Nos. 18-442, 18-601, and 18-606

In the Supreme Court of the United States

JESSE R. BENTON, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN FREDERICK TATE, AKA JOHN M. TATE, PETITIONER

v.

UNITED STATES OF AMERICA

DIMITRIOS N. KESARI, AKA DIMITRI KESARI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether campaign expenditure reports that must be filed with the Federal Election Commission are a "matter within the jurisdiction of" that agency under 18 U.S.C. 1519.

2. Whether the evidence was sufficient to establish that petitioners' false description of the purpose of campaign expenditures was material under 18 U.S.C. 1001.

3. Whether the evidence was sufficient to establish that the campaign expenditure reports were false.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-49a)[1] is reported at 890 F.3d 697.

JURISDICTION

The judgments of the court of appeals in Nos. 18-442 and 18-606 were entered on May 11, 2018. The judgment of the court of appeals in No. 18-601 was entered on May 15, 2018. The petitions for rehearing were denied on July 6, 2018 (Pet. App. 52a). The petition for a writ of certiorari in No. 18-442 was filed on October 4, 2018. On September 14, 2018, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari in No. 18-601 to and including November 5, 2018, and the petition was filed on that date. On September 26, 2018, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari in No. 18-606 to and including November 3, 2018, and the petition was filed on November 5, 2018 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following jury trials in the United States District Court for the Southern District of Iowa, petitioners were convicted of causing false campaign expenditure reports, in violation of the Federal Election Campaign Act of 1971 (FECA), 52 U.S.C. 30104(a)(1) and (b)(5)(A),[2]

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[1] The appendices in all three petitions for writs of certiorari contain materially the same information. Appendix citations throughout this brief refer to the petition appendix in *Benton* v. *United States*, No. 18-442.

[2] At the time of petitioners' crimes, the penalty provisions were located in Title 2; they have since been moved to Title 52 in an editorial recodification. See, *e.g.*, 52 U.S.C. 30109 (Supp. V 2017). Accordingly, all citations to Title 52 refer to Supp. V 2017.

30109(d)(1)(A)(i), and 18 U.S.C. 2; obstruction of justice, in violation of 18 U.S.C. 1519 and 18 U.S.C. 2; causing a false statement to a government agency, in violation of 18 U.S.C. 1001(a)(1) and 18 U.S.C. 2; and conspiracy to commit each of those crimes, in violation of 18 U.S.C. 371. Pet. App. 2a. The district court sentenced petitioners Jesse Benton and John Tate to two years of probation and petitioner Dimitrios Kesari to three months of imprisonment, to be followed by two years of supervised release. Benton Judgment 3; Tate Judgment 3; Kesari Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-49a.

1. Congress enacted the FECA, Pub. L. No. 92-225, 86 Stat. 3 (52 U.S.C. 30101 *et seq.*), to regulate campaigns for election to federal office. Among other disclosure provisions, the FECA requires campaigns to report "the name and address of each * * * person to whom an expenditure in an aggregate amount or value in excess of $200 within the calendar year is made * * * together with the date, amount, and purpose of such operating expenditure." 52 U.S.C. 30104(b)(5)(A). As this Court has recognized, "[w]ith the advent of the Internet, prompt disclosure of expenditures can provide * * * citizens with the information needed to hold * * * elected officials accountable for their positions and supporters." *Citizens United* v. *FEC*, 558 U.S. 310, 370 (2010). Such disclosure provides "transparency" that "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 371.

To enforce the FECA, Congress created the Federal Election Commission (FEC). Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443,

§ 208, 88 Stat. 1279-1287. The FEC's mission is to "protect the integrity of the federal campaign finance process by providing transparency and fairly enforcing and administering campaign finance laws." *Mission and History*, http://fec.gov/info/mission.shtml; see 52 U.S.C. 30106(b)(1). To carry out that mission, the FEC has promulgated regulations that require it to "make * * * available for public inspection * * * [r]eports of [campaign] receipts and expenditures." 11 C.F.R. 5.4(a)(1). In the modern era, the FEC does so by posting campaigns' receipt and expenditure reports on its website. See *Campaign Finance Data*, https://www.fec.gov/data/.

2. Petitioners managed former U.S. Representative Ron Paul's 2012 presidential campaign: Benton was the campaign chairman, Tate the campaign manager, and Kesari the deputy campaign manager. Pet. App. 3a. In the week before the Iowa caucuses, Kesari, with Benton and Tate's agreement, paid Iowa State Senator Kent Sorenson $25,000 to endorse Paul. *Id.* at 6a-8a.

When word of the bribe leaked to the press, Benton told the press that no payment had occurred. Pet. App. 8a. The next day, Tate oversaw a press release denying the payment and claiming that forthcoming campaign financial reports would prove that no payment had occurred. *Id.* at 8a-9a; see Gov't Exs. 51-54. Kesari told Sorenson to repeat the lie on live television the following day, which Sorenson did. Pet. App. 9a.

Petitioners then sought to ensure that the payment, which had started as a check from Kesari and then morphed into a wire transfer from the campaign, became untraceable. See Pet. App. 6a, 8a-10a. They settled on a scheme in which a friend of Kesari's brother would use his company, Interactive Communications Technology (ICT), to act as a middleman. *Id.* at 10a. Sorenson sent

Kesari invoices for "Consulting Services" and "Retainer to provide services" from Sorenson's company, Grassroots Strategy, Inc. (GSI). *Ibid.* Kesari then sent the invoices to ICT and asked it to bill the campaign "for video services." *Ibid.* ICT did so, sending an invoice charging the Paul campaign $38,125 for "Production Services." *Ibid.* The campaign then paid that invoice, along with six months of similar invoices, with the payments to Sorenson totaling $73,000. See *id.* at 10a-12a ($25,000 initial payment plus six monthly payments of $8000). The campaign recorded the payments in internal records, and later in the FEC reports, as payments to ICT for "audio/visual expenses." *Id.* at 12a-13a. Emails among petitioners established that each knew the details of the arrangement. See *id.* at 9a-13a.

3. A federal grand jury returned an indictment charging petitioners with causing false campaign expenditure reports, in violation of 52 U.S.C. 30104(a)(1) and (b)(5)(A), 30109(d)(1)(A)(i), and 18 U.S.C. 2; obstruction of justice, in violation of 18 U.S.C. 1519 and 18 U.S.C. 2; causing a false statement to a government agency, in violation of 18 U.S.C. 1001(a)(1) and 18 U.S.C. 2; and conspiracy to commit each of those crimes, in violation of 18 U.S.C. 371. Pet. App. 2a, 13a. Benton was also indicted on one count of making false statements to law enforcement, in violation of 18 U.S.C. 1001(a)(2) and 18 U.S.C. 2; and Kesari was also indicted on one count of obstruction of justice, in violation of 18 U.S.C. 1512(b)(3).[3] Pet. App. 13a-14a.

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[3] At an initial trial, a jury convicted Kesari on the Section 1519 charge, acquitted him on the obstruction charge, and hung on the other three charges. Pet. App. 14a. The jury also acquitted Benton on the charge of making false statements to law enforcement. *Ibid.* Kesari was retried on the three hung counts, and Tate and Benton

Before trial, petitioners moved to dismiss the indictment on the theory that their conduct was not illegal because FEC regulations permit the use of "umbrella vendors" to pay sub-vendors. D. Ct. Docs. 394 (Jan. 8, 2016); 396 (Jan. 8, 2016); 414 (Jan. 14, 2016); 468 (Mar. 4, 2016). The district court denied their motions. D. Ct. Doc. 513 (Apr. 20, 2016). The court determined that the regulations permitting umbrella vendors "ha[d] no bearing on the Government's allegations against [petitioners] here." *Id.* at 4. The court observed that the "Government *does not* argue that use of [umbrella vendors], in and of itself, violates the FECA." *Ibid.* Rather, the court explained, the "Government's theory in this case is that the payments at issue were not payments to ICT for audio/visual expenses, and instead, the payments to ICT were used to disguise the [campaign's] payments to Kent Sorenson (through his company, GSI) for his endorsement of Ron Paul." *Ibid.* Accordingly, the court determined that the "Government w[ould] not be permitted to argue that merely listing ICT as the recipient is sufficient to render the report false, but will be permitted to argue that combination of a payee used to disguise the true payee, together with a false statement of purpose, is sufficient to violate the statutes alleged in the indictment." *Ibid.* Consistent with that ruling, the court instructed the jury that "[t]he FEC reporting requirements do not prohibit a campaign from reporting payments to a vendor of services who in turn pays subvendors which are not separately listed in the report." D. Ct. Doc. 546, at 16 (May 3, 2016).

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were tried on the four counts listed above, after their initial indictments had been dismissed without prejudice on procedural grounds. *Ibid.*

At trial, FEC Branch Chief Michael Hartsock testified that the agency makes decisions about whether to publish expenditure reports online (and permit them to remain online) and that, in some cases, the contents of those reports can trigger further action by the agency. 4/26/16 Trial Tr. (Tr.) 545, 547. The trial evidence also included the expenditure forms themselves, which warn the filer that "[s]ubmission of false, erroneous, or incomplete information may [result in] the penalties of 2 U.S.C. § 437g," the prior location of the false-reporting offense now codified at 52 U.S.C. 30109. Gov't Ex. 145, at 1. Additionally, FEC guidance on filing the reports, which was likewise in evidence, instructed "filers [to] consider [whether] * * * 'a person not associated with the committee [could] easily discern why the disbursement was made.'" Tate Ex. 2, at 1; Tr. 556.

Petitioners advanced a joint defense that the campaign actually paid Sorenson for work he did, which petitioners contended could be fairly characterized as audio/visual: posing for photographs, making television appearances, sending fundraising emails, and recording robocalls. Pet. App. 12a. In support, they presented evidence that, prior to endorsing Paul, Sorenson had been paid $7500 a month by Michele Bachmann's campaign to lead campaign efforts in Iowa. *Id.* at 3a. Benton and Tate further argued that they lacked knowledge about the scheme to hide the payments to Sorenson for his endorsement. See *id.* at 22a-24a.

The jury found petitioners guilty on all four counts. Pet. App. 2a, 14a. The district court sentenced Benton and Tate to two years of probation and Kesari to three months of imprisonment, to be followed by two years of supervised release. Benton Judgment 3; Tate Judgment 3; Kesari Judgment 3-4.

4. The court of appeals affirmed. Pet. App. 1a-49a. As relevant here, the court found the evidence sufficient to show that the reports were false under the FECA, that they were "matter[s] within the jurisdiction of" the FEC under Section 1519, and that they were material under Section 1001. *Id.* at 17a-29a.

First, the court of appeals rejected petitioners' argument that, because the FECA "does not prohibit a campaign from paying a vendor, which in turn pays a subvendor, while reporting only the payment to the first vendor," their convictions were improper. Pet. App. 17a. The court explained that the campaign expenditure reports violated the FECA's reporting requirements not because they reported payments to an umbrella vendor but because they falsely stated the purpose of the payments to ICT, which were not for audio/visual work but instead for retransmission to Sorenson (minus a channeling fee) as compensation for Sorenson's endorsement. *Id.* at 18a-19a. The court rejected petitioners' argument that Sorenson had in fact been compensated for performing audio/visual work, noting that the government introduced evidence that Sorenson had instead been paid for his endorsement. *Id.* at 21a-22a.

Second, the court of appeals determined that the phrase "matter within the jurisdiction of" an agency in Section 1519, as in Section 1001, "'merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body.'" Pet. App. 27a (quoting *United States* v. *Rodgers*, 466 U.S. 475, 479 (1984)). Because the FECA "requires campaigns to submit [expenditure] reports" and requires the FEC to make them "available for public inspection," the court determined that such reports were

matters within the FEC's jurisdiction. *Ibid.* The court contrasted the circumstances here with the circumstances of decisions including *United States* v. *Facchini*, 874 F.2d 638 (9th Cir. 1989) (en banc), on which petitioners had relied, explaining that *Facchini* involved an agency authorization merely "to monitor the administrative structure of the state's unemployment benefits program," whereas the FEC reports here contained "'information received that was directly related to an authorized function' of the Commission." Pet. App. 27a (quoting *Facchini*, 874 F.2d at 642) (brackets omitted).

Third, the court of appeals found that the false statements here satisfied the undisputed standard for materiality, under which a statement is material if it "has a natural tendency to influence or was capable of influencing the government agency or official to which it was addressed." Pet. App. 28a (citation omitted); see *ibid.* (citing *United States* v. *Gaudin*, 515 U.S. 506, 509 (1995)). The court rejected petitioners' argument that "the false statements of purpose were not material because they did not influence the Commission in light of the fact that accurate reports would have been published, just as the false reports were." *Id.* at 29a. The court reasoned that, even if true, that argument did not "foreclose the possibility that the Commission might have taken different action had the reports truthfully described the disbursements' purpose." *Ibid.*

ARGUMENT

Petitioners renew their arguments that the FEC expenditure reports were not a "matter within the jurisdiction of" the FEC under Section 1519 (Benton Pet. 17-25; Tate Pet. 10-20; Kesari Pet. 26-27) and that the evidence was insufficient to establish that the false

statements were material under Section 1001 (Benton Pet. 11-17; Tate Pet. 20-28; Kesari Pet. 26-27). Additionally, Kesari contends (Pet. 9-26) that the evidence was insufficient to establish that the campaign reports were false in the first place. The court of appeals correctly rejected all three arguments, and its decision does not conflict with any decision of this Court or of any other court of appeals. In addition, this case would be a poor vehicle for considering the two questions advanced by all three petitioners, as a favorable decision on those questions would have little practical consequence for petitioners, who have already served their sentences and would remain convicted of other felonies regardless. Further review is unwarranted.

1. Petitioners contend (Benton Pet. 17-25; Tate Pet. 10-20) that they were improperly convicted under Section 1519, which applies where a person "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. 1519. Contrary to petitioners' contention, the filing of campaign expenditure reports is a "matter within the jurisdiction of" the FEC for purposes of Section 1519. *Ibid.*

a. As the court of appeals explained, the phrase "matter within the jurisdiction of" an agency in Section 1519 has the same meaning as the identical phrase in Section 1001. Pet. App. 26a. Petitioners appear to agree. See Tate Pet. 11-13 (relying on Section 1001 cases); Benton Pet. 20 (same); see also Tate C.A. Br. 30 n.6. This Court has explained that "[t]he most natural, nontechnical reading of [that] language is that it covers

all matters confided to the authority of an agency or department." *United States* v. *Rodgers*, 466 U.S. 475, 479 (1984). That is, the phrase "merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body." *Ibid.* And as the court of appeals correctly recognized, the FECA "requires campaigns to submit [expenditure] reports" to the FEC and requires the FEC to make those reports "available for public inspection." Pet. App. 27a. As a result, the reports are matters within the FEC's jurisdiction. *Ibid.*

Petitioners contend (Benton Pet. 20; Tate Pet. 14) that because the payment to Sorenson was not illegal under federal campaign-finance laws, the attempt to cover it up with false statements does not implicate the FEC's jurisdiction. That unduly narrow construction of Section 1519 is unsupported. As this Court made clear in *Rodgers*, the key question is whether a matter falls within the "authorized functions of an agency," 466 U.S. at 479—not whether the agency could bring a civil-enforcement action relating to the underlying behavior that the knowingly false statements seek to hide.

Petitioners raise several other arguments (Benton Pet. 18-25; Tate Pet. 15-18) for limiting the reach of Section 1519. None has merit.

First, contrary to petitioners' suggestion (Benton Pet. 19; Tate Pet. 15), the application of Section 1519 to conduct like petitioners' does not displace the FECA. The two statutes have different elements and cover different conduct. See Pet. App. 31a. In particular, the relevant provision of the FECA applies only to false statements in filed reports involving amounts above $25,000 in a calendar year, see 52 U.S.C. 30109(d)(1)(A)(i), whereas Section 1519 lacks the monetary threshold and applies

to internal documents as well as filed reports, see 18 U.S.C. 1519. Where two statutes "overlap substantially but not completely," each should be given its natural meaning. *Shaw* v. *United States*, 137 S. Ct. 462, 468 (2016); see *United States* v. *Rowland*, 826 F.3d 100, 105-111 (2d Cir. 2016) (affirming Section 1519 conviction based on false internal campaign contracts), cert. denied, 137 S. Ct. 1330 (2017).

Second, petitioners contend (Benton Pet. 19; Tate Pet. 15) that prosecutors will forgo FECA charges in favor of Section 1519 charges because Section 1519 has a "lower" mens rea requirement. That contention disregards that Section 1519 has its own specific intent requirement. While the FECA requires both knowing and willful conduct, see 52 U.S.C. 30109(d)(1)(A), Section 1519 requires knowledge and "the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of" an agency. 18 U.S.C. 1519; see D. Ct. Doc. 546, at 10, 13 (jury instructions).

Third, petitioners rely on (Benton Pet. 23; Tate Pet. 16) this Court's decision in *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016). But *McDonnell* is inapposite. In that case, this Court interpreted the word "matter" in a different statute, 18 U.S.C. 201, applying the statutory construction principle of *noscitur a sociis* in light of the list in which the word "matter" appeared: "cause, suit, proceeding or controversy." 136 S. Ct. at 2368-2370. Section 1519 uses the word "matter" in a different context, and not as part of a list that includes narrower terms.

Finally, petitioners' reliance (Benton Pet. 21-25; Tate Pet. 18) on *Marinello* v. *United States*, 138 S. Ct. 1101 (2018), is misplaced. *Marinello* interpreted the general tax-obstruction statute, 26 U.S.C. 7212(a), to

require that a defendant be aware of a tax proceeding that his actions could obstruct. 138 S. Ct. at 1107. That requirement came from the general obstruction-of-justice statute, 18 U.S.C. 1503. See 138 S. Ct. at 1105-1106 (citing *United States* v. *Aguilar*, 515 U.S. 593 (1995)). Section 1519, in contrast, is a specific, narrower statute relating to the spoliation of records, documents, or "objects one can use to record or preserve information." *Yates* v. *United States*, 135 S. Ct. 1074, 1081 (2015). The provision "is specifically meant not to include any technical requirement" that an investigation or proceeding have commenced. S. Rep. No. 146, 107th Cong., 2d Sess. 14-15 (2002) (Senate Report).[4]

b. Petitioners contend (Benton Pet. 20; Tate Pet. 11-14, 16-17) that the court of appeals' decision conflicts with decisions from the Sixth, Ninth, and Eleventh Circuits purportedly adopting a narrower interpretation of the phrase "matter within the jurisdiction of" an agency. But, as the court of appeals recognized, the cases on which petitioners rely (*ibid.*), unlike this one, involve defendants who interacted with a *state* entity and had no direct contact with a federal agency. See Pet. App. 27a.

For example, in *United States* v. *Facchini*, 874 F.2d 638 (1989) (en banc), the Ninth Circuit overturned Section 1001 convictions based on false statements in applying for state-funded unemployment benefits. Under the relevant program, the Department of Labor may provide funds to aid in the administration of a State's program, but "not one cent of federal money goes to pay

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[4] In attempting to justify a narrower reading of the statute, Tate relies on (Pet. 18 n.10) the dissenting legislators' concerns expressed in the minority report. See Senate Report 27. If anything, the views of the dissenting legislators underscore that the majority did not adopt the limitation that petitioners urge.

the unemployment benefits." *Id.* at 640. The Ninth Circuit reasoned that "[e]ven though there may be jurisdiction under section 1001 when the false statement is not made directly to a federal agent and when the federal agency is not affected financially by the false statement," the statutory language required "a direct relationship * * * between the false statement and an authorized function of" the federal agency. *Id.* at 641 (citations omitted). The court did not believe that any such direct relationship existed because the Department of Labor could "monitor only the administrative structure of the state program[,] * * * not * * * the actual operation of the state program." *Id.* at 642. The Sixth Circuit in *United States* v. *Holmes*, 111 F.3d 463 (1997), agreed with *Facchini* and reached a similar conclusion on similar facts. See *id.* at 466; but see *United States* v. *Herring*, 916 F.2d 1543, 1546-1547 (11th Cir. 1990) (disagreeing and affirming false-statement convictions under a similar unemployment program), cert. denied, 500 U.S. 946 (1991).

The Eleventh Circuit's decision in *United States* v. *Blankenship*, 382 F.3d 1110 (2004), likewise involved false statements that were not made to a federal agency. In that case, a subcontractor made false statements to secure work on a construction contract with the Florida Department of Transportation, which had received a grant from the federal Department of Transportation to build the road at issue. *Id.* at 1117. The court reversed the defendant's conviction because his false statement "concerned [his] compliance with the terms of [his] contract with [the general contractor], a contract over which the [Department of Transportation] neither had nor exercised any supervisory power." *Id.* at 1137.

Here, by contrast, petitioners filed the campaign expenditure reports directly with the FEC because the FECA required them to do so. No state agency or private entity exercised primary jurisdiction over their filings; the federal agency was the only relevant actor. Accordingly, whatever the merits of *Facchini*, *Holmes*, and *Blankenship*, the court of appeals' decision does not conflict with those decisions, as the court recognized. See Pet. App. 27a. Indeed, the court's decision here is consistent with other decisions involving the application of Sections 1001 and 1519 to campaign-finance reporting. See *Rowland*, 826 F.3d at 107-111 (affirming convictions under both statutes and the FECA for campaign's failure to disclose contracts); *United States* v. *Smukler*, No. 17-cr-563, D. Ct. Doc. 108, at 15-21 (E.D. Penn. Aug. 1, 2018) (denying motion to dismiss Section 1001 charges for filing false expense reports with the FEC to conceal true purpose of campaign expenses).

2. Petitioners separately contend (Benton Pet. 11-17; Tate Pet. 20-28) that the evidence was insufficient to support their convictions under 18 U.S.C. 1001(a)(1), which applies when a person "in any matter within the jurisdiction of" the government "knowingly and willfully * * * falsifies, conceals, or covers up by any trick scheme, or device a material fact." As the court of appeals recognized, Pet. App. 28a-29a, the trial evidence, viewed "in the light most favorable to the prosecution," *Musacchio* v. *United States*, 136 S. Ct. 709, 715 (2016) (citation omitted), sufficiently established that the false statements on the campaign expenditure reports were material under Section 1001.

a. Petitioners do not appear to contest the legal standard for materiality that the court of appeals recited. See Pet. App. 28a-29a; cf. Benton Pet. 12; Tate

Pet. 21. Three decades ago, this Court explained that a "misrepresentation is material if it has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed." *Kungys* v. *United States*, 485 U.S. 759, 770 (1988) (internal quotation marks omitted). That definition applies to Section 1001. See *United States* v. *Gaudin*, 515 U.S. 506, 509 (1995). The district court incorporated that standard into its instructions to the jury, D. Ct. Doc. 546, at 12, and the court of appeals applied it in reviewing the sufficiency of the evidence, Pet. App. 28a-29a.

The well-settled materiality standard serves to ensure that the statute does not "embrace trivial falsehoods." *United States* v. *Elashyi*, 554 F.3d 480, 497 (5th Cir. 2008), cert. denied, 558 U.S. 829 (2009). But, contrary to petitioners' suggestion (Tate Pet. 21), "[i]t has never been the test of materiality that the misrepresentation or concealment would *more likely than not* have produced an erroneous decision, or even that it would *more likely than not* have triggered an investigation." *Kungys*, 485 U.S. at 771; see also *Brogan* v. *United States*, 522 U.S. 398, 402 (1998) (rejecting the "premise that only those falsehoods that pervert governmental functions are" material). The case on which petitioners rely for a more "rigorous" standard (Benton Pet. 14; Tate Pet. 21), *Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), involved the False Claims Act, not Section 1001, and did not purport to alter settled materiality law in any relevant respect. Indeed, *Escobar* cited common-law tort principles defining materiality as either a fact that "'a reasonable man would attach importance to'" or one that "the

defendant knew or had reason to know that the recipient of the representation attaches importance to." *Id.* at 2002-2003 & n.5 (citation omitted).

Petitioners' challenge to the court of appeals' decision thus appears primarily to be a factual one. See, *e.g.*, Benton Pet. 16-17; Tate Pet. 27. But whether the trial evidence established materiality is a question for the jury, *Gaudin*, 515 U.S. at 523, and a factbound question of the sufficiency of the evidence to meet a well-established legal standard does not warrant this Court's review. Sup. Ct. R. 10.

And in any event, the court of appeals correctly determined that petitioners' false statements about paying "audio/visual expenses," rather than buying endorsements, were material. Pet. App. 12a. The statute requiring expense reports explicitly identifies the expenditure's recipient and purpose as required elements, 52 U.S.C. 30104(b)(5)(A); the reporting form itself admonished filers that accurate information was important and that false information could lead to criminal penalties, Gov't Ex. 145, at 1; and the FEC had published guidance on filing the reports that instructed "filers [to] consider [whether] * * * 'a person not associated with the committee [could] easily discern why the disbursement was made,'" Tate Ex. 2, at 1; Tr. 556. The FEC had also previously determined that using a mere pass-through vendor, which did no bona fide work for the campaign, to conceal the identity of the true recipient violated the FECA. See *In re Jenkins for Senate 1996*, FEC MUR 4872 (Feb. 1, 2002).

Petitioners contend (Benton Pet. 17; Tate Pet. 27) that, under the evidence submitted, the court of appeals could not have concluded that the FEC "might have

taken different action had the reports truthfully described the disbursements' purpose," Pet. App. 29a. But the evidence showed otherwise; at a minimum, it was sufficient to allow a jury to find petitioners' falsities to be material. The FEC retained full authority to act on the campaign's report by making it public, taking it down, or asking questions. The agency acted when it published the information that the campaign paid ICT for "audio/visual expenses." And the government introduced testimony that, in some cases, the contents of expenditure reports can trigger further action by the agency. See Tr. 545, 547. Petitioners' false statements here cannot be characterized as "trivial" rather than "substantive." *Kungys*, 485 U.S. at 786. Petitioners themselves understood the importance of accurate reporting of this information, repeatedly telling the public that campaign expenditure reports would prove that no bribe to Sorenson had occurred. See Pet. App. 8a-9a; see also Gov't Exs. 51-54.

The logical consequence of petitioners' materiality argument would mean that individuals could lie with impunity to agencies like the FEC (or the Census Bureau, the Bureau of Labor Statistics, the Securities and Exchange Commission, and so on) that collect and publish information. That cramped reading of Section 1001's materiality requirement would undermine this Court's decisions extolling the importance of transparency, especially in the realm of campaign finance. See, *e.g.*, *McCutcheon* v. *FEC*, 572 U.S. 185, 223-224 (2014); *Citizens United* v. *FEC*, 558 U.S. 310, 370 (2010).

b. Petitioners contend (Tate Pet. 23; see Benton Pet. 14) that the decision below conflicts with decisions of other courts of appeals that require "the Government [to] show that it likely would have acted differently had

it received a truthful statement." That contention is incorrect.

As an initial matter, consistent with this Court's decision in *Kungys*, none of the cited decisions required a showing that the truth "would *more likely than not* have" changed anything. 485 U.S. at 771. Rather, each court applied the traditional materiality standard that a false statement be "capable of influencing" a government action—the same materiality standard that the court of appeals applied here. Compare Pet. App. 28a, with, *e.g.*, *United States* v. *Moyer*, 674 F.3d 192, 208 n.8 (3d Cir.), cert. denied, 568 U.S. 846 (2012), and 568 U.S. 1143 (2013). Although some of the cited decisions naturally found proof that the government would have acted differently *sufficient* to show materiality, those decisions do not hold (contrary to this Court) that such proof is *necessary*. See, *e.g.*, *United States* v. *Evans*, 42 F.3d 586, 593 (10th Cir. 1994) (finding materiality where agent testified that he "would have notified the [Office of the Comptroller of the Currency]").

Each of the decisions that petitioners cite applied the same general principles, outlined above, and scrutinized the different contexts in which the false statement occurred. When the agency to which the defendant lied is one that issues licenses or approves transactions, materiality may turn on whether the lie could affect issuance of the license or approval of the transaction. See, *e.g.*, *United States* v. *David*, 83 F.3d 638, 648 (4th Cir. 1996) (jury question whether lie was material where defendant argued that he "would have been allowed to continue as a firearms dealer even had he responded truthfully to [a] question" on a licensing form); *Evans*, 42 F.3d at 593 (source of funds to take control of a bank

was material because bank examiner "would have notified the [Office of the Comptroller of the Currency]," which "might not have approved the application"). When the agency is one that conducts investigations, materiality may depend on whether the lie could affect an investigation. See, *e.g.*, *Moyer*, 674 F.3d at 208 n.8 (omitting the names of suspects from a report was material because it would "be of a type capable of influencing the investigation") (citation and internal quotation marks omitted); *United States* v. *Johnson*, 530 F.2d 52, 55 (5th Cir.) (affidavit that could have explained audit discrepancies was material because it could have forestalled an investigation or prosecution), cert. denied, 429 U.S. 833 (1976). And when an agency gathers information to make it public, either individually or in statistical form, a lie is material when it undermines reliance on that information. See, *e.g.*, *United States* v. *Chmielewski*, 218 F.3d 840, 842 (8th Cir. 2000) (false statements about the value of exported goods on customs forms material where values were used to compile statistics used in trade negotiations). The court of appeals' decision here was consistent with those principles.

3. Finally, Kesari, but not Benton or Tate, additionally argues (Pet. 9-26) that the trial evidence did not demonstrate that petitioners' campaign expenditure reports were actually false. The jury found otherwise, and that factbound determination does not merit this Court's review.

Kesari initially contends (Pet. 10-13, 16-17) that listing the immediate—but not the ultimate—recipient of a campaign expenditure does not violate the FECA. But that was not the basis for his criminal liability. As the court of appeals explained, the government argued to the jury that petitioners used ICT to disguise the true

payee and, in doing so, falsely stated the *purpose* of the payments to ICT. Pet. App. 17a-18a. Kesari does not contest (Pet. 13) that a false statement of purpose violates the FECA. And the government introduced sufficient evidence that "the payments to Sorenson were for his endorsement and not for any audio/visual services, a theory bolstered by the fact that the payments were arranged before Sorenson performed any services." Pet. App. 21a-22a. Although Kesari contends (Pet. 13-14, 25-26) that Sorenson did actual work for the campaign that can fairly be described as "audio/visual expenses," that contention was raised as a defense at trial; the district court instructed the jury accordingly; and the jury's verdict reflects its rejection of that defense. See Pet. App. 12a. See also D. Ct. Doc. 546, at 15, 17 (jury instructions on falsity and good faith); *id.* at 16 (jury instruction that the use of umbrella vendors is not illegal). Kesari fails to demonstrate that the jury was required to accept it.

Kesari's remaining arguments—that the court of appeals should have left this matter to the FEC's civil enforcement (Pet. 24), that the court should have deferred to FEC decisions purportedly establishing a narrower construction of the FECA (Pet. 18-23), that the court should have applied the rule of lenity (Pet. 16), and that the court's decision raises due process questions (Pet. 14-15)—are also meritless. First, it is neither problematic nor unusual for "both a criminal and a civil sanction [to apply] to the same act or omission." *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938). In the FECA, Congress vested civil enforcement authority in the FEC and authorized criminal charges. Second, as the court of appeals recognized, even if FEC precedent could limit a federal criminal prosecution, this prosecution

comported with FEC precedent. See Pet. App. 18a-21a. Third, the FECA's plain language requires reporting of the "purpose of [a qualifying] operating expenditure." 52 U.S.C. 30104(b)(5). Because it "is clear enough" that the requirement refers to the *true* purpose, the rule of lenity is inapplicable. *Shaw*, 137 S. Ct. at 469. Fourth, for similar reasons, the statute provides ample notice of what the law requires and satisfies the fair-notice component of due process.

4. Finally, this case would be a poor vehicle for considering certain of the questions presented because this Court's decision would have little practical effect on petitioners or their sentences.

As an initial matter, petitioners have already served, or will shortly have served, the minimal sentences that they received. Benton and Tate were sentenced to two years of probation, which expired in September 2018. See Benton Judgment 3; Tate Judgment 3. Kesari, meanwhile, served a three-month sentence of imprisonment, from which he was released on February 15, 2017. See Kesari Judgment 3; Federal Bureau of Prisons, U.S. Dep't of Justice, *Find an Inmate*, https://www.bop.gov/inmateloc (search for inmate register number 15507-030). His subsequent two-year term of supervised release will expire in the next month. See Kesari Judgment 4.

Although petitioners' challenge to their Section 1519 and Section 1001 convictions is not moot, see *Lane* v. *Williams*, 455 U.S. 624, 631 n.10 (1982), a decision in their favor would have little practical effect. Contrary to Tate's suggestion (Pet. 28-29), resolution of the first two questions presented in petitioners' favor would not result in vacatur of their convictions on all four counts. Tate and Benton do not contest the propriety of their

convictions under the FECA for filing false reports, and neither of the first two questions presented implicates those convictions.[5] Petitioners do not suggest that they will be affected in any meaningful practical way by the precise nature of the felony convictions on their records. The minimal practical importance of this case for petitioners underscores that it does not warrant this Court's review.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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[5] Kesari does challenge his FECA conviction, but, for the reasons explained above, pp. 20-22, *supra*, that challenge is factbound and meritless.