No. 23-1095

In the Supreme Court of the United States

PATRICK D. THOMPSON,
Petitioner,
v.
UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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In this case, as in so many previous cases, the government construes a criminal statute non-literally, to sweep in more conduct than the text of the statute encompasses. Section 1014 prohibits making a "false statement." But the government asserts that "Section 1014 criminalizes misleading representations and is not limited to 'literally false' statements." BIO 6.

This is not how statutes are interpreted, especially not criminal statutes. The "Court has traditionally exercised restraint in assessing the reach of a federal criminal statute. …. After all, crimes are supposed to be defined by the legislature, not by clever prosecutors riffing on equivocal language." *Dubin v. United States*, 599 U.S. 110, 129-30 (2023) (citations, brackets, and internal quotation marks omitted). If a statute makes it a crime to do X, Y, and Z, a person must literally do X, Y, and Z before they can be convicted.

Section 1014 criminalizes the making of a "false statement" to any of several listed organizations "for the purpose of influencing in any way the action" of the organization. 18 U.S.C. § 1014. To violate this statute, a person must literally make a statement. The statement must be made literally to one of the organizations listed in the statute, literally for the purpose of influencing the organization's action. And the statement must literally be false. Yet the government has succeeded in persuading several circuits to adopt its non-literal construction of the statute and to affirm convictions based on statements that were not false.

The government offers three reasons for denying certiorari: first, that Patrick Thompson's statements *were* literally false, BIO 5-6; second, that the decision below is correct, *id.* 6-10; and third, that the circuit conflict is not worth resolving, *id.* 10-13. All three claims are wrong.

I. Both courts below decided this case on the assumption that Patrick Thompson's statements were not false.

At every stage of this case, including in this Court, *id.* at 5-6, the parties have disagreed over whether Patrick Thompson's statements were false, but no court has ever decided whether they were. Neither the District Court nor the Court of Appeals addressed the question because both courts held that falsity is not a prerequisite for conviction under section 1014. The District Court concluded: "Because the Court finds that literal falsity is not required to sustain a Section 1014 conviction, the Court does not address the Government's argument that Thompson's statements were literally false." Pet. App. 56a. The Court of Appeals likewise explained that "we need not decide whether Thompson's statements were literally true because … § 1014 criminalizes misleading representations." *Id.* at 9a.

The case thus arrives at this Court presenting a clean legal question about what the statute prohibits. If the Court agrees with our view, on remand the lower courts can finally decide whether Thompson's statements were false. We think the lower courts will find that they were not false. *See* Pet. 5-6. But this dispute is hardly a reason to deny certiorari. The Court's normal role is to resolve legal questions

and then to remand for the lower courts to dispose of whatever is left of a case.

II. The decision below is wrong.

The government defends the decision below on the ground that "false" does not literally mean "false," but instead means "misleading" as well. BIO 6-10. This argument makes gobbledygook out of much of Title 18, which includes some statutes, like section 1014, that prohibit only "false" statements and others that prohibit "false or misleading" statements. *See, e.g.*, 18 U.S.C. §§ 1038(a)(1), 1365(b), 1515(b).

When a statement is misleading, it is because the speaker has omitted important contextual information. But when Congress wants to prohibit omissions as well as false statements, Congress does so explicitly. *See, e.g.*, 18 U.S.C. § 1027; 15 U.S.C. § 77q(a)(2).

The Court has recently emphasized this distinction between false statements and misleading omissions in discussing SEC Rule 10b-5, which prohibits both. As the Court explained, "[t]his Rule accomplishes two things. It prohibits 'any untrue statement of a material fact'—*i.e.*, false statements or lies. It also prohibits omitting a material fact necessary 'to make the statements made ... not misleading.'" *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 601 U.S. 257, 263 (2024) (citation omitted). Section 1014—unlike Rule 10b-5—prohibits only false statements. It does not prohibit omitting material facts.

The government suggests that there is nothing to be learned by comparing the text of section 1014 to that of other statutes, on the theory that such a

comparison is valid only between two sections of the same statute. BIO 9. But all courts, including this Court, consider the text of related statutes in determining what a statute means. Justice Scalia called this the "Related-Statutes Canon." As he explained,

> Any word or phrase that comes before a court for interpretation is part of a whole statute, and its meaning is therefore affected by other provisions of the same statute. It is also, however, part of an entire *corpus juris*. So, if possible, it should no more be interpreted to clash with the rest of the corpus than it should be interpreted to clash with other provisions of the same law. Hence laws dealing with the same subject—being *in pari materia* (translated as "in a like matter")—should if possible be interpreted harmoniously.

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012). Throughout the rest of Title 18, "false" clearly means something different from "misleading." There is no reason to think that the two words suddenly become synonyms in section 1014.

The government fares no better when it grapples with the statutory text. The government argues that the statutory prohibition of *any* false statement, rather than *a* false statement, "suggests a broad reading." BIO 7 (citation and internal quotation marks omitted). But the use of "any" cannot change the meaning of "false." Whether a statute prohibits the wearing of "*a* green sweater" or "*any* green sweater," the sweater must still be green.

Rebuffed by the statute's text, the government turns to an equally unpersuasive purposivism. "It

would be anomalous," the government says, "to read a law designed to protect lenders from being 'influenc[ed] in any way' as excluding misleading statements." *Id.* But Congress enacts statutes, not designs. Section 1014 does not prohibit *all* actions that influence lenders. It only prohibits false statements that do so.

The government ultimately falls back on dicta from *Kay v. United States*, 303 U.S. 1 (1938), in which the Court rejected a constitutional challenge to the Home Owners' Loan Act of 1933. In a throwaway line that had nothing to do with the case's holding, the Court noted that "Congress was entitled to secure protection against false and misleading representations." *Id.* at 7. But even if we take this line seriously, it still does not help the government. The Home Owners' Loan Act did not just prohibit false statements. It also punished one who "willfully overvalues any security," *id.* at 3 n.1, an action that can be accomplished by making misleading statements as well as false ones.

The government dismisses our concern that its non-literal interpretation of section 1014 threatens to criminalize an enormous range of statements commonly made during negotiations. BIO 10. We're still worried. In our certiorari petition, we gave the example of a homebuyer negotiating for a mortgage. If she tells the lender "I have an offer at a lower interest rate from another bank," without disclosing that the other bank requires a higher down payment, she has committed a felony on the government's reading of section 1014, because she has made a misleading statement for the purpose of in-

fluencing the lender. She can be sent to prison for thirty years and fined a million dollars.

Finally, the government has nothing to say about the rule of lenity. "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Williams v. United States*, 458 U.S. 279, 290 (1982) (internal quotation marks omitted). As Judge Sutton observed for the Sixth Circuit, however, "[t]he only thing 'clear and definite' here is that Congress did not proscribe concealment, half-truths or omissions in § 1014." *United States v. Kurlemann*, 736 F.3d 439, 448 (6th Cir. 2013).

III. The government errs in minimizing the importance of the circuit conflict.

This case would have come out differently if Patrick Thompson lived in Detroit or Cleveland rather than Chicago. In *Kurlemann*, the Sixth Circuit methodically demolished the government's argument that "false" means something other than "false." The Sixth Circuit concluded that "§ 1014 covers 'false statements.' It does not cover misleading statements, false pretenses, schemes, trickery, fraud or other types of deception." *Id.* at 445.

The government grudgingly concedes that *Kurlemann* "is in at least some tension" with the decision below, BIO 12, which is a bit like saying that Voldemort is in some tension with Harry Potter. The two cases are diametrically opposed. Both courts below acknowledged the conflict. The Seventh Circuit explained that it could not follow *Kurlemann* because it

was bound to follow circuit precedent instead. Pet. App. 11a. The District Court said the same thing. *Id.* at 52a.

The government was more candid in its briefing below. "To be sure," the government conceded, after describing the Seventh Circuit's caselaw, "the Sixth Circuit has held otherwise." U.S. 7th Cir. Br. at 39. Rather than sweeping the conflict under the carpet, the government argued that "*Kurlemann*'s reasoning … is not sound." *Id.* at 40.

The government also errs in denying the conflict with the First and Eleventh Circuits. BIO 11-12. In *United States v. Attick*, 649 F.2d 61, 63 (1st Cir. 1981), the defendant's statement was that no "event of default" had occurred. The defendant argued that this statement was literally true because loan proceeds had been distributed not to him (which would have been an event of default) but to a shell corporation of which he was the sole shareholder. The First Circuit recognized that the defendant "correctly points out that one cannot be convicted under 18 U.S.C. s 1014 if the statement claimed to be false is, in fact, literally true." *Id.* But the court concluded that the defendant's statement was literally false, because under state law, a payment to the shell corporation constituted a payment to the defendant. *Id.* at 64. If state law had been different, the defendant's statement would have been misleading but literally true, so he could not have been convicted.[1] Our case would have come out differently in the First Circuit.

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[1] The government errs in claiming, BIO 12, that the First Circuit departed from this view in *United States v. Concemi*, 957 F.2d 942 (1st Cir. 1992). In *Concemi*, the defendant waived his challenge to the sufficiency of the evidence, so the First Circuit

Our case would also have come out differently in the Eleventh Circuit. In *United States v. Thorn*, 17 F.3d 325, 327 (11th Cir. 1994), the defendant's statement was a title insurance policy that contained no falsehoods but was misleading because it failed to disclose an outstanding mortgage. The Eleventh Circuit held that this misleading but literally true statement could not support a conviction under section 1014. *Id.* at 328. The court disagreed with "the government's theory that a false statement in violation of § 1014 may be implied from the circumstances in which a correct statement is made." *Id.*

Finally, the government mistakenly supposes that "it is unclear how practically meaningful" this circuit split will be. BIO 13. It was clear enough to the District Court in our case, which recognized: "Admittedly, if *Kurlemann* were the law in the Seventh Circuit, Thompson's argument would have more traction." Pet. App. 52a. It was clear to the government last year, when it implicitly conceded in the Seventh Circuit that it would lose this case if the court followed *Kurlemann*. U.S. 7th Cir. Br. at 39-40.

The disagreement among the circuits has enormous practical consequences for defendants. In most prosecutions brought under section 1014, the government has the alternative of proceeding under 18 U.S.C. § 1001 instead. Unlike section 1014, section 1001 prohibits misleading statements along with false ones. § 1001(a)(1). There is a world of difference in outcomes under the two statutes. The maximum

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applied a deferential standard of review—"clear and gross injustice"—rather than reviewing the issue de novo. *Id.* at 950-51. *Concemi* does not cite *Attick*, so the court evidently did not think it was departing from *Attick*.

sentence under section 1001 is five years, not thirty years. And while probation is an available sentence for violations of section 1001, it is not available for violations of section 1014. *See* 18 U.S.C. §§ 3561(a)(1) (probation unavailable for class B felonies), 3559(a)(2) (defining offenses with maximum terms of imprisonment of twenty-five years or more as class B felonies). By charging cases under section 1014 that really belong under section 1001, the government is forcing some defendants to serve much longer prison sentences than they should and consigning other defendants to incarceration when probation should have been an available option.

This case involves a clear circuit split with significant real-world consequences. The Court should decide which interpretation of section 1014 is the right one.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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