No. 23-1095

In the Supreme Court of the United States

PATRICK D. THOMPSON,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government has changed its view since the Court granted certiorari.

In opposing certiorari, the government defended the position taken by the courts below, that "[s]ection 1014 criminalizes misleading representations and is not limited to 'literally false' statements." BIO 6. Now the government has abandoned that argument, and rightly so, because section 1014 prohibits making a "false statement" but not a misleading one. 18 U.S.C. § 1014. The government now seems to agree with us that only false statements are prohibited by section 1014.

Now the government contends that all misleading statements *are* false, because "false and misleading have long been considered synonyms." Govt. Br. 26. On this view, there can be no such thing as a statement that is true but misleading.

The government's new argument is no better than its old one. "False" and "misleading" are not synonyms. Congress certainly does not think they are. Congress has enacted some statutes that prohibit "false or misleading" statements and others, such as section 1014, that only prohibit "false" statements. Congress, like any competent speaker of English, knows that some statements are misleading but not false.

I. The text and context of section 1014 demonstrate that it prohibits false statements, not statements that are true but misleading.

"Congress' choice of words is presumed to be deliberate and deserving of judicial respect." *SAS Inst.,*

Inc. v. Iancu, 584 U.S. 357, 364 (2018) (citation and internal quotation marks omitted). Contrary to the government's refrain, there is nothing "hypertechnical," Govt. Br. 10, 13, 15, 22, about paying close attention to the text of statutes. This is how statutes are normally interpreted. If they were interpreted in any other way, the government could prosecute people for acts that Congress has not defined as crimes.

1. In section 1014, Congress chose to prohibit only false statements. Many other statutes also prohibit misleading statements, *see* Pet. Br. 19 (citing examples),[1] but Congress chose not to include such a prohibition in section 1014. Still more statutes prohibit, in addition to false statements, omissions that render statements misleading, *see id.* at 21 (citing examples), but Congress declined to include any such prohibition in section 1014. Congress evidently does not think "false" and "misleading" are synonyms.

The government argues that there is nothing to be learned from comparing the text of section 1014 with that of other statutes, because some of the other statutes govern different subjects and were enacted at different times. Govt. Br. 28. But this is no reason to ignore Congress's choice of words in section 1014. The Court often interprets the text of one statute by comparing it with the text of others, even when the other statutes are about different topics and were

[1] We could have included many more, such as 15 U.S.C. § 78ff(a), the criminal provision of the Securities Exchange Act, which punishes the making of any statement required by the Act where the statement is "false or misleading." A Westlaw search ("advanced: TE(false /10 misleading") indicates that there are over 100 such statutes in the U.S. Code.

enacted at different times. *See, e.g.*, *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019).

Moreover, the distinction drawn by Congress between false statements and misleading statements can be seen clearly even in statutes that govern the same subject as section 1014 and were enacted at the same time. Chapter 47 of Title 18, 18 U.S.C. §§ 1001-1040, entitled "Fraud and False Statements," consists of several statutes criminalizing false and misleading statements, most of which were enacted simultaneously as part of the reorganization of the federal criminal code in 1948. Pub. L. No. 80-772, 62 Stat. 683, 749-755 (1948). Some of these statutes, including section 1014, punish false but not misleading statements.[2] By contrast, other statutes in chapter 47 punish misleading statements along with false ones.[3] When Congress reenacted the crim-

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[2] *See* 18 U.S.C. §§ 1005 (false entry in a bank report); 1006 (false entry by employees of various regulatory agencies and financial institutions); 1007 (false statement to influence the FDIC); former 1008 (false statement to obtain FSLIC insurance); former 1009 (false statement derogatory to an FSLIC-insured institution); 1010 (false statement to influence HUD); 1011 (false statement to a federal land bank); 1012 (false statement to HUD); 1014 (false statement to various financial institutions and federal agencies); 1015(a), (e), and (f) (false statements regarding citizenship); 1016 (false statement by officer authorized to administer oaths); 1018 (false statement by officer authorized to give a certificate); 1019 (false certification by consular officers); 1020 (false statement by federal employees regarding highway projects); 1021 (false certification of real property records by a federal officer); 1026 (false statement to influence Agriculture Department).

[3] *See* 18 U.S.C. §§ 1001(a)(1) (concealing a material fact in any matter within federal jurisdiction); 1001(a)(2) (false or fraudulent statement in any matter within federal jurisdiction); 1013 (attempts to deceive or defraud by false pretense or representa-

inal code in 1948, it chose where it would penalize only false statements, and where it would penalize misleading statements as well. Courts have no power to disregard these choices.

Indeed, the Court has used this method to interpret section 1014 itself. In *United States v. Wells*, 519 U.S. 482, 490-93 (1997), the Court held that materiality is not an element of the offense described in section 1014, because the text of other statutes includes a requirement of materiality, but the text of section 1014 does not.

The government also suggests that Congress's textual choices should be ignored, on the theory that the phrase "false or misleading" is merely a redundancy that means the same thing as "false," and that where Congress has expressly prohibited (in addition to false statements) omissions that render statements misleading, this too is a redundancy that adds nothing to the prohibition of false statements alone. Govt. Br. 29. The government attributes to Congress an implausibly slapdash attitude toward statutory drafting. While statutes may occasionally include redundancies, the government's argument would saddle the U.S. Code with an enormous number of them. As the Court once noted about a similar argument, "[w]e think this statutory usage shows beyond question that attorney's fees and expert fees are distinct items of expense. If, as WVUH argues, the one includes the other, dozens of statutes referring to the two separately become an inexplicable exercise in redundancy." *West Virginia Univ. Hosps.,*

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tion regarding farm loan bonds); 1017 (fraudulently affixing government seal); 1025 (fraud or false pretense on the high seas).

Inc. v. Casey, 499 U.S. 83, 92 (1991). *See also Arcadia v. Ohio Power Co.*, 498 U.S. 73, 79 (1990) ("In casual conversation, perhaps, such absentminded duplication and omission are possible, but Congress is not presumed to draft its laws that way.").[4]

Congress thus distinguishes between (1) statements that are false, and (2) statements that are not false but are misleading because the speaker omits important contextual information. *See, e.g., Slack Technologies, LLC v. Pirani*, 598 U.S. 759, 766-67 (2023) (noting that the statute at issue "imposes liability for false statements or misleading omissions"); *see also Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 601 U.S. 257, 263 (2024) (noting that SEC Rule 10b-5 distinguishes between false statements, on one hand, and omissions that render statements misleading, on the other, and prohibits them both).

Ordinary speakers of English likewise understand the difference between "false" and "misleading." They know that a true statement can be misleading. *See, e.g., Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 102 (1990) (noting that a "statement, even if true, could be misleading"); *United States v. Ninety-Five Barrels (More or Less) Al-*

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[4] Justice Scalia, the author of these two opinions, would no doubt be startled to see his book cited in support of an argument that would cause the U.S. Code to contain so much surplusage. *See* Govt. Br. 29 (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170, 176-77 (2012)). In the cited portion of the book, Justice Scalia and his coauthor explain and defend the canon that statutes should be construed so as not to contain surplusage. They merely caution that the canon should not be followed blindly because some statutes do include redundancies.

leged Apple Cider Vinegar, 265 U.S. 438, 443 (1924) ("Deception may result from the use of statements not technically false or which may be literally true."); *Bronston v. United States*, 409 U.S. 352, 353 (1973) (referring to a statement "that is literally true but not responsive to the question asked and arguably misleading"); *NLRB v. Noel Canning*, 573 U.S. 513, 591 (2014) (Scalia, J., concurring in the judgment) (describing a statement in the Court's opinion as "true but misleading"); *Ortwein v. Schwab*, 410 U.S. 656, 665 n.* (1973) (Marshall, J., dissenting) (describing a statement in the Court's opinion as "true, but irrelevant and misleading").

2. The government also wrongly asserts that a statement is false if it "appears to be conveying the whole truth when it is not." Govt. Br. 14. Such a statement is misleading, but it need not be false. Consider a lawyer who hopes to impress prospective clients by stating, truthfully, that he is a member of the bar of this Court. The lawyer's statement appears to convey the whole truth, but it does not, because it does not reveal how easy it is for any lawyer to become a member of the Court's bar. An ordinary English speaker would say that the lawyer's statement is misleading because his listeners may believe, incorrectly, that his bar membership is a mark of distinction. *See In re R.M.J.*, 455 U.S. 191, 205 (1982) (observing that "such a statement could be misleading to the general public unfamiliar with the requirements of admission to the Bar of this Court"). But no ordinary English speaker would say that his statement—"I am a member of the Supreme Court bar"—is false. The statement would be false only if he *wasn't* a member of the Court's bar.

Likewise, much advertising consists of statements that are true but that fail to convey the entire truth. Such statements are misleading, but they are not false. *Friedman v. Rogers*, 440 U.S. 1, 9 (1979) ("Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading."); *Donaldson v. Read Magazine*, 333 U.S. 178, 188 (1948) ("Advertisements as a whole may be completely misleading although every sentence separately considered is literally true.").

We are not suggesting, as the government claims, that "false" and "misleading" are "mutually exclusive." Govt. Br. 26. A statement can be simultaneously false and misleading; indeed, most false statements probably are. And while most true statements are not misleading, some are. "False" and "misleading" are neither synonymous nor mutually exclusive. They are simply two different concepts.

Nor do we suggest, as the government repeatedly alleges, *e.g.*, *id.* at 10, that a statement's falsity should be evaluated "in a vacuum," shorn of context. Context obviously matters in determining whether a statement is false. *Bronston,* 409 U.S. at 355 n.3. Even a simple "yes" or "no" can be false, depending on what question was asked. But the importance of context hardly means that "false" and "misleading" are synonyms.

The government's hypotheticals are thus easily resolved using the conventional definitions of "false" and "misleading." Where a drunk driver tells the police he "had just one cocktail," *id.* at 14, his statement is false, because the word "just" indicates that he had one drink and no more. If Patrick Thompson had stated that he borrowed "just" $110,000, his

statement would have been false. But he did not say that.

Similarly, where an NBA star's accountant asks him how much he earned last season, *id.* at 16, the context of the question indicates that the accountant is asking for his *total* income, because the accountant needs that figure to prepare his tax return. If the star says he earned one dollar, his statement, in context, is false. But it is false only because it was made in response to a question that specifically called for the total amount. If the star simply volunteered his statement to the accountant, without being asked anything, his statement would be true but misleading. It is the same with Patrick Thompson. His statements were not in response to any questions. When Thompson spoke with representatives of Planet Home Lending, *he* was the one who called *them*, because he was confused about how much he owed. JA 50-63. And when he spoke with representatives of the FDIC, as one of them testified, "I don't even think we even asked him what he borrowed." *Id.* at 90.

Where a child tells her mother "I ate one cookie" after eating the whole jar, Govt. Br. 16, the context of the child's statement will likewise determine whether her statement is false or merely misleading. If she is responding to a question like "You ate the whole jar of cookies, didn't you?" her statement is false, because in context it constitutes a denial of her mother's accusation. By contrast, if she was not asked any question at all—if she brought the subject up on her own initiative—her statement would be misleading, but it would not be false. It would be misleading because it might cause her mother to be-

lieve that someone else ate the other cookies. But it would not be false, because she *did* eat one cookie.

The Court drew the same context-based distinction in *Bronston* when it interpreted the federal perjury statute. The Court explained that "[w]hether an answer is true must be determined with reference to the question it purports to answer, not in isolation." *Bronston*, 409 U.S. at 355 n.3. Thus, where a person "in response to a specific quantitative inquiry, baldly understates a numerical fact," the statement is false. *Id*. If Patrick Thompson had made his statement in response to a question like "did you borrow $269,000?" his statement, in context, would have been false. But his statement was not made in response to a specific quantitative inquiry, or indeed to any inquiry at all.

Before leaving the government's hypotheticals, it bears emphasizing that distinguishing between false and misleading statements is not a problem that arises very often in the real world. Many federal statutes prohibit false *and* misleading statements. Patrick Thompson might have been prosecuted under one of these statutes, but the government chose instead to prosecute him under section 1014, which prohibits only false statements.

3. Straining to buttress its erroneous theory that "false" and "misleading" are synonyms, the government cites several treatises, *id.* at 18, but these treatises are inapposite because they discuss the common law of fraud, which prohibits omissions and misleading statements as well as false statements. *See Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 187 (2016) ("Because common-law

fraud has long encompassed certain misrepresentations by omission, 'false or fraudulent claims' include more than just claims containing express falsehoods."). Fraud can be committed with half-truths and omissions of information, but section 1014 can be violated only by making a false statement. A half-truth is equivalent to a falsehood in the common law of fraud, in the sense that both can give rise to liability, but this is not true under section 1014.

The government's reliance (Govt. Br. 19) on *Federal Trade Comm'n v. Winsted Hosiery Co.*, 258 U.S. 483 (1922), is equally inapposite. In *Winsted Hosiery*, the Court was interpreting section 5 of the FTC Act of 1914, Pub. L. No. 63-203, 38 Stat. 717, 719, which prohibited all "unfair methods of competition," not merely false statements. A true but misleading statement would have violated the FTC Act, but it does not violate section 1014.

Nor can the government draw any support from dictionaries and thesauri that group "false" with "misleading." Govt. Br. 15, 26. The dictionaries show only that false statements are often made to mislead or deceive, a point with which no one disagrees. And the purpose of a thesaurus is not only to list exact synonyms, but also to provide "words of analogous signification" to "suggest by association other trains of thought." Peter Mark Roget, *Thesaurus of English Words and Phrases* 16-17 (1880). The Merriam-Webster thesaurus, for example, lists 37 entries under "false." One of them is "misleading." The others include "untested," "askew," "off," and "trumped-up." *Merriam-Webster Thesaurus* (online ed.). Just as a person cannot be convicted under section 1014 for making a statement that is not false but merely un-

tested or askew, he cannot be convicted for making a statement that is merely misleading.

Nor is the government's argument advanced by its discovery that the etymological origin of "false" is the Latin word for "deceive." Govt. Br. 15. The Latin roots of English words often tell us little or nothing about what these words mean to English speakers today, few of whom have studied Latin. If one wanted to know the current English meaning of the word "court," for instance, it would not help to learn that its etymological origin is the Latin word for "farmyard." *Oxford English Dictionary* (online ed.).

The government's other textual arguments are no stronger. The government emphasizes that section 1014 prohibits "any" false statement rather than "a" false statement. Govt. Br. 19-20. But the word "any" cannot expand the meaning of "false." Whether a statute prohibits "any" false statement or merely "a" false statement, the statement must still be false. The use of "any" indicates that the statute prohibits false statements of whatever kind, not that the word "false" should be construed in an unconventionally broad way. *See Brogan v. United States*, 522 U.S. 398, 400 (1998) (rejecting the argument that a false exculpatory denial is outside the statutory proscription of false statements, on the ground that "18 U.S.C. § 1001 covers 'any' false statement—that is, a false statement 'of whatever kind'"); *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 220 (2008) (holding that the statutory phrase "any other law enforcement officer" includes officers of the Bureau of Prisons, on the ground that "Congress' use of 'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers of what-

ever kind."). When Congress wants to criminalize misleading statements along with false ones, it says so explicitly, by forbidding "false or misleading" statements. Congress does not hide its desire within the word "any."

The government also emphasizes that section 1014 prohibits false statements made to influence lenders "in any way," and suggests that it would be "unnatural" to read section 1014 so as not to include every debtor's attempt to influence a lender. *Id.* at 21. But section 1014 does not prohibit *all* actions intended to influence lenders. It only prohibits false statements made with that purpose. When Congress wants to criminalize other actions intended to influence lenders, such as misleading statements and omissions, it does so explicitly.

The government offers the policy argument that true-but-misleading statements to lenders should not be "tolerated," because financial transactions "require accurate risk assessment and careful bookkeeping." *Id.* at 20. This is an argument that would be better directed to Congress, which, if it sees fit, can add the phrase "or misleading" after "false" in section 1014, as it has done in so many other statutes. In any event, as these other statutes show, the premise of the government's argument is incorrect. True-but-misleading statements to lenders are *not* tolerated under federal law. Rather, they are proscribed by several other statutes that prohibit misleading statements to lenders. *See, e.g.*, 18 U.S.C. §§ 1341, 1343, 1344.

A literal interpretation of section 1014 would not, as the government contends, create "a loophole for underreporting of debts." Govt. Br. 21. Bank loan

applications virtually always request a list of all outstanding debts.[5] A borrower asked this question would make a false statement if he omitted some of his debts, because the context created by the lender's request would indicate that the borrower's response purported to be a complete list. But no one ever asked Patrick Thompson for a list of his debts.

Finally, the government promises that its view of section 1014 will not criminalize a wide range of everyday statements, *id.* at 36-37, but its assurances fall flat. If a statement is "false" wherever it "appears to be conveying the whole truth when it is not," *id.* at 14, many borrowers and prospective borrowers will become felons. The homebuyer who tells the bank "I have an offer from another lender with a lower interest rate," without disclosing that the other lender requires a larger down payment, makes a statement that precisely fits the government's definition of "false," because it appears to convey the whole truth but does not. So does the debtor who tells the lender "I hope to pay you back in full next

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[5] *See, e.g.*, Federal Deposit Insurance Corporation, *Personal Financial Statement*, "Total Liabilities," https://www.fdic.gov/formsdocuments/f7600-01.pdf; U.S. Department of Housing & Urban Development, *Personal and Financial Credit Statement*, "Total Liabilities," https://www.hud.gov/sites/documents/92417.pdf; U.S. Small Business Administration, *Personal Financial Statement*, "Total Liabilities," https://www.sba.gov/sites/default/files/2022-08/SBA%20Form%20413%20%287a-504-SBG-WOSB-8a%29_8.9.2022-508.pdf; Bank of America, *Personal Financial Statement*, "Total Liabilities," https://utility.bankofamerica.com/sbloans/assets/documents/Personal_Financial_Statement-2021_11_10.pdf; Chase, *Personal Financial Statement*, "Total Liabilities," https://www.chase.com/content/dam/chase-ux/documents/business/chase-personal-financial-statement.pdf.

year," without disclosing that his prospects will be no better next year. Under the government's view of section 1014, they can both be sent to prison for thirty years. It comes as no relief to hear from the government, *id.* at 36, that section 1014 only applies to factual statements that can be characterized as true or false. These statements *would* be false under the government's idiosyncratic definition of the word.[6]

II. The Court's precedents support our view, not the government's.

The government cites three of the Court's precedents as support for its erroneous claim that "false" and "misleading" are synonyms, but these cases do not stand for any such proposition. Rather, they support the view of Congress and of ordinary English speakers that the two words mean different things.

First, the government implies, through selective quotation, that *Macquarie*, 601 U.S. at 263, held that a statement is false if it states "the truth only so far as it goes, while omitting critical qualifying

[6] Because the government's interpretation of section 1014 would give the government the power to prosecute everyday commercial conduct as a felony, this is exactly the sort of case to which the rule of lenity should be applied, if the Court is in equipoise between the government's interpretation and ours. While members of the Court have disagreed about the degree of ambiguity required to invoke the rule, there is no debate that one essential function served by lenity is to prevent the conviction of people for acts "beyond the fair import" of a statute's text, *Wooden v. United States*, 595 U.S. 360, 390 (2022) (Gorsuch, J., concurring in the judgment) (quoting Justice Story), such as the homebuyer who says she has a better offer from another bank, or the debtor who expresses hope that he can pay the lender in full at some future time.

information." Govt. Br. 17. In fact, *Macquarie* says the opposite. The Court drew a sharp line between "false statements," on the one hand, and statements "omitting a material fact necessary to make the statements made ... not misleading," on the other. *Macquarie*, 601 U.S. at 263 (internal quotation marks omitted). The Court observed that SEC Rule 10b-5 prohibits both kinds of statements: false statements *and* "half-truths," i.e., "representations that state the truth only so far as it goes, while omitting critical qualifying information." *Id.* *Macquarie* thus indicates that half-truths are *not* false statements. If they were, Rule 10b-5 need not have prohibited them separately. The rule could simply have prohibited false statements.

Second, the government suggests that in *Kay v. United States*, 303 U.S. 1 (1938), the Court equated "false" and "misleading." Govt. Br. 22-24. Not so. As we explained in our opening brief, Pet. Br. 30-31, the Court did not address this question in *Kay*. The Court had no occasion to address it because the petitioner's statements were blatantly false. *Kay*, 303 U.S. at 5. The words "mislead" and "misleading" do appear in *Kay*, but only where the Court refers to the *purpose* of the petitioner's statements—to mislead the Home Owners' Loan Corporation. *Id.* at 5-7.[7] Consideration of the statements' purpose was

[7] *Kay*, 303 U.S. at 5-6 ("It does not lie with one knowingly making false statements with intent to mislead the officials of the Corporation to say that the statements were not influential or the information not important."); *id.* at 6 ("There can be no question that Congress was entitled to require that the information be given in good faith and not falsely with intent to mislead."); *id.* ("When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by

necessary because one of the elements of the offense was that the false statements be made "for the purpose of influencing," i.e., misleading, the Corporation. *Id.* at 3 n.1. *Kay* thus does not support the government's claim that all misleading statements are false.

Third, the government's reliance on *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) (cited at Govt. Br. 24 n.4), is mistaken for the same reason as its reliance on *Kay*. In *D'Oench*, the Court noted that a false statement might be "designed to deceive" creditors and that in such a case the FDIC "was likely to be misled." *Id.* at 460. *D'Oench*, like *Kay*, thus stands for the truism that false statements are often misleading. It does not support the government's claim that all misleading statements are false.

The government also errs in its treatment of two cases on which we relied in our opening brief.

In *Williams v. United States*, 458 U.S. 279, 286 (1982), the Court held that section 1014 does not prohibit writing a bad check, because a check is not literally a statement. We rely on *Williams* to show that contrary to the view of the courts below, the elements of the offense described in section 1014

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false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction."); *id.* at 7 ("[T]he instant case is not one of conspiracy to obtain money from the United States, but one of false statements designed to mislead those acting under authority of the Government."); *id.* ("Congress was entitled to secure protection against false and misleading representations while the act was being administered, and the separability provision of the act, section 9, 12 U.S.C.A. s 1468, is clearly applicable.").

should be read literally. Just as there must be a literal statement, the statement must literally be false. Pet. Br. 17. The government's contention that *Williams* did not address falsity, Govt. Br. 32, is thus correct but irrelevant.

In *Bronston*, 409 U.S. at 357-58, the Court held that the text of the federal perjury statute, read literally, does not prohibit testimony that is true but misleading, even though misleading statements made in casual conversation might be considered just as blameworthy as false ones. We rely on *Bronston* to argue that the same logic applies to section 1014, despite the differences in the circumstances governed by each statute. Pet. Br. 33. The government's emphasis on the fact that the perjury statute, unlike section 1014, deals with false statements under oath, Govt. Br. 34-35, is again correct but irrelevant.

The government accuses us of inserting the word "literally" into section 1014, *id.* at 31, but statutes are normally read literally. *See* Pet. Br. 15-18. *Williams* read section 1014 literally. *Bronston* read the perjury statute literally and held that it is not violated "so long as the witness speaks the literal truth." 409 U.S. at 360. On the government's theory, apparently, statutes would only be read literally if the word "literally" appeared in the text. But statutes have never been interpreted that way.

III. The argument in point II of the government's brief is not within the Question Presented and is also incorrect.

In the final section of its brief, Govt. Br. 38-40, the government argues that Patrick Thompson's statements really *were* false. This argument is not within the Question Presented. It is also wrong.

The Court granted certiorari on a pure question of law: "Whether 18 U.S.C. § 1014, which prohibits making a 'false statement' for the purpose of influencing certain financial institutions and federal agencies, also prohibits making a statement that is misleading but not false." Pet. i. Whether Patrick Thompson's statements were true or false is not within this question. The Court should therefore not address the argument in point II of the government's brief. *See* Sup. Ct. Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) ("This rule is prudential in nature, but we disregard it only in the most exceptional cases.") (citation and internal quotation marks omitted).

Even if Rule 14.1(a) did not exist, it would make little sense to decide whether Thompson's statements were false. This Court is not a factfinder. Neither of the courts below decided whether his statements were false because it made no difference under their erroneous interpretation of section 1014. Pet. App. 9a ("In the end, we need not decide whether Thompson's statements were literally true because … § 1014 criminalizes misleading representations."); *id.* at 56a ("Because the Court finds that lit-

eral falsity is not required to sustain a Section 1014 conviction, the Court does not address the Government's argument that Thompson's statements were literally false."). As this Court is "a court of final review and not first view," *Zivotovsky ex rel. Zivotovsky v. Clinton*, 566 U.S. 189, 201 (2012) (citation and internal quotation marks omitted), it should not be the first court to resolve the factual question of whether the statements were false.

The Court presumably granted certiorari to resolve the circuit conflict on the Question Presented. *See* Pet. for Cert. 6-13. It should do that and then remand for the lower courts to find the facts.

In any event, the government's argument is incorrect. Patrick Thompson's statements were not false. Viewing the evidence in the light most favorable to the government, the most it showed was that he volunteered, not in response to any question, that he borrowed $110,000. When he called Planet Home Lending, he stated that he *borrowed* $110,000, not that he *only owed* $110,000, and not that any higher amount was incorrect. JA 50-63. The same was true when he spoke with representatives of the FDIC. As the FDIC's representative explained at trial, he never asked Thompson how much he borrowed or how much he owed. The conversation was only about the $110,000 note:

> A: … We just mentioned his personal note. … I don't even think we even asked him what he borrowed. We just mentioned the personal debt.
>
> …
>
> Q: [I]t's true that John Gembara loaned him $110,000, isn't it?

A: Yes.

Q: And he did not say he only owed $110,000 and that any higher amount was incorrect, did he, sir?

A: No.

Id. at 90-91.

As the prosecutor acknowledged in the District Court, Thompson's statements were "literally true." *Id.* at 144.

If Thompson had said "I only owe $110,000," that would have been a false statement. But he said no such thing. If his actual statement had been in response to a question like "how much did you borrow in total?", his statement would have been false. But he was never asked such a question. His statements were misleading, but they were not false. Perhaps he could have been convicted under one of the many federal statutes that prohibit "false or misleading" statements. But he should not have been convicted under section 1014, which prohibits only false statements, not misleading ones.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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