No. 17-1134

IN THE

Supreme Court of the United States

MARK ELLISON, ET AL.,

Petitioners,

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* CATO INSTITUTE, REASON FOUNDATION, AND LAW PROFESSORS JULIE ROSE O'SULLIVAN, IRA P. ROBBINS, JEFFREY S. PARKER, AND GIDEON YAFFE IN SUPPORT OF PETITIONERS

Ilya Shapiro
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Paul D. Kamenar
Counsel of Record
1629 K Street, N.W., Ste. 300
Washington, DC 20006
(301) 257-9435
paul.kamenar@gmail.com

Manuel S. Klausner
LAW OFFICES OF MANUEL S. KLAUSNER
601 W. Fifth St., Ste. 800
Los Angeles, CA 90071
(213) 617-0414
mklausner@klausnerlaw.us

March 14, 2018

QUESTIONS PRESENTED[1]

1. Can a defendant properly be convicted under a federal criminal statute requiring "willful" misstatements or fraud—such as Section 10(b) of the Securities Exchange Act—without proof of *mens rea* with respect to the unlawfulness of his conduct?
2. Can a defendant properly be convicted of violating Section 10(b) of the Securities Exchange Act without proof that the relevant statement or conduct was material, based at least in part on its impact on the "total mix" of information made available to investors?
3. Can a criminal defendant properly be required to produce, in advance, the exhibits he plans to use in cross-examining witnesses during the government's case-in-chief, on the theory that such cross-examination actually constitutes part of the defendant's own "case-in-chief" under Fed. R. Crim. Proc 16(b)?

[1] While *amici* agree that petitioners' Rule 16(b) issue is also cert-worthy, we focus our brief on the *mens rea* and materiality issues.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTEREST OF THE *AMICI CURIAE*[2]

The **Cato Institute** was established in 1977 as a nonpartisan, public-policy research organization dedicated to advancing individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies, established in 1989, promotes the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs, including those cases raising important *mens rea* issues such as this one. *See*, *e.g.*, *Farha v. United States*, 832 F.3d 1259 (11th Cir. 2016), cert. denied, ___U.S. ____(U.S. Apr. 24, 2017) (No. 16-888).

Reason Foundation was established in 1978 as a nonpartisan and nonprofit public-policy organization dedicated to advancing a free society. Reason develops and promotes policies that advance free markets, individual liberty, and the rule of law—which allow individuals and private institutions to flourish. To support these principles, Reason publishes *Reason* magazine, produces commentary on its websites, and issues policy research reports. And in significant public-policy cases, Reason selectively files amicus curiae briefs, including joining Cato in *Farha*.

Julie Rose O'Sullivan, Professor of Law at Georgetown University Law Center, is a former federal prosecutor and criminal defense lawyer. She

---

[2] Rule 37 statement: All parties received timely notice of and consented to the filing of this brief. No party's counsel authored this brief in any part. No person other than *amici*, their members, or their counsel made a monetary contribution to fund its preparation or submission.

teaches and writes in the area of federal white collar crime and, in particular, *mens rea* issues in the federal criminal code. Professor O'Sullivan has written the leading casebook on white-collar crime and is a recognized expert on both the federal sentencing guidelines and white collar criminal law.

Jeffrey S. Parker is a Professor of Law at Antonin Scalia Law School, George Mason University. He teaches in the fields of criminal law and sentencing and has published on the topics of corporate criminal liability and sentencing. Professor Parker formerly served as Deputy Chief Counsel and Consulting Counsel to the United States Sentencing Commission

Ira P. Robbins is the Barnard T. Welsh Scholar and Professor of Law and Justice at American University, Washington College of Law. He has served as Special Consultant to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States, as well as a reporter for or member of several American Bar Association criminal-justice-related task forces or committees. Professor Robbins has authored many books and articles on criminal law and procedure, including on *mens rea* issues.

Gideon Yaffe is Professor of Law & Professor of Philosophy and Psychology at Yale Law School. He is the author of numerous books and articles concerned with the criminal law, focusing on *mens rea* issues. He is also a member of the MacArthur Foundation's law and neuroscience project and leader of the subgroup investigating criminal mental states.

This case concerns *amici* because the decision below erodes *mens rea* requirements and thus enables unconstitutional overcriminalization.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the prosecution and conviction of the petitioners for securities fraud based on alleged misconduct in connection with the sales of certain real-estate-backed securities after the Great Recession of 2008. At that time, the real estate market collapsed and qualified wealthy investors who bought those securities from third-party brokers—who were informed of the financial status of the investment offerings—lost a portion of their investment.

Section 10(b) of the Securities Act forbids using "any manipulative or deceptive device" to sell securities. 15 U.S.C. § 78j(b). SEC Rule 10b-5(a) (17 C.F.R. § 240.10b-5) similarly makes it unlawful to "to employ any device, scheme or artifice to defraud" in selling securities. Yet the petitioners were not convicted of that conduct. Nor were they convicted of violating Rule 10b-5(b) for "making any untrue statement of a material fact or to omit to state a material fact" regarding the selling of securities. Instead, they were found guilty of what is aptly called the "catch-all" provision of the broadly worded Rule 10b-5(c), which makes it unlawful for anyone, "directly or indirectly," to "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." *Id.*[3]

Although securities law only criminally punishes those who "willfully" violate the law or any rule or regulation thereunder, the jury was instructed that

[3] Notably, the petitioners were found not guilty of conspiracy to violate any securities-fraud laws.

"Acting willfully does not require that the defendant know that the conduct was unlawful." Jury Instr. No. 30 (Pet. Appx 70a). In addition to this watered-down *mens rea* standard, with respect to the requisite showing of "materiality" of information alleged to be false or deceptive, the court below applied its open-ended test of whether a hypothetical reasonable investor only *might* consider the information "important" in making an investment decision.

Putting aside the fact that the defendants were *not* found guilty of "making any untrue statement of a material fact or to omit to state a material fact," the Ninth Circuit's general-materiality test conflicts with this Court's—and most circuits'—stricter "total mix" test. That test is whether within the "total mix" of all the information provided in a case-specific context, the piece of information or conduct at issue was "material" to an actual investor's investment decision.

This Court should address these important issues, which substantially affect the liberty interests of countless people subject to prosecutorial discretion in regulatory cases where administrative and civil remedies are available.[4]

---

[4] For example, in *United States v. Mangione,* Civil No. 17-CV-5305 (NGG) (E.D.N.Y.) (filed Sept. 11, 2017), the Justice Department brought only *civil* fraud securities in a 66-page complaint against the defendant for engaging in fraud in selling over $1 billion in mortgage-backed securities that resulted in "hundreds of millions of dollars in losses." *See* DOJ Press Release, "United States Files Civil Fraud Complaint Against Former Deutsche Bank Head of Subprime Mortgage Trading," Sept. 11, 2017, http://bit.ly/2p4gCtW.

REASONS FOR GRANTING THE PETITION

I. This Court Should Ensure that Lower Courts Apply the Correct *Mens Rea* Standard for Determining "Willful" Violations of the Law

A. This Court has long held that knowledge of the facts constituting criminal conduct is central to criminal responsibility. The "central thought," the Court has declared, is that a person must be "blameworthy in mind" before he can be held accountable for a crime." *Morissette v. United States*, 342 U.S. 246, 252 (1952). This principle means "that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (quoting *Staples v. United States*, 511 U.S. 600, 608 n.3 (1994)).

The "blameworthy in mind" principle is so fundamental that even when a criminal statute is silent on *mens rea*, the Court generally reads in a knowledge element. "The fact that the statute does not specify any required mental state . . . does not mean that none exists. We have repeatedly held that 'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.'" *Elonis*, 135 S. Ct. at 2009 (quoting *Morissette*, 342 U.S. at 250). In keeping with this approach, the Court in *Morissette* interpreted the federal theft statute (18 U.S.C. § 641) to require proof that the defendant knew the property at issue belonged to the government. 342 U.S. at 275-76. The Court held in *Staples* that the statute prohibiting possession of a machine gun required proof that the defendant knew the firearm

had automatic-firing capability. *See* 511 U.S. at 619. And in *United States v. X-Citement Video*, 513 U.S. 64 (1994), the Court held that the statute prohibiting shipments of visual depictions of minors engaging in sex acts requires proof that the defendant knew that the person depicted was a minor. *Id.* at 78.

Those cases honor the "blameworthy in mind" principle by reading knowledge into criminal statutes that do not expressly require it. But to convict anyone of violating the securities laws, subject to up to 20 years in prison, Congress required the government to prove more than a knowing violation by requiring proof beyond a reasonable doubt of "willfully" violating the law. To be more specific, as Jury Instruction No. 29 properly instructed the jury, to be found guilty of securities fraud the government must prove beyond a reasonable doubt that the defendants acted both "knowingly [and] willfully."

However, the trial court's Jury Instruction No. 30 erroneously provided that, "[a]cting willfully *does not* require the defendant know that the conduct was unlawful." Pet. Appx 78a (emphasis added). Jury Instruction No. 30 also provides a definition of "knowingly" to include "mak[ing] a statement or representation that is untrue and known to the defendant to be untrue" or "*reckless* disregard as to its truth or falsity." *Id.* (emphasis added). In short, there is little if any daylight between acting "knowingly" and "willfully" and a juror could easily convict on the general "knowingly" *mens rea* standard rather than the stricter "willfully" standard of knowledge.

Willful violations of the law have generally been characterized as requiring proof of a specific intent rather than general intent, namely proof that that the

defendant knew she was violating the law. In *Bryan v. United States,* 524 U.S. 184 (1998), this Court ruled that "to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.' " *Id*. at 191-92 (quoting *United States v. Ratzlaff*, 510 U.S. 135, 137 (1994)).

Indeed, the Justice Department has taken the position that the least demanding meaning of "willful"—that the conduct was "deliberate"—is not sufficiently rigorous for § 1001 cases. As petitioners noted, the solicitor general confessed error in *Ajoku v. United States*, 134 S. Ct. 1872 (2014), from the Ninth Circuit's holding that the "willfully" in 18 U.S.C. §§ 1001 and 1035 requires that the defendant "acted with knowledge that his conduct was unlawful." Pet. 24.

Similarly, the solicitor general confessed error in *United States v. Russell*, 134 S. Ct. 1872 (2014), from the First Circuit's upholding a conviction under 18 U.S.C. § 1035 for "willfully" making false statement in connection with the payment of health care benefits using the lowest "deliberate" standard for "willful" conduct. The solicitor general stated:

> Petitioner contends that Section 1035's "willfully" element requires proof that the defendant knew that his false statement was unlawful. The … government now agrees that the correct interpretation of "willfully" in Section 1035 is the one articulated in *Bryan v. United States*, 524 U.S. 184 (1998). To find that a defendant "willfully" made a false statement in violation of Section 1035, a jury must conclude "that he acted with knowledge that his conduct was unlawful." *Id.* at 193. The same

> interpretation should apply to 18 U.S.C. 1001's materially identical prohibition on "knowingly and willfully" making a false statement in a matter within the jurisdiction of the federal government.

Russell v. United States, Brief of the United States in Opposition, 2014 WL 1571932, at 6 (2014).

This Court then granted cert. and remanded for reconsideration in light of the government's confession of error. 134 S. Ct. 1872 (2014). The solicitor general should similarly confess error here so that this Court can dispose of that issue summarily and hear the other two issues in plenary fashion.

Besides conflicting with these controlling decisions of this Court, as the petitioners point out, the Ninth Circuit's definition of "willfulness" also conflicts with the First Circuit's decision in *United States v. Bank of New England,* 821 F.2d 844, 855 (1st Cir. 1987). Pet. 22-23. On the other hand, the Second Circuit follows the Ninth Circuit that "willfulness" does *not* require knowledge that the conduct was unlawful. *United States v. Kaiser,* 609 F.3d 556, 568 (2d Cir. 2010).

The court below almost watered down the express "willful" knowledge element to a "knowing" standard by dispensing with the requirement that the government prove that the defendant "acted with knowledge that his conduct was unlawful." Because the lower court's decision conflicts with decades of case law by this Court and fundamental principles of criminal responsibility, as well as a split in the circuits, the Court should grant the petition in order to clarify the law and reverse the judgment below.

B. Judicial downgrading of "willfulness" also violates the separation of powers. Congress expressly included the element of "willful" knowledge in the securities fraud statute, 15 U.S.C. § 78ff. When "the judiciary substitutes a lesser mental state for statutorily prescribed knowledge, then, it encroaches on the legislative prerogative of defining criminal conduct." Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. Crim. L. & Criminology 191, 194-95 (1990); *see also United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 93 (1820) ("It is the legislature, not the court, which is to define a crime and ordain its punishment."); Julie R. O'Sullivan, Federal White Collar Crime, Sec. D, at 7 (6th ed. 2016) ("If Congress meant to demand only recklessness, it could have and would have said so. Reading a statute that demands 'knowledge' to be satisfied by 'recklessness,' then, contravenes long-established distinctions in degrees of mens rea as well as congressional intent."). Prof. Sullivan's point is well taken. Not only did the Ninth Circuit dilute "willfulness" almost to a "knowing" violation, but also Jury Instruction No. 30 further downgraded the "knowing" prong of the violation to "mak[ing] a statement with *reckless* disregard as to its truth or falsity." Jury Instr. No. 30.3 (emphasis added) (Pet. Appx 86a).[5]

---

[5] See also *United States v. Clay,* 832 F.3d 1259 (11th Cir. 2016), where the Eleventh Circuit held that a "knowing and willful" violation of committing health care fraud was satisfied by a lower "deliberate indifference" standard despite that standard being rejected by this Court in a *civil* patent-infringement case. *Global-Tech Appliances, Inc. v. SEB S.A.,* 563 U.S. 754 (2011). It appears that many trial courts around the country continue to use outdated jury instructions previously approved by their circuits,

The Ninth Circuit's dilution of the "willful" level of knowledge, if allowed to stand, risks weakening the *mens rea* element in other federal criminal statutes requiring proof of knowledge and willfulness, as the petitioners note with respect to 18 U.S.C. § 1001 and 18 U.S.C. 1035. Pet. at 24. In addition, the health care fraud statute requires a "knowingly and willfully" level of intent. 18 U.S.C. § 1347. Financial crimes include 18 U.S.C. § 1350 (prohibiting the CEO and CFO of an issuer from certifying any statement in a publicly filed financial report "knowing" that it does not comport with stated requirements, including that the report "fairly" presents, in all "material" respects, the financial condition of the company) and 18 U.S.C. § 1520 (prohibiting "knowingly and willfully" violating a section or *any* rule or regulation of the SEC).

Moreover, that same judicial approach of determining intent can dilute the *mens rea* level of other statutes that require only "knowing" conduct.[6] If

including the Ninth Circuit, despite their now running afoul of this Court's more recent jurisprudence.

[6] *See, e.g.*, 18 U.S.C. § 1001(a) (knowingly making false statements to an executive, legislative, or judicial branch of the U.S. government); 18 U.S.C. § 1347 ((18 U.S.C. § 1015(a), (c), (d) (multiple crimes relating to naturalization, citizenship status, or alien registry); 18 U.S.C. § 641 (knowingly converting any voucher, money, or thing of value of the United States for personal use); 18 U.S.C. § 1425 (knowingly procuring or attempt to procure the naturalization of an alien with unlawful documentary evidence); 18 U.S.C. § 1542 (knowingly making any false statement on passport application); 18 U.S.C. § 2314 (knowingly transporting falsely made, forged or counterfeited securities in interstate commerce); 18 U.S.C. § 152(1-6)(8)(9) (multiple crimes relating to concealment of assets and false oaths). In addition to these general-intent offenses, which require that a defendant act with "knowledge," there are many specific-intent offenses that would also be affected, because they, like the

left intact, prosecutors will likely continue to reduce the "willful" and "knowing" element of this and other federal criminal statutes to dispense with proving the defendants knew their conduct was unlawful, thus leading to other courts acquiescing in that view, and the regrettable erosion of the "blameworthy in mind" principle will continue.

This Court has intervened repeatedly in the past to safeguard this "background assumption" of the criminal law, *Liparota v. United States*, 471 U.S. 419, 426 (1985), and it should do so here as well.

II. There Is a Clear Circuit Split on the Materiality Issue of a Section 10b Prosecution

It is well-settled that a criminal prosecution will not lie in a Section 10b securities case for just any instance of a misrepresentation or omission of information. Rather, to cabin prosecutorial discretion, the government must prove that the misrepresentation or omission was "material." The issue presented in this case is how "material" or significant the misrepresentation, or omission, or other conduct with respect to information, should be.

The Ninth Circuit (and the Fourth and Sixth Circuits) requires the jury to consider only the *speculative* importance of the information in the

statute at issue here, require general "knowledge" in addition to a specific intent to achieve a certain end. *See, e.g.*, 18 U.S.C. § 1519 (destruction, alteration, or falsification of records in federal investigations and bankruptcy); most offenses under 18 U.S.C. § 1029 (fraud and related activity in connection with access devices); 18 U.S.C. § 1031 (major fraud against the United States); 18 U.S.C. § 1002 (possession of false papers to defraud United States).

abstract, that is, whether a reasonable investor *might* consider the particular piece of information "important," whereas this Court and most other circuits, including the Second, Third, Eighth, Tenth, Eleventh, and D.C. Circuits, require a stricter "total mix" test. *See*, *e.g.*, *TSC Industries, Inc. v. Northway, Inc*. 426 U.S. 438 (1976) and cases cited at Pet. 17-19.

That test is whether within the "total mix" of *all* the information provided in a case-specific context, the piece of information or conduct at issue would have a "substantial likelihood" (not that it "might") to be considered "important" to a reasonable investor's investment decision. *Amici* submit that review is also warranted on this issue of what is a material misrepresentation or omission of information, or in this case, some other unspecified conduct only *related* to information given to investors under the overly broad "catch all" provision of 10b-5(c) that covers noninformational conduct.

Amici suggest that the materiality standard in a criminal case like this, where substantial liberty interests are at stake, should at least be as rigorous as it is in the civil fraud context—where only money damages are at issue—such as the False Claims Act. Thus, in *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (U.S. 2016), this Court held that a relator's civil *qui tam* suit should not be permitted to pass beyond the pleadings stage unless the relator adequately pleads facts demonstrating that any allegedly false claims were "material" to the Government's decision to pay the claim. *Escobar* emphasized that the materiality test is both "demanding" and "rigorous"—and it is not met unless the relator's factual allegations demonstrate that the

alleged misrepresentation "likely" induced the Government to pay the claim. *Id*. at 2002-03.

As the *Escobar* Court explained, "instead of adopting a circumscribed view of what it means for a claim to be false or fraudulent, concerns about fair notice and open-ended liability can be effectively addressed through strict enforcement of the Act's materiality and scienter requirements. Those requirements are rigorous." *Id.* (cleaned up).

Here, the criminal securities fraud materiality test should likewise be "demanding" and "rigorous" and require that the alleged misrepresentation or conduct "likely" induced an investor to buy the securities being sold—and not that they were considered post-hoc as to how they "might" be "important" as the court below held. This is another way of stating that the "total mix" of the representations should be considered rather than for the government to cherry pick one statement or omission out of many to make out a criminal case of fraud. As petitioners note, this standard would subject companies and management to not just civil, but criminal liability "for insignificant omissions or misstatements." Pet. 16 (citing *TSC Industries*, 426 U.S. at 448).

Moreover, Jury Instruction No. 41 (App. 86a) seems to water this standard down even further by instructing the jury on materiality as to whether a "reasonable investor—that is, someone of *ordinary* prudence and comprehension" would merely "tend to be influence[d]" by the fact, and not that they were actually deceived (emphasis added). Here, of course, the only investors allowed by the government to buy these real estate-backed securities were not your "ordinary" investor—but more financially

sophisticated ones with significant financial means (at least $1 million in assets or a minimum of $200,000 or $300,000 in income)—who purchased them through broker-dealers who also did their due diligence before selling the securities in question.

Because the standard of materiality used by the lower court conflicts with this Court's and other circuits' stricter test, this conflict should be resolved by this Court.

III. Watering Down the *Mens Rea* and Materiality Standards Leads to Abusive Overcriminalization

Effectively displacing the requirement of "willful" knowledge with a watered-down "knowing" standard, which in turn can be further diluted to a "recklessness" standard, eliminates an essential layer of protection for ordinary Americans while transferring even more power to federal prosecutors. See, e.g., *Yates v. United States*, 135 S. Ct. 1074, 1100-01 (2015) (Kagan, J., dissenting) (discussing the "overcriminalization and excessive punishment in the U.S. Code" and noting that the statute at issue, by "giv[ing] prosecutors too much leverage" is "an emblem of a deeper pathology in the criminal code"); *McDonnell v. United States*, 136 S. Ct. 2355, 2372-73 (2016) (in choice between reading criminal statute as a "meat axe or a scalpel," unanimously choosing the latter notwithstanding government's promise to "use [statute] responsibly"); *Skilling v. United States*, 561 U.S. 358, 399-414 (2010) (narrowly construing honest-services-fraud statute and then reversing conviction under it); *id.* at 415 (Scalia, J., concurring in judgment) (finding statute unconstitutionally vague). See also Paul J. Larkin, Jr.,

Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law, 42 Hofstra L. Rev. 745 (2014).

Federal prosecutors have enormous, largely unreviewable power as it is. Diluting the level of *mens rea* would leave persons exposed to criminal prosecution for conduct better left for administrative or civil enforcement.

A. The federal code holds at least 4,450 separate federal criminal offenses, 40 percent of which have been enacted since about 1980. *See* Harvey A. Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* 202 (2009). And that is just the crimes that appear in the statutes themselves. Others lurk in regulations, which the criminal code incorporates by reference. Include those, and the estimate balloons to 300,000 potential separate federal crimes. Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 Harv. J.L & Pub. Pol. 715, 729 (2013). And as Congress and agencies gorge themselves on criminal law, they are producing directives that are "poorly defined in ways that exacerbate their already considerable breadth and punitiveness, maximize prosecutorial power, and undermine the goal of providing fair warning of the acts that can lead to criminal liability." Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. Crim. L. & Criminology 537, 565 (2012).

Among the general symptoms of this pathology is the growth of crimes that are "properly characterized as *malum prohibitum*—wrong because prohibited," not prohibited because morally wrong. Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace:*

Obstruction Statutes as a Case Study, 96 J. Crim. L. & Criminology 643, 657 (2006). This outsized proportion of regulatory *malum prohibitum* offenses "shifts [the] ground from a demand that every responsible member of the community understand and respect the community's moral values to a demand that everyone know and understand what is written in the statute books." Harvey A. Silverglate & Monica R. Shah, *The Degradation of the "Void for Vagueness" Doctrine: Reversing Convictions While Saving the Unfathomable "Honest Services Fraud,"* 2009-2010 Cato Sup. Ct. Rev. 201, 220 (2010) (cleaned up). And as such laws become "too confusing and impractical, . . . they also become useless and unjust." *Id.*

B. Although Congress, in cooperation with the Justice Department, is the primary source of the pathology (which puts a full cure beyond judicial reach), courts have a constitutional duty to alleviate the disease. One way is by ensuring the appropriate use of *mens rea* as the line between conduct that warrants criminal punishment and conduct merely subject to civil liability. *See* Part I, *supra.*

Especially where Congress has delineated the bounds of criminal liability with a high *mens rea* requirement, as here, lesser *mens rea* standards provide no substitute. High and clear *mens rea* standards set firm boundaries between civil and criminal liability and thereby safeguard liberty, "preventing morally undeserved punishment and guaranteeing the fair warning necessary to enable law-abiding citizens to avoid committing crimes." Stephen F. Smith, Heritage Foundation, Legal Mem. No. 135, *A Judicial Cure for the Disease of Overcriminalization*, 3 (2014).

Even—especially—where someone's conduct may be at odds with some regulatory requirement, *mens rea* is a bulwark between the government's power to pursue *civil* remedies and its wielding the heavy arsenal of *criminal* sanctions, which is traditionally reserved for immoral and deliberate wrongdoing. *See Morissette*, 342 U.S. at 264 ("Congress . . . has seen fit to prescribe that an evil state of mind . . . will make criminal an otherwise indifferent act."). A clear and high *mens rea* bar performs this function by "narrow[ing] the scope of the . . . prohibition and limit[ing] prosecutorial discretion." *Gonzales v. Carhart*, 550 U.S. 124, 150 (2007).

In the present securities-fraud case, the Ninth Circuit essentially allowed "willfully" to be redefined as general knowledge that the defendants knew that they engaged in the conduct in question, not that they knew they were committing an unlawful act. If such a precedent can stand, then the ostensibly clear and high protection of a "willfully" *mens rea* requirement—to mitigate excessive, expansive, and unclear *actus reus* elements—is illusory.

C. Many *malum prohibitum* offenses derive from "the twentieth century pursuit of regulatory crimes," such as those governing commerce, finance, the environment, and public health. Larkin, 36 Harv. J. L. & Pub. Pol. at 728. Correspondingly, companies and individuals working in those highly regulated areas, such as health care, banking, securities, and government contracting, face unique hazards. As they find themselves subject to many and shifting rules, they also interact regularly with the governmental bodies eager to claim violations of those rules; yet they are particularly impaired in resisting aggressive

criminal prosecutions. And the very characteristics that increase the hazards to companies and individuals in this area also specially enable extensive civil remedies. It is thus particularly crucial in this context that courts *not* let slip the line between criminal and civil misconduct.

1. Regulated industries involve especially complicated and continually changing legal environments. In interacting with governmental agencies, companies and their executives must navigate a complex and shifting web of statutes, regulations, agency interpretations, official guidance memoranda, forms, and worksheets, among other sources of *de jure* as well as *de facto* law. In many cases, highly regulated companies must satisfy not only complex federal requirements, but also related and equally complicated state laws and regulations.

This inherent complexity often leads to ambiguity in underlying statutory and regulatory compliance requirements, which in turn creates genuine uncertainty regarding whether a given business structure or transaction qualifies under applicable compliance standards. And agencies cannot be counted on to resolve ambiguities even when aware of them. These realities have in turn produced a corporate culture and cottage industry obsessed with "compliance." Rather than focusing on the ethics and morality of their conduct, some overregulated companies may "begin to gear the system to comply with the regulations in such a way that they are adhering to the letter of the law but the actual spirit of it has totally evaporated." Note, *The Good, the Bad, and Their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good*

Behavior, 116 Harv. L. Rev. 2123, 2141 (2003) (internal quotation marks omitted).

2. Not only are companies and officers in regulated industries more vulnerable to the risks of overcriminalization, they also are less able to counter those risks—which in turn increases them further.

For any criminal defendant, an indictment is a daunting prospect. One reason is that—unlike with relatively common orders dismissing a complaint, *see generally Ashcroft v. Iqbal*, 556 U.S. 662, 677-87 (2009)—courts go out of their way to avoid dismissing indictments, even though the terms of the corresponding rules of procedure are functionally identical. *Compare* Fed. R. Civ. P. 8(a)(2) & 12(b)(6) *with* Fed. R. Crim. P. 7(c)(1) & 12(b)(3)(B)(v). So federal criminal law lacks "any effective mechanism to decide legal questions early in criminal prosecutions." James M. Burnham, *Why Don't Courts Dismiss Indictments? A Simple Suggestion for Making Federal Criminal Law a Little Less Lawless*, 18 Green Bag 2d 347, 351 (2015). Thus, "purely legal judicial opinions construing criminal statues in the context of a discrete set of assumed facts," akin to opinions on a 12(b)(6) motion to dismiss a complaint, are comparatively rare. *Id.* at 348. Instead, such questions are deferred until post-trial appellate review. As a result, the accused faces the choice of either pleading guilty or enduring the ordeal of trial and only then appealing in a context in which courts are reluctant to throw out the result of months or years of work. *Id.* These incentives clear the path for the government in "pursuing aggressive, questionable legal theories that would present large targets for motions to dismiss." *Id.* at 358.

Such hazards and imbalances are all the worse in the context of businesses—especially in regulated industries. At least since Arthur Andersen's demise, it has been commonplace that, "[i]n business, particularly in the financial services industry . . . an indictment can ruin a firm, or a career, well before trial," because of the reputational effect. Dale A. Oesterle, *Early Observations on the Prosecutions of Business Scandals of 2002-03*, 1 Ohio St. J. Crim. L. 443, 471-72 (2004). Challenging the government's legal theory post-trial may provide merely a pyrrhic victory. *See Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (unanimously reversing conviction based on error with respect to intent, following collapse of firm shortly after its indictment).

Courts have recognized this dynamic—that a company, "faced with the fatal prospect of indictment," "could be expected to do all it could, assisted by sophisticated counsel, to placate and appease the government." *United States v. Stein*, 541 F.3d 130, 142 (2d Cir. 2008)—even sacrificing its own employees, *id.* at 142-43. Prosecutors see it too. As one result, "federal prosecutors and potential corporate defendants, both aware of the power prosecutors wield, have reached an 'entente cordiale' wherein corporations under suspicion enter into deferred-prosecution agreements ('DPAs'), pay enormous penalties, and undertake massive internal reforms." Dane C. Ball & Daniel E. Bolia, *Ending a Decade of Federal Prosecutorial Abuse in the Corporate Criminal Charging Decision*, 9 Wyo. L. Rev. 229, 251 (2009).

More generally, prosecutors with companies or company officials in their sights are specially incentivized to be aggressive from the outset,

including stretching the statutory elements of a crime to cover even noncriminal conduct. That increases the hazard to the target—at little or no cost to the prosecutor or the government.

The inevitable resulting settlement means that the law never develops through litigation; the prosecutors' theory of what a vague statute means becomes the *de facto* law. Corporate criminal investigations involving statutes commonly applied to companies or company officials, such as the Foreign Corrupt Practices Act, "have developed a 'prosecutorial common law,' allowing [the government] to impose burdensome compliance costs without having to prove in court that criminal activity has actually occurred or is likely to occur." John S. Baker, Jr. & William J. Haun, *Criminal Law & Procedure: The "Mens Rea" Component Within the Issue of the Over-Federalization of Crime*, 14 Engage 2, 26 (July 2013).

In a system so stacked in favor of the government, without regard to the merit of its position, one of the few ways to keep some balance is for courts to hold firmly to high, clear *mens rea* requirements. That means, at a minimum, that when Congress explicitly calls for "knowledge" or "willfulness" courts enforce that requirement without dilution. More than that, the law also needs to be clear enough that a court *will* do so, such that potential defendants can have confidence from the first moment they hear from prosecutors.

In sum, regulated industries should be able to act, and interact with the government, firm in the confidence that, at least when Congress *says* "knowledge" and "willfulness" courts will require the government to *prove* "knowledge" and "willfulness,"

meaning that the defendant knew his conduct was unlawful. If, instead, "Congress meant to demand only recklessness, it could have and would have said so." Julie R. O'Sullivan, Federal White Collar Crime, Sec. D, at 7. Where it has not, however, "reading a statute that demands 'knowledge' to be satisfied by 'recklessness,' . . . contravenes long-established distinctions in degrees of mens rea as well as congressional intent." *Id.* And as previously noted, the jury instructions in this case defined "knowingly" to include a "reckless disregard" of the truth of the statement. See s*upra*, at 6, 9.

CONCLUSION

For the foregoing reasons and those stated by petitioners, this Court should grant the petition.

Respectfully submitted,

Ilya Shapiro
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Paul D. Kamenar
Counsel of Record
1629 K Street, N.W., Ste. 300
Washington, DC 20006
(301) 257-9435
paul.kamenar@gmail.com

Manuel S. Klausner
LAW OFFICES OF MANUEL S. KLAUSNER
601 W. Fifth St., Ste. 800
Los Angeles, CA 90071
(213) 617-0414
mklausner@klausnerlaw.us

March 14, 2018