No. 16-639

In the Supreme Court of the United States

JOHN G. ROWLAND, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner "falsified * * * any record, document, or tangible object" under 18 U.S.C. 1519 where petitioner, in order to avoid Federal Election Commission reporting requirements, created sham contracts stating that he intended to provide consulting services to business or charitable organizations, when in fact he intended to work on the campaigns of two political candidates.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 826 F.3d 100.

JURISDICTION

The judgment of the court of appeals (Pet. App. 76a-77a) was entered on June 17, 2016. On August 16, 2016, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including November 14, 2016, and the petition was filed on that date. 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 District of Connecticut, petitioner was convicted on two counts of falsifying documents with the intent to impede, obstruct, or influence a federal investigation, in violation of 18 U.S.C. 1519 (Counts 1

and 3); one count of conspiracy to commit an offense against the United States, in violation of 18 U.S.C. 371 (Count 2); two counts of submitting false statements, in violation of 18 U.S.C. 1001(a)(2) (Counts 4 and 5); and two counts of causing illegal campaign contributions, in violation of 2 U.S.C. 441a(a)(1)(A) and (f) and 437g(d)(1)(A)(ii) (2012 & Supp. II 2014) (Counts 6 and 7). Pet. App. 7a-8a. Petitioner was sentenced to 30 months of imprisonment. The court of appeals affirmed. *Id.* at 1a-29a.

1. Petitioner is a former governor of Connecticut. He resigned his post in 2004 amid a corruption scandal and later pleaded guilty to federal charges of honest-services fraud and tax fraud. After serving his sentence, petitioner sought to use his political experience by doing political consulting work for candidates for federal office in Connecticut. Pet. App. 4a-5a.

a. In 2009, petitioner met Mark Greenberg, who was considering a run for Congress. Petitioner offered to serve as a paid consultant for Greenberg's campaign. "[Petitioner] told Greenberg he did not want to be paid by the campaign—which would have had to report his employment—but instead wanted to be paid by Greenberg's business or charitable interests." Pet. App. 5a. Petitioner prepared and gave to Greenberg a draft contract in which petitioner agreed to perform "consulting services" to Greenberg's businesses and charitable foundation. *Ibid.* Petitioner sought a retainer that would pay him $35,000 per month for 14 months, followed by payment of $25,000 per month for an additional 12 months. But Greenberg refused petitioner's offer by ripping up the draft contract, and petitioner did no work for Greenberg's

campaign. *Ibid.*; see *id.* at 88a-90a ("Consulting Agreement").

b. In September 2011, petitioner met congressional candidate Lisa Wilson-Foley and offered to help her campaign. Wilson-Foley and her husband, Brian Foley, believed that petitioner might be helpful but were concerned that hiring a convicted felon might jeopardize the campaign. Foley, who ran a business called Apple Rehab, suggested that petitioner pretend to work for Apple while actually working for Wilson-Foley's campaign. Pet. App. 5a-6a. The Foleys believed that such an arrangement would allow them to conceal petitioner's campaign work from the Federal Election Commission. See *id.* at 6a ("Wilson-Foley explained to her campaign manager that [petitioner] would be paid by Apple because 'that way they wouldn't have to report it to the FEC.'") (citation omitted). To further "avoid direct 'connections' between [petitioner] and the Foleys," petitioner contracted with Christian Shelton, Apple's attorney, to provide "consulting" services to Shelton's business, the Law Offices of Christian B. Shelton, Esq. LLC, for $5000 per month. *Ibid.*; see *id.* at 79a-87a ("Consulting Agreement").

After finalizing the agreement with Shelton, petitioner worked on Wilson-Foley's campaign almost daily: He "vetted press releases, used a campaign e-mail address, and received access to the campaign calendar." Pet. App. 6a-7a. Petitioner also attended staff meetings and was involved in campaign strategy and fundraising. Petitioner did some work for Apple during this period, but his work for the campaign "substantially exceeded" the Apple work. *Id.* at 7a; see *ibid.* (787 email exchanges about the campaign, 63

about Apple, 23 about both). Petitioner's payments—approximately $35,000 in total—were laundered through a real estate company owned by Foley and then routed to Shelton's law office. Gov't C.A. Br. 10-11. In 2012, petitioner's work for the campaign became public. Petitioner subsequently ended his ties with the campaign and with Apple. Pet. App. 7a.

2. Petitioner was charged with a variety of offenses, including causing the submission of false statements to the Federal Election Commission, causing illegal campaign contributions, and criminal conspiracy. Petitioner was also charged with two counts of "falsif[ying]" documents or records in connection with a federal investigation, in violation of 18 U.S.C. 1519, based on the Greenberg and Shelton contracts. Pet. App. 7a-8a. At trial, over defense counsel's objection, the district court instructed the jury that under Section 1519, "[a] defendant falsifies a document by knowingly including within the document any untrue statement or representation or by knowingly omitting from the document a material fact." *Id.* at 217a. The jury found petitioner guilty on all counts. *Id.* at 8a.

3. The court of appeals affirmed. Pet. App. 1a-29a. As relevant here, the court held that petitioner had "falsifie[d]" his draft contract with Greenberg and his contract with Shelton within the meaning of Section 1519. As the court explained, the plain meaning of the term "falsify" includes creating a new document as well as tampering with an existing one. Pet. App. 9a-10a. The court pointed to dictionary definitions, which "confirm that, in common usage, it is acceptable to say that someone 'falsifies' a document when he creates a document that misrepresents the truth." *Id.* at 10a-11a. The court also explained that its interpretation

was consistent with the caption of Section 1519, see *id.* at 11a ("Destruction, alteration, or falsification of records in Federal investigations and bankruptcy"), was necessary to prevent words in the statute from overlapping, see *id.* at 11a-12a ("falsifies" and "alters"), and was consistent as well with the provision's legislative history, which shows that "Section 1519 [wa]s meant to apply broadly to any acts to destroy *or fabricate* physical evidence," *id.* at 13a (quoting S. Rep. No. 146, 107th Cong., 2d Sess. 14 (2002) (Senate Report)).

The court of appeals rejected petitioner's argument that the Greenberg and Shelton contracts were not "falsified." For that argument, petitioner relied on the Eleventh Circuit's decision in *United States* v. *Blankenship*, 382 F.3d 1110 (2004), cert. denied, 546 U.S. 828 (2005), which involved a defendant who had prepared contracts falsely stating that a minority-owned company would provide certain services, when in fact the services would be performed by a different company. *Id.* at 1117-1118. The Eleventh Circuit held that the defendant could not be prosecuted under 18 U.S.C. 1001(a)(3) for "making false writings." See 382 F.3d at 1131. The court acknowledged that contracts may be "false" within the meaning of Section 1001 when forged or altered, or when they contain factual misrepresentations. *Id.* at 1132. But reasoning that a contract merely creates "legal rights" between parties—and "is nothing more, and nothing less, than what it actually states"—the Eleventh Circuit held that a contract is not a false writing within the meaning of Section 1001 simply because its contains promises that neither party intends to keep. *Id.* at 1134.

In this case, the court of appeals stated that "in some circumstances, we might agree with these observations." Pet. App. 14a. Nevertheless, the court concluded that in the present context, "importing principles of contract law into the interpretation of this criminal statute muddies the issues rather than clarifies them." *Ibid.* The court accordingly concluded, consistent with its textual analysis, that a "written contract may be falsified for purposes of § 1519 if it misrepresents the true nature of the parties' agreement." *Ibid.* (internal quotation marks omitted).

Turning to the case at hand, the court of appeals held that the jury could permissibly find that petitioner had falsified the two "business consulting" contracts. Pet. App. 15a. Those contracts "purported to memorialize the terms of his arrangements with Greenberg and the Foleys." *Id.* at 14a. Yet the documents "intentionally did *not* reflect the arrangements contemplated by the parties" but rather "reflected and were designed to reflect" a far different arrangement. *Id.* at 14a-15a. In the court's view, the contracts were properly treated as "falsified," much as if petitioner "had written a memo to his file purporting to summarize the negotiations in this misleading way (that is, as business rather than political consulting)." *Id.* at 15a. For similar reasons, the court rejected petitioner's challenge to the jury instructions, which had defined falsification to include the omission of material facts. *Id.* at 28a.

ARGUMENT

Petitioner renews his contention (Pet. 20-28) that one who creates a sham contract in order to conceal a business relationship from the government has not "falsifie[d]" a document within the meaning of 18

U.S.C. 1519. Petitioner also argues that the courts of appeals are divided on that issue (Pet. 13-17), as well as on the question whether an omission can give rise to a false-statement prosecution (Pet. 17-20). The decision below is correct and does not conflict with the decision of any other court of appeals. Further review is unwarranted.

1. Section 1519 was enacted in 2002, as part of the Corporate and Criminal Fraud Accountability Act of 2002, Pub. L. No. 107-204, Tit. VIII, 116 Stat. 800, which is part of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), Pub. L. No. 107-204, 116 Stat. 745. Congress passed the Sarbanes-Oxley Act to protect investors and restore market confidence after the exposure of massive fraud by the Enron Corporation and a wide-ranging cover-up by Enron and its outside accounting firm, Arthur Andersen LLP. Senate Report 2-7. Congress intended for the law "to clarify and close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records." *Id.* at 14; see *Yates* v. *United States*, 135 S. Ct. 1074, 1079 (2016) (opinion of Ginsburg, J.).

a. As enacted by the Sarbanes-Oxley Act, Section 1519 imposes liability on anyone who:

> 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 or any case filed under title 11, or in relation to or contemplation of any such matter or case.

18 U.S.C. 1519. The court of appeals correctly held that, in prohibiting the "falsif[ying]" of documents for the purpose of misleading federal officials in the investigation or administration of the specified matters, Section 1519 applies to the creation of new documents as well as to the destruction or alteration of existing documents. See Pet. App. 9a-11a. That reading of Section 1519's text accords with dictionary definitions, which define the term "falsify" to mean "represent falsely: misrepresent, distort" and "to give a false account of; to misrepresent." *Id.* at 10a (brackets omitted) (quoting *Webster's Third New International Dictionary, Unabridged* 820 (2002) and *Oxford English Dictionary* 702 (2d ed. 1989)). That reading is consistent as well with Congress's intention to cover "a wide array of cases where a person destroys *or creates evidence* with the intent to obstruct an investigation or matter that is within the jurisdiction of any federal agency." Senate Report 12 (emphasis added); see *ibid.* (Section 1519 "would clarify and plug holes in the current criminal laws relating to the destruction *or fabrication* of evidence.") (emphasis added). And, as the decision below notes, a contrary reading that construes "falsify" as "prohibit[ing] only changes to existing documents" would render the word redundant with the statute's prohibition on "alter[ing]" documents. Pet. App. 12a (second set of brackets in original). Thus, Section 1519 includes not only the falsification of an existing document but also the creation of a false document. See *United States* v. *Schmeltz*, 667 F.3d 685, 688 (6th Cir. 2011) ("[T]he falsification statute plainly criminalizes the creation of a false document.").

Petitioner argues (Pet. 27) that "Section 1519's prohibition against 'falsifying' documents is * * * limited to creating 'counterfeit' or 'forged' documents like phony accounting records, fake shipping labels, etc." He contends (*ibid.*) that the Greenberg and Shelton contracts, although they may have misrepresented the political-consulting work that petitioner intended to do, nevertheless were "*authentic* documents," and that authentic documents "do not become *falsified* documents whenever their content is misleading." See *ibid.* ("Even misleading contracts are genuine contracts."). This Court rejected a similar argument in *Moskal* v. *United States*, 498 U.S. 103, 110 (1990), concluding that a genuine automobile title containing an inaccurate odometer reading was "falsely made" under 18 U.S.C. 2314 (1988). See 498 U.S. at 110 (concluding that "'falsely made' encompasses genuine documents containing false information"). And beyond that, a sham contract created to deceive the government about the purpose of monetary payments is hardly "authentic." A bogus contract created in order to mislead federal officials is not different than a shipping label that is created to convey the misimpression that merchandise will be (or has been) shipped, when in fact the label-maker intends to retain it (or has retained it) for himself. In both cases, if the misleading document is created "with the intent to impede, obstruct, or influence" the investigation or administration of a case or matter within federal jurisdiction, then the fabricator has "falsif[ied]" a document within the meaning of Section 1519.

Nor is petitioner correct in arguing (Pet. 27) that Section 1519 is inapplicable to contracts because the provision is "carefully limited to the affirmative 'en-

try' of misinformation," or that he was convicted merely for "passively omitting a material commitment from a contract," Pet. 28 (emphasis omitted). Making a false entry is only one of several obstructive actions that Section 1519 prohibits ("alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in"). Falsifying a document is indisputably covered. And creating a contract to conceal from federal officials the parties' true agreement is active, not passive, conduct. If petitioner, in order to deceive federal officials, had written in his diary, "today I agreed that I would work for the Law Offices of Christian B. Shelton, Esq. LLC," then even petitioner would have to concede that Section 1519 applies. A different result is not warranted merely because the Shelton contract uses the present tense to depict the same fictitious agreement. See Pet. App. 79a ("This consulting agreement * * * is made and entered into * * * by and between the Law Offices of Christian B. Shelton, Esq. LLC * * * and [petitioner].") (capitalization altered).

Petitioner is also wrong to claim (Pet. 32) that the decision below "essentially requires contracting parties to convert every contract into a comprehensive record of their relationship if they want to ensure they are never accused of falsifying documents." That argument is based on the incorrect premise (Pet. 33) that Section 1519, as construed by the court of appeals, would "penalize parties for every instance of tactical incompleteness within every contract." Yet that provision applies only where the contract is "falsifie[d] * * * with the intent to impede, obstruct, or influence" a federal investigation, case, or matter within the jurisdiction of a department or agency of

the United States. For similar reasons, the decision below would not "create[] a broad federal regulatory regime" or "significantly alter and displace the established law of contracts." Pet. 34-35. Section 1519 is no more a general federal prohibition on incomplete agreements than it is a general federal prohibition on incorrect recordkeeping. Congress enacted it to protect the integrity of federal investigations against purposely deceptive conduct. Petitioner's categorical exemption of intentionally misleading contracts would simply serve as a roadmap for the concealment of improper or undisclosed payments through the guise of sham "consulting" agreements.

b. Petitioner further argues (Pet. 20-26) that the decision below conflicts with this Court's prior cases, but that is incorrect.

In *Williams* v. *United States*, 458 U.S. 279 (1982), the Court held that "the deposit of a 'bad check'"—that is, a check supported by insufficient bank funds—did not violate 18 U.S.C. 1014 (1976), which prohibits the making of "any false statement" in order to influence the actions of a federally insured bank. 458 U.S. at 280. Under state law, the Court explained, the deposit of a check does not "make any representation as to the state of [the check-writer's] bank balance." *Id.* at 285. The Court based its holding as well on its reading of the key statutory phrase, "false statement": "'false statement' is not a term that, in common usage, is often applied to characterize 'bad checks.'" *Id.* at 286.

Contrary to petitioner's argument (Pet. 20-22), *Williams* does not conflict with the decision below. The statute at issue in that case, Section 1014, required the government to identify a "false statement,"

which caused the Court to look for a specific factual "representation." See 458 U.S. at 284-285. Since the defendant's only alleged false statement was a "representation as to the state of [his] bank balance," the Court found it significant that no such representation existed under state law. *Id.* at 285. In this case, by contrast, the Greenberg and Shelton contracts were, in their entirety, "falsifie[d] * * * document[s]" within the meaning of Section 1519 because they were fabricated as false evidence of a relationship that never existed and were designed to mislead federal officials. In addition, in *Williams* the Court relied on the "common usage" of the statutory term "'false statement,'" which "is not a term that * * * is often applied to characterize 'bad checks.'" *Id.* at 286. Here, by contrast, that consideration points in the opposite direction: "[I]n common usage, it is acceptable to say that someone 'falsifies' a document when he creates a document that misrepresents the truth." Pet. App. 10a-11a.

Petitioner's reliance (Pet. 22-23) on *Bronston* v. *United States*, 409 U.S. 352 (1973), is similarly misplaced. That case involved a prosecution under the federal perjury statute, which imposed criminal liability on a witness who "willfully states any material matter which he does not believe to be true." *Id.* at 357 (ellipses omitted) (quoting 18 U.S.C. 1621 (1964)). For several reasons, the Court concluded that the perjury statute did not cover a witness's statements that were "literally true but not responsive to the question asked and arguably misleading by negative implication." *Id.* at 353. First, the Court stated that the "literal" focus of the statute is on whether the witness has "willfully state[d] any material matter"

that he believes to be untrue, not on whether the witness has "state[d] any material matter that *implies* any material matter that he does not believe to be true." *Id.* at 357-358. The Court also distinguished "our system of adversary questioning and cross-examination," in which "the scope of disclosure is largely in the hands of counsel and [the] presiding officer," from laws that punish "criminally fraudulent or extortionate statements," contexts in which "the actor himself generally selects and arranges the representations." *Id.* at 358 n.4 (citation omitted). Furthermore, the Court could "perceive no reason why Congress would intend the drastic sanction of a perjury prosecution to cure a testimonial mishap that could readily have been reached with a single additional question by counsel." *Id.* at 358. And the Court noted as well that a contrary rule would "inject a new and confusing element into the adversary testimonial system we know." *Id.* at 359; see *id.* at 360 ("[W]e must read § 1621 in light of our own and the traditional Anglo-American judgment that a prosecution for perjury is not the sole, or even the primary, safeguard against errant testimony.").

The reasoning of *Bronston* does not support petitioner's reading of Section 1519. The question here is not whether petitioner "state[d]" a "matter" he believed to be untrue, *Bronston*, 409 U.S. 357, but whether he "falsifie[d]" a "document," 18 U.S.C. 1519, an inquiry that depends on the type of document, its content, and the circumstances under which it was created. The Greenberg and Shelton contracts, moreover, were not "literally" true statements that were "arguably misleading by negative implication" or that merely "*implie[d]*" something false. *Bronston*, 409

U.S. at 353, 358. They were wholesale fabrications, created to deceive the Federal Election Commission about the true relationship between the parties and the nature of the payments petitioner intended to receive. In addition, petitioner himself was wholly responsible for the content of the contracts, and federal officials had no way to "cure * * * readily" the false impression that the contracts conveyed. *Id.* at 358. And not only does it make intuitive sense "why Congress would intend" to cover misconduct like petitioner's, *ibid.*, but Congress specifically declared that it intended for Section 1519 to apply to the "fabrication of evidence," Senate Report 12.

Finally, the decision below also does not conflict with *Yates*, *supra*. In that case, the Court held that Section 1519's prohibition on destroying "tangible object[s]" did not apply to a fisherman who tossed allegedly undersized fish back into the sea. Based largely on contextual clues, the plurality concluded that the phrase "is better read to cover only objects one can use to record or preserve information, not all objects in the physical world." 135 S. Ct. at 1081 (opinion of Ginsburg, J.). Justice Alito concurred in the judgment on similar grounds. *Id.* at 1089-1090.

Petitioner points (Pet. 24-26) to several aspects of *Yates* that he claims support his argument, but in fact they undermine it. First, petitioner notes that, in construing the phrase "tangible object," the plurality in *Yates* emphasized that "two [of the statute's] verbs, 'falsify' and 'make a false entry in,' typically take as grammatical objects records, documents, or things used to record or preserve information." 135 S. Ct. at 1086 (opinion of Ginsburg, J.) (brackets omitted). And Justice Alito noted that the word "falsifies" is "closely

associated with filekeeping." *Id.* at 1090. Petitioner argues (Pet. 24) that "[c]ontracts are neither created to 'preserve information' nor used for 'filekeeping.'" Yet a contract is indisputably a "document," one of the items explicitly mentioned in Section 1519. No one doubts that a defendant who "alters" or "destroys" a contract in order to conceal his wrongdoing has violated Section 1519; the same result is warranted where, as here, a defendant "falsifies" a contract. And petitioner is simply wrong in asserting that written contracts are not intended to preserve information: They are created to reflect the parties' true agreement and serve as evidence of it—or, as in this case, to conceal the parties' true agreement by serving as false evidence.

Second, petitioner notes the *Yates* plurality's statement "that '§ 1519 was passed as part of legislation targeting corporate fraud,' and 'was intended to prohibit, in particular, corporate document-shredding to hide evidence of financial wrongdoing.'" Pet. 24 (quoting 135 S. Ct. at 1080-1081). Yet that legislative purpose also supports the decision below, which prevents the creation of fake contracts to hide corporate or financial malfeasance from federal officials. Just as Section 1519 targets a corporation that alters an existing contract to conceal the source or nature of payments, so too it applies where the corporation simply creates a fake contract from scratch.

Third, petitioner notes that the caption of Section 1519 refers to the "Destruction, alteration, or falsification of *records*," and he argues that the Greenberg and Shelton contracts "were not 'records.'" Pet. 24-25 (citation omitted). For the reason just stated, that is simply incorrect: A contract is a record of the parties'

agreement. And in any event, a contract is certainly a "document."

Fourth, petitioner notes (Pet. 24) that the *Yates* plurality gave the phrase "tangible object" a limited reading, rather than "the Government's unrestrained reading." 135 S. Ct. at 1081. He argues (Pet. 25) that the court of appeals' reasoning would turn Section 1519 into "a general ban on incomplete agreements, covering all contracts that might be relevant to any matter that is ever under any sort of federal investigation." Yet whatever reasons may exist for reading narrowly the *physical items* to which the statute applies ("any record, document, or tangible object"), or for limiting its *jurisdictional* coverage ("any matter within the jurisdiction of any department or agency of the United States"), that says nothing about how properly to interpret the statute's active verbs ("alters, destroys, mutilates, conceals, covers up, *falsifies*, or makes a false entry in"). Nor is the decision below "a general ban on incomplete agreements." Pet. 25. Petitioner was not convicted merely because the Greenberg and Shelton contracts were incomplete. He was convicted because he "falsifie[d]" them: He created them to deliberately "misrepresent the true nature of the parties' negotiations * * * in order to frustrate a possible future government investigation." Pet. App. 4a.

Fifth, petitioner notes (Pet. 26) that the *Yates* "plurality invoked the rule of lenity," while the court of appeals did not. Yet that rule comes into play only where, after all interpretive methods have been exhausted, "there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *United*

States v. *Castleman*, 134 S. Ct. 1405, 1416 (2014) (quoting *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010)). No such "grievous ambiguity" exists here.

2. Petitioner argues (Pet. 13) that the decision below "creates two separate circuit splits." But the cases to which petitioner points do not involve prosecutions under Section 1519 and do not create any conflict.

a. Petitioner contends (Pet. 13) that the decision below conflicts with decisions in which the Tenth and Eleventh Circuits have held that "contractual commitments cannot be 'false.'" In *United States* v. *Blankenship*, 382 F.3d 1110 (11th Cir. 2004), cert. denied, 546 U.S. 828 (2005), the defendants were convicted under 18 U.S.C. 1001(a)(3) (2000 & Supp. IV 2004) of "mak[ing] or us[ing] [a] false writing or document," based on a scheme in which the defendants created various subcontracts and leases to make it appear as if governmental contracts were being performed by a minority-owned business, when in fact the work was being performed by another business. See 382 F.3d at 1116-1118. In reviewing those convictions, the Eleventh Circuit stated that "for a conviction to be sustained under § 1001(a)(3), it is imperative that the 'writing or document' be 'false.'" *Id.* at 1132. Under the circumstances, the court held that the defendants' leases and subcontracts did not meet that standard. The court acknowledged that if a contract were forged, "the document itself would be, quite literally, false." *Ibid.* In addition, the court stated that a contract "can be 'false' * * * if it contains factual misrepresentations." *Ibid.* But, relying heavily on this Court's decision in *Williams*, the Eleventh Circuit held that a contract is not a false writing merely be-

cause "neither party ever intended to enforce their contractual rights," because a contract "does not convey and implicitly guarantee either that the parties to the contract intended to perform, or that they intended to actually enforce their contractual rights." *Id.* at 1134.

Blankenship is not in conflict with the decision below because the statute at issue in that case differs significantly from Section 1519. Indeed, the court of appeals stated that "in some circumstances, we might agree with [*Blankenship*'s] observations," but found them unhelpful in "the interpretation of *this criminal statute*." Pet. App. 14a (emphasis added). A conviction under Section 1001(a)(3) must involve a "false writing or document," which the Eleventh Circuit interpreted as requiring "factual misrepresentations." 382 F.3d at 1132. Section 1519, by contrast, applies to a broader range of conduct designed to obstruct justice, including where no false factual representation is made. For instance, in *United States* v. *Wortman*, 488 F.3d 752 (7th Cir. 2007), the court of appeals upheld the conviction under Section 1519 of a defendant who, in order to interfere with an FBI investigation, destroyed a CD that contained images of child pornography. *Id.* at 755. Section 1519 would similarly apply where: a bankrupt destroys evidence of his assets in the midst of a bankruptcy case; a retailer scratches off the foreign-origin markings on its inventory in order to mislead federal investigators; or an executive fabricates IOUs from fictitious "clients" to mislead regulators into believing that his company is solvent. As in those examples, petitioner's conduct here was designed to deceive federal investigators by altering, in his favor, the evidence available to them. And, to the

extent that *Blankenship* relied for its holding on this Court's decision in *Williams*, it is distinguishable for the reasons stated above. See pp. 11-12, *supra*.

For similar reasons, the decision below also does not conflict with *United States* v. *Rothhammer*, 64 F.3d 554 (10th Cir. 1995), which involved a prosecution under 18 U.S.C. 1014 (1994) based on a real estate scheme in which the defendants used a series of bad checks and promissory notes to obtain bank loans. Relying on *Williams*, the Tenth Circuit held that the defendants' promissory notes, even if backed by insufficient funds, were not "false statement[s] to a bank" within the meaning of Section 1014. 64 F.3d at 557. Section 1519 applies to a broader range of behavior than does Section 1014, and as noted, the decision below is distinguishable from *Williams*. See pp. 11-12, 18, *supra*.

b. Petitioner argues (Pet. 17) that the decision below also created a split with the Sixth Circuit, which "has held that *incomplete* statements—even ones with material omissions—cannot constitute *false* statements." For that claim, he relies on *United States* v. *Kurlemann*, 736 F.3d 439 (2013), which involved a prosecution under Section 1014 based on a complicated real estate scheme involving the shifting of funds from bank account to bank account to conceal the insufficient income and assets of straw purchasers. See *id.* at 443-444. The court held, based largely on *Williams*, that statements to a bank that are literally true but omit material information—such as "a seller's representation that he has received a 'down payment' from the buyer in a real estate transaction," which may imply "that the down payment is not an unsecured promissory note delivered from the buyer to the

seller"—do not qualify as "false statements or reports to banks" within the meaning of Section 1014. *Id.* at 445, 447-448 (brackets and internal quotation marks omitted). Petitioner argues (Pet. 17-20) that *Kurlemann* is inconsistent with the decision below.

Yet petitioner fails to acknowledge that the Sixth Circuit has explicitly held that prosecution under Section 1519 may be based on a defendant's "[m]aterial omissions of fact." *United States* v. *Lanham*, 617 F.3d 873, 887 (2010), cert. denied, 563 U.S. 1002 (2011). In *Lanham*, the defendants were corrections officers who attempted by various means to cover up their involvement in and knowledge of the rape of an inmate under their control. See *id.* at 878-881. One of the defendants argued on appeal that he could not be convicted under Section 1519 based on his report of the incident, which merely "contained omissions of fact rather than affirmative lies." *Id.* at 887. The court of appeals found that the defendant's incomplete statement was false, explaining that "[m]aterial omissions of fact can be interpreted as an attempt to 'cover up' or 'conceal' information. A reasonable fact-finder could conclude that [the defendant] *falsified his report*." *Ibid.* (emphasis added).

Similarly, in *Schmeltz*, *supra*, the Sixth Circuit upheld the conviction under Section 1519 of a sheriff's deputy based on his report regarding the death of a pretrial detainee. The indictment alleged that the defendant had "knowingly falsified a document" by "omit[ing] from his official report any mention of his assault of [the detainee] in the Jail's Booking area; any mention of [another officer's] use of a 'sleeper hold' on [the detainee]; and any mention of the fact that [the other officer] had rendered [the detainee]

unconscious with the sleeper hold." 667 F.3d at 686-687 (emphasis omitted). The defendant argued that that count of the indictment was "duplicitous because the omissions from his report constitute separate false entries and therefore present three separate violations of § 1519." *Id.* at 688. The court of appeals rejected that argument, explaining that the defendant "was not charged with making 'a false entry,' but rather the indictment alleged he 'falsified a document.'" *Ibid.* The court further explained:

> The 'falsifies' clause of § 1519 was * * * intended to punish the falsification of a document, rather than specific statements or omissions within a document. Accordingly, [the defendant] could violate § 1519 once—and no more than once—by falsifying his May 30th report with his omissions. Because Count 6 charged only one offense, the district court did not err in instructing the jury.

Ibid.

The Sixth Circuit's decisions in *Lanham* and *Schmeltz* are fully consistent with the decision below. And other courts of appeals have similarly upheld prosecutions under Section 1519 based, at least in part, on omissions. See *United States* v. *Taohim*, 817 F.3d 1215, 1222 (11th Cir. 2013) (omission of information in garbage record); *United States* v. *Moyer*, 674 F.3d 192, 198, 207-208 (3d Cir.) (omission in police report), cert. denied, 133 S. Ct. 165 (2012); *United States* v. *Jackson*, 186 Fed. Appx. 736, 738 (9th Cir. 2006) (omitted confession). No division of authority on this issue exists.

c. Finally, in addition to disproving petitioner's assertion of a circuit split on the issue of omissions, the contrast between the Sixth Circuit's decision in

Kurlemann (which rejected a "false statement" conviction under Section 1014 based on omissions) and its decisions in *Lanham* and *Schmeltz* (which upheld "falsified document" convictions under Section 1519 based on omissions) confirms the argument above: namely, that Section 1519 is broader than statutes, such as Sections 1001(a)(3) and 1014, that require proof of false statements. See p. 18, *supra*. Petitioner therefore cannot rely on cases involving prosecutions under Sections 1001(a)(3) or 1014 to support his argument that the decision below created a circuit conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[*] The Acting Solicitor General is recused from this case.