No. 21-69

In the
# Supreme Court of the United States

JOHN ALLISON HUCKABAY,
*Petitioner*,
v.

STATE OF IDAHO,
*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of the State of Idaho**

## BRIEF OF *AMICI CURIAE* THE BUCKEYE INSTITUTE, COMPETITIVE ENTERPRISE INSTITUTE, CLAUSE 40 FOUNDATION, REASON FOUNDATION, FAITH & FREEDOM COALITION, AND THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## INTERESTS OF THE *AMICI CURIAE*

*Amicus curiae* The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy at the state and federal level.[1] The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals.

The Buckeye Institute has taken the lead in Ohio, and across the country in advocating for sensible criminal laws and against the expanding criminalization of regulatory noncompliance.

The Competitive Enterprise Institute ("CEI") is a non-profit public policy organization dedicated to advancing the principles of limited government, free enterprise, and individual liberty. CEI regularly

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[1] Pursuant to Rules 37.2(a) and 37.3(a), The Buckeye Institute states that it has timely notified and obtained written consent to file this amicus brief from all parties in the case. Further, pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission.

participates in public interest litigation, as litigant or amicus, where fundamental due process and other basic constitutional rights are threatened.

Clause 40 Foundation is a nonpartisan, nonprofit organization whose mission is to honor, preserve, and promote the constitutionally guaranteed due process rights in the criminal legal system. Clause 40 Foundation is participating as *amicus curiae* in this matter because the proliferation of criminal statutes without scienter requirements, like the regulatory scheme at issue in this case, threatens Americans' due process rights.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason participates as *amicus curiae* in cases raising significant constitutional or legal issues.

Faith & Freedom Coalition was founded in 2009 as a nonpartisan, non-profit, tax-exempt, social welfare organization as defined by I.R.C. section 501(c)(4). Its mission is to educate, equip, and mobilize people of faith and like-minded individuals to be effective citizens and to enact public policy that strengthens

families, protects individuals, promotes time-honored values, protects the dignity of life and marriage, lowers the tax burden on small business and families, and requires government to live within its means. Today, it has grown to over 2.5 million members nationwide. Faith & Freedom Coalition is a leader at the state and federal level in advocating for proven reforms to the criminal justice system that make our communities safer, our criminal system more just, and that promote rehabilitation and restoration. Faith & Freedom is concerned that the never-ending expansion of criminal laws and the criminalization of regulatory noncompliance undermines justice and places an especially heavy burden on small, family-owned businesses.

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom, ensuring that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed to persons by Constitution and laws of the United States.

## SUMMARY OF ARGUMENT

Justice Holmes observed that "even a dog distinguishes between being stumbled over and being kicked." O. Holmes, The Common Law 3 (1881). This

Court has long noted that the distinction between an intentional wrong and mere stumbling carries Due Process implications, particularly where significant criminal penalties are in play.

Beginning with *Morissette v. United States* in1952 and continuing through *Rehaif v. United States* in 2019, this Court and the circuit courts have sought to balance the fundamental due process principle that "no man should be held criminally responsible for conduct which he could not reasonably understand to be proscribed" with the government's interest in protecting society at large from the dangers of a modern industrialized society through strict liability regulation. See *Morissette v. United States*, 342 U.S. 246, 254 (1952); *Rehaif v. United States*, 139 S.Ct. 2191, 2196–97, 204 L.Ed.2d 594 (2019); *United States v. Harris*, 347 U.S. 612, 617 (1954).

This Court and the circuit courts have performed this balancing act in contexts ranging from consumer health and safety statutes, environmental statutes, food stamp fraud, felon registration laws, and drug and firearms possession laws. See, e.g., *Liparota v. United States,* 471 U.S. 419, 420 (1985); *United States v. Freed*, 401 U.S. 601, 608 (1971); *Staples v. United States*, 511 U.S. 600, 605 (1994). Yet a definitive test regarding when Due Process demands some element of scienter has remained elusive.

Mr. Huckabay's felony conviction for the vaguely defined strict liability offense of possessing a moose carcass out of season or without proper tags presents a factual scenario that will allow this Court to provide additional contours to its scienter-Due Process

jurisprudence or, better yet, to articulate a clear test for when a strict liability regulatory offense violates Due Process.

Clarifying the level of scienter required for a felony conviction under a public welfare regulatory statute is vital because the government—at the State, federal, and local levels—continues to rely on significant criminal penalties to enforce regulatory schemes. Indeed, the list of regulatory crimes continues to expand, often criminalizing ordinary behavior and ensnaring citizens who had no reason to believe they were committing crimes. This overcriminalization has long concerned commentators and courts, and it has now seeped into the public consciousness. While a sort of gallows humor has sprung up on the internet, where Americans are amused by bizarre criminal laws, the laughter betrays societal anxiety that regardless their legal diligence, a Kafkaesque prosecution for an innocent act that somehow violated a vague and obscure statute may await even those with the best of intentions.

Overcriminalization also imposes steep costs on governments by wasting tax dollars to prosecute and sometimes incarcerate non-violent offenders and diminishes public respect for the justice system. Worse yet, it destroys human capital.

Clarifying the due process limits of non-scienter regulatory offenses will help restore public confidence that citizens who run afoul of a regulatory scheme while acting with no moral culpability will not be branded as criminals and will encourage lawmakers to be more circumspect when regulating what is otherwise

non-criminal behavior through the threat of criminal penalties.

## ARGUMENT

### I. The Petition for Certiorari Presents a Question of Great Importance.

The principle that "an injury is criminal only if inflicted knowingly is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Rehaif v. United States*, 139 S.Ct. 2191, 2196, 204 L.Ed.2d 594 (2019) (internal citations omitted). Thus, "scienter requirements advance this basic principle of criminal law by helping to "separate those who understand the wrongful nature of their act from those who do not." *Id*.

Yet beginning in the nineteenth century a tension arose between the long-established notion that criminal liability should be based only on moral culpability and the needs of the modern state regulate an increasingly complex world. This Court documented the rise and reasons for criminal statutes with no scienter requirement in *Morissette*, explaining:

> The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to

> observe new cares and uniformities of conduct. Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care.

*Morissette,* 342 U.S. at 253–54. Lawmakers responded to these technological and societal shifts with "detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare." *Id.*

But unlike earlier criminal laws, many of the new public welfare statutes did not ask a "normal individual to choose between good and evil." *Morrisette*, 342 U.S. at 250. They simply demanded that individuals follow the rules as written. Thus, the individual who relied solely on his moral compass—no matter how finely tuned—to navigate the regulatory sea would soon find himself lost.

The Court overturned Morissette's conviction for theft of federal property by reading a scienter requirement into the charging statute. *Id.* at 274; see also *Staples v. United States*, 511 U.S. 600, 605 (1994). *Morissette* acknowledged that "[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion" and took a middle path. Yet at the same time, the *Morissette* court expressed a willingness to accept strict liability

for certain regulatory offenses because the offender is "usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities" and that "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." *Morissette*, 342 U.S. at 256. But the Court's conclusions about regulatory offenses have not been borne out in the intervening years, which have seen an explosion of strict liability offenses, many of which carry significant penalties. See*, The Ever-Growing Problem of Overcriminalization, Section III, infra.*

In the years following *Morissette*, this Court and the circuit courts have balanced these factors on a case-by-case basis, but have never articulated a black-letter rule regarding when the absence of scienter violates due process. For example, in *Lambert v. People of the State of California,* the Court held that a strict liability city ordinance requiring felons to register within five days of their arrival did not afford due process absent some evidence that the defendant was aware of the requirement. 355 U.S. 225, 226 (1957). The Court explained that "[w]here a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community." *Id*. at 229—230. The *Lambert* court qualified its holding by noting that the statute in question was not a simple prohibition, but required an affirmative act by Mr. Lambert. *Id*. at 228-229.

Similarly, in *Liparota v. United States,* this Court reversed a conviction for unauthorized use of food stamps under a statute making it illegal to use food stamps at a store that charged higher prices to food stamp customers on the basis that the statute criminalized "a broad range of apparently innocent conduct" and swept in individuals who had no knowledge of the facts that made their conduct blameworthy." 471 U.S. 419, 420 (1985), see also *Elonis v. United States*, 575 U.S. __ (2015). Again, however, the case turned in large part on the peculiarities of its own facts and the notion that a defendant would be unlikely to suspect that the transaction was illegal.

Yet this Court has never adopted a universally applicable rule regarding scienter requirements. In its own words, the *Morissette* court "attempt[ed] no closed definition, for the law on the subject is neither settled nor static" and no prior court had "undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not." *Morissette*, 342 U.S. at 260.

Even forty years later, the *Staples* court still declined to provide a more definitive rule, holding that the Court "need not adopt such a definitive rule of construction to decide this case, however. Instead, we note only that where, as here, dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement." *Staples*, 511 U.S. at 618-619. Indeed, commentators have noted

that "[d]espite the sweeping potential of *Lambert*'s holding, which could be read to eviscerate the doctrine that ignorance of the law is no excuse, the opinion has been construed narrowly and invoked rarely." Susan L. Pilcher, *Ignorance, Discretion & the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 16 (1995).

There is also confusion among the circuit courts regarding the interplay between scienter and due process. For example, the Sixth Circuit held in a case regarding taking of birds under the Migratory Bird Treaty Act that the absence of a scienter requirement violates due process unless "(1) the penalty is relatively small and (2) where the conviction does not gravely besmirch." *U.S. v. Wulff*, 758 F.2d 1125 (6th Cir. 1985). Conversely, the Third Circuit, in a case involving the same statute explicitly rejected that approach. *U.S. v. Engler*, 806 F.2d 425, 431 (3rd Cir. 1986). Both circuits cited *Morissette*, yet drew different lessons from it. See also, *The Courts Take Flight: Scienter and The Migratory Bird Treaty Act*, 36 WASH. & LEE L. REV. 241 (1979).

The facts and issues presented in this case provide the Court the opportunity further define and clarify when due process requires reading a scienter requirement into regulatory statutes with criminal penalties.

## II. Idaho's Regulatory Scheme for Big Game Hunting—and similar regulatory regimes—threatens to ensnare innocent actors

Regulatory statutes with no scienter requirement and criminal penalties pose the obvious danger that a person engaging in routine activity that he or she does not know is regulated may inadvertently become a criminal. Mr. Huckabay's experience with Idaho's hunting regime provides a frightening example of how a complex regulatory scheme can ensnare a person who makes every attempt to act lawfully for conduct most people would be surprised to learn is illegal.

To hunt for moose in Idaho, you must have a hunting license. This restriction is reasonable and easy to understand. In addition, to hunt for moose, you apply for a controlled hunt tag. See Idaho Dept. Of Fish and Game, Idaho Season and Rules, available at "https://idfg.idaho.gov/sites/default/files/seasons-rules-moose-bighorn-sheep-mtn-goat-2021-2022.pdf?updated=04-02-2021. Controlled hunt tags are awarded by lottery and are valid only for certain types of moose in certain areas, during certain times of the year. *Id.* at 6, 37.

Moose season in Idaho generally runs from August 30th through November 23rd. Except in "controlled hunt area" 1-1, where it runs from September 15th through December 1st, or in controlled hunt area 1-3 where the season runs from Oct. 1 through October 14th. And these rules, of course, do not apply to "Antlerless Moose Controlled Hunts" in area 54-1, where the season runs from October 15th through November 23rd. *Id.* at 8.

If one is unclear regarding the borders of area 54-1, the State of Idaho explains that:

> Hunt Area 54-1 is "That portion of Unit 54 north and east of the following boundary: beginning at the intersection of 3800 E (Rock Creek Road) and Highway 30 in Hansen, south along 3800 E (Rock Creek Road) to FS Road 515, then south east to FS Road 538 (Monument Peak Road), then southeast to FS Road 533 (Trapper Creek Road), then easterly to 2100 South, then east to Unit 54 boundary near the town of Oakley."

*Id*. at 15.

The State warns, however, that "[s]easons and rules may change after a booklet is printed" and hunters are advised to look for "significant changes or corrections to this printed proclamation online at idfg.idaho.gov/rules. See https://idfg.idaho.gov/sites/default/files/seasons-rules-moose-bighorn-sheep-mtn-goat-2021-2022.pdf?updated=04-02-2021. The booklet further advises prospective hunters that "hunt areas are different for each species" and to "refer to the current Big Game Seasons and Rules Books" or download a PDF of the State's current administrative rules to obtain a "full text of legal description and boundaries for Game Management Units. The State's "Big Game 2021 Seasons & Rules" book aspires to the majestic stature of its subject matter, weighing in at 124 pages. *Id.* The PDF file of the state rules, by comparison, is comparatively quick read, at only 22 pages. *See* Idaho Dept. Fish and Game, *13.01.08 Rules Governing Taking of Big Game Animals*, adminrules.idaho.gov/rules/current/13/130108.pdf. Not

unlike the famous hunter confronted with frequently changing and conflicting information regarding whether it is rabbit season or duck season, an Idaho hunter might find himself unsure of whether his conduct is lawful. See RABBIT FIRE, (Warner Bros.1951).

Nor is Idaho's "Big Game Seasons and Rules" book a model of clarity, especially for the layman. For example, in regard to elk hunting, the second page of the Big Game book prominently warns resident elk hunters that "[i]f you apply for a controlled elk hunt in 2021, you cannot buy a capped elk zone tag until five (5) days after they go on sale **regardless of whether you draw a controlled hunt elk tag."** *Big Game 2021 Seasons & Rules* at 2 (*emphasis in original*). Of course, "Super Hunts," "Extra antlerless hunts," and "Depredation hunts" are exempt from the waiting period. *Id.*

All this is to say that the complexity of Idaho's regulatory scheme governing big game hunting rivals any byzantine regulation from the deepest recesses of the Federal Register. Bringing down an elk is no small task. See David E. Petzal, *The 7 Hardest Animals to Hunt*, FIELD AND STREAM, Apr. 30, 2021, https://www.fieldandstream.com/story/hunting/big-game-animals-you-need-to-drop-quickly/. But complying with the applicable regulations to do so is no walk in the woods either. And the penalties for failure can be more significant.

Certainly, just as responsible big game hunters would properly outfit themselves for the hunt, they would familiarize themselves with the applicable rules

and if in doubt contact the authorities. Indeed, holding a person who voluntarily joins the regulated community strictly liable for violations of those particular regulations has greater justification, as the individual presumably is on notice of the regulatory scheme and the heightened duties contained therein. See *Morissette* at 256 ("[T]he accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities."). *See also*, Pilcher, *supra* at 19 ("the burdens of risk-avoidance could most easily be borne by the risk-creators.").

But in this case, Mr. Huckabay did not voluntarily join the regulated community of Idaho moose hunters. There was no allegation that Mr. Huckabay was hunting moose or had killed a moose. Rather, he was simply helping a friend, Mr. Cushman, who he believed was properly credentialed, move a moose that he believed had been legally taken in season. And to the extent that Mr. Huckabay was aware of moose hunting regulations through past experience, Mr. Cushman had assured him that the taking was in compliance with regulations. Indeed, it is unclear from the record how Mr. Huckabay was charged with "possessing" a moose carcass, as the evidence in the record shows that he was merely a passenger in Mr. Cushman's truck. Pet. App. 38a-39a. Yet Mr. Huckabay is held to account for compliance with the State's complex and ambiguous moose hunting rules. Indeed, he is held to account for Mr. Cushman's apparent violation of those rules.

Reading the Idaho statute and the many similar non-scienter regulatory statutes across the country like it to turn citizens engaging in otherwise lawful behavior into felons based on their unknowing proximity to a regulatory violation is plainly inconsistent with the principles that this Court articulated in *Morissette*. Unfortunately, the fundamental unfairness that Mr. Huckabay experienced is not limited to persons moving moose carcasses. As set forth below, Mr. Huckabay's experience is of a piece with the expanding use of criminal penalties, often expressed in vague statutes, to achieve regulatory aims.

## III. The Ever-Growing Problem of Overcriminalization

Over the last half century, scholars have voiced alarm over the expansion of criminal law into people's lives. See Sanford Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 3 (1963); Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 1 (1967) ("Excessive reliance upon the criminal law to perform tasks for which it is ill-suited has created acute problems for the administration of criminal justice."). Because "overcriminalization" can have several meanings, the term as it is used here "refers to the overuse and misuse of the criminal law to punish conduct traditionally deemed morally blameless." Paul J. Larkin, *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOF. L. REV. 745 (2014). As Mr. Larkin describes, "the use of the criminal law to

enforce a regulatory regime" is a "prime example of the phenomenon." *Id.*

Scholars have attributed the rise in overcriminalization to the phenomenon evident in Mr. Huckabay's case—"the profligate extension of the criminal sanction to cover all rules lawfully promulgated by an administrative agency." John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal & Civ. Law Models-& What Can Be Done About It*, 101 YALE L.J. 1875, 1880–81 (1992). While the government's regulatory aims are no doubt important, the coercive manner in which they are achieved exacts a cost that is difficult to quantify: it makes criminals out of otherwise innocent citizens. One commentator has observed that as "this process of reflexive criminalization continues, its little-noticed consequence is to expose a significant portion of the population of the United States to potential entanglement with the criminal law during the ordinary course of their professional and personal lives." Pilcher, *supra* at 33. Left unchecked, the increasing criminalization of regulatory offenses ends up in dystopia, "creating an environment in which all are safe but none is free." *Id.* (quoting Herbert L. Packer, *The Limits of the Criminal Sanction*, 65 (1968)).

The scope of potentially criminal conduct at the federal level alone is vast. A study by The Heritage Foundation reported that in 2007 the U.S. Code (listing all statutes enacted by Congress) contained more than 4,450 criminal offenses, up from 3,000 in 1980. John Baker, *Revisiting the Explosive Growth of Federal*

*Crimes,* The Heritage Foundation, Jun. 16, 2008. Other researchers have met with less success in attempting to count the nation's criminal statutes. Beginning in 1982, the U.S. Justice Department worked to provide a definite number of federal crimes. But after working for two years, they could muster only an educated guess of 3,000 statutory federal offenses. *Many Failed Efforts to Count Nation's Federal Criminal Laws*, Gary Fields & John R. Emshwiller, THE WALL STREET JOURNAL (July 23, 2011). The American Bar Association fared little better in its 1998 attempt, concluding that any attempt to reach an exact count of federal offenses was likely "to prove futile and inaccurate." *Id*. And these efforts did not even attempt to count federal administrative rules that might trigger criminal penalties. In 1991, Professor Coffee estimated that there were as many as 300,000 federal criminal regulations. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991).

Worse still, many of these federal offenses are either strict liability or contain poorly drafted *mens rea* requirements. A 2010 study of laws proposed in the 109th Congress found that over 57 percent of the non-violent, non-drug offenses introduced, and 64 percent of offenses enacted into law, contained inadequate *mens rea* requirements, putting even the innocent at risk of punishment. Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, The Heritage Foundation & The National Association of Criminal Defense Lawyers (2010).

State statutes imposing unexpected criminal liability are also legion and sometimes bizarre. For example, Delaware punishes by up to six months imprisonment the sale of perfume or lotion as a beverage; in Alabama, it is a felony to maim one's self to "excite sympathy" and Nevada criminalizes the disturbance of a congregation at worship by "engaging in any boisterous or noisy amusement." Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 704 (2005).

The notion that American life is overcriminalized is no longer merely a topic of academic discussion. It has taken root in popular culture. The humorous twitter account "A Crime a Day," which catalogs the many non-obvious ways in which one might inadvertently run afoul of state or federal law, has nearly two hundred thousand followers: A Crime a Day (@CrimeADay), https://twitter.com/CrimeADay. Recent posts note that selling liquor-flavored sherbet that contains more liquor than necessary to flavor the sherbet, riding a motorbike without a horn at the National Institutes of Health, and shooting fish from an airplane are all criminal activities. See 21 U.S.C. §333 & 21 CFR §135.40(e)(4); 40 U.S.C. § 1315 & 45 CFR §3.27, and 16 U.S.C. § 742j-1(a)(1), respectively.

Also, the television game show "Jeopardy!" recently featured a category titled "It's a Federal Crime." *Jeopardy*!, Show #8461, August 9, 2021, Sony Pictures Television. Clues included "Pretending to be a member of this alphanumeric 'learning by doing' organization is a federal offense" and "For writing a check for less than this amount of money, you can be fined or imprisoned

not more than six months, or both." (The correct responses were "What is 4H?" and "What is one dollar?") 18 U.S.C. § 916; 18 U.S.C. § 336.

While examples of overcriminalization may elicit chuckles, that humor masks a societal anxiety. Further, overcriminalization subtly undermines the justice system. As Mr. Larkin observes, "having too many criminal laws damages the respectability of the process that enforces them." Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J. L. & PUB. POL'Y 715, 720 (2013).

But for defendants caught up by these bizarre crimes, there is nothing funny about overcriminalization. It upends lives and makes criminals out of honest citizens. For example, Mariza Ruelas, a single mother of six in Stockton, California, was charged with operating a food facility without a permit because she offered to sell homemade cerviche through a Facebook recipe group. James R. Copeland, The Orange County Register, Sept. 27, 2016, https://www.ocregister.com/2016/11/27/homemade-ceviche-case-exemplifies-need-to-address-overcriminalization/.

Although the offense with which she was charged was a misdemeanor and not a felony, it still carried with it a potential sentence of up to six months in jail. See Ann. Cal. Health& Safety Code §113758; Ann. Cal. Health& Safety Code §114395. The charges against Ms. Ruelas were eventually dropped in exchange for her agreement to perform 80 hours of community service and her agreement not to sell or trade food online without the proper permits. https://arstechni

ca.com/tech-policy/2017/01/woman-prosecuted-for-ceviche-sales-on-facebook-settles-with-da/.

Notably, the California Homemade Food Act under which Ms. Ruelas was prosecuted—like the Idaho poaching statute—imposes strict liability for any person engaging in "the manufacture, packing, or holding of any processed food in this state" without a valid registration from the State. Ann. Cal. Health & Safety Code §110460. And like Mr. Huckabay, the California act is broad and ambiguous enough to sweep up conduct that carries no element of moral turpitude.

Similarly, in 2016, authorities in Oklahoma prosecuted bartender Colin Grizzle for serving vodkas infused with flavors like bacon and pickles. Bill Schammert, *Bacon Booze: Local bar, bartender in trouble for infusing vodka*, Fox 25 (June 24, 2016); https://okcfox.com/news/local/bacon-booze-local-bar-bartender-in-trouble-for-infusing-vodka. While the drinks were popular with customers, Oklahoma regulators had no love for the concoctions, which they claimed violated an Oklahoma statute that prohibited the re-filling of containers which contained alcohol. *See* Okla. Stat. tit. 37, § 584. Unlike Ms. Ruelas, Mr. Grizzle was arrested and temporarily spent three days behind bars for the violation. Schammert, *supra.*

Overcriminalization's obvious problem—as Mr. Huckabay, Ms. Ruelas, and Mr. Grizzle can attest—is that "[i]t becomes a formidable task for the average person to know what the law forbids, because the moral code offers no lodestar." Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J. LAW PUBL. P. 716, 720 (2013). In each case, the

accused's conduct was morally unobjectionable and routine—a friend helping a fellow hunter, a cook serving a favorite dish, a bartender mixing drinks. But the lack of a scienter requirement, coupled with vague and obscure laws turned these ordinary activities into crimes.

Author and civil rights lawyer Harvey Silverglate estimates that due to the number of criminal statutes and vague rules tied to them, the average American commits three felonies a day. L. Gordon Crovitz, *You Commit Three Felonies a Day*, THE WALL STREET JOURNAL (Sept. 27, 2009). In a similar vein, one former law professor mused that "[t]here is no one in the United States over the age of 18 who cannot be indicted for some federal crime" Fields & Emshwiller, *supra.*

The State's ability to prosecute virtually anyone for virtually anything "empower[s] prosecutors, who are the criminal justice system's real lawmakers." William Stuntz, *The Pathological Politics of Criminal Law,* 100 MICH. L. REV.3, 506-507 (2001). Indeed, "[a]nyone who reads criminal codes in search of a picture of what conduct leads to a prison term, or who reads sentencing rules in order to discover how severely different sorts of crimes are punished, will be seriously misled." Id.

This uncertainty naturally breeds anxiety over engaging in what on their face would appear to be lawful activities. The additional social costs include "the fear and anxiety imposed on risk-averse individuals forced to live under the constant threat of draconian penalties." Coffee, *supra* at 1881. "These citizens," Professor Coffee notes, "bear not only the risks of false accusation and erroneous conviction,

but also the constant fear that they might commit an unintentional violation." *Id.* While this anxiety is difficult to measure it is palpable.

While the primary responsibility for overcriminalization lies with Congress and state legislatures, granting the petition will allow the Court to annunciate a clear rule governing non-scienter offenses and provide lawmakers with visible guideposts for drafting future statutes.

## CONCLUSION

For all the reasons states in the Petition for Writ of Certiorari and this amicus brief, this Court should grant the Writ.

Respectfully submitted,

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