NO: _____

IN THE
SUPREME COURT OF THE UNITED STATES

GUY ST. AMOUR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Title 49, United States Code, Section 46306(b)(9), makes it a felony offense to knowingly "operat[e] an aircraft with a fuel tank or fuel system that has been installed or modified," in a manner that does not comply with Federal Aviation Administration (FAA) regulations. Petitioner Guy St. Amour, a licensed pilot, was convicted of violating § 46306(b)(9), after taxiing an aircraft with a modified fuel tank to a fueling station, in anticipation of take-off the following day. The FAA has never interpreted "operat[ing] an aircraft" to encompass conduct which is not temporally connected to immediate flight. Nor has any defendant previously been criminally prosecuted for violating the regulation at issue.

The Eleventh Circuit discounted the absence of any judicial or administrative precedent and held that the regulatory and statutory language was broad enough to encompass "any" use of an aircraft for the purpose of flight. In doing so, the court refused to apply the rule of lenity, finding that the operative language did "not create the grievous ambiguity necessary to trigger the rule." *United States v. St. Amour*, 886 F.3d 1009, 1016 n.11 (11th Cir. 2018). The questions presented are:

1. Did the Eleventh Circuit's novel interpretation of an FAA regulation in a criminal statute, to encompass conduct never before penalized by the FAA itself, deprive Mr. St. Amour of fair notice as to the conduct the law prohibited?

2. Whether this Court should grant *certiorari* to reconcile conflicting standards governing the threshold at which the rule of lenity applies to the construction of criminal statutes.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Constitutional Provision

Rules, Statutes, and Regulations

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner Guy St. Amour respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number No. 17-13352 in that court on March 29, 2018, *United States v. St. Amour*, 886 F.3d 1009 (11th Cir. 2018), which affirmed the judgment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment of the United States District Court for the Southern District of Florida, is contained in the appendix (A-1).

STATEMENT OF JURISDICTION

The United States District Court for the Southern District of Florida had original jurisdiction because petitioner was charged with violating federal criminal laws, pursuant to 18 U.S.C. § 3231. The United States Court of Appeals of the Eleventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The petition is timely filed pursuant to Sup. Ct. R. 13.1.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

49 U.S.C. § 46306(b)(9)

Except as provided by subsection (c) of this section, a person shall be fined under title 18, imprisoned for not more than 3 years, or both, if the person—

...

(9) operates an aircraft with a fuel tank or fuel system that has been installed or modified knowing that the tank, system, installation, or modification does not comply with regulations and requirements of the Administrator of the Federal Aviation Administration.

49 U.S.C. § 40102(a)(35)

(35) "operate aircraft" and "operation of aircraft" mean using aircraft for the purposes of air navigation, including--

(A) the navigation of aircraft; and

(B) causing or authorizing the operation of aircraft with or without the right of legal control of the aircraft.

14 C.F.R. § 1.1

Operate, with respect to aircraft, means use, cause to use or authorize to use aircraft, for the purpose (except as provided in § 91.13 of this chapter) of air navigation including the piloting of aircraft, with or without the right of legal control (as owner, lessee, or otherwise).

STATEMENT OF THE CASE AND FACTS

Petitioner Guy St. Amour, a licensed pilot, was hired to be a "ferry pilot," to fly a Cessna 182 single-engine aircraft from Ft. Lauderdale Executive Airport in Florida to Asunción, Paraguay. *United States v. St. Amour*, 886 F.3d 1009, 1010 (11th Cir. 2018). On March 27, 2013, Mr. St. Amour hired two airplane mechanics to work on the Cessna for its flight. *Id.* When the work was completed, Mr. St. Amour "started the aircraft's engine and taxied to a maintenance facility for refueling." *Id.*

Based on a tip "about a suspicious aircraft," agents from the Drug Enforcement Agency (DEA), stopped and spoke with Mr. Amour. *Id.* The DEA agents discovered no drugs, and referred the matter to the Department of Transportation (DOT). On March 25, 2015, Mr. St. Amour was interviewed by agents from the DOT. Mr. St. Amour provided a sworn affidavit admitting that he was aware of the need to obtain FAA approval prior to operating an aircraft with fuel modifications such as those made to the Cessna, but had not sought or secured such FAA approval. He also stated that he "never flew the airplane to South America because the D.E.A. showed up to question about the airplane," and that he was scheduled to fly the plane to Paraguay the following day. (DE 41:2-3).

On January 6, 2017, nearly four years later after the incident, Mr. St. Amour was charged in a single-count indictment, alleging that he "knowingly and willfully operate[d] an aircraft . . . with a fuel tank and fuel system that had been installed and modified knowing that the tank, system, installation, and modification did not

comply with the requirements of the Administrator of the Federal Aviation Administration, in violation of 49 U.S.C. § 46306(b)(9)." (DE 1).

Mr. St. Amour moved to dismiss the indictment on the grounds that he did not "operate" the aircraft within the meaning of the FAA regulations enforced by the statute. (DE 30). The parties stipulated for purposes of a hearing on the motion that Mr. St. Amour "taxied an airplane from a facility in Fort Lauderdale Executive Airport to a fueling facility with a modified, unapproved fuel tank in the back and other apparatus to the plane." (DE 63:25). Mr. St. Amour argued that 14 C.F.R. § 1.1 defines "operate, with respect to aircraft," to mean the use of an aircraft "for the purpose of air navigation", and thus defines "operate" to mean "fly or getting ready to fly". (DE 30:4-7) (emphasis omitted). Mr. St. Amour also directed the court's attention other FAA regulations that use the term "operate" to refer to flight. (63:35-36). Mr. St. Amour argued that he did not "operate" the aircraft on March 27, 2013, because he was not preparing for imminent flight.

The district court denied the motion, stating that it found the term "operate" to be "broader than the more specific concept of flying an aircraft." (DE 63:52). The court ruled:

> The Court finds that the plain meaning of the term "operate" is clearly broader than the more specific concept of flying an aircraft.
>
> The Court further finds beyond a reasonable doubt that the defendant's conduct of taxiing the subject aircraft to obtain fuel for a flight scheduled the next day constituted operation of an aircraft for the purpose of air navigation in violation of 49 United States Code § 46306(b)(9).

> While the Court need not attempt to define exactly how close in time the operation of an aircraft must be in relation to air navigation to constitute a violation of 49 U.S.C. § 46306(b)(9), the Court finds that in this case the defendant's operation of the aircraft was sufficiently connected to the air navigation scheduled for the following day.
>
> Accordingly, the defendant's motion to dismiss Count 1 is hereby denied.

(DE 63:52).

Thereafter, Mr. St. Amour entered a conditional plea of guilt to the sole count of the indictment, in which he specifically reserved the right to appeal "the District Court's denial of the motion to dismiss (DE 30) on the grounds that the term 'operate' as used in Title 49, United States Code, Section 46306(b)(9) means 'fly or getting ready to fly.'" (DE 40:3).

Mr. St. Amour appealed his conviction to the United States Court of Appeals for the Eleventh Circuit, arguing that the district court erred by applying a generic reading of the term "operate," rather than by construing the term as it is used within the FAA regulations themselves. Within the field of aviation, Mr. St. Amour argued, operation of an aircraft is understood to mean "incident to flight and an integral part of it." *Daily v. Bond*, 623 F.2d 624, 626 (9th Cir. 1980).

Mr. St. Amour argued that three independent canons of statutory construction compelled this result. First, he argued, because 49 U.S.C. § 43609(b)(9) criminalizes the violation of FAA regulations, the courts are required to apply the definition of industry terms used by the FAA itself. Second, Mr. St. Amour argued that the rule of lenity compelled a restrained reading of the statute, particularly where the government failed to locate even a single precedent interpreting the word

"operate," with respect to an aircraft, in the manner advocated by the government. Lastly, Mr. St. Amour argued that the doctrine of constitutional avoidance weighed in favor of his interpretation, because the district court's construction of the statute raised significant Due Process and vagueness concerns.

The Eleventh Circuit decision

The court of appeals affirmed Mr. St. Amour's conviction in a published decision issued without oral argument. After reviewing the language of the relevant statutory and regulatory provisions, the court ruled that 49 U.S.C. § 46306(b)(9) "broadly embraces ***any*** use of an aircraft for the purpose of air navigation, including flight itself and actions that are preparatory or incident to flight." *St. Amour*, 886 F.3d at 1013 (emphasis omitted and emphasis supplied). The court further found that "[t]he breadth of this definition makes sense" given the policies underlying the statute, which include "assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce." 49 U.S.C.§ 40101(d)(1). "It thus makes good sense that the term 'operates an aircraft' in 49 U.S.C. § 46306(b)(9) reaches ***any*** use of an aircraft for the purpose of flight." *St. Amour*, 886 F.3d at 1014 (emphasis omitted and emphasis supplied).

The court disagreed with Mr. St. Amour's argument "that the term 'operates an aircraft' requires a strict temporal relationship between the use of an aircraft and flight," finding that "[t]he definitions do not speak in terms of time; they speak only of purpose." *Id*. at 1015. "Accordingly, when a person uses an aircraft with the intent for flight, he has operated that aircraft." *Id*.

In a footnote, the Court wrote:

> St. Amour argues that the term "operates an aircraft" creates ambiguity sufficient to trigger the rule of lenity or, if not, to raise a question of unconstitutional vagueness. The rule of lenity is a canon of statutory construction that "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Svete*, 556 F.3d 1157, 1169 (11th Cir. 2009) (quotation omitted). It applies when a grievous ambiguity in the statute allows no more than a guess as to what Congress intended. *Muscarello v. United States*, 524 U.S. 125, 138–39, 118 S. Ct. 1911, 1919, 141 L.Ed.2d 111 (1998). Here, the rule of lenity does not require an acquittal of St. Amour because the term "operates an aircraft" does not create the grievous ambiguity necessary to trigger the rule. By defining "operate" as any use of an aircraft for the purpose of air navigation, including the piloting of aircraft, the statutory and regulatory definitions puts individuals on notice that the word "operate" sweeps more broadly than flight or actions imminent to flight. The rule of lenity has no application to this case.
>
> St. Amour argues that due process forbids interpreting 49 U.S.C. § 46306(b)(9) to proscribe conduct which he could not have foreseen within its scope. His problem is that the statute is not ambiguous. *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 1225, 137 L.Ed.2d 432 (1997) ("[T]he vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." (quotation omitted)). Section 46306(b)(9) forbids a person from operating an aircraft with an unapproved fuel tank, where "operate" is defined to mean using an aircraft for the purpose of air navigation—including but not limited to piloting an aircraft. A person of common intelligence would understand that this language reaches uses of an aircraft done in preparation for or incident to the flight of an aircraft.

Id. at 1016 n.11.

This petition follows.

REASONS FOR GRANTING THE WRIT

I.

The Eleventh Circuit's novel interpretation of an FAA regulation in a criminal statute, to encompass conduct never before penalized by the FAA itself, deprived Mr. St. Amour of fair notice as to the conduct the law prohibited.

A. This case exemplifies the dangers of overcriminalization.

The story of Guy St. Amour provides a cautionary tale about the dangers of overcriminalization in the modern administrative state. His case raises important questions regarding the interaction between administrative regulations and federal criminal law, warranting the Court's review.

In 2013, Guy St. Amour was a licensed airline pilot. He "occasionally worked as a 'ferry pilot,' which mean[t] that he facilitate[d] the sale of aircraft by flying them to the location of the purchaser." *United States v. St. Amour,* 886 F.3d 1009, 1010 (11th Cir. 2018). On March 27, 2013, the DEA received a tip from a confidential source "that a suspicious aircraft was parked outside" a maintenance facility at the Fort Lauderdale Executive Airport. *Id*. at 1011. Agents from the DEA "apprehended" St. Amour. *See id*. They thought he was trafficking drugs. They were wrong. Mr. St. Amour had, however, modified a fuel tank on the aircraft in a manner inconsistent with FAA regulations. And, while he had not yet flown the aircraft in that condition, he admitted the intent to do so the following day.

Nearly four years after his encounter with the DEA, Mr. St. Amour was federally charged with violating 49 U.S.C. § 46306(b)(9), which makes it a crime to

"operat[e] an aircraft with a fuel tank or fuel system that has been installed or modified, knowing that the tank, system, or modification does not comply with the regulations and requirements of the Administrator of the Federal Aviation Administration" The FAA had never before defined "operating an aircraft" broadly enough to encompass Mr. St. Amour's conduct. Nor was the government able to point to a single case where any person had been criminally charged for violating § 46306(b)(9).

This case thus raises an important question of federal law which has not, but should be, answered by this Court. Specifically, may a criminal court, consistently with constitutional requirements of notice and due process, impose criminal liability for the violation of a regulatory statute in a manner never before applied by the agency charged with enforcing that regulation? Because no agency decision had ever interpreted the phrase "operates an aircraft" in the manner applied below, Mr. St. Amour maintains that his prosecution was obtained in violation of due process, and his conviction must be vacated.

B. To "operate" an aircraft, within the meaning of the FAA regulations, means to fly.

Within the field of aviation, the word "operate" has a specific and well-understood meaning. Title 14, C.F.R. § 1.1 defines "[o]perate, with respect to an aircraft" as follows:

> Operate, with respect to aircraft, means use, cause to use or authorize to use aircraft, for the purpose (except as provided in § 91.13 of this chapter) of air navigation including the piloting of aircraft, with or without the right of legal control (as owner, lessee or otherwise).

14 C.F.R. § 1.1.

Consistently with this definition, 49 U.S.C. § 40102(a)(35) states:

> "operate aircraft" and "operation of aircraft" mean using aircraft for the purposes of air navigation, including
>
> (A) the navigation of aircraft; and
>
> (B) causing or authorizing the operation of aircraft with or without the right of legal control of the aircraft.

49 U.S.C. § 40102(a)(35).

These provisions codify a consistent and commonly understood definition with the field of aviation: to operate an aircraft means to use the aircraft "for purposes of . . . air navigation," *i.e.,* to fly. *Accord*, *e.g.,* 14 C.F.R. § 170.3 ("Aircraft operations means the airborne movement of aircraft in controlled and nonctontrolled terminal areas..."); 14 C.F.R. § 91.7(a) ("no person may operate a civil aircraft unless it is an airworthy condition."). *See also Daily v. Bond*, 623 F.3d 624, 625 (9th Cir. 1980) (petitioner conceded that "operate 'means incident to flight and an integral part of it.'").

C. Neither the FAA, nor any other agency charged with administering the regulations, has interpreted conduct committed a day prior to departure to constitute "operating" an aircraft.

Because Mr. St. Amour did not actually fly the plane and was not planning on flying the plane until the following day, he did not "operate the aircraft" as that term has consistently been used and interpreted by the FAA. Nonetheless, the Eleventh Circuit held that the definitions provided in 49 U.S.C. § 40102(a)(3), and 14 C.F.R. § 1.1 are broad enough to embrace "any" use of an aircraft in preparation for flight. *See St. Amour*, 886 F.3d at 1014 ("[T]he term 'operates an aircraft' in 49 U.S.C. § 46306(b)(9) necessarily encompasses more than the piloting of an aircraft in flight. It broadly embraces any use of an aircraft for the ***purpose*** of air navigation, including flight itself and actions that are preparatory and incident to flight.") (emphasis in original). The court specifically rejected Mr. St. Amour's argument that "the term 'operates an aircraft' requires a strict temporal relationship between the use of an aircraft and flight." *St. Amour*, 886 F.3d at 1016 ("The definitions do not speak in terms of time; they speak only of purposes. Accordingly, when a person uses an aircraft with the intent for flight, he has operated the aircraft.").

As the district court implicitly noted, however, this "purpose" requirement necessarily entails a degree of line-drawing. In denying Mr. St. Amour's motion to dismiss, the district court stated that it "need not attempt to define exactly how close in time the operation of an aircraft must be in relation to air navigation to

constitute a violation of 49 U.S.C. § 46306(b)(9)." (DE 63:52). It found only that the "defendant's operation of the aircraft was ***sufficiently connected*** to the air navigation scheduled for the following day." (DE 63:52) (emphasis added). This raises the obvious question of what would ***not*** be "sufficiently connected" to air navigation to qualify as "operating an aircraft." Would refurbishing an airplane in preparation for a flight the following week suffice? What about purchasing a plane, with the intention of flying in the foreseeable, but not immediately scheduled, future?

None of the administrative agencies charged with enforcing the regulations at issue has ever interpreted "operat[ing] an aircraft" as broadly as the Eleventh Circuit did in this case. Tellingly, every case the Eleventh Circuit relied on in support of its holding did involve a "strict temporal relationship between the use of an aircraft and flight." *St. Amour*, 886 F.3d at 1015. In other words, the FAA, the National Transportation Safety Board (NTSB), and the Civil Aeronautics Board (CAB) have ***only*** found operation of an aircraft in circumstances of flight, preparations for immediate flight, or, as in the case of *Administrator v. Collins*, 2 N.T.S.B. 1494, 2004 WL 1795341 (1975), conduct occurring prior to the termination of flight. *See Collins*, 2 N.T.S.B at 1495 ("upon landing respondent taxied the aircraft in a careless manner"). *See also Administrator v. Pauly*, 2 N.T.S.B. 1369, 1370, 1975 WL 20191 (1975) (finding defendant operated the aircraft where "it was apparent that the aircraft was being started in order to enable respondent to depart the airport"); *Daily v. Bond*, 623 F.2d 624 (1980) (attempting to start aircraft for

purposes of flight). *See also St. Amour*, 886 F.3d at 1009 (citing *Administrator v. Hise*, 38 C.A.B. 1237, 1237 (1963), where defendant "taxied to a tie-down area and stopped the aircraft, but kept the engine running; "these actions were 'directly and necessarily connected with the flight.'"). The analysis applied in each of these cases confirms that "operating" an aircraft requires a strict temporal relationship to flight. *See Collins*, 2 N.T.S.B. at 1495 (rejecting respondent's argument that "taxiing after termination of a flight does not constitute such 'operation'", where respondent "was performing an act 'directly and necessarily connected with the flight.'") (footnote omitted).

D. The analysis applied by the Eleventh Circuit conflicts with the approach taken by the Fifth Circuit in *United States v. Moss*, 872 F.3d 304 (5th Cir. 2017).

The Eleventh Circuit gave no weight to the fact that the neither the FAA, the NTSB, nor the CAB, had ever interpreted "operating" an aircraft to encompass actions taken a day prior to flight. Instead, the court relied on policy justifications that it believed supported a broad interpretation of statutory terms. *St. Amour*, 886 F.3d at 1014 ("The breadth of this definition makes sense given the policies underlying 49 U.S.C. § 46306(b)(9)").

The Fifth Circuit took the opposite approach in *United States v. Moss*, 872 F.3d 304, 310 (5th Cir. 2017). There, in interpreting agency regulations, the court gave significant weight to the absence of agency practice supporting the government's position. *See id.* at 312 ("The consistency of over sixty years' prior

administrative practice in eschewing direct regulatory control over contractors, subcontractors and individual employees supports the district court's conclusion that these regulations do not apply to nor do they potentially criminalize the appellees' conduct."); *Id.* at 312 ("The virtually non-existent past enforcement of OCSLA regulations against contractors confirms that the regulations were never intended to apply to the appellees."). *See also id.* at 315 ("No prior judicial decision countenanced this action, which is at odds with a half century of agency policy, and we will not do so now.").

"Worse, this is no civil enforcement proceeding where 'only' money is at stake." *Id*. The government failed to identify even a single past criminal prosecution for operating an aircraft with a modified fuel tank. Instead, violations of similar regulations seem always to have been handled administratively. *See, e.g., In the matter of: Liberty Foundation, Inc.*, 2017 WL 9289445, *3-4 (FAA Dec. 26, 2017) (Respondent non-profit foundation assessed civil penalty of $32,500, after "major alteration" to fuel system which resulted in fire); *In the matter of: Marion C. Blakely v. Steven L. Foster,* 2004 WL 1795341 (N.T.S.B June 29, 2004) (affirming revocation of Private Pilot Certificate upon finding of "multiple Regulatory violations which were done in a deliberate manner, knowingly, in a flight that was reckless"); *In the Matter of Warbelow's Air Ventures, Inc.*, FAA Order No. 2000-3, 2000 WL 298578 at *9 (FAA Feb. 3, 2000) ("Complainant failed to explain to the law judge why, according to the Sanction Guidance Table, the fuel pump violations deserved a maximum penalty, or what the minimum, moderate, and maximum ranges of a

maximum civil penalty were for an air carrier of Warbelow's size."). The Eleventh Circuit's expansive definition of "operate," combined with the absence of prior criminal enforcement of similar regulations, render this prosecution particularly unfair. *See Moss*, 872 F.3d at 314 ("[W]here, as here an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute.") (citing *Christopher v. SmithKline Beecham Corp*., 567 U.S. 142, 158 (2012)).

E. The Eleventh Circuit's novel interpretation of regulatory terms deprived Mr. St. Amour of fair notice that his conduct might subject him to criminal penalties.

Like the fisherman in *Yates v. United States*, 135 S. Ct. 1074 (2015), Mr. St. Amour "would have had scant reason to anticipate a felony prosecution" for his conduct. *Id.* at 1087 (plurality opinion). Yet, because the government believed he violated an FAA regulation (in a manner never sanctioned by the FAA itself), Mr. St. Amour will now "bear the stigma of having a felony conviction." *Yates*, 135 S. Ct. at 1087.

The result is chilling. One scholar estimates that there are "at least 10,000 – ***but possibly upwards of 300,000*** — federal administrative regulations that can be enforced criminally." *Todd Haugh, Overcriminalization's New Harm Paradigm*, 68 Vand. L. Rev. 1191, 1198 (Oct. 2015) (emphasis in original). It is also unconstitutional. *See United States v. Lanier*, 520 U.S. 259, 266-7 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to

conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope"); *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964) (holding that an "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, [which] the Constitution forbids").

Because no agency decision had ever interpreted the phrase, "operates an aircraft" in the manner applied below, Mr. St. Amour had no notice that his conduct could subject him to a criminal prosecution. He respectfully asks this Court to grant review to determine whether, consistently with the notice and Due Process requirements of the Fifth Amendment, a court may impose criminal liability for the violation of a regulatory statute, in a manner never before applied by the agency in charge of enforcing that regulation.

II.

Certiorari should be granted to resolve the issue of when courts should apply the rule of lenity to ambiguous statutory terms.

A. The Court has applied varying standards for invoking the rule of lenity.

This Court's review is additionally needed to clarify the role of lenity in the interpretation of criminal statute. In his brief to the Eleventh Circuit, Mr. St. Amour argued that: "[s]hould the Court have 'any doubt' about the meaning of the statute, however, the rule of lenity should apply." *Brief of the Appellant Guy St.*

Amour, No. 17-13352-KK (11th Cir. Oct. 31, 2017) (citing *Yates*, 135 S. Ct. at 1087-88 (plurality opinion), for the position that the rule should be invoked in the case of "any doubt" about the meaning of statutory terms). The Eleventh Circuit dismissed this argument, finding that the statutory language did "not create the grievous ambiguity necessary to trigger the rule." *St. Amour*, 886 F.3d at 1016 n.11. Because the role of lenity may play a determinative factor in many cases – and most certainly did in this case – Mr. St. Amour respectfully submits that clarifying the proper application of the rule of lenity provides an additional compelling ground for granting review.

The Court has, over the years, applied different standards for evaluating when the rule of lenity should apply. In *United States v. Bass*, 404 U.S. 336 (1971), the Court stated without qualification that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id*. at 348 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). The Court cited with approval language from *United States v. Gradwell*, 243 U.S. 476 (1917), that Congressional language implemental criminal laws should be "plainly and unmistakably" clear. *See Bass*, 243 U.S. at 349 (quoting *Gradwell*, 243 U.S. at 486). *See also United States v. Granderson*, 511 U.S. 39, 54 (1994) ("In these circumstances – where text, structure, and history fail to establish that the Government's position is unambiguously correct – we apply the rule of lenity and resolve the ambiguity in Granderson's favor.") (citations omitted); *United States v. Enmons*, 410 U.S. 396, 411 (1973) ("any ambiguity must be resolved in favor of lenity") (citations omitted). The most recent

pronouncement of the robust lenity standard appears in *Yates*, wherein the plurality wrote: "Finally, if our recourse to traditional tools of statutory construction leaves any doubt about the meaning of the [term], we would invoke the rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Yates*, 135 S. Ct. at 1088 (citing *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (further citation omitted)).

Other statements, however, have been less generous. In *Muscarello v. United States,* the Court held that "[t]he simple existence of some statutory ambiguity . . . is not sufficient to warrant application of the rule, for most statutes are ambiguous to some degree." 524 U.S. 125, 138 (1998) (citation omitted). There, the Court held that "[t]o invoke the rule, we must conclude that there is a 'grievous ambiguity or uncertainty' in the statute." *Id.* at 139 (internal quotation marks and citation omitted). *See also Shaw v. United States*, 137 S. Ct. 462, 469 (2016) ("The statute is clear enough...").

B. The standard for invoking the rule may be determinative.

The standard applied by a court to determine the existence of ambiguity can be strongly determinative of whether the rule of lenity applies. *See* Daniel Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus Linguistics*. 25 B.U. Pub. Int. L. J. 101, 120 (2016).

> [T]he standard of ambiguity the Court chooses to apply is seemingly determinative. If a judge is looking for a 'grievous ambiguity' before the rule of lenity applies, the judge will conclude the rule of lenity applies in only 13% of cases.... In contrast, a judge considering whether a statute is 'unambiguously correct' will apply lenity far more frequently, about 70% of the time.

Id.

In this case, the Eleventh Circuit's adoption of the "grievous ambiguity" approach clearly determined the result. That there was some ambiguity – if not fatal vagueness – in the statutory language was proven by the district court's statement that it "need not attempt to define exactly how close in time the operation of an aircraft must be in relation to air navigation to constitute a violation of 49 U.S.C. § 46306(b)(9)." (DE 63:52). Such an *ad hoc* and standardless approach is at odds with the cardinal rule that criminal statutes must define offenses "with sufficient definiteness that ordinary people can understand what is prohibited and . . . in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States*, 561 U.S. 358, 402-03 (2010) (quotation omitted). The statement confirms, moreover, that the district court at least found a degree of uncertainty sufficient to trigger the rule.

The lower courts' interpretation of 49 U.S.C. § 46306(b)(9) was not "unambiguously correct". Had the Eleventh Circuit used this threshold to invoke the rule of lenity, Mr. St. Amour would still be a licensed pilot – and not a convicted felon. He respectfully asks this Court to grant review.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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