [2] 'actual securities,'" *ibid.*, indicating that the statute prohibits only fictional instruments. The court acknowledged that "'[f]alse' and 'fictitious' have overlapping def-

initions"—"both can mean not real or imaginary," and both "can also mean deceptive." *Ibid.* (citing dictionary definitions). But by explicitly contrasting such documents with "an actual security," the statute's text underscored that it prohibits only fictional instruments. "'Actual' means 'existing in fact or reality.'" *Ibid.* Further, "[t]he legislative history," while not dispositive, "support[ed] this construction." *Id.* at 460. The Fifth Circuit has since reaffirmed that holding, applying *Morganfield* to vacate convictions under Section 514 where defendants passed falsified, "facially genuine" versions of existing types of instruments (there, checks). *United States* v. *Kittelberger*, 595 Fed. Appx. 355, 361 (2014).

Soon after *Howick*, the Sixth Circuit adopted the Ninth Circuit's interpretation of Section 514, *United States* v. *Anderson*, 353 F.3d 490, 500-501 (2003), and since then it has consistently applied that interpretation, see *Heath*, 525 F.3d at 455 (holding Section 514(a) encompassed passing documents entitled "Registered Bills of Exchange," which "looked like genuine financial instruments but were in fact [a] fictitious" type of instrument).

The Eighth Circuit similarly relied on *Howick* in holding that Section 514(a) "covers wholly nonexistent types of financial instruments." *United States* v. *Getzschman*, 81 Fed. Appx. 619, 621-622 (2003) (per curiam) (applying statute to "fictitious [T]reasury direct money orders and sight drafts"); accord *United States* v. *Pullman*, 187 F.3d 816, 823 (1999) (Section 514 "covers instruments drawn on financial institutions that do not exist or wholly nonexistent types of instruments"). The Eighth Circuit recently reaffirmed that interpretation. *United States* v. *Gibson*, 729 Fed. Appx. 488, 489, 490 (2018) (per curiam) (upholding Section 514(a) conviction based on fictitious "Private Offset Discharging and Indemnity Bond" and "Private Offset Bond," both of which

"bore 'a family resemblance to genuine financial instruments'") (quoting *Getzschman*, 81 Fed. Appx. at 622).

2. Two Circuits Hold That Section 514 Also Covers Fake Versions Of Existing Instruments

The Second and Eleventh Circuits have reached the opposite conclusion, holding that Section 514 encompasses not just fictitious instruments, but also fake versions of existing instruments.

In *United States* v. *Williams*, 790 F.3d 1240 (2015), the Eleventh Circuit upheld a conviction under Section 514 for the passing of "phony checks" that the defendant created "using blank check stock and check-writing software." *Id.* at 1243, 1248. The court believed that Section 514's "use of the disjunctive 'or'" between "false" and "fictitious" "indicates that the statute contemplates documents that are not 'fictitious' since they purport to be of a type of instrument that actually exists, but are still 'false' in the sense that they are wholly inauthentic." *Id.* at 1246. The court concluded that interpreting Section 514 to cover "only non-existent *types* of instruments" would "render the term 'false' mere surplusage." *Id.* at 1245-1246. In the Eleventh Circuit's view, "neither *Howick* nor *Morganfield* provide[d] a convincing basis for holding otherwise." *Id.* at 1249. The court denied rehearing en banc.

The Second Circuit below applied the same mode of analysis. The court relied extensively on the Eleventh Circuit's decision in *Williams* and expressly rejected the interpretations adopted by the Fifth, Sixth, Eighth, and Ninth Circuits. App. 7a-8a & n.2. The court focused primarily on the need to treat the terms "false" and "fictitious" "distinctly" and to avoid "surplusage." App. 7a. In its view, "fictitious" documents were "purely contrived categories of obligations," whereas "false" documents in-

clude "fake versions of existing documents," like petitioner's GTRs and purchase orders. App. 6a, 7a, 9a.

3. This Court's Review Is Necessary To Resolve The Split

The division is entrenched and unlikely to be resolved without this Court's intervention. Before *Williams*, the circuits to reach the issue agreed that Section 514 covered only nonexistent obligations, with multiple decisions containing exhaustive analyses of the statute. The split first arose in 2015 with *Williams* and deepened with the decision below, both of which thoroughly analyzed the statute but adopted a contrary interpretation. Both the Second and Eleventh Circuits denied rehearing en banc. After *Williams*, the courts on the majority side of the split have reaffirmed their narrower readings. *Gibson*, 729 Fed. Appx. at 490; *Hall*, 681 Fed. Appx. at 623. And though even the government agreed that *Howick*'s interpretation was the correct one, the Second Circuit in this case *sua sponte* decided to deepen the circuit split because it deemed the majority rule "overly favorable" to petitioner. App. 6a. The Second Circuit thus consciously broke with the Fifth, Sixth, Eighth, and Ninth Circuits, and then it denied rehearing. At this point, only this Court can provide uniformity on this important and recurring issue.

B. The Decision Below Is Wrong

By its plain terms, Section 514 covers only the use of nonexistent types of obligations. Any doubt about its plain meaning is dispelled by the statute's language, context, and history and by application of this Court's rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000) (quoting *Rewis* v. *United States*, 401 U.S. 808, 812 (1971)). The Second Circuit's contrary interpretation bypasses key text and con-

text—most notably by ignoring that Section 514 differs markedly from the array of counterfeiting prohibitions that predate it. This Court should grant review to reaffirm vital principles of statutory interpretation, under which the Second Circuit's unbounded interpretation of Section 514 cannot stand.

1. Reading Section 514 expansively to cover fake versions of existing documents erases key statutory text, negates the statute's internal logic, and overrides critical context. The other provisions of Chapter 25 of Title 18 overwhelmingly employ the same time-honored structure, prohibiting "false" (or "falsely made"), "forged," "counterfeited," or "altered" financial instruments or currency that actually exist: for example, "obligation[s] or other securit[ies] of the United States," 18 U.S.C. 471, 472, 473; "securit[ies] issued under the authority of [a] foreign government, or any treasury note, bill, or promise to pay, lawfully issued by such foreign government," 18 U.S.C. 478, 479; "any bank note or bill issued by a bank or corporation of any foreign country," 18 U.S.C. 480, 482, 483; "any coin of a denomination higher than 5 cents or any gold or silver bar coined or stamped at any mint or assay office of the United States," 18 U.S.C. 485; see also 18 U.S.C. 486 (foreign or U.S. metal coins); 18 U.S.C. 490 (minor coins); "any note, bond, debenture, coupon, obligation, [or] instrument" of various lending agencies, 18 U.S.C. 493; "any certificate of discharge from the military or naval service of the United States," 18 U.S.C. 498; "any naval, military, or official pass or permit, issued by or under the authority of the United States," 18 U.S.C. 499; and Postal Service money orders, 18 U.S.C. 500, just to name a few.

The language and structure of Section 514(a) are critically different. A person violates Section 514(a) by using a "false or fictitious instrument, document, or other item *appearing, representing, purporting,* or contriv-

ing through scheme or artifice, to be an *actual* security or other financial instrument" issued by a specified entity. 18 U.S.C. 514(a) (emphasis added). The text thus contemplates two distinct categories of documents: (1) "false or fictitious" documents and (2) "actual" obligations. *Morganfield*, 501 F.3d at 459. The terms are used in contradistinction; thus, a "false or fictitious" document cannot, by definition, be an "actual" obligation—one "existing in fact or reality." *Ibid.*; see Actual, a., *Oxford English Dictionary* (2d ed. 1989) ("[e]xisting in act or fact," as opposed to "virtual, theoretical"; "[i]n action or existence at the time; present, current"). "The statute, then, prohibits the use of a not real or imaginary type of instrument that purports to be an existing type of security." *Morganfield*, 501 F.3d at 460. As the government explained below, "[t]he counterfeit statute is focused on" whether the instrument "is similar to an existing financial instrument"; by contrast, Section 514 "is focused on wh[ether] the document 'appear[s], represent[s], purport[s], or contriv[es] through scheme or artifice'" to be an "actual" security. Gov't C.A. Br. 11-12 (quoting *United States* v. *Turner*, 985 F. Supp. 2d 1311, 1317 (M.D. Ala. 2013)).

If Congress had intended to cover fake or altered versions of existing obligations, it would have had no need to distinguish between "false or fictitious" obligations and "actual" obligations. It instead would have used the familiar language and structure it has used for more than two centuries, and that it has used time and again in the other provisions of Chapter 25. These counterfeiting prohibitions do not, and need not, distinguish between false obligations and "actual" obligations, because "falsely made, forged, counterfeited, or altered obligation[s]" *by definition* have a genuine, existing counterpart—as their express references to those existing counterparts make clear. Congress's distinction between fake and "ac-

tual" documents in Section 514 shows that it was targeting a different sort of fake obligation than in the counterfeiting statutes.

The majority rule's interpretation of Section 514 also avoids creating incoherent overlap with the counterfeiting prohibitions that long preceded it. For example, Section 508, one of the counterfeiting prohibitions predating Section 514, forbids the use of any "false, forged, counterfeited, or altered" "form or request in similitude of the form or request provided by the Government for requesting a common carrier to furnish transportation on account of the United States," 18 U.S.C. 508—*i.e.*, forms akin to the GTRs and purchase orders that were the basis of petitioner's conviction. But Section 514 authorizes a maximum sentence two-and-a-half times longer than Section 508's 10-year sentence. 18 U.S.C. 514, 3559(a)(2).

Fake instruments violate the counterfeiting prohibitions in Chapter 25 even if they are not perfect replicas; they need only be "calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care." *Howick*, 263 F.3d at 1065-1066 (citation omitted). As a result, creating or passing "fake versions of existing types of documents or instruments," App. 9a, will frequently trigger the many preexisting federal counterfeiting prohibitions. There is no evidence that Congress intended Section 514 to serve as a second prohibition, typically with significantly enhanced penalties, for conduct already covered. This Court reads statutes to avoid just this sort of "overlap" among provisions of the criminal code, particularly when the superfluity occurs within "the same statutory scheme." *Yates* v. *United States*, 574 U.S. 528, 543 (2015) (plurality opinion); see also *Ashe* v. *Swenson*, 397 U.S. 436, 445 n.10 (1970) (overlap enables "prosecutors to spin out a startingly numerous series of offenses from a single alleged criminal transaction").

At the same time, the interpretation adopted below broadens existing counterfeiting prohibitions in an incoherent manner. Courts (including the court below) have consistently rejected that Section 514 requires "similitude" between the fictitious and actual obligations. App. 9a n.3 (citing *Howick*, 263 F.3d at 1067). Unlike in the many counterfeiting statutes predating Section 514, a fictitious obligation must "appear[] to be 'actual'" only "in the sense that it bears a family resemblance to genuine financial instruments." *Howick*, 263 F.3d at 1068; see *Getzschman*, 81 Fed. Appx. at 622 (same). Thus, reading Section 514 to cover fake versions of existing documents does not just create overlap, it also inexplicably relaxes the ordinary standards governing counterfeiting and then, for many categories of obligations, imposes greater maximum penalties for that broadened category of conduct. There is no reason to think that Congress intended to impose greater maximum penalties on individuals who make bad fakes (bearing only a "family resemblance" to real instruments) than on those who make good ones.

2. The courts that have interpreted Section 514 to reach fake versions of existing instruments have concluded that a broader interpretation is necessary to give "false" and "fictitious" independent meanings. App. 7a; *Williams*, 790 F.3d at 1246. But *Howick*'s narrower interpretation does, too. The statute's use of both "false" and "fictitious" in prohibiting the use of fake, nonexistent instruments clarifies that the statute covers documents and instruments that, though not actually of an existing category, bear a general "family resemblance" to an actual category of obligation. *Howick*, 263 F.3d at 1068. Congress used both terms to ensure that all nonexistent instruments were covered. Such "redundancies are common in statutory drafting—sometimes in a congressional effort to be doubly sure, sometimes because of congressional inadvertence or lack of foresight, or some-

times simply because of the shortcomings of human communication." *Barton* v. *Barr*, 140 S. Ct. 1442, 1453 (2020).

Indeed, even if a narrow interpretation rendered "false" and "fictitious" *completely* interchangeable, the surplusage rule kicks in only if the alternative reading "gives effect to every clause and word of a statute." *Microsoft Corp.* v. *i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011) (quotation marks omitted). The Second Circuit's interpretation does the opposite. Reading "false" to capture fake versions of existing documents "create[s] its own redundancy problem," *Rimini St., Inc.* v. *Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019), by creating "significant[] overlap," *Yates*, 574 U.S. at 543 (plurality opinion), between Section 514 and long-existing counterfeiting prohibitions. See p. 19, *supra*.

3. Although the narrower interpretation adopted in the Fifth, Sixth, Eighth, and Ninth Circuits follows from Section 514's plain text and structure, legislative history also strongly "supports this construction." *Morganfield*, 501 F.3d at 460. It is not just that Section 514 aimed to close a particular "loophole"—namely, documents that "are not counterfeits *of any existing negotiable instrument*." *Id.* at 458 (quoting 141 Cong. Rec. S9533 (daily ed. June 30, 1995) (statement of Sen. D'Amato)). It is also that there is nothing in the legislative record suggesting that Congress intended Section 514 to duplicate existing prohibitions or to provide enhanced penalties for offenses involving fake versions of existing instruments. Counterfeiting had been prohibited for centuries; this new law was laser-focused on the narrow category Chapter 25 did not already cover: "completely fictitious financial instruments"—documents that "do[] not even exist." *Senate Banking Committee Hearing* at 1 (statement of Chairman D'Amato). Section 514 "attack[ed]" this "narrow but growing" class of fraud, *id.* at 3 (statement of

Sen. Bond); the Second Circuit's expansive interpretation cannot be squared with that targeted intent.

4. Should "traditional tools of statutory construction leave[] any doubt" about Section 514's reach, interpreting the statute to cover only nonexistent obligations is necessary under the rule of lenity. *Yates*, 574 U.S. at 547 (plurality opinion). This Court, recognizing that "[p]robability is not a guide which a court, in construing a penal statute, can safely take," holds that ambiguity in criminal statutes "should be resolved in favor of lenity." *United States* v. *Santos*, 553 U.S. 507, 514 (2008) (quoting *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820) (Marshall, C.J.), and *Bell* v. *United States*, 439 U.S. 81, 83 (1955) (Frankfurter, J.)). "[T]he tie" thus "must go to the defendant." *Ibid.* In light of Congress's textual distinction between "false or fictitious" documents and "actual" obligations, and the stark contrast between that formulation and those in Congress's myriad counterfeiting prohibitions, the statute cannot be said to *unambiguously* capture fake versions of existing instruments. Rather, if Section 514 can possibly be read to cover fake versions of existing documents, it is only because its terms are ambiguous—it is subject to two "fair alternative[]" readings, in which case the reading that protects petitioner must prevail. *United States* v. *Davis*, 139 S. Ct. 2319, 2332 (2019) (quoting *United States* v. *Rumely*, 345 U.S. 41, 45, 47 (1953)).

C. This Case Presents An Ideal Vehicle For Resolving An Important And Recurring Question

The question presented is important, and this case is an ideal vehicle to resolve it.

1. The decision below transforms the fictitious-obligation prohibition into an all-purpose counterfeiting statute that overlaps substantially and incoherently with long-existing criminal prohibitions and that imposes greater maximum penalties for conduct of a type already

proscribed. Creating or passing counterfeit, forged, or altered financial instruments is, and has long been, a felony. 18 U.S.C. 471, 472. Congress has even prohibited (albeit with lesser maximum penalties) the creation or passing of fake government transportation forms akin to those petitioner was charged with passing. 18 U.S.C. 508. Yet, under the Second Circuit's interpretation, swaths of counterfeiting offenses can also be charged under Section 514 as the use of a "false" instrument, under a relaxed "similitude" requirement compared to the counterfeiting provisions.

There are hundreds of prosecutions for counterfeiting offenses every year. More counterfeiting cases were filed in Fiscal Year 2019 than any other type of "Government Regulatory Offense" except immigration and money-laundering offenses.[*] The interpretation of Section 514 adopted below opens each of these charged defendants to an additional felony charge—one that almost always carries a longer maximum sentence and a longer term of supervised release than other Chapter 25 provisions. Curtailing unnecessary overlap in criminal statutes is of paramount importance, as such overlap permits "prosecutors to spin out a startingly numerous series of offenses from a single alleged criminal transaction." *Ashe*, 397 U.S. at 445 n.10. And this Court has frequently found it necessary to reaffirm "the rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Yates*, 574 U.S. at 547-548 (plurality opinion) (quoting *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000)); see also *Davis*, 139 S. Ct. at 2333 (lenity reflects "the tenderness of the law for the rights of individuals" (quoting *Wiltberger*, 18 U.S. (5 Wheat.) at

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[*] U.S. Dep't of Justice, *United States Attorneys' Annual Statistical Report: Fiscal Year 2019*, at 13 tbl.3B, https://www.justice.gov/usao/page/file/1285951/download.

95 (Marshall, C.J.)); *Santos*, 553 U.S. at 515 ("[P]robability is not a guide which a court, in construing a penal statute, can safely take.") (quoting same).

2. This case cleanly presents this single legal question for resolution. At each stage of the proceedings, petitioner preserved his argument that the evidence did not support a conviction because Section 514 covers only nonexistent types of documents. Petitioner's Section 514 conviction concretely affected his sentence because it exposed him to a substantially longer period of supervised release—a penalty highly significant to Jones given his mental health issues that create potential for conflict with his probation officer. The district court imposed the maximum of five years' supervision, two years more than he could have received based on his other counts of conviction. C.A. App. 277. The court of appeals conceded the existence of a circuit split on whether Section 514 covers the sorts of documents at issue in petitioner's case, App. 8a & n.2, and considered the question dispositive. In particular, because "[i]nstruments such as Jones's * * * actually exist," App. 9a n.3, the court recognized that he could not have been convicted under a statute proscribing only the use of nonexistent instruments. But having concluded that Section 514 applies to "fake versions of existing documents or instruments," it concluded, "*[t]herefore*, the evidence was sufficient to support Jones's conviction." App. 2a-3a (emphasis added).

CONCLUSION

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

Respectfully submitted.

LUCAS ANDERSON
ROTHMAN, SCHNEIDER,
SOLOWAY & STERN, LLP
100 Lafayette St., Suite 501
New York, New York 10013
(212) 571-5500

JOHN P. ELWOOD
Counsel of Record
ALLON KEDEM
SAMUEL F. CALLAHAN
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
john.elwood@arnoldporter.com

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APPENDICES