No. 11-959

IN THE

Supreme Court of the United States

CORY LEDEAL KING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE CATO INSTITUTE, AND THE TEXAS PUBLIC POLICY FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should an individual face federal criminal liability under 18 U.S.C. § 1001 for a false statement made to a person unconnected to the federal government at a time when no federal investigation exists merely because the statement concerns an issue over which the federal government may exercise discretionary regulatory authority?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT.................................. 2

ARGUMENT 3

I. Judicial Expansions of 18 U.S.C. § 1001 Have Invited Prosecutors to Stretch the Statute Beyond Its Proper Reach.. 3

II. An Improperly Broad Definition of the "Matter Within the Jurisdiction" Clause Presents Significant Risks of Overcriminalization and Misuse........ 8

CONCLUSION.. 14

TABLE OF AUTHORITIES

Page(s)

CASES

Bouie v. City of Columbia,
378 U.S. 347 (1964)... 13

Brogan v. United States,
522 U.S. 398 (1998)....................................5, 6, 12

*Bryson v. United State*s,
396 U.S. 64 (1969)... 4

Fowler v. United States,
131 S. Ct. 2045 (2011)... 7

Hubbard v. United States,
514 U.S. 695 (1995).. 3, 4

Julian v. United States,
463 U.S. 1308 (1983)... 4

McBoyle v. United States,
283 U.S. 25 (1931)... 13

Sorich v. United States,
555 U.S. 1204 (2009)... 13

United States v. Aguilar,
515 U.S. 593 (1995)... 7

United States v. Blankenship,
382 F.3d 1110 (11th Cir. 2004)........................... 6

United States v. Ford,
639 F.3d 718 (6th Cir. 2011) 7

United States v. Gibson,
881 F.2d 318 (6th Cir. 1989) 6

United States v. Gilliland,
312 U.S. 86 (1941)... 4

United States v. Knox,
396 U.S. 77 (1969)... 4

United States v. Rodgers,
466 U.S. 475 (1984).. 4, 5

United States v. Yermian,
468 U.S. 63..*passim*

STATUTES

18 U.S.C. § 1001..*passim*

18 U.S.C. § 1030.. 9

False Statement Accountability Act of 1998,
Pub. L. No. 104-292, 110 Stat. 3459 4

Intelligence Reform and Terrorism
Prevention Act of 2004, Pub. L. No. 108-
458, 118 Stat. 3638 4

Adam Walsh Child Protection and Safety Act
of 2006, Pub. L. No. 109-248, 120 Stat.
587 4

OTHER AUTHORITIES

Reining in Overcriminalization: Assessing the Problems, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Security of the H. Comm. on the Judiciary, 111th Cong. (Sept.28, 2010) (Statement of Abner Schoenwetter). 10

John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193 (1991)........ 8

Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 Buff. Crim. L. Rev. 45, 63 n.19 (1998) 11

Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 Calif. L. Rev. 1515 (2009) 11

Alex Kozinski, J. & Misha Tseytlin, *You're (Probably) a Federal Criminal*, *in* In the Name of Justice: Leading Experts Reexamine the Classic Article "The Aims of the Criminal Law" 43 (Timothy Lynch ed., 2009) 9

Harry Litman, *Pretextual Prosecution*, 92 Geo. L.J. 1135 (2004) 11

Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 Geo. L.J. 1435 (2009) 10

Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 Colum. L. Rev. 583 (2005).. 11

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INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit association of criminal defense lawyers with a national membership of more than 10,000 attorneys.[1] As practitioners representing clients in criminal trials in the federal court system, NACDL has a keen interest in ensuring that federal criminal law is administered consistent with basic notions of fairness and due process.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, it publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs.

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[1] Due to inadvertent error, notice of the intent of *amici curiae* to file a brief was provided to counsel of record for all parties on March 5, 2012, which was not at least 10 days prior to the due date for the brief as required by Sup. Ct. Rule 37.2(a). Both petitioner and respondent consented to the filing of this brief and waived the untimeliness of the notice. Pursuant to Sup. Ct. Rule 37.2(a), a letter of consent from each party accompanies this filing. Pursuant to Sup. Ct. Rule 37.6, *amici* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation and submission of this brief.

The Texas Public Policy Foundation is a non-profit, non-partisan research institute founded in 1989. Funded by thousands of individuals, foundations, and corporations, the Foundation does not accept government funds or contributions to influence the outcomes of its research. It has no capital stock or other ownership. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise throughout Texas and the U.S. by educating policymakers and the national public policy debate with academically sound research and outreach.

Amici have, in recent years, devoted considerable attention to the problems of overcriminalization and the overfederalization of criminal law. The decision of the Ninth Circuit, if allowed to stand, would implicate both of these interests as it would expose individuals to federal indictment, prosecution, and incarceration for conduct that no reasonable person would contemplate to be a crime. Accordingly, this case is of the utmost interest to *amici*.

SUMMARY OF ARGUMENT

18 U.S.C. § 1001 criminalizes the knowing and willful making of materially false statements in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States. Given the increasingly broad reach of the federal government and the expansion of its regulatory authority, it is critical for the Court to properly define the "matter within the jurisdiction" language to prevent an

unwarranted expansion of the reach of an already broad statute.

In this case, the Ninth Circuit held that to satisfy the jurisdictional prong of 18 U.S.C. § 1001, the government needed only to prove that the subject matter of a false statement involves an issue over which a federal government agency possessed regulatory authority. In so doing, it continued a troubling expansion of Section 1001 and exceeded the undefined boundary of reasonable application that Courts have assumed would serve as the protection against unfair prosecutions of non-criminal behavior. Taken to its logical conclusion, the Ninth Circuit's opinion makes very real the potential that Section 1001 could be used as a "'trap for the unwary,'" *see United States v. Yermian*, 468 U.S. 63, 75 n.14, expanded "in such a way as to 'make a surprisingly broad range of unremarkable conduct a violation of federal law.'" *Id.* at 82 (Rehnquist, J. *dissenting*) (citation omitted). This Court should grant certiorari and properly limit the scope of Section 1001.

ARGUMENT

I. Judicial Expansions of 18 U.S.C. § 1001 Have Invited Prosecutors to Stretch the Statute Beyond Its Proper Reach

18 U.S.C. § 1001 has its origins in a statute originally designed to punish fraudulent government claims. *Hubbard v. United States*, 514 U.S. 695, 704 (1995). While a 1918 expansion broadened the law to cover false statements "intended to bilk the Government out of money or property," the statute remained "relatively

narrow." *Id.* at 706. And even after Congress created the now-existing statute during the New Deal to cover statements made "in any matter within the jurisdiction of any department or agency of the United States . . ." *id.*, prosecutions were focused on statements made directly to a federal official or a federal agency.[2]

Since 1984, Congress has broadened the reach of 18 U.S.C. § 1001. In 1996, Congress expressly amended the statute to criminalize statements regarding "any matter within the jurisdiction of the executive, legislative, or judicial branch." False Statement Accountability Act of 1998, Pub. L. No. 104-292, § 2, 110 Stat. 3459, 3459.[3] In 2004 and again in 2006, Congress amended the penalty provision of the statute to increase penalties for false statements related to certain offenses. Intelligence Reform and

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[2] To the extent amici are aware of such cases, every Section 1001 case the Court reviewed before its decision in *United States v. Yermian*, 468 U.S. 63 (1984) involved a statement made to a federal official or agency. *See United States v. Rodgers*, 466 U.S. 475 (1984) (false statements made to an FBI agent); *Julian v. United States*, 463 U.S. 1308 (1983) (false statements made to an agent of the U.S. Customs Agency); *United States v. Knox*, 396 U.S. 77 (1969) (false statements made to the IRS); *Bryson v. United States*, 396 U.S. 64 (1969) (false statements made to the National Labor Relations Board); *United States v. Gilliland*, 312 U.S. 86 (1941) (construing the predecessor of § 1001 regarding false statements made to a federal board charged by the Secretary of the Interior with the administration of the "Hot Oil" Act of 1935).

[3] Congress' action was in direct response to the Court's holding that false statements made to the judicial branch did not fall within the scope of 18 U.S.C. § 1001. *Hubbard v. United States*, 514 U.S. 695 (1995).

Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6703(a), 118 Stat. 3638, 3766; Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 141(c), 120 Stat. 587, 603.

During that same period, four opinions from this Court expanded the reach of 18 U.S.C. § 1001 still further. In *United States v. Rodgers*, 466 U.S. 475 (1984), the Court held that the statute covered a false report to the FBI, rejecting the argument that the statute applied only to false statements made to federal agencies that doled out benefits or adjudicated rights. In *United States v. Yermian*, 468 U.S. 63 (1984), the Court held that the statute covered a false statement made to an individual's employer on forms that were forwarded to the Department of Defense, rejecting the argument that the statute required proof that the defendant had actual knowledge that the matter fell within federal agency jurisdiction. And in *Brogan v. United States*, 522 U.S. 398 (1998), the Court held that the statute covered a one-word denial made in response to a federal investigator's question, rejecting the common law "exculpatory no" defense.

This is not to suggest that the expansion of the statute occurred without significant criticism and the articulation of prescient warnings. In dissenting from the majority's opinion in *Yermian*, Justice Rehnquist (joined by Justices Brennan, Stevens, and O'Connor) warned that by failing to require proof of a defendant's actual knowledge that a matter fell within an agency's jurisdiction, the Court risked "criminaliz[ing] the making of even the most casual false statements so long as they turned out, unbeknownst to their maker, to be

material to some federal agency function," *Yermian*, 468 U.S. at 82. The dissenters predicted that the Court's failure to articulate a precise knowledge standard "invited lower courts to improvise a new state-of-mind requirement, almost out of thin air, in order to avoid the unfairness of the Court's decision . . . ." *Id.* at 83.

While the majority in *Yermain* rejected the notion that Section 1001 would create "a trap for the unwary," *id.* at 74, that theme would resurface fourteen years later. In a concurring opinion in *Brogan*, Justice Ginsburg wrote that Section 1001 "is a powerful instrument with which to trap a potential defendant" and noted it "arms Government agents with authority not simply to apprehend lawbreakers, but to generate felonies, crimes of a kind that only a Government officer could prompt." *Brogan*, 522 U.S. at 409 and n.1.

Courts of Appeal have recognized the potential mischief posed by a broad statute applied without reasonable limitations. For example, the Eleventh Circuit held in 2004 that if 18 U.S.C. § 1001 were to be construed without a reasonable construction of the jurisdiction element "the results would be shocking." *United States v. Blankenship*, 382 F.3d 1110, 1137 (11th Cir. 2004). *See also, United States v. Gibson*, 881 F.2d 318, 324 (6th Cir. 1989) (Merritt, J. dissenting) (citing overbreadth and ambiguity concerns raised in *Yermian* dissent and noting that "Chief Justice Rehnquist's prediction of significant confusion in the lower courts has come to pass"). Similar concerns certainly drove the Sixth Circuit's decision last year reversing Section 1001 convictions because "[w]hile

the facts that [the defendant] failed to disclose concerned an entity inseparable from federal ties, the entities to which he failed to disclose those facts were anything but federal." *United States v. Ford*, 639 F.3d 718, 720 (6th Cir. 2011).[4]

The Ninth Circuit's opinion in Mr. King's case not only represents a clear circuit split with the Sixth Circuit's opinion in *Ford*, it also reflects the culmination of an expansion of 18 U.S.C. § 1001 past any point of reason. Cory King's alleged false statements were not made to a federal official. They were not made to an individual with any relationship to a federal agency. And they were not made during the pendency of a federal

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[4] Indeed, in applying a reasonably limiting principle to the jurisdictional element of 18 U.S.C. § 1001, the Sixth Circuit conformed to this Court's treatment of similar, process-related crimes. Just last year, in construing the federal witness tampering statute, the Court held that the government must prove it was "'reasonably possible'" rather than merely "possible" that a communication would be made to a federal official in order to support a conviction under that statute. *Fowler v. United States*, 131 S. Ct. 2045, 2051 (2011) (citation omitted) (recognizing the need for a limiting principle to avoid "extending the scope of this federal statute well beyond the primarily federal area that Congress had in mind.") And in construing the catchall provision of the obstruction of justice statute, the Court similarly imposed the requirement that a defendant's act have the natural and probable effect of interfering with the due administration of justice. *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (recognizing the need to "place metes and bounds on the very broad language of the catchall provision.") While those cases did not involve 18 U.S.C. § 1001, the need to properly define federal jurisdiction to limit the reach of otherwise broad statutes has similar force here.

investigation. According to the Ninth Circuit, Mr. King committed a federal crime because the subject matter of his statement was one over which a federal government agency possessed regulatory authority. In so holding, the Ninth Circuit closed the circle on Justice Rehnquist's prediction that 18 U.S.C. § 1001, without proper limitation, would "criminalize the making of even the most casual false statements so long as [it] turned out, unbeknownst to [its] maker, to be material to some federal agency function." *Yermian*, 468 U.S. at *Id.* 82.

II. An Improperly Broad Definition of the "Matter Within the Jurisdiction" Clause Presents Significant Risks of Overcriminalization and Misuse

If the Ninth Circuit's unbounded interpretation of 18 U.S.C. § 1001's "matter within the jurisdiction" clause were to stand, it is not difficult to imagine applications that would border on the absurd. This is especially true given the expanded regulatory jurisdiction of various federal government agencies and the expansive reach of existing and newly-minted federal statutes.

The American Bar Association and others have calculated that federal agencies have promulgated approximately 10,000, and possibly as many as 300,000 federal regulations many of which can be enforced criminally.[5] As Petitioner notes,

[5] The Smart on Crime Coalition, *Smart on Crime, Recommendations for the Administration and Congress* (hereinafter "Smart on Crime") at 2 (2011), http://www.besmartoncrime.org/pdf/Complete.pdf (citing Am.

"[i]t is a rare conversation whose "subject matter" does not fall within the regulatory jurisdiction of at least one federal agency." Pet. at 25 n.7 (citing U.S. Food and Drug Administration, *About FDA* (Oct. 2011) (estimating that FDA regulates "about 25% of the United States economy"). *See also* Alex Kozinski, J. & Misha Tseytlin, *You're (Probably) a Federal Criminal*, *in* In the Name of Justice: Leading Experts Reexamine the Classic Article "The Aims of the Criminal Law" 43, 44 (Timothy Lynch ed., 2009) (noting that "[i]t is impossible to know how many Americans are federal criminals. There are thousands of federal regulations that can be criminally enforced.").

Under a regime where the criminality of a false statement is based on the subject matter of the statement rather circumstances of its making, a vast array of informal conversations become the potential basis for federal criminal prosecutions. For example, given the reach of federal statutes governing the use of information obtained from a computer used in interstate commerce, *see* 18 U.S.C. § 1030 (Computer Fraud and Abuse Act), an office IT specialist who lies to a co-worker about files downloaded from an office computer system could face prosecution for violating 18 U.S.C. § 1001. A pharmaceutical sales representative who lies to a friend in a coffee shop about his off-label promotion of a drug to a potential doctor faces

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Bar Ass'n, Crim. Justice Section, *The Federalization of Criminal Law* at 9 n.11; app. C (1998); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991).

similar liability. While these examples may seem far-fetched, the Ninth Circuit's subject matter test contains no limiting principle that would bind a prosecutor from charging such an offense or compel a trial court to dismiss such a prosecution. Indeed, before the Ninth Circuit opinion at issue here, it seemed similarly far-fetched to imagine a federal court prosecution for making a false statement about a water runoff system to a state livestock investigator wholly unconnected to any federal agency or investigation.

One final example illustrates the potential effect of the Ninth Circuit's holding in the present era of overcriminalization. In a recent congressional hearing, Abner Schoenwetter, a 64-year-old former seafood importer with no previous criminal record, testified about his six-year term in federal prison for Lacey Act violations arising out of his purchase of a shipment of lobsters that violated obscure, and possibly outdated, Honduran treaty regulations because they were the wrong size and in the wrong packaging. *Reining in Overcriminalization: Assessing the Problems, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 36-37 (Sept.28, 2010) (Statement of Abner Schoenwetter). Under the Ninth Circuit's holding in King, because Mr. Schoenwetter's seafood purchases arguably implicated issues under the regulatory authority of the U.S. Department of Agriculture, a false statement about them to a dock worker, even in the absence of any on-going investigation by the USDA would violate Section 1001.

An improperly broad construction of 18 U.S.C. § 1001 also affects the integrity of the criminal justice system. Section 1001 is one of a class of "process crimes" that focus on offenses "not against a particular person or property, but against the machinery of justice itself." Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 Geo. L.J. 1435, 1437 (2009). Numerous commentators have explored the phenomenon of "pretextual prosecution" of process crimes. See, Harry Litman, *Pretextual Prosecution*, 92 Geo. L.J. 1135 (2004); Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 Colum. L. Rev. 583 (2005); And while exact numbers are difficult to gather, "statistics on federal prosecutions indicate a steady increase in false statement cases, which appeared to double between 1997 and 2007, from approximately 600 to approximately 1200 filed annually." Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 Calif. L. Rev. 1515, 1522 n.25 (2009).

A number of recent high-profile cases, including the prosecutions of Martha Stewart (obstruction of justice and securities fraud based upon false statements instead of insider trading charges), Barry Bonds (perjury and obstruction of justice instead of controlled substance offenses), Roger Clemens (same), and Lewis "Scooter" Libby (false statements, obstruction of justice and perjury instead of classified information transmission offenses), have involved "process crime" charges rather than indictment on the underlying conduct that triggered the government investigation.

Decisions such as these give weight to the observation that "[s]ometimes the operating philosophy seems to be that, if government cannot prosecute what it wishes to penalize, it will penalize what it can prosecute." Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 Buff. Crim. L. Rev. 45, 63 n.19 (1998). The recent trends suggest that Justice Ginsburg's concerns about the prospect of 18 U.S.C. § 1001 being used to "trap a potential defendant" were well-founded. *Brogan v. United States*, 522 U.S. 398, 409 (1998) (Ginsburg, J., concurring) (18 U.S.C. § 1001 "arms Government agents with authority not simply to apprehend lawbreakers, but to generate felonies, crimes of a kind that only a Government officer could prompt."). Indeed, a commentator recently suggested that "practical considerations . . . provide the most straightforward explanation for the government's reliance on false statements [charges] . . . more certain resolution of the existing case or advantageous substitution of a simple one. False statement charges also supply leverage to induce cooperation against other defendants." Griffin, 97 Calif. L. Rev. at 1535. In these circumstances, it is critically important for 18 U.S.C. § 1001 to be properly defined and appropriately narrow.

In the past two decades, the number of federal criminal offenses has exploded. As of 2007, there were more than 4,450 offenses that carried criminal penalties under the United States Code.[6] From 2000 through 2007, Congress created 452

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[6] Smart on Crime at 2 (citing John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation L. Memo. No. 26, June 16, 2008, at 5).

new federal crimes -- approximately one new crime a week on average during that period.[7] Many of these new federal crimes subject individuals to lengthy prison terms for regular economic conduct that he or she had no reason to know could be construed as illegal. Allowing an already broad statute like 18 U.S.C. § 1001 to be untethered from a meaningful jurisdictional element would only exacerbate the on-going overcriminalization crisis.

It is a "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime." *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964). As Justice Scalia noted, "[i]t is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail." *Sorich v. United States*, 555 U.S. 1204, 1207 (2009) (Scalia, J., dissenting from denial of certiorari).

The trend of overcriminalization that has dominated the last decade shows that without the Court's moderating influence, Congress will continue to pass vague statues that will be pursued aggressively by "headline-grabbing prosecutors,"[8] and individuals will continue to face prosecution without receiving "a fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). Allowing the federal criminal law to reach informal conversations simply because the subject matter of the conversation involves an issue over which the

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[7] Smart on Crime at 2; Baker, Jr., *supra* n. 5, at 2.

[8] *Sorich*, 555 U.S. at 1207.

federal government possesses regulatory authority runs afoul of that basic notion. The Court should grant certiorari in this case to properly limit the scope 18 U.S.C. § 1001 and retard the unnecessary expansion of federal criminal law into the daily lives of Americans.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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