No. 11-959

In the Supreme Court of the United States

CORY LEDEAL KING, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Under the Safe Drinking Water Act (SDWA), 42 U.S.C. 300f *et seq.*, a person generally may not inject fluids underground without a permit. See 42 U.S.C. 300h(b) and (d)(1). Petitioner was convicted of willfully injecting fluids into wells without a permit, in violation of 42 U.S.C. 300h-2(b)(2), and with making a false statement concealing those injections, in violation of 18 U.S.C. 1001(a). The questions presented are:

1. Whether petitioner's concedely false statement about the injection wells to a state official investigating his injections was made "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States," 18 U.S.C. 1001(a).

2. Whether the provisions of the SDWA requiring permits for underground water injections exceed Congress's power under the Commerce Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 660 F.3d 1071. The district court's order denying petitioner's new trial motion (Pet. App. 20a-29a) is not published in the Federal Supplement but is available at 2009 WL 2848559. The district court's order denying petitioner's motion to dismiss the indictment (Pet. App. 30a-43a) is not published in the Federal Supplement but is available at 2009 WL 940600.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 2011. On December 15, 2011, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 2, 2012,

and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Idaho, petitioner was convicted on four counts of willfully injecting fluids into wells without a permit, in violation of 42 U.S.C. 300h-2, and one count of making a materially false statement in a matter within the jurisdiction of the United States Environmental Protection Agency (EPA), in violation of 18 U.S.C. 1001(a)(2). The district court sentenced him to three years of probation, a $5000 fine, and a $500 special assessment. The court of appeals affirmed. Pet. App. 1a-19a.

1. a. Congress enacted the Safe Drinking Water Act (SDWA or Act), 42 U.S.C. 300f *et seq.*, in order to "assure that water supply systems serving the public meet minimum national standards for protection of public health." H.R. Rep. No. 1185, 93d Cong., 2d Sess. 1 (1974) (*House Report*). As relevant here, the SDWA protects underground sources of drinking water from contamination through a joint federal-state regime. See 42 U.S.C. 300h *et seq.* Under that regime, a State first submits a proposed underground injection control program to the EPA. See 42 U.S.C. 300h(b), 300h-1(b) and (d); 40 C.F.R. 145.11(b). Once the EPA approves the program, the State becomes the primary enforcer of it but the federal government retains concurrent enforcement authority. See 42 U.S.C. 300h-2. Once the State's program has been approved, it is a federal felony to "willful[ly]" "violate[] any requirement of" that program. 42 U.S.C. 300h-2(b)(2).

To obtain EPA approval, a state program must prohibit all underground injections except those authorized by permit or by state rule. 42 U.S.C. 300h(b) and (d)(1); see 40 C.F.R. 144.11. The state program places the burden on a permit applicant to "satisfy the State that the underground injection will not endanger drinking water sources." 42 U.S.C. 300h(b)(1)(B); see 40 C.F.R. 144.12(a); see also Pet. App. 9a. This requirement applies to both actual and potential sources of drinking water. See 42 U.S.C. 300h(d)(2); 40 C.F.R. 144.3.

b. Idaho has had an EPA-approved underground injection control program since 1985. See 40 C.F.R. 147.650-.651; 50 Fed. Reg. 23,956 (June 7, 1985). Under that program, no "waste disposal and injection well"—an injection well more than 18 feet below the surface—can be used "unless a permit * * * has been issued" by the State. Idaho Code Ann. §§ 42-3903, 42-3902(19) (2003).[1] The state may issue a permit only if the applicant establishes that "drinking water sources" will not be "unreasonably affected." Idaho Admin. Code r. 37.03.03.010, 37.03.03.045, 37.03.03.050 (2006). Consistent with the SDWA, Idaho defines a "[d]rinking water source" to include both actual and potential drinking water sources. See Idaho Code Ann. § 42-3902(3) (2003); Idaho Admin. Code r. 37.03.03.010(17) (2006); see also 40 C.F.R. 144.3.

2. a. Petitioner was the manager of a large farming and cattle operation in southern Idaho called Double C Farms Partnership (Double C). Pet. App. 2a. The Dou-

[1] After the events at issue, Idaho revised the terminology of the state program by substituting the term "deep injection well" for "waste disposal and injection well." See 2011 Idaho Sess. Laws 287-288 (effective July 1, 2011). That amendment has no effect on the issues presented here.

ble C's facilities include about 11,500 acres of cropland irrigated by a system of wells and pivots (agricultural sprinklers) and a 25-acre cattle feedlot. *Ibid.*

The Double C did not have a state permit to inject fluids into any of its many wells. Pet. App. 6a.[2] In 1987, petitioner had applied to the State for a permit to inject "winter runoff from Willow Creek" (a creek running through Double C land) into a 500-foot deep well between the months of November and April. *Id.* at 2a. The State denied the application in November 2000. *Ibid.*

b. On May 23, 2005, John Klimes, a state agriculture department inspector, drove onto Double C property to conduct a routine waste inspection of the feedlot operation. Pet. App. 2a. As Klimes drove toward the feedlot, he noticed that the north side of the main waste pond for the feedlot had washed out and that wastewater was running from the pond and into a ditch. *Ibid.* He also noticed that a pipe on the west side of the pond was uncapped and that waste from the pipe was running into the ditch. *Id.* at 2a-3a.

Klimes was supposed to meet with the feedlot manager, but the meeting was rescheduled. Pet. App. 2a. As Klimes drove away from the feedlot, he was stopped by Double C employee Shaun Carson. *Id.* at 3a. Carson confirmed that the feedlot waste pond had ruptured and the wastewater was flowing into the ditch. *Ibid.* He also told Klimes that valves at two wells on the property had been reversed so that "dirty water" could be injected into the wells. *Ibid.* Carson urged Klimes to investigate

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[2] The petition does not dispute that the wells at issue in this case are ones for which an injection permit is required.

quickly because he thought the valves would be switched back by the end of the day. *Ibid.*

Klimes looked at the valves at the two wells. Pet. App. 3a. Just as Carson had said, the backflow valves at each well were installed in the wrong direction, allowing water to flow into (rather than out of) the wells. *Ibid.* Klimes also heard water "cascading" into one of the wells. *Ibid.* When Klimes returned to the wells later in the day, the valves had been switched back as Carson had predicted. *Ibid.*

c. On June 2, Klimes returned to the Double C for a scheduled meeting with petitioner. Pet. App. 3a. He was accompanied by his supervisor, John Chatburn. *Ibid.* At the meeting, Chatburn confronted petitioner about whether he had been injecting wastewater into his wells. *Id.* at 3a-4a. Petitioner denied the allegation. *Id.* at 4a. Chatburn asked petitioner if they could take samples from his wells, and petitioner responded that the wells had not yet been turned on. *Ibid.* (That was untrue; Klimes had observed that the wells were on during his May 23 visit. *Ibid.*)

Klimes and Chatburn then went to one of the wells (well five) without petitioner. Pet. App. 4a. They noticed that a valve that was ordinarily covered with dirt was uncovered, and they heard water "running back down the well." *Ibid.* The ground around the well was vibrating, and the vent pipe at the back of the well was blowing air. *Ibid.* Later that day, Klimes returned to the well and saw petitioner and Jose Guerrero nearby. *Ibid.* The three men went to the well, and Klimes saw that the valve had been re-covered. *Ibid.* Klimes asked petitioner what the valve did; petitioner told Klimes that the valve led to a nearby irrigation pivot. *Ibid.* That statement was false. As the government established at

trial, the valve led to a well, and it had been used to inject water into the well in the spring of 2005. Supp. C.A. E.R. 259. When the valve was installed in 2000, Guerrero had asked petitioner what to say if someone asked about it, and petitioner told him he should lie and say that it went to the neighboring pivot. *Id.* at 258-259.

Klimes then contacted an EPA investigator to coordinate further investigation of the illegal injections. C.A. E.R. 146-149.

3. A grand jury in the United States District Court for the District of Idaho charged petitioner with four counts of willfully injecting water into injection wells without a permit, in violation of 42 U.S.C. 300h-2, and one count of willfully making a materially false statement in a matter within the jurisdiction of the EPA, in violation of 18 U.S.C. 1001(a)(2). Pet. App. 4a-5a; C.A. E.R. 289-299 (first superseding indictment). The false-statement charge was based on petitioner's statement to Klimes that the valve at well five was feeding an irrigation pivot. Pet. App. 4a-5a; C.A. E.R. 299.

Before trial, petitioner moved to dismiss the SDWA counts on the ground that the SDWA exceeds Congress's power under the Commerce Clause. Pet. App. 10a, 31a. The district court disagreed and denied the motion. *Id.* at 30a-43a. The court explained that petitioner brought a "facial challenge" to the SDWA, which required him to establish that there was "'no set of circumstances'" in which it could be constitutional. *Id.* at 37a (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)). The court determined that the SDWA permissibly regulates activities that substantially affect interstate commerce because "underground drinking water supplies and illnesses caused by contaminants do not abide by state lines," and the "degradation of under-

ground drinking water supplies" has an "obvious" and "substantial impact on the national economy." *Id.* at 37a, 40a. The court relied on the "extensive findings" about the importance of drinking water to the national economy contained in the SDWA's House Report. *Id.* at 40a.

At the time the SDWA was enacted, the court explained, underground injection disposal was viewed as economically attractive because it was rarely regulated, and as a result, such injections threatened to pollute the national drinking water supply, leading to "waterborne disease outbreaks [that] would * * * inhibit interstate travel and tourism, reduce economic productivity, and spread across state lines." Pet. App. 38a-40a. The court added that here, "both the actor (a commercial farmer) and his alleged conduct (the disposal of the farm's waste) have a plainly economic character": "[Petitioner] runs a commercial farm," and he "inject[ed] fluids from a pond containing waste from the farm's cattle feedlot operation" rather than use a more costly but safer and legal form of disposal. *Id.* at 39a.

A jury found petitioner guilty on all five counts, and the district court sentenced him to three years of probation, a $5000 fine, and $500 special assessment. Pet. App. 5a; C.A. E.R. 1-5.

Petitioner filed a motion for a new trial. As relevant here, he contended that the evidence was insufficient to establish that his false statement concerned a "matter within the jurisdiction of the" EPA under 18 U.S.C. 1001. Pet. App. 23a-24a. The district court rejected that argument, finding that there was sufficient evidence for the jury to conclude that petitioner's "false response to Klimes's question about the bypass valve was directly

related to the EPA's retained enforcement authority" under the SDWA. *Id.* at 25a.

4. The court of appeals affirmed. Pet. App. 1a-19a.

a. The court rejected petitioner's argument that the underground injection provisions of the SDWA exceed Congress's Commerce Clause authority. Pet. App. 10a-15a. The court explained that the SDWA was enacted to provide a nationwide solution for the problem of "increased use of underground injections to dispose of waste," which between 1961 and 1970 had led to "130 outbreaks of disease or poisoning * * *, causing over 46,000 illnesses and 20 deaths." *Id.* at 10a-11a. Because "'water in the hydrologic cycle does not respect State borders,'" Congress concluded that "an effective regulatory scheme protecting drinking water would need to be national in scope." *Id.* at 11a (quoting *House Report* 8).

The court determined that the SDWA's underground injection provisions "regulate[] activities that have a substantial relation to interstate commerce." Pet. App. 13a. The court explained that "[d]rinking water is an economic commodity": most urban residents pay for tap water; many rural residents pay for wells; and some pay for bottled water, "which is often transported across state lines." *Ibid.* The court further explained that "[a]ny regulatory scheme that affects the safety of a source, including an underground source, of drinking water inescapably has an effect on the supply of drinking water, and therefore on interstate commerce." *Ibid.* In particular, the court noted that unregulated underground injections "have disastrous consequences for drinking water" and for "human health." *Id.* at 14a. And the court explained that Congress rationally addressed this problem by "prevent[ing] pollution of underground aquifers in the first place," rather than

"clean[ing] up polluted aquifers after the fact." *Id.* at 12a; see *id.* at 14a.

b. The court also rejected petitioner's argument that his false statement was not one in a "matter within the jurisdiction of the executive * * * branch" of the United States. Pet. App. 15a-17a (quoting 18 U.S.C. 1001(a)(2)). That language, the court explained, encompasses "all matters confided to the authority of an agency or department." *Id.* at 16a (quoting *United States* v. *Rodgers*, 466 U.S. 475, 479 (1984)). The court determined that "Section 1001(a)(2) jurisdiction extends wherever the federal government 'has the power to exercise authority,'" and a statement "need not be made to a federal agent to support a conviction" under it. *Ibid.* (quoting *Rodgers*, 466 U.S. at 479).

The court agreed with petitioner that Section 1001(a)(2) "cannot be read so broadly as to incorporate any false statement made to anyone regarding matters pertinent to the federal government." Pet. App. 16a. Here, however, the court emphasized several connections that brought petitioner's false statement within the coverage of Section 1001: the statement concealed "a federal crime under the SDWA"; petitioner made the statement to a state official during an investigation of the underground injections underlying the federal crime; the state official had authority to investigate those injections; and petitioner knew that the official was investigating those injections. *Id.* at 17a. Accordingly, the court held, "this case does not exceed the outer boundaries of the statute." *Id.* at 16a.

ARGUMENT

1. Petitioner renews his contention (Pet. 13-28) that his false statement about his underground injections

was not one made "in any matter within the jurisdiction of the executive * * * branch of the Government of the United States." 18 U.S.C. 1001(a)(2). The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review of petitioner's factbound claim is therefore unwarranted.

a. The court of appeals correctly concluded that petitioner's false statement was in a "matter within the jurisdiction of the executive * * * branch" of the United States. As this Court has explained, the "most natural" reading of the "matter within the jurisdiction" language is that it "covers all matters confided to the authority of an agency or department." *United States* v. *Rodgers*, 466 U.S. 475, 477, 479 (1984). The "primary purpose" of this language "is to identify the factor that makes the false statement an appropriate subject for federal concern." *United States* v. *Yermian*, 468 U.S. 63, 68 (1984). The Court has "stressed that the term 'jurisdiction' should not be given a narrow or technical meaning for purposes of § 1001." *Rodgers*, 466 U.S. at 480 (citation and internal quotation marks omitted). Instead, "jurisdiction" is construed broadly to "protect[] the integrity of official inquiries." *Bryson* v. *United States*, 396 U.S. 64, 70 (1969); see Pet. App. 16a.

As petitioner himself recognizes (Pet. 15), a false statement need not be made directly to the federal government to sustain a conviction under Section 1001. See *Yermian*, 468 U.S. at 65-66 (upholding Section 1001 conviction based on a false statement an individual made to his employer, a defense contractor, which ultimately was

transmitted to the federal government).[3] That is because Section 1001 focuses on the relationship between the false statement and federal authority, not the person to whom it was made. As this Court has explained, the "matter within the jurisdiction" language serves to "limit the reach of the false-statements statute to matters of federal interest." *Id.* at 74.

Petitioner made a materially false statement in a "matter within the jurisdiction of" the EPA when he told state inspector Klimes that the valve at well five led to an irrigation pivot. The false statement concerned whether petitioner was allowing water to flow down into an injection well. Pet. App. 4a-5a; see Supp. C.A. E.R. 259. Petitioner said that the valve was connected to a certain pivot in order to conceal the fact that he was injecting large quantities of water underground. See Supp. C.A. E.R. 259, 271-272. Those underground injections violated the SDWA. See Pet. App. 17a; see also 42 U.S.C. 300h-2(b)(2) and (d). The EPA is charged with administering the SDWA, see 42 U.S.C. 300g-1(b)(1), and it has concurrent enforcement authority under it,

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[3] See, *e.g.*, *United States* v. *Jackson*, 608 F.3d 193, 197-198 (4th Cir. 2010) (upholding conviction for false statements made to private employer), cert. denied, 131 S. Ct. 999 (2011); *United States* v. *Taylor*, 582 F.3d 558, 562-564 (5th Cir. 2009) (false statements made to state agency), cert. denied, 130 S. Ct. 1116 (2010); *United States* v. *Shafer*, 199 F.3d 826, 829 (6th Cir. 1999) (same); *United States* v. *Davis*, 8 F.3d 923, 929 (2d Cir. 1993) (same); *United States* v. *Murphy*, 935 F.2d 899, 900 n.1 (7th Cir. 1991) (same); *United States* v. *St. Michael's Credit Union*, 880 F.2d 579, 591-592 (1st Cir. 1989) (same); *United States* v. *Frazier*, 53 F.3d 1105, 1115-1116 (10th Cir. 1995) (false statements made to nonprofit organization); *United States* v. *Candella*, 487 F.2d 1223, 1225-1226 (2d Cir. 1973) (false statements made to municipality), cert. denied, 415 U.S. 977 (1974); see also *United States* v. *Montemayor*, 712 F.2d 104, 108 (5th Cir. 1983) (collecting cases).

see 42 U.S.C. 300h-2. Petitioner's statement to a state official authorized to inspect and examine his wells and injection procedures was therefore in a matter within the EPA's jurisdiction.

As the court of appeals explained, a "close[] connection" linked petitioner's false statement and the EPA's regulation of drinking water under the SDWA. Petitioner knew that Klimes was investigating his underground injections; the State and the EPA share enforcement authority over such injections; and petitioner "lied to Klimes * * * in order to defeat the investigation." Pet. App. 17a. Klimes contacted an EPA investigator within a week of petitioner's false statement to coordinate investigation of the illegal injections. C.A. E.R. 146-149. If petitioner had succeeded in misleading Klimes, it would have interfered with the integrity of an official inquiry and with the EPA's authorized functions. See *Bryson*, 396 U.S. at 70 (Section 1001 is designed to protect "the integrity of official inquiries").

b. No disagreement exists among the courts of appeals on the question presented. In addition to the court below, the two other courts of appeals that have addressed this issue also have concluded that a false statement concealing SDWA violations made to a state official is in a "matter within the jurisdiction" of the federal government. *United States* v. *White*, 270 F.3d 356 (6th Cir. 2001) (false statements made to Kentucky Division of Water); *United States* v. *Wright*, 988 F.2d 1036 (10th Cir. 1993) (false statement made to a county health department). Those courts explained that because the SDWA creates a cooperative federal-state scheme with concurrent enforcement authority, a false statement concealing SDWA violations made to a state official is in

a matter within the authority of the EPA. *White*, 270 F.3d at 363-364; *Wright*, 988 F.2d at 1038-1039.

Petitioner does not mention the Sixth Circuit's decision in *Wright*. He does attempt to distinguish the Tenth Circuit's decision in *White* on the ground that the defendant there made a false statement to state *water* department officials, and here petitioner made the false statement to a state *agriculture* department official. Pet. 15-16. But *White* did not rest on such a distinction, nor should that distinction matter. The key question is whether the false statement is in a matter within the EPA's jurisdiction, and underground injections of water are such a matter, regardless of whether state water or agriculture officials investigate such injections. Contrary to petitioner's contention (Pet. 15), *White* did not hold that a statement to a state official only concerns a matter within the jurisdiction of the United States when "the relationship between that person and the United States was sufficiently close that the person could be deemed to be standing in the shoes of the United States." Rather, *White* repeated this Court's recognition that Section 1001 "covers all matters confided to the authority of an agency or department," 270 F.3d at 363 (quoting *Rodgers*, 466 U.S. at 479), and it focused on whether the false statement related to "an official function of the EPA," such as "ensuring safe drinking water," *id.* at 364.

In any event, petitioner is wrong to suggest (Pet. 16) that the state agriculture department played no role in ensuring the safety of the drinking water supply. State law authorizes the Idaho Department of Agriculture "to regulate beef cattle animal feeding operations to protect state natural resources, including surface water and ground water" and "to exercise any other authorities

delegated by the director of the department of environmental quality regarding the protection of ground water." Idaho Code Ann. § 22-4903(1)-(3) (2004); see *id.* § 22-4902(2) (2001). The state agriculture department is required to coordinate with the EPA to fulfill these objectives. See *id.* § 22-4902(3). And although the Idaho Department of Water Resources enforces the State's federally approved underground injection control program, Idaho law requires it to coordinate with the Idaho Department of Environmental Quality and the Idaho Department of Agriculture to protect ground water sources. See, *e.g.*, *id.* §§ 39-120(2), 39-126 (2002). And, of course, state officials here did report petitioner's illegal injections of water to the EPA.

Petitioner contends (Pet. 14-22) that the decision below conflicts with *United States* v. *Ford*, 639 F.3d 718 (6th Cir. 2011). He is mistaken. *Ford* addressed whether a state senator violated 18 U.S.C. 1001 when he failed to disclose that he had consulted for private healthcare businesses that contracted with a Tennessee state healthcare organization. 639 F.3d at 719-720. The court of appeals stated that the "subject matter of [Ford's] non-disclosures * * * was federal" because the state healthcare organization received federal funding and exists because of a federal waiver from Medicaid. *Id.* at 720. But the court found that Ford's nondisclosures did not concern a "matter within the jurisdiction" of the federal government because he was only required to disclose the information to state entities, the state election registry had the authority to take action, and "no federal entity had similar authority" to act on Ford's failure to disclose the information. *Id.* at 721.

The *Ford* court articulated and applied the same legal rules as the court of appeals in this case, principles

taken directly from this Court's decisions. Like the court below, the *Ford* court recognized that the word "jurisdiction" in the phrase "matter within the jurisdiction * * * of the United States" should be construed broadly, not "given a narrow or technical meaning." 639 F.3d at 720 (indirectly quoting *Bryson*, 396 U.S. at 70); see Pet. App. 16a. Both courts explained that "[t]he federal government has jurisdiction 'when it has the power to exercise authority in a particular situation.' " *Ford*, 639 F.3d at 720 (indirectly quoting *Rodgers*, 466 U.S. at 479); see Pet. App. 16a ("Section 1001(a)(2) jurisdiction extends wherever the federal government 'has the power to exercise authority.'" (quoting *Rodgers*, 466 U.S. at 479)). And both courts focused on whether the statement at issue was sufficiently connected to the federal agency's functions. Compare *Ford*, 639 F.3d at 721 ("To establish jurisdiction, the information received must be directly related to an authorized function of the federal agency." (citation omitted)), with Pet. App. 16a ("Jurisdiction requires a direct relationship between the authorized functions of an agency and the false statement." (citation and internal quotation marks omitted)).

Petitioner errs in suggesting (Pet. 19-20) that "[t]he Ninth Circuit held that § 1001's 'matter within the jurisdiction' requirement is met if the subject matter of the statement/omission is federal," while the Sixth Circuit found that fact "irrelevant." The decision below was not based only on the subject matter of petitioner's statement. To the contrary, the court said it would not read the statute to "incorporate any false statement made to anyone regarding matters pertinent to the federal government." Pet. App. 16a. Rather, the court cited several factors supporting its finding of a "close[] connection" between the false statement and the federal gov-

ernment, including that the state agency was investigating injecting water into deep wells without a permit, which is a federal crime, and that petitioner "lied to Klimes * * * in order to defeat the investigation." *Id.* at 17a. At the same time, the *Ford* court did not say that the federal nature of the false statement's subject matter was "irrelevant"; rather, like the court below, it focused on whether the statement concerned a situation where the federal government "has the power to exercise [its] authority." 639 F.3d at 720 (indirectly quoting *Rodgers*, 466 U.S. at 479).

The *Ford* court reached a different result than the court in this case because of that case's materially different facts. The *Ford* court concluded that "no federal entity" had enforcement authority over Ford's nondisclosures to the state senate and election financing entity involved in that case, 639 F.3d at 721, while the court here explained that the statement pertained to a willful unpermitted injection, which "is a federal crime under the SDWA"; the EPA has concurrent enforcement authority under the SDWA; and the state investigator was investigating facts underlying a federal offense, Pet. App. 16a-17a. Nothing in *Ford* suggests that the Sixth Circuit would decide this case differently than the Ninth Circuit. Accordingly, further review to resolve the alleged conflict between the two fact-specific decisions is not warranted.

c. Petitioner is likewise mistaken in contending (Pet. 22-28) that the decision below is inconsistent with this Court's decision in *United States* v. *Rodgers*, *supra*. The court below used the same legal test set out in *Rodgers*: whether a false statement is in a "matter within the jurisdiction" of a federal department or agency depends on whether the federal entity "has the

power to exercise authority in a particular situation." 466 U.S. at 479; see Pet. App. 16a. As petitioner acknowledges (Pet. 23-24), the court below relied upon this Court's precedents to state the governing legal standard; it did not fashion its own legal test.

Focusing on the word "matter," petitioner contends (Pet. 22-23) that the decision below interpreted "matter" to mean "subject matter," while *Rodgers* interpreted the word "matter" to mean "a proceeding of some sort (such as an investigation)." Neither part of that argument is correct. As explained above, the court of appeals did not hold that a statement is in a "matter within the jurisdiction" of a federal agency any time it concerns a subject matter in which a federal agency has an interest. See pp. 15-16, *supra*. Instead, the court relied on the cooperative state-federal regulation of underground water injections; the state investigation of petitioner's illegal injections; the fact that petitioner's false statement was made "in order to defeat the investigation"; and the EPA's concurrent enforcement authority in this area. Pet. App. 16a-17a.

Further, the *Rodgers* Court did not interpret the word "matter," much less hold that it is limited to "a proceeding of some sort." Pet. 23. All the Court said on this point was that "Section 1001 expressly embraces false statements made 'in *any* matter within the jurisdiction of *any* department or agency of the United States'" and "[a] criminal investigation surely falls within the meaning of 'any matter.'" *Rodgers*, 466 U.S. at 479. To the extent the Court addressed the issue, it suggested that "matter" is a broad term when it stated that "[t]he only possible verbal vehicle for narrowing the sweeping language Congress enacted is the word 'jurisdiction.'" *Ibid.*

Petitioner fails to identify any court of appeals that has adopted his proposed interpretation of "matter," and that factor alone counsels against further review.[4]

2. Petitioner contends (Pet. 29-36) that the underground injection provisions of the SDWA (primarily 42 U.S.C. 300h-2(b)) exceed Congress's authority under the Commerce Clause. The court of appeals' decision is correct, and further review is unwarranted.

a. Petitioner does not identify any disagreement in the courts of appeals on the second question presented. Before the decision below, no court of appeals had considered whether the underground injection provisions of the SDWA exceed Congress's authority under Article I. Nor does petitioner contend that the decision below conflicts with a decision of this Court. Review of the issue should be denied for that reason alone.[5]

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[4] Contrary to petitioner's contention (Pet. 28), the decision below is not inconsistent with *United States* v. *Bramblett*, 348 U.S. 503 (1955), overruled by *Hubbard* v. *United States*, 514 U.S. 695, 702 (1995). Petitioner reads (Pet. 28) *Bramblett* to establish that "§ 1001 applies only to those falsifications made to an organ of the federal government." But petitioner himself acknowledges (Pet. 15) that false statements made to state officials may be prosecuted under 18 U.S.C. 1001. See also pp. 10-11, *supra*. And in any event, *Bramblett* (which has been overruled) concerned whether statements to legislative and judicial officials, as opposed to executive officials, may be prosecuted under Section 1001, 348 U.S. at 504-505; it did not address whether only statements to federal officials qualify.

[5] Every court of appeals to consider Commerce Clause challenges to other provisions of the SDWA has rejected those challenges. See *Nebraska* v. *EPA*, 331 F.3d 995, 998-999 (D.C. Cir. 2003) (rejecting facial challenge to SDWA provisions regulating permissible contaminants in drinking water); see also *ACORN* v. *Edwards*, 81 F.3d 1387, 1392-1395 (5th Cir. 1996) (acknowledging Congress's authority to regulate lead-contaminated drinking-water coolers under Commerce Clause but ruling that a provision requiring States to adopt a specified regulat-

b. The court of appeals correctly rejected petitioner's challenge to the underground injection provisions of the SDWA. As the court explained, "the SDWA, including its permitting process under a state [underground injection control] program, regulates activities that have a substantial relation to interstate commerce." Pet. App. 13a.

The Constitution grants Congress the power "[t]o regulate commerce * * * among the several States." Art. I, § 8, Cl. 3. In addition to regulating the "channels of interstate commerce" and "the instrumentalities of interstate commerce, and persons or things in interstate commerce," Congress may "regulate activities that substantially affect interstate commerce." *Gonzales* v. *Raich*, 545 U.S. 1, 16-17 (2005). In reviewing such a determination, the Court's "task * * * is a modest one." *Id*. at 22. The Court "need not determine whether [the regulated] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Ibid.* (citation omitted). Congress's Commerce Clause authority is supplemented by the Necessary and Proper Clause, which "makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.' " *United States* v. *Comstock*, 130 S. Ct. 1949, 1956 (2010) (quoting *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 413, 418 (1819)).

Congress had the authority under the Commerce Clause and the Necessary and Proper Clause to enact

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ory program violates the Tenth Amendment), cert. denied, 521 U.S. 1129 (1997).

the SDWA and, in particular, 42 U.S.C. 300h-2(b). Section 300h-2(b) regulates a class of activities—underground injections of fluids—that has a substantial effect on interstate commerce. Pet. App. 39a. The SDWA's legislative record contains detailed findings, in which Congress observed that underground injections introduce contaminants into drinking water, thereby endangering the public health and implicating various federal programs. *House Report* 1-54. As Congress determined, this threat to the public health substantially affects interstate commerce because it threatens the workforce, reducing economic productivity. *Id.* at 8-9. This Court has recognized that Congress has authority under the Commerce Clause to regulate "activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981).

Moreover, drinking water is "an economic commodity." Pet. App. 13a. This Court has recognized that ground water is "an article of commerce," and threats to ground water are "a national problem" within Congress's authority. *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 954 (1982). As the court of appeals noted, people pay for drinking water, whether it comes from their taps, individual wells, or in bottles, and that water comes from a variety of sources, often requiring transportation across state lines. Pet. App. 13a. Not only is drinking water an article of commerce, but the threats to its safety result from commerce. As Congress noted, nationwide regulation was necessary because commercial enterprises were increasingly using well injections to dispose of contaminants because it was less

costly than other disposal methods. *House Report* 6, 8, 29; see Pet. App. 10a-11a.

Further, Congress found that underground injections had increasingly been used for the purpose of waste disposal, and waste is both itself a commodity in interstate commerce and a direct result of commercial activity. See *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 389 (1994); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Res.*, 504 U.S. 353, 359 (1992); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 618, 621-623 (1978). The House Report observed that "business[es] engaged in or enterprises affecting interstate commerce"—particularly agricultural enterprises—generate "contaminants which endanger the public health when present in drinking water." *House Report* 6, 8. It noted that, without the protections of the SDWA, companies would continue to dispose of wastes through underground injections, thereby endangering the national drinking water supply. *Id.* at 6, 8, 29. Congress's decision to regulate underground injections is rational in light of these effects on the interstate market for waste and waste disposal.

For all of those reasons, the court of appeals correctly concluded that regulating underground injections to protect drinking water sources "inescapably has an effect on the supply of drinking water, and therefore on interstate commerce." Pet. App. 13a. Congress rationally concluded that national regulation was necessary to protect these drinking water sources, because existing federal and state laws had been inadequate to ensure the safety of drinking water, and sources of drinking water were not confined by state boundaries. *House Report* 2-8; see *Hodel*, 452 U.S. at 282. And Congress rationally "concluded that the most effective way to en-

sure clean drinking water was to prevent pollution of underground aquifers in the first place, rather than clean up polluted aquifers after the fact." Pet. App. 12a.

c. Petitioner contends that, even if Congress has authority to regulate underground injections, Congress lacks authority to criminalize "injection of uncontaminated, intrastate water into irrigation wells unconnected to sources of drinking water." Pet. 12; see also Pet. 29-36. As an initial matter, the record does not support petitioner's assertion (Pet. 7, 30-31) that he injected only uncontaminated water into a wholly intrastate aquifer that was unconnected to actual or potential sources of drinking water. Petitioner did not establish those facts before the district court, and because the charged offense did not require proof of those facts, the government did not prove them at trial.[6] In any event, petitioner's particular conduct is not determinative, because the district court determined that petitioner brought a facial challenge to the underground injection provisions of the SDWA, not a challenge confined to his own conduct. See Pet. App. 37a.

Further, Congress may permissibly regulate contamination of intrastate drinking water sources to protect the national drinking water supply. This Court has rec-

[6] Petitioner is wrong to assert (Pet. 3) that the district court "issued a specific finding that the injected water was not contaminated." At sentencing, the government sought a sentencing enhancement that required it to prove contamination. The district court concluded that the government had failed to establish contamination because the sample it took was collected four weeks after the last proven injection. C.A. E.R. 14-15. But the court made clear that it "did not make a determination that the defendant was innocent of an allegation that there may have been manure or other substances like that injected into the aquifer." Supp. C.A. E.R. 308.

ognized that Congress may "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Raich*, 545 U.S. at 17. And "[w]hen Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Ibid.* (citation and internal quotation marks omitted). Here, as in *Raich* and *Wickard* v. *Filburn*, 317 U.S. 111 (1942), "Congress had a rational basis for believing that, when viewed in the aggregate," failing to regulate some sources of underground drinking water supply "would have a substantial influence on price and market conditions" for drinking water. 545 U.S. at 19. And Congress had a rational basis for adopting its "cautious 'preventive' approach requir[ing] permit applicants to show that their injections will not harm underground sources of drinking water." Pet. App. 14a.

Petitioner contends (Pet. 33) that Congress should have exempted certain classes of injections. But Congress determined that such exceptions would "undermine the orderly enforcement of the entire regulatory scheme," *Raich*, 545 U.S. at 28, and that decision was rational, particularly because it is exceedingly difficult to determine the exact boundaries of underground water sources and because "water in the hydrologic cycle does not respect State borders," Pet. App. 11a (quoting *House Report* 8). This Court has reiterated that courts have no power to excise individual applications of a "concededly valid statutory scheme," *Raich*, 545 U.S. at 22-23, and such action would be particularly inappropriate here, where petitioner brought a facial challenge to the statute, see Pet. App. 37a. And contrary to petitioner's contention (Pet. 33-35), the fact that Congress excluded certain underground injections from regulation

under the SDWA does not undermine its Commerce Clause authority to act in this area. Congress is only required to have a "rational basis" for concluding that the regulated activities substantially affect interstate commerce, see *Raich*, 545 U.S. at 22, which it plainly does here.

The facts of this case confirm Congress's conclusion that unpermitted underground injections substantially affect interstate commerce. Petitioner made illegal injections in his role as manager of a commercial farming operation. Pet. App. 39a. This commercial farm included approximately 11,500 acres of cropland irrigated by a system of wells, and petitioner used some of those wells to commit the unpermitted injections at issue. *Id.* at 2a. As the district court noted (*id.* at 39a), both the actor (a commercial farmer) and his alleged conduct (the disposal of excess fluids on the farm) have a plainly economic character.

d. Petitioner argues (Pet. 36) that this Court should hold the petition in this case pending its decision in *Department of Health and Human Services* v. *Florida*, No. 11-398 (argued Mar. 26-27, 2012). That case addresses whether the minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, is a valid exercise of Congress's powers under Article I of the Constitution. Petitioner has pointed to no similarity between these two cases that justifies holding the petition here, other than the fact that both cases involve statutes Congress enacted using its Commerce Clause (and Necessary and Proper Clause) authority.

The respondents in *HHS* v. *Florida* contend that the Affordable Care Act's minimum coverage provision, which requires non-exempted federal income taxpayers

who fail to maintain a minimum level of health insurance coverage to pay a tax penalty, is invalid because it "compel[s] individuals to enter into commerce" rather than "regulat[ing] existing commercial intercourse." State Resp. Br. at 11, *HHS* v. *Florida*, *supra*; see Private Resp. Br. at 7-10, *HHS* v. *Florida*, *supra.* The government disagrees with that characterization because the uninsured as a class participate in the market for health care services and thus are engaged in economic activity; the Affordable Care Act regulates the manner of paying for those services. But for present purposes, the point is that the respondents' argument in *HHS* v. *Florida* is fundamentally different from petitioner's argument here. Petitioner does not contend that the SDWA requires him to participate in economic activity; indeed, it is undisputed that he already was engaging in economic activity when he made underground injections in his role as manager of a commercial enterprise. Instead, petitioner's argument is that Congress cannot regulate some intrastate underground injections to ensure a safe drinking water supply nationwide. Accordingly, the outcome of *HHS* v. *Florida* has no reasonable likelihood of affecting the outcome of this case, and this case therefore should not be held pending the decision in *HHS* v. *Florida.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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