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

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Government contends that the statement uttered by Petitioner Cory King to an Idaho livestock inspector – which related to whether Mr. King's farm was injecting water into irrigation wells – was made in connection with a "matter within the jurisdiction" of the United States. 18 U.S.C. § 1001(a). Yet the record in this case includes *none* of the evidentiary features traditionally relied on by federal courts in concluding that a false statement falls within § 1001 jurisdiction: (1) the statement was *not* made to an employee of the United States; (2) the individual to whom it was made (John Klimes) worked for the Idaho Department of Agriculture, an agency that had *no role* in enforcing the federal-state program that required permits for underground water injections; (3) Klimes himself had *no relationship* with the Environmental Protection Agency (EPA) or any other federal agency at the time the statement was made; and (4) Klimes did not contact EPA until a week *after* the statement was made.

The Government nonetheless insists that Mr. King was properly charged under § 1001 because, it asserts, "a close connection linked petitioner's false statement and the EPA's regulation of drinking water under the SDWA [Safe Drinking Water Act]." Opp. Br. 12. Given the absence of any connection between Klimes and the EPA, however, the only connection between Mr. King's statement and EPA was the *subject matter* of the statement. The Government's contention that a subject-matter connection of that sort is sufficient to bring the statement within the purview of § 1001 is supported by neither the statutory language nor case law construing the statute. Indeed, the Government has not pointed to a single case in which a § 1001

prosecution has been upheld under even remotely similar facts. Moreover, the Government has not identified any relevant distinctions between the Ninth Circuit's decision and a 2011 Sixth Circuit decision that reached a directly conflicting interpretation of § 1001's "matter within the jurisdiction" language. Review is warranted to resolve that conflict and to cabin the Government's efforts to expand the reach of the federal material false statement statute.

Review is also warranted to determine whether the Government is exceeding its delegated powers under the Commerce Clause by applying the SDWA to Mr. King's admittedly intrastate activities. The Government attempts to rewrite the Petition by stating that Mr. King is asserting a *facial* challenge to the SDWA. Opp. Br. 19-25. Mr. King makes no such claim. Rather, he asserts an as-applied challenge to his SDWA conviction and contends that the SDWA may not constitutionally be applied to his well injections in the absence of any allegation or proof that the injected water: (1) was contaminated; (2) flowed in interstate commerce; or (3) was injected into any aquifer that was a current or potential source of drinking water. In the courts below, Mr. King repeatedly affirmed that he was raising an as-applied challenge, and the Ninth Circuit clearly understood it as such. *See, e.g.*, Pet. App. 10a ("King contends that if the SDWA is construed to allow a criminal conviction in his case, Congress has exceeded its authority under the Commerce Clause.").

The Government does not challenge the intrastate nature of Mr. King's activities. Rather, it assets that his activities are subject to federal regulation because they "are part of an economic class of activities"

whose "total incidence," Congress has reasonably determined, pose a threat to drinking water supplies. Opp. Br. 23. The Government concedes, however, that the SDWA's permitting requirement contains numerous statutory exemptions; those exemptions render implausible any contention that the SDWA comprehensively regulates underground injections. The Ninth Circuit's determination that Congress may nonetheless restrict Mr. King's intrastate activities conflicts sharply with the Court's admonition that such restrictions may only be imposed as an *essential* part of a *comprehensive* regulatory scheme – a scheme that would be undercut unless the intrastate activity were regulated.

I. THE APPEALS COURT'S UNPRECEDENTED INTERPRETATION OF § 1001'S JURISDICTIONAL PROVISION CONFLICTS WITH *FORD* AND DECISIONS OF THIS COURT

The Government characterizes Mr. King's jurisdictional challenge to his § 1001 conviction as a "factbound claim" whose review is unwarranted. Opp. Br. 10. That description is wholly inapt. The Government does not dispute any of Mr. King's assertions regarding the circumstances of his conversation with an Idaho Department of Agriculture employee. Rather, the dispute focuses solely on what constitutes a "matter within the jurisdiction" of the United States, within the meaning of § 1001.

The Government contends that a conversation between a defendant and a state employee who has no

connection with the federal government is nonetheless a "matter within the jurisdiction" of the United States because the *subject matter* of the conversation – underground injection of water – is one over which EPA has jurisdiction. Opp. Br. 12. It asserts that Mr. King "lied to Klimes" in order to cover up the fact that water was being injected; that EPA possesses "concurrent enforcement authority" over water injections; and thus that the lie (if believed) could have "interfered with the integrity" of a not-yet-initiated EPA investigation. *Id.* at 11-12. Tellingly, the Government cites *no* court decisions that supports its theory that a statement not made to a federal official (or someone standing in the shoes of a federal official) is nonetheless a "matter" within the jurisdiction of the United States if the subject matter of the statement is federal in character.

The Government's citations to *United States v. White*, 270 F.3d 356 (6th Cir. 2001), and *United States v. Wright*, 988 F.2d 1036 (10th Cir. 1993), are inapposite. Opp. Br. 11. It contends that those decisions stand for the proposition that "a false statement concealing SDWA violations made to a state official is in a 'matter within the jurisdiction' of the federal government." *Id.* That contention mischaracterizes those decisions. In each instance, the defendant was convicted of filing false official reports with state officials to whom EPA had delegated primary enforcement of SDWA reporting requirements. Both courts emphasized the close working relationship between EPA and the state officials to whom the false reports were submitted, and the fact that EPA regularly monitored those reports. *White*, 270 F.3d at 362-64; *Wright*, 988 F.2d at 1038-39. In sharp contrast to those cases, there was *no* relationship between Klimes (the

state employee with whom Mr. King spoke) and EPA, and no other evidence to suggest that Klimes was standing in the shoes of EPA officials when he spoke with Mr. King.

The Government notes that Klimes was performing an official duty when he spoke with Mr. King. Klimes was a livestock investigator and as such was authorized to ensure that the cattle operations at Mr. King's Double C Farms were not a source of pollution.[1] It is uncontested, however, that Klimes and the Department of Agriculture played *no* role in enforcing the SDWA and that the joint federal-state Underground Injection Control (UIC) Program (which requires permits for many underground injections) was administered by a separate state agency – the Idaho Department of Water Resources (DWR). *See* 40 C.F.R. § 147.650 (EPA regulation explicitly acknowledging that Idaho's UIC program is administered by DWR).

Indeed, the Government has never contested (either here or below) that Klimes was *not* investigating whether Double C Farms had the required permits to inject run-off water into its irrigation wells. The evidence indicates that he was focusing on whether

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[1] Idaho's Beef Cattle Environmental Control Act, Idaho Code § 22-4900, *et seq.*, contemplates that the Department of Agriculture will cooperate with the Idaho Cattle Association, Idaho's Department of Environmental Quality, and EPA in ensuring that beef cattle operations comply with the federal Clean Water Act with respect to *surface* waters. I.C. § 22-4903(1). The cooperation agreement (which does not include the Idaho's Department of Water Resources) focuses solely on beef operations; it makes no mention of well injections or the UIC permitting program.

waste water from the farm's cattle operations was being properly handled. Pet. 26 n.8.[2] But regardless what issues Klimes may have been looking at, it is uncontested that he had no relationship with EPA; that his agency had no role in enforcing the UIC program; and that EPA's local administrator had never heard of Klimes, Mr. King, or Double C until Klimes called him a week *after* his conversation with Mr. King. Pet. 4-6. No federal case has upheld a § 1001 conviction under remotely similar factual circumstances. No case law supports the contention that a conversation with a state employee is "a matter within the jurisdiction" of the United States simply because the employee is performing official *state* duties, where those duties are not undertaken in conjunction with federal officials.

Moreover, as the Petition demonstrated (at 17-20), the Ninth Circuit's decision directly conflicts with a Sixth Circuit decision that overturned a § 1001 conviction under closely analogous facts on the grounds that the defendant's statement did not arise in a "matter within the jurisdiction" of the United States. *United States v. Ford*, 639 F.3d 718 (6th Cir. 2011). The Government's efforts to distinguish *Ford* are unavailing. *Ford* involved § 1001 charges filed against a Tennessee State Senator who filed false financial

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[2] The Government does not allege that Klimes was investigating compliance with the permitting program. Its brief nonetheless invites the Court to infer (incorrectly) that Klimes was investigating permit compliance, by quoting a Ninth Circuit statement that Klimes "was investigating injecting water into deep wells without a permit, which is a federal crime." Opp. Br. 16. As the Government well knows, however, the Ninth Circuit erred in making that statement.

statements with the State Senate; he omitted any mention of an $800,000 bribe he received from a health care provider that sought to obtain contracts from a federally-funded Tennessee agency. The Government seeks to distinguish *Ford* as follows:

> The *Ford* court concluded that "no federal entity" had enforcement authority over Ford's nondisclosures to the state senate and election financing entity involved in that case, 639 F.3d at 721, while the court here explained that the statement pertained to a willful unpermitted injection, "which is a federal crime under the SDWA."

Opp. Br. 16 (quoting Pet. App. 17a).

The cited distinctions between the cases are nonexistent. Ford misled the State Senate regarding his acceptance of bribes;[3] similarly, the jury here found that Mr. King misled a state official. The Government asserts that Mr. King's statement "pertained" to a federal crime (unpermitted injections), but that assertion makes our point precisely: the Ninth Circuit concluded that Mr. King's statement was a "matter within the jurisdiction" of the United States because its *subject matter* was a matter within EPA's SDWA jurisdiction. The Sixth Circuit disagreed with that interpretation of § 1001. Although recognizing that the "subject matter of Ford's non-disclosures – his financial interests related to TennCare [the federally funded

[3] At a separate trial, he was convicted of bribery concerning programs receiving federal funds, in violation 18 U.S.C. § 666.

agency] – was federal," 639 F.3d at 720, the Sixth Circuit held that a federal "subject matter" is insufficient to make a misleading financial disclosure to state officials a "matter within the jurisdiction" of the United States. *Id.* at 720-23. Both Ford and Mr. King arguably were subject to prosecution under *state* law for their false statements/omissions; but under the Sixth Circuit's holding, neither was subject to prosecution under § 1001 in the absence of evidence that the statements/omissions were made in a setting that was federal in character.

As explained in the Petition (22-28), the decision below also conflicts with this Court's case law. The Court held in *United States v. Bramblett*, 348 U.S. 503, 507 (1955), that Congress adopted § 1001's "matter within the jurisdiction" language in 1934 "to indicate that not all falsifications but only those made to government organs were reached." The Government's efforts to distinguish *Bramblett*, Opp. Br. 18 n.4, are unavailing. One can plausibly argue (as have a number of federal appeals courts) that a false statement made to one standing in the shoes of the federal government qualifies as a false statement to a federal government organ; but that rationale is inapplicable here, where there was no connection between EPA and Klimes, the Idaho livestock investigator. Review is warranted to resolve the conflict between *Bramblett* and the decision below.

Moreover, in a leading § 1001 decision the Court appears to have construed the word "matter" in the manner that Mr. King advocates. *United States v. Rodgers*, 466 U.S. 475, 479 (1984) (construing § 1001's use of the word "matter" as referring to a proceeding of

some sort (*e.g.*, a "criminal investigation") rather than to the subject matter of the false statement). The Government asserts that *Rodgers* must have understood "matter" to be a "broad term," Opp. Br. 17, because the Court opined that the word "jurisdiction" was the *only* possible hook for the "constricted construction given [§ 1001] by the Court of Appeals." *Rodgers*, 466 U.S. at 479. That assertion misreads *Rodgers*; the Court stated that it did not focus on the word "matter" because the false statements at issue were made within a context (an FBI "criminal investigation" of an alleged kidnaping plot) that "surely falls within the meaning of 'any matter.'" *Id.* Nothing in that statement suggests that the Court viewed the term "matter" as encompassing not only statements made in government proceedings but also any statement whose *subject matter* falls within the jurisdiction of some federal agency.

II. THE DECISION BELOW EXTENDS THE REACH OF THE COMMERCE CLAUSE BEYOND ANYTHING PREVIOUSLY SANCTIONED BY THE COURT

Mr. King was convicted on four counts of violating the SDWA (for injecting surface run-off water into his irrigation wells), despite his repeated objections that the prosecution exceeded the commerce power in the absence of any allegation or proof that the injected water: (1) was contaminated; (2) flowed in interstate commerce; or (3) was injected into any aquifer that was a current or potential source of drinking water.

The Government responds, "[T]he record does not support petitioner's assertion that he injected only

uncontaminated water into a wholly intrastate aquifer that was unconnected to actual or potential sources of drinking water. Petitioner did not establish those facts before the district court, and because the charged offenses did not require proof of those facts, the government did not prove them at trial." Opp. Br. 22. First, it is not true that Mr. King failed to present evidence on these points.[4] More importantly, Mr. King bore no such evidentiary burden. Once the constitutionality of a criminal prosecution is placed at issue, the Government bears the burden of demonstrating that it is acting within its delegated powers. The Government is free to argue that it need not introduce evidence to establish a connection with interstate commerce, but it may not preclude adjudication of the issue by faulting Mr. King for allegedly failing to create an adequate record.[5]

The Government mischaracterizes Mr. King's constitutional claim as based on an argument that the Commerce Clause required Congress to regulate less comprehensively:

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[4] For example, to counter prosecution claims that Mr. King had injected polluted water and thus should receive an enhanced sentence, his expert witness Charles P. Gerba, Ph.D., offered unrebutted testimony that no pollutants were present in the aquifer below the Double C property. The district court's Sentencing Memorandum explicitly found that the Government failed to prove that the injected runoff water contained any waste or pollutant. ER 14-16.

[5] As noted *supra* at 2, the Government's assertion that Mr. King is raising only a facial challenge to the SDWA is similarly without merit.

> Petitioner contends (Pet. 33) that Congress should have exempted certain classes of injections. But Congress determined that such exceptions would "undermine the orderly enforcement of the entire regulatory scheme," [*Gonzales v.*] *Raich*, 545 U.S. [1,] 28 [(2005)], and that decision was rational, particularly because it is exceedingly difficult to determine the exact boundaries of underground water sources and because "water in the hydrologic cycle does not respect State borders."

Opp. Br. 23 (quoting Pet. App. 11a).

Mr. King is actually making a quite different argument. Had Congress chosen to regulate all injections of fluids into deep wells, its assertion of regulatory authority over intrastate activities having no discernable effect on drinking water might pass muster under *Raich*. But as detailed in the Petition, the SDWA does *not* comprehensively regulate fluid injections; it includes numerous provisions exempting many aspects of oil and gas production from permitting requirements. In the absence of a comprehensive scheme, the Government cannot plausibly contend that it must regulate Mr. King's conduct without regard to whether it has any effect on interstate commerce, for fear that failing to do so might "undermine the orderly enforcement of the entire regulatory scheme." *Raich*, 545 U.S. at 28.[6]

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[6] Spurred by complaints from environmental groups that widespread "fracking" activity by oil and gas companies is endangering drinking water supplies, EPA recently published a proposed guidance indicating its intent to expand somewhat its

The Government also urges the Court not to hold this petition pending a decision in *Dep't of Health and Human Services v. Florida*, No. 11-398, which raises issues regarding the scope of Congress's Commerce Clause power. It asserts that the respondents' argument in that case is "fundamentally different" from Mr. King's. The Government is correct that there are significant differences. Both cases nonetheless share a common theme: whether there exist any discernable limits on the power of Congress to regulate purely intrastate activity based on determinations by Congress that: (1) such activity (in the aggregate) affects interstate commerce; and (2) regulating the activity is necessary to the success of the overall regulatory scheme.

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regulation of diesel fuel injections. *See* EPA News Release, "EPA Releases Draft Permitting Guidance for Using Diesel Fuels in Oil and Gas Hydraulic Fracturing" (May 4, 2012). Criticism by environmental groups (some of whom urge Congress to lift all SDWA permit exemptions for oil and gas companies) that the latest EPA move is inadequate makes clear that the SDWA regulatory scheme remains far from comprehensive.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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