No. 14-1071

In the Supreme Court of the United States

RICHARD R. BAUMGARTNER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's convictions for misprision of a felony, in violation of 18 U.S.C. 4, violated the First Amendment.

2. Whether petitioner concealed a felony within the meaning of 18 U.S.C. 4 when he made misrepresentations to state judges and other officials designed to deter them from scrutinizing the conduct of a person who was supplying him with controlled substances as part of a drug conspiracy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is not published in the Federal Reporter but is reprinted in 581 Fed. Appx. 522. The order of the district court (Pet. App. 32a-37a) is not reported. The report and recommendation of the magistrate judge (Pet. App. 38a-72a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 2014. A petition for rehearing was denied on October 31, 2014. On January 29, 2015, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including February 28, 2015, and the petition was filed on February 27, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on five counts of misprision of a felony, in violation of 18 U.S.C. 4. Pet. App. 2a. He was sentenced to six months of imprisonment and one year of supervised release. See Judgment, D. Ct. Doc. 171, at 3-4 (Apr. 19, 2013). The court of appeals reversed petitioner's conviction on one count and affirmed his convictions on the remaining four counts. Pet. App. 2a.

1. Petitioner was a judge on the Knox County Criminal Court in Tennessee. Pet. App. 3a. He also served on the Knox County Drug Court, which provides substance-abuse treatment and job training as an alternative to incarceration for nonviolent offenders. *Ibid.*

One of the individuals who appeared before petitioner in the Drug Court was Deena Castleman. Pet. App. 3a. Although Castleman had completed the Drug Court program in 2005, she returned to the Drug Court in 2007 and was ultimately terminated from the program. *Ibid.* In 2009, petitioner invited Castleman to his chambers and gave her money to procure for him hydrocodone, a controlled substance. *Ibid.* Petitioner then began regularly procuring controlled substances from Castleman. *Id.* at 4a. Castleman eventually identified her suppliers to petitioner and introduced him to a man who became petitioner's direct supplier. *Ibid.* Petitioner and Castleman also engaged in a sexual relationship. *Ibid.*

During this period, Castleman faced criminal charges before other state judges. Pet. App. 4a-5a. Petitioner repeatedly intervened to help make sure

that Castleman would not face scrutiny from those judges for her drug dealing, which could have revealed his relationship with her. *Ibid.* For example, before Castleman's preliminary hearing on a burglary charge in February 2010, petitioner contacted the presiding judge and told him that Castleman was "doing very well" in the Drug Court and that he "didn't think [the new] charges were any good and wanted [the judge] to take a look at the case." *Id.* at 4a. Petitioner also attempted to get Castleman admitted to a YWCA transitional-housing unit by helping her pass a urine test with another person's sample and, when the substitute sample still tested positive, falsely telling the housing director that Castleman had passed the test. *Id.* at 4a-5a.

Then, in August 2010, petitioner convinced a juvenile-court magistrate judge to rescind an arrest warrant for Castleman, telling the judge that petitioner was "working with" Castleman in his criminal court. Pet. App. 5a. And in October 2010, petitioner told a state prosecutor that Castleman was "a fine drug court person" who was merely "having a little bit of trouble," and he asked the prosecutor "to do for her what [he] could" with respect to pending charges for burglary, larceny, a drug offense, and drunk driving. *Ibid.*

2. Petitioner was indicted by a grand jury in the United States District Court for the Eastern District of Tennessee on seven counts of misprision of a felony, in violation of 18 U.S.C. 4. That statute, enacted in its original form in 1790 by the first Congress,[1] subjects

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[1] See Act of Apr. 30, 1790, ch. IX, § 6, 1 Stat. 113 ("[I]f any person or persons having knowledge of the actual commission of the crime of willful murder or other felony * * * shall conceal, and

to criminal punishment a person who, "having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States." The government alleged that petitioner had knowledge of a "conspiracy to distribute controlled substances, * * * in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(C)" and had "conceal[ed] the same by making material misrepresentations about Deena Castleman" to fellow judges and others. Pet. App. 86a-90a.

Petitioner moved to dismiss the indictment. Pet. App. 32a. He argued, as relevant here, that the indictment had not sufficiently alleged a violation of Section 4 because, petitioner contended, a verbal misrepresentation must be made to a federal official to qualify as an act of concealment under the statute. See *id.* at 34a. Adopting the recommendation of a magistrate judge, the district court concluded that petitioner's objection could be disposed of "quite easily" because "the plain language of the statute itself does not require that the concealment be directed to a federal authority." *Ibid.*; see *id.* at 50a-58a (magistrate judge's report and recommendation). The district court also adopted the magistrate judge's conclusion that the application of the statute to petitioner's misrepresentations would not violate the First Amendment. See *id.* at 32a-33a, 58a-61a. The magistrate judge explained that petitioner's "alleged verbal

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not as soon as may be disclose and make known the same to some one of the judges or other persons in the civil or military authority under the United States, on conviction thereof, such person or persons shall be adjudged guilty of misprision of felony.").

misrepresentations are the means by which he concealed a federal felony" and that "the Supreme Court's well-settled precedent" holds that "speech integral to criminal conduct is not protected by the First Amendment." *Id.* at 59a-60a.

After one count was dismissed, the other six charged counts were tried to a jury. The jury convicted petitioner on five of the counts. Pet. App 2a; see Jury Verdict, D. Ct. Doc. No. 143 (Nov. 2, 2012). He was sentenced to six months of imprisonment and one year of supervised release. See Judgment, D. Ct. Doc. 171, at 3-4 (Apr. 19, 2013).

3. The court of appeals reversed petitioner's conviction on one count, but affirmed his convictions on the other four counts.

a. The court of appeals first rejected petitioner's argument that where the concealment of a federal felony is accomplished through "non-commercial, private speech," the verbal misrepresentations must be made to federal officials. Pet. App. 5a-10a. The court explained that the statutory text does not limit the forbidden acts of concealment to "'concealment from federal authorities'" and that the text "provides no basis for distinguishing between physical and verbal acts of concealment." *Id.* at 8a. The court further noted that "even if the statute required concealment *from federal authorities*, speech can conceal the commission of a felony from federal authorities without being made directly to them—for example, it can be made to potential whistleblowers or to potential witnesses at trial." *Id.* at 9a-10a.

The court of appeals also rejected petitioner's First Amendment challenge. Pet. App. 13a-16a. The court explained that in *Branzburg* v. *Hayes*, 408 U.S. 665

(1972), this Court, citing Section 4, had made clear that "concealment of crime and agreements to do so" are not entitled to "First Amendment protection." Pet. App. 14a (quoting *Branzburg*, 408 U.S. at 697). "[S]peech that constitutes misprision of a felony," the court of appeals continued, "appears to qualify as one of the[] 'historic and traditional categories of expression' not protected under the First Amendment." *Id.* at 15a (quoting *United States* v. *Alvarez*, 132 S. Ct. 2537, 2544 (2012) (Kennedy, J.)).

Finally, the court of appeals held that the evidence presented at trial supported petitioner's convictions on four of the five counts. Pet. App. 16a-23a. The court concluded that the jury could rationally infer that Castleman was involved in a drug conspiracy in light of the money she was regularly receiving on the transactions with petitioner over a period of months and the fact that she was paying other co-conspirators "to transport her to and from drug deals." *Id.* at 19a. With respect to the concealment element of Section 4, the court explained that petitioner's various statements to state judges and others were "designed to keep Castleman out of the clutches of law enforcement and to keep her placated with respect to [petitioner's] relationship with her." *Id.* at 22a. "If Castleman were treated by law enforcement and the transitional housing director as a 'good drug court candidate' who was 'turning her life around,'" the court further explained, "it would have been considerably less likely that she would have been investigated further and connected with a wide-ranging drug conspiracy—one that involved [petitioner] himself." *Id.* at 23a. The court vacated one count of conviction on the ground that the drug conspiracy had not yet begun at the time that

petitioner had committed the relevant act of concealment. *Id.* at 19a.

b. Judge Clay dissented from the court's affirmance of the four counts of conviction, stating that he would "construe the concealment element of the misprision statute somewhat more narrowly than the majority." Pet. App. 26a; see *id.* at 25a-31a. In particular, he believed that Section 4 should be construed to require "[s]ome nexus * * * between the concealment of the principal's crime and an investigation or proceeding (whether state or federal) related to that criminal conduct." *Id.* at 29a.

ARGUMENT

Petitioner contends (Pet. 18-32) that the court of appeals misconstrued 18 U.S.C. 4 and (Pet. 9-18) that, as so construed, the statute violates the First Amendment. Those arguments lack merit. Petitioner's proposed construction of the statute would impose qualifications that appear nowhere in the statutory text, and the type of crime-facilitating speech at issue here has never been afforded First Amendment protection. Petitioner does not allege that the decision below conflicts with any decision of another court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly held that to prove a violation of Section 4 based on a defendant's verbal misrepresentations, the government is not required to establish that the defendant directed the misrepresentations to federal officials. See Pet. App. 5a-10a.

a. Section 4 imposes criminal liability on a person who, "having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or

military authority under the United States." That text does not provide any basis to conclude that verbal misrepresentations designed to conceal felonious conduct fall outside the statute's reach if they are made to persons other than federal officials—here, for example, state judges. To the contrary, the text indicates just the opposite: A separate element—the failure to report the felony—*does* specify that the relevant reporting must be to federal officials. By contrast, the concealment element contains no such qualification. The natural inference is that any act of concealment, no matter to whom it is directed, satisfies that element of the offense.

Petitioner has not identified a single judicial decision in the long history of the misprision offense (see note 1, *supra*) that adopted his interpretation. See Pet. App. 54a. Petitioner argues (Pet. 25), however, that appellate decisions involving Section 4 prosecutions for "verbal concealment" typically involve statements made to "federal authority figures." But he identifies no judicial decision holding that concealment from a federal official is an *element* of the offense. A common fact pattern does not equate to a legal requirement.

Many of the appellate decisions that petitioner cites, moreover, identify the same concealment element as the decision below, without the limitation that petitioner posits. See *United States* v. *Ciambrone*, 750 F.2d 1416, 1417 (9th Cir. 1984); *United States* v. *Sampol*, 636 F.2d 621, 653 (D.C. Cir. 1980) (per curiam); *United States* v. *Hodges*, 566 F.2d 674, 675 (9th Cir. 1977) (per curiam). And petitioner acknowledges a number of appellate decisions with fact patterns that involved verbal misrepresentations to persons other

than federal officials. See Pet. 26-27; see also, *e.g.*, *United States* v. *White Eagle*, 721 F.3d 1108, 1111-1112, 1119-1120 (9th Cir. 2013) (defendant falsely told a private citizen that citizen's wife had loans that had to be repaid); *United States* v. *Walkes*, 410 Fed. Appx. 800, 803-804 (5th Cir. 2011) (per curiam) (defendant falsely told his employees that his conduct was legal).[2]

Petitioner also purports (Pet. 28-32) to find support for his position in the common-law background and legislative history of Section 4, but he does not identify anything in those materials that validates his departure from the statute's text. Petitioner asserts that "no evidence exists that Congress * * * meant to reach purely local activities or crimes." Pet. 30. But since the statute reaches only actions that serve to conceal *federal* crimes, like the drug trafficking at issue here, it does not apply to "purely local activities or crimes." That an act of concealment is in some sense "local" because it is not directly aimed at federal officials does not change the inherently federal character of the offense.

Finally, petitioner cites (Pet. 27) the rule of lenity as a basis to adopt his interpretation of Section 4. But that rule of construction serves only to resolve a "grievous ambiguity or uncertainty," *Maracich* v. *Spears*, 133 S. Ct. 2191, 2209 (2013) (citation omitted),

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[2] Petitioner discusses (Pet. 19-21) circuit decisions holding that Section 4 requires an "affirmative act of concealment." The jury instructions in this case included that requirement. See 10/30/12-11/2/12 Tr., D. Ct. Doc. 155, at 83 (Feb. 11, 2013) ("Mere failure to report a felony is not a crime. The Defendant must commit some affirmative act designed to conceal the fact that a federal felony has been committed. A material misrepresentation may constitute an affirmative step to conceal.").

and it applies only where a court is faced with two or more permissible readings of a criminal statute. See *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000). No permissible interpretation of Section 4 would allow a court to add the qualification that a verbal misstatement intended to conceal a federal felony violates the provision only if the misstatement is made to federal officials.[3]

b. Petitioner contends (Pet. 9-18) that the court of appeals' construction of Section 4 violates the First Amendment. That argument lacks merit.

i. The First Amendment does not protect speech that is "integral to criminal conduct." *United States* v. *Stevens*, 559 U.S. 460, 468 (2010) (citing *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)). For example, the First Amendment does not protect offers to engage in an illegal transaction, conspiracy, solicitation, or incitement. See *United States* v. *Williams*, 553 U.S. 285, 297-298 (2008) (child pornogra-

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[3] Petitioner relatedly cites the vagueness doctrine, but he does not appear to challenge Section 4 as unconstitutionally vague. Even if he did, any such challenge has been forfeited because petitioner did not raise a vagueness challenge in his opening brief in the court of appeals and the court of appeals did not address whether Section 4 is vague. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992). Petitioner did suggest in his reply brief in the court of appeals that the government's construction of Section 4 would render it vague (see C.A. Reply Br. 13-14), but raising a claim for the first time in a reply brief does not suffice to preserve it in the Sixth Circuit. See *Overstreet* v. *Lexington–Fayette Urban Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002). In any event, petitioner has identified nothing in the text of Section 4 that renders it incapable of principled application, and it would be unprecedented to declare a criminal statute that has been in effect since 1790 too indeterminate to be enforced.

phy). Such speech is unprotected regardless of whether it has a commercial component. *Id.* at 298.

Here, the jury found that petitioner's speech was designed to conceal from discovery a drug conspiracy that violated federal law. This Court has recognized that such speech, like other unprotected categories of speech integral to criminal conduct, is not protected by the First Amendment. In *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), the Court, after noting that "[m]isprision of a felony * * * was often said to be a common-law crime" and that Section 4 has a pedigree stretching back to the first Congress, explained that "[i]t is apparent from this statute, as well as from our history and that of England, that concealment of crime and agreements to do so are not looked upon with favor." *Id.* at 696-697. The Court thus concluded that such conduct is not entitled to "First Amendment protection." *Ibid.* That discussion refutes petitioner's contention that his efforts to conceal Castleman's drug conspiracy were entitled to First Amendment protection.

Petitioner contends (Pet. 13-14) that the Court's discussion in *Branzburg* is not relevant here because at common law, no speech was required to commit the offense of misprision of a felony; it was sufficient that a person failed to report a felony. See *Branzburg*, 408 U.S. at 696. But that argument overlooks that the Court discussed Section 4, which has always required an act of concealment (see note 1, *supra*), as a statute that imposed criminal penalties on speech that is not protected by the First Amendment. See *id.* at 696-697; see also *Roberts* v. *United States*, 445 U.S. 552, 557-558 (1980) ("Concealment of crime has been con-

demned throughout our history.") (citing federal misprision offense and *Branzburg*).

ii. Petitioner argues (Pet. 11-15) that this Court's decision in *United States* v. *Alvarez*, 132 S. Ct. 2537 (2012), supports his claim that the First Amendment protects speech designed to conceal federal felonies from detection. *Alvarez*, however, offers no support for petitioner's novel argument. *Alvarez* held that the Stolen Valor Act of 2005, 18 U.S.C. 704(b), which criminally prohibited false claims that a person had been awarded a military honor, violated the First Amendment. See *Alvarez*, 132 S. Ct. at 2543 (Kennedy, J.); *id.* at 2551 (Breyer, J., concurring in the judgment). A majority of the Court rejected the view that false statements categorically fall outside the scope of the First Amendment. See *id.* at 2547 (Kennedy, J.); *id.* at 2553 (Breyer, J., concurring in the judgment). But the plurality also made clear that "there are instances in which the falsity of speech bears upon whether it is protected," noting statutes proscribing fraud, perjury, and false impersonation, and explained that its "opinion does not imply that any of these targeted prohibitions are somehow vulnerable." *Id.* at 2546 (Kennedy, J.). The concurrence likewise recognized that many statutes that prohibit false statements are constitutional when accompanied by "limitations [that] help to make certain that the statute does not allow its threat of liability or criminal punishment to roam at large, discouraging or forbidding the telling of the lie in contexts where harm is unlikely or the need for the prohibition is small." *Id.* at 2554-2555 (Breyer, J., concurring in the judgment).

Section 4's application to petitioner's efforts to conceal a federally prohibited drug conspiracy by

influencing judges and others readily satisfies the standards set out by the opinions in *Alvarez*. Section 4 does not prohibit mere false speech. Rather, it imposes a "targeted prohibition" on conduct and speech designed to ensure that serious criminal activity goes undetected. The defendant must know about the felony and must take action intended to prevent its detection (and must then fail to make the felony known to a federal official in a timely manner). Nothing in *Alvarez* supports affording First Amendment protection to such crime-facilitating speech. To the contrary, the *Alvarez* plurality reaffirmed this Court's longstanding teaching that "speech integral to criminal conduct" is not protected. 132 S. Ct. at 2544 (Kennedy, J.).

iii. Petitioner also appears to argue (Pet. 15-18) that Section 4 violates the First Amendment because it could reach "everyday conversations." Petitioner does not contend, however, that his efforts to influence judges and others in order to conceal Castleman's drug conspiracy qualify as "everyday conversations." Accordingly, that argument could at most support a facial overbreadth challenge to the statute. See *Los Angeles Police Dep't* v. *United Reporting Pub. Corp.*, 528 U.S. 32, 38 (1999). But petitioner did not raise a facial overbreadth challenge in the court of appeals, and the court of appeals did not address that question. Accordingly, any overbreadth challenge is forfeited. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

In any event, a First Amendment overbreadth argument fails on the merits. Overbreadth requires that a statute be substantially overbroad "not only in an absolute sense, but also relative to the statute's plain-

ly legitimate sweep." *Williams*, 553 U.S. at 292. Here, this Court has already indicated that Section 4 has a substantial legitimate sweep. See *Branzburg*, 408 U.S. at 696-697. The theoretical possibility of an impermissible application of Section 4 does not suffice to demonstrate that the statute is facially invalid under the First Amendment. See *Williams*, 553 U.S. at 303; see also *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). And petitioner has not cited a single example in the statute's long history of a case in which Section 4 has been held to apply to an "everyday conversation" that merits First Amendment protection.

c. At points in the petition, petitioner appears to contest the sufficiency of the evidence supporting his convictions. For example, petitioner claims that his acts of concealment "had no nexus to any federal crime" (Pet. 4) even though the jury was instructed that to convict petitioner, it had to find that petitioner "knowingly took an affirmative step to conceal Deena Castleman's commission of the federal felony of conspiracy to distribute controlled substances." 10/30/12-11/2/12 Tr., D. Ct. Doc. 155, at 82-83 (Feb. 11, 2013); see Pet. 9 ("The government offered no proof whatsoever of a nexus between Petitioner's private conversations * * * and a federal crime."); Pet. 15 (claiming that the government "[l]ack[ed] an evidentiary foundation to tie Petitioner's statements to any existing or future federal crime"). This Court, however, does not typically grant review to evaluate the sufficiency of the evidence supporting a jury's verdict of guilt. See *Hamling* v. *United States*, 418 U.S. 87, 124 (1974) (explaining that "[t]he primary responsibility for re-

viewing the sufficiency of the evidence to support a criminal conviction rests with the Court of Appeals").

In any event, as the court of appeals held, the trial evidence permitted a rational trier of fact to convict petitioner of misprision of a felony. See *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). The evidence showed that Castleman participated in a federal drug trafficking conspiracy; that petitioner was aware of her crime because he depended on her to supply him with painkillers; and that he did not report her crime to federal authorities. The evidence also showed that petitioner concealed Castleman's crime by falsely minimizing her drug activities to other state judges, a state prosecutor, and a transitional-housing director, intending to discourage them from further scrutinizing her conduct. As the court of appeals explained, petitioner's statements were designed to "keep Castleman out of the clutches of law enforcement." Pet. App. 22a. If the officials viewed Castleman as a "fine drug court person" who "was turning her life around," *id.* at 4a-5a, it was less likely that she would have been investigated further and connected to a drug conspiracy involving petitioner. *Id.* at 22a-23a. Although petitioner repeatedly characterizes his acts of concealment as "private" conversations, they were clearly intended to influence public officials in the performance of their duties. Indeed, petitioner's statements to one judge resulted in the vacatur of an arrest warrant against Castleman. *Id.* at 5a.

2. Petitioner has identified no sound basis for further review. Petitioner does not argue that the decision below conflicts with a decision of any other court of appeals. And for the reasons discussed above, petitioner is incorrect that the decision below conflicts

with this Court's decision in *Alvarez*. Although petitioner alleges that review here is warranted to prevent the criminal prosecution of citizens for protected speech, Section 4 does not apply to protected speech (and petitioner has forfeited any overbreadth challenge in any event, see p. 13, *supra*). Rather, it applies to speech like petitioner's, which was designed to prevent the detection of serious criminal activity. Petitioner has pointed to no evidence that Section 4 has been used to punish protected expression.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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