No. 22- 170

In The

Supreme Court of the United States

DANIEL BECKWITT,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTIONS PRESENTED

In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), this Court proscribed "unexpected and indefensible" retroactive judicial criminalization of primary conduct. *Id.* at 354. Field preemption is a dispositive defense to common-law liability. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008). Petitioner's leading issue explores the overlap of these two doctrines, an area of vast importance to numerous preemptively regulated industries.

First Question Presented for Review:

Did Maryland's retroactive elimination of multiple field preemption defenses and imposition of absolute liability for deregulated fire safety conduct in a common law grossly negligent manslaughter prosecution violate Beckwitt's Due Process rights?

In *Carmell v. Texas*, 529 U.S. 513 (2000), this Court addressed retroactive reductions in the burden of proof. The secondary issue is *Carmell's* corollary.

Second Question Presented for Review:

Did Maryland violate Beckwitt's Due Process rights by refusing to apply established common law quantitative evidentiary sufficiency rules?

Third Question Presented for Review:

Did Maryland present *ex-ante* sufficient evidence?

PARTIES TO THE PROCEEDING

All parties appear in the cover page's case caption.

STATEMENT OF RELATED PROCEEDINGS

State v. Beckwitt, No. 133838C, Circuit Court for Montgomery County, Maryland. Judgments entered June 17, 2019, and March 29, 2022.

Beckwitt v. State, No. 794, September Term, 2019, the Court of Special Appeals of Maryland. Judgment entered March 31, 2021.

Beckwitt v. State, No. 16, September Term, 2021, the Court of Appeals of Maryland. Timely petition for rehearing denied and judgment entered, both on March 25, 2022.

Beckwitt v. Malagari, Case No. 1:2022CV00659, U.S. District Court for the District of Maryland. Filed March 17, 2022. Moved to stay pending this petition.

Beckwitt v. Maryland, Application No. 21A816, The Supreme Court of the United States. Filing of this petition extended to August 22, 2022. Order entered June 14, 2022, by the Chief Justice.

Beckwitt v. Maryland, Application No. 22A110, The Supreme Court of the United States. Word limitation of this petition extended to 12,000 words. Order entered August 10, 2022, by the Chief Justice.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Daniel Beckwitt, *pro se*, ("Petitioner") hereby petitions this Court, respectfully praying for a writ of certiorari reviewing judgment below, supporting said requisition as follows:

OPINIONS BELOW

The Court of Appeals' opinion is reported 270 A.3d 307 and 477 Md. 398, appearing at Appendix A.

The Court of Special Appeals' opinion is reported 245 A.3d 201 and 249 Md.App. 333, appearing at Appendix B.

A transcript of the motion for judgment of acquittal hearing in the Circuit Court for Montgomery County appears at Appendix C.

JURISDICTION

The Court of Appeals denied Petitioner's timely petition for rehearing and entered judgment March 25, 2022 (App.195d-196e). This petition is due 150 days thereafter, as the Chief Justice granted extension application No. 21A816. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS, AND ORDINANCE INVOLVED

INTRODUCTION

This high-profile ex-murder case arrives for analysis as an *elementally deficient* *"grossly negligent"* involuntary manslaughter at common-law, sporting an unparalleled spectrum of pernicious substantive retroactivity issues, with *acquittal compelled thrice-over* based solely upon the subject matter of conduct under *ex-ante* precedent. The decision below defies innumerable precedents of this Court, raising consequential Constitutional issues.

In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), this Court held the substantive due process right to fair warning proscribes "unexpected and indefensible" retroactive judicial criminalization of conduct. *Id.* at 354.

Petitioner's leading issue presents this Court with an exceptional opportunity to explore the nature of common-law liability in applying *Bouie* to the "unexpected and indefensible" retroactive abrogation of legal duty as an offense element and *judicial veto of three field preemption defenses* which had twice-over immunized Petitioner *ex-ante* with "comprehensive, on-point statute[s]" *Compare Metrish v. Lancaster*, 569 U.S. 351, 366 (2013).

Petitioner's secondary issue presents this Court with the opportunity to apply *Bouie* to retroactive judicial abrogation of quantitative evidentiary sufficiency rules, as it previously addressed in *Ex Post Facto* Clause jurisprudence. *See Carmell v. Texas*, 529 U.S. 513 (2000).

While superficially resembling a complex substantive due process morass, this pure regulatory field preemption case is easily resolved without any fact-finding (beyond the subject matter of conduct) by holding that states cannot prosecute preemptively deregulated conduct at common-law. The prolix appendix is merely a sign that lower courts failed to identify the dispositive legal issues. Petitioner's case is suitable for summary reversal directing acquittal if this Court lacks bandwidth for plenary review.

STATEMENT

FACTUAL BACKGROUND

This case arises from a bizarre and phantasmagorical fact pattern extensively covered by D.C. area news media. Succinctly, Petitioner had hired Askia Khafra ("decedent") to excavate an underground bunker beneath the basement of a dwelling house in Bethesda, Maryland. An electrical fire accidentally ignited in the basement and decedent perished. Various instances of Petitioner's fire safety conduct were purported to be evidence of negligence, including omission of: a smoke detector, unobstructed emergency egress, reasonable trouble-shooting of electrical instrumentalities, means of emergency notification, and assorted collateral matters. *See* 477 Md. at 411-15(App.5a-11a). Because the general subject matter of conduct—fire safety—is most legally relevant, facts are appended infra.

PROCEDURAL BACKGROUND AND FEDERAL ISSUE PRESERVATION

Petitioner was indicted by Montgomery County's grand jury for the common-law offenses of second degree (depraved-heart) murder and (grossly negligent) involuntary manslaughter (App.212g). A bill of particulars was filed (App.213g-214g).

Petitioner was tried by jury (Schweitzer, J., presiding) in Montgomery County's Circuit Court. Petitioner moved for judgment of acquittal (App.153c-194c), citing, *inter alia:* the fire's accidental ignition (App.155c), failure to prove negligence (App.173c,184c), and the two regulatory preemption defenses infra (App.172c-173c). The trial court didn't address preemption, using the common-law safe workplace duty as a basis of liability (App.177c-179c). The jury was instructed on said duty (App.298g). Petitioner was found guilty as charged, and sentenced to 9 years executed.

Briefing his special appeal, Petitioner renewed his regulatory preemption defenses (App.216g-218g), argued application of the (then retroactively demised) *Pagotto* rule (App.218g), and again argued mens rea failure (App.220g). Maryland's special intermediate court held evidence of malice insufficient, didn't address preemption, retroactively bifurcated grossly negligent manslaughter (discussed infra), and manufactured a special verdict imposing absolute liability. (*See* 249 Md.App. at 373-82;App.125b-129b).

Briefing below in the Court of Appeals, Petitioner: added his third preemption defense as an unwaivable jurisdictional defect (App.224g-234g), renewed regulatory preemption defenses (App.234g-251g), claimed a *Bouie* violation (App.251g), argued all quantitative evidentiary sufficiency rules infra (App.251g-254g), and attempted to restore legal duty's elemental status (App.254g-257g). Discussed in depth infra, these contentions were ignored by the Court of Appeals, except for: overruling the third preemption defense(477 Md. at 419-28;App.16a-27a), abrogating legal duty as an offense element (477 Md. at 455-56;App.59a-60a), and imposing an absolute duty of reasonable care, irrespective of regulatory preemption (477 Md. at 446-48;App.50a-51a). Petitioner specifically highlighted the *Bouie* violation in petitioning for rehearing (App.258g-259g). The special intermediate court's decision was affirmed. On March 29, 2022, Petitioner was resentenced to 5 years executed. Petitioner was paroled July 22, 2022.

As this Court will see infra, Petitioner's issues enjoy dual federal cognizability, under both *ex-ante* application of *Jackson v. Virginia*, 443 U.S. 307 (1979), and *ex-post* application of *Bouie*, with the *Bouie* claim only ripening in the Court of Appeals. *See* 347 U.S. at 354. Alternatively, all issues qualify for plain error review. *See Osborne v. Ohio,* 495 U.S. 103, 147-48 (1990) (Brennan, J., dissenting).

Petitioner hereby amplifies the prayer for certiorari:

FIRST ISSUE

NATIONAL IMPORTANCE

Petitioner's case is significant, considering the recent proliferation of preemptive regulations, especially by states. *See* R. Briffault, *The New Preemption Reader*, 11 (2019) ("Starting around the turn of the twenty-first century and accelerating rapidly after 2010, legislatures in many states began to engage in a new and more aggressive form of intentional and extensive preemption"). Given the tremendous economic burden of exceeding standards of care required by regulations for industrial actors, the reliance interest in accurately predicting whether field preemption supplies a dispositive defense to criminal prosecution is paramount in ensuring adherence to substantive Due Process, warranting this Court's review.

ARGUMENT SUMMARY

Petitioner's chief complaint, briefly summarized, is that Respondent has mutated its common-law grossly negligent manslaughter offense *ex-post facto* to uphold Petitioner's conviction for conduct that was *ex-ante* non-negligent as a matter of law. Disposition of Petitioner's case falls squarely into the holding of *Fiore v. White*, 531 U.S. 225 (2001) that a state cannot "consistently with the Federal Due

Process clause, convict [a defendant] for conduct that its criminal statute, as properly interpreted, does not prohibit." *Id.* at 228. ***Nulla poena sine lege.***

Various statutes and regulations had pre-empted common-law conduct rules within the subject matter of fire safety, thus conditioning liability upon allegation of violating a positive enactment, and thereby effectively immunizing Petitioner *ex-ante*, with identical effect to the statute preempting requirements "different from, or in addition to" its provisions, considered by this Court in *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008). Despite this, Respondent's judiciary unforeseeably abrogated legal duty from the offense's elements and upheld Petitioner's conviction for specifically *ex-ante* de-regulated conduct within the scope of "comprehensive, on-point statute[s]" *Cf. Lancaster*, 569 U.S. 351, 366 (2013).

THE RIGHT TO FAIR WARNING

"The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Lynce v. Mathis*, 519 U.S. 433, 439 (1997).

The doctrine of fair warning even appeared in the Danish *Codex Holmiensis C37* of 1241, which stated in part the law "must meet their needs and

speak plainly, so that all men may know and understand, what the law is."

"An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed." *Fletcher v. Peck*, 6 Cranch 87, 138 (1810). The *Ex Post Facto* Clauses' core proscription is "making an innocent action criminal" *Calder v. Bull*, 3 Dall. 386, 391 (1789).

Although said Clauses only cover legislation, their core proscription of retroactive criminalization applies judicially under the Fifth Amendment's Due Process Clause, incorporated against the states under the Fourteenth Amendment (App.197f-198f). Conflicting state law is preempted by the Constitution's Supremacy Clause, Art. VI, cl. 2 (App.198f-199f). *See Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

In this Court's landmark *Bouie*, 378 U.S. 347, a trespassing statute (narrowly proscribing ingressing realty) was retroactively interpreted on appeal to also include remaining in a drug store after notice to leave. This Court held the action violative of Due Process as "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Id.* at 354.

In *Marks v. U.S.*, 430 U.S. 188 (1977), this Court applied *Bouie* to the retroactive reduction of proving obscenity, holding the defendants were entitled to rely on *ex-ante* precedent. *Id.* at 196.

In *U.S. v. Lanier*, 520 U.S. 259 (1997), this

Court applied *Bouie* to affirm the Civil Rights Act conviction of a state judge, holding the fair warning requirement equivalent to the "clearly established" standard from qualified immunity. *Id.* at 270.

In *Rogers v. Tennessee*, 532 U.S. 451 (2001), abrogation of the common-law year-and-a-day-rule limiting cognizable homicide mortality latency was retroactively applied, where the victim expired after 15 months. Distinguishing *Bouie*, this Court upheld Rogers' conviction, since the *actus reus* of stabbing was clearly prohibited *ex-ante*. *Id.* at 466-67.

Similarly, in *Bradshaw v. Richey*, 546 U.S. 74 (2005), this Court upheld a novel interpretation of transferred intent to an unintended victim because the *actus reus* of arson was proscribed. *Id.* at 76-78.

Most recently and significantly, this Court again confronted *Bouie*-type claims in *Lancaster*, 569 U.S. 351. The case involved abrogation of an established common-law diminished capacity defense between Lancaster's two trials. *Id.* at 354. This Court held no Due Process violation occurred, as the defense had been *ex-ante* superseded by an "unambiguous... comprehensive, on-point statute... inverse of the situation this Court confronted in *Bouie*." *Id.* at 365-66. *Lancaster's ratio decidendi* was the foreseeability of field preemption. As this Court will see infra, Petitioner's case presents the precise inverse of *Lancaster*, with primary conduct rules *ex-ante* superseded, a quintessential *Bouie* violation.

THE REGULATORY FIELD PREEMPTION

This Court first confronted the regulatory field preemption's doctrinal core as the contention "that full power to regulate a particular subject, implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it." in *Gibbons v. Ogden*, 9 Wheat 1, 198 (1824). *Laws need not conflict, but merely overlap in subject matter*, to trigger the doctrine, as "coincidence is as ineffective as opposition." *Charleston & Western Carolina R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915). The doctrine arises from a legislature's "exercise of its superior authority in this field." *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941).

In recent decades, this Court's industrial tort jurisprudence has explored the impact of preemptive regulatory legislation upon common-law liability. In this Court's landmark *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), a plurality held that "requirement or prohibition sweeps broadly and suggests no distinction between positive enactments and common law... those words easily encompass obligations that take the form of common-law rules." *Id.* at 521. In *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993), this Court applied *Cipollone* to hold that administrative regulations covering the subject matter of train speeds preempted common-law negligence actions premised on the same conduct. *Id. at* 673-76. In *Riegel,* 552 U.S. 312, this Court reaffirmed *Cipollone* by holding "Absent other

indication, reference to a State's 'requirements' includes its common-law duties." *Id.* at 324, and interpreted the Medical Device Amendments as conditioning any liability for conduct within the regulated subject matter requiring allegation of a statutory violation. *Id.* at 327-30.

"A SPECIAL KIND OF DEFENSE"

In *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), this Court addressed "a special kind of defense... [where non-violation of a preemptive] standard automatically exempts a defendant from state law" *Id.* at 869. This "special kind of defense" has three preconditions: (1) a subject matter must have been preempted, (2) a defendant's conduct must fall within the scope of the aforesaid subject matter, and (3) the aforesaid conduct must not violate a preemptive regulation. This regulatory immunity occurs from what the late Justice Scalia described as "inaction joined with action" in *P.R. Consumer Affairs v. Isla Petroleum*, 485 U.S. 495, 503 (1988); the action of preemptively regulating a subject matter is joined with the inaction of exempting certain conduct therein from regulatory compliance. Judge Moylan referred to this concept as "negative preemption" in *CSX Transp., Inc. v. Miller*, 159 Md.App. 123, 171-73 (2004) ("infer from the failure... to regulate, an affirmative decision that further regulation was both unnecessary and inappropriate"). *See also Arkansas Elec. Coop. v. Ark. Public Serv. Comm'n*, 461 U.S. 375, 384 (1983)

(discussing preemptive effect of nonregulation); *Bethlehem Steel Co. v. N.Y. State Labor Relations Bd.*, 330 U.S. 767, 774 (1947) ("failure of the... officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is... appropriate or approved"); *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 613 (1926) ("Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose.").

This Court has applied this special kind of defense to common-law liability on numerous occasions, most prominently in *Cipollone*, 505 U.S. at 524 (negligent failure to warn claim based on smoking and health preempted); *Easterwood*, 507 U.S. at 673-76 (train speed claim preempted); *Riegel*, 552 U.S. at 327-30 (plaintiff must plead 'parallel claims' to Medical Device Amendments); and *Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 283-87 (2014) (holding tort claim preempted by field of Airline Deregulation Act). In each case, it was assumed that a valid cause was pled under state common-law, but held preempted by federal law.

Petitioner's case presents only slight modification of this rubric; state common-law liability was preempted *ex-ante* by unambiguous state statutes, therefore common-law prosecution enforcing a standard of reasonable care is preempted *ex-post facto* by the fair warning requirement of the Due Process Clause. *Accord In re Green*, 369 U.S. 689

(1962) (contempt of court conviction reversed for Due Process violation where trial court's subject matter jurisdiction was preempted by the NLRA). The fatal error in the proceedings below was a failure to recognize that this "special kind of defense" overrides liability under either a special relationship or any factual degree of unreasonable risk creation. Put simply, the reasonableness of Petitioner's conduct was not a legally relevant fact *ex-ante*.

Petitioner's use of defensive preemption is superficially similar to, yet distinguishable from, several cases unsuccessfully invoking OSHA as an immunity defense, discussed in Note, *Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 Harv.L.Rev. 535 (1987). *See State ex Rel. Cornellier v. Black*, 144 Wis.2d 745 (Wis.Ct.App. 1988) (holding OSHA did not occupy field of state prosecution *Id.* at 751-56); *People v. Chicago Magnet Wire Corp.*, 510 N.E.2d 1173 (holding OSHA occupied field of prosecution *Id.* at 1174-76), *rev'd* 534 N.E.2d 962 (Ill. 1989) (rejecting: express and field preemption *Id.* at 964-968, conflict preemption *Id.* at 969), *cert. denied sub. nom. Asta v. Illinois*, 493 U.S. 809 (1989); *People v. Hegedus*, 425 N.W.2d 729 (holding field occupied *Id.* at 731-32), *rev'd* 443 N.W.2d 127 (Mich. 1989) (rejecting: express preemption *Id.* at 131-35, field preemption *Id.* at 135-37, conflict preemption *Id.* at 137-38); *People v. Pymm*, 563 N.E.2d 1 (N.Y. 1990) (rejecting: express preemption *Id.* at 5-6, field preemption *Id.* at 6-8, conflict preemption *Id.* at 8); *Sabine Consol. Inc. v.*

State, 756 S.W.2d 865 (holding field occupied *Id.* at 867-69), *rev'd* 806 S.W.2d 553 (Tex.Crim.App. 1991) (rejecting: express preemption *Id.* at 558-59, field and conflict preemption *Id.* at 558-59); *State v. Far West Water Sewer Inc.*, 228 P.3d 909 (Ariz.Ct.App. 2010) (rejecting all preemption arguments *Id.* at 919 citing the cases supra).

That "special kind of defense" failed because of OSHA's broad savings clause covering, *inter alia*, "common law or statutory rights, duties, or liabilities" in its subject matter. *See Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 96 (1992). Nonetheless, these cases outline regulatory preemption of state criminal prosecutions, properly identifying field preemption as a dispositive defense. As this Court will see infra, the narrow savings clauses of applicable statutes *sub judice* dispositively distinguish the failed OSHA preemption defense.

Another significant factor distinguishing the OSHA preemption cases is that they all involved prosecutions under existing state law, the only argument was preemption of the (otherwise cognizable) prosecution by federal law. By contrast, Petitioner is arguing his prosecution retroactively created new common-law duties which had previously been superseded by state statutes and regulations. "In the absence of duty imposed by law, due process concerns may bar a criminal prosecution." *Far West Water and Sewer Inc.*, 228 P.3d at 922 n.8.

FIELD PREEMPTION IN MARYLAND

Maryland imported pre-revolutionary common-law and statutes from England under Md. Const. Decl. of Rts. Art. 5 (App.199f). Maryland's homicide offenses are generally substantively common law with statutory penalties. *See Stansbury v. State*, 218 Md. 255, 260 (1958). Maryland first recognized express preemption in *Hooper v. Baltimore*, 12 Md. 464, 475 (1859), and implied theories of conflict and field preemption in *Lutz v. State*, 167 Md. 12, 15 (1934). Subsequent to Maryland enacting a vehicular manslaughter statute, field preemption was held to supply a dispositive defense to common-law grossly negligent manslaughter (of which Petitioner stands convicted), insofar as involving operation of vehicular instrumentalities, in *State v. Gibson,* 4 Md.App. 236, 240, *aff'd* 254 Md. 399, 401 (1969). This holding was extended to depraved-heart murder in *Blackwell v. State,* 34 Md.App. 547, 555 (1977), being reaffirmed in *Forbes v. State*, 324 Md. 335, 343 n.4 (1991) (applying *Gibson* to reverse common-law conviction); and *State v. DiGennaro,* 415 Md. 551, 565 n.7 (2010) (holding prosecution outside preempted *Gibson* field), remaining good law. *See Harris v. State,* 251 Md.App. 612, 638-39 (2021) (holding *Gibson* field doesn't encompass felony-murder doctrine).

All common-law assault offenses were held preempted in *Robinson v. State,* 353 Md. 683 (1999), and the defendant awarded a new trial for jury speculation on offense cognizability. *Id.* at 704. The

doctrine of field preemption has become deeply entrenched in Maryland's regulatory jurisprudence. *See Howard County v. Pepco*, 319 Md. 511, 529 (1990) (and therein cited); *Accord Talbot County v. Skipper*, 329 Md. 481, 491 (1993) ("These statutory provisions manifest the general legislative purpose to create an all-encompassing state scheme"); *Bd. of Cty. Comm'rs of Washington Cty. v. Perennial Solar, LLC*, 464 Md. 610, 631 (2019) ("The statute manifests the general legislative purpose to create an all-compassing statutory scheme").

RETROACTIVE ABROGATION OF LEGAL DUTY AS AN OFFENSE ELEMENT CONFLICTS WITH THIS COURT'S *CIPOLLONE v. LIGGETT GROUP, INC.*

Distinguishing "divisible" from "indivisible" offenses has long plagued this Court. *See Mathis v. U.S.*, 579 U.S. 500, 504-506 (2016) (indivisible offenses list alternative factual means of committing the same crime, whereas divisible offenses list alternative elements). An odious new variant of this problem arising below is the retroactive mutation of an indivisible offense into a divisible offense with fewer elements. This Court has held that "common-law... actions... are premised on the existence of a legal duty" *Cipollone*, 505 U.S. at 522. Maryland's appellate judiciary has adopted an entirely different (abridged) elemental view of the *Clapham omnibus*, flouting centuries of precedent.

Legal duty first entered Maryland's negligence jurisprudence in the case of *Mayor, Etc. of Baltimore v. Howard*, 6 H. & J. 383, 393-94 (1825). The history of the element's development is outlined in *Jacques v. First Nat'l Bank*, 307 Md. 527, 532-35 (1986). Despite the element's consistent appearance in centuries of Maryland's negligence cases, it lost elemental status during Petitioner's appeals.

The most outlandish irregularity below is the abrogation of legal duty from the offense elements of grossly negligent manslaughter, bifurcating it into a lesser-included absolute liability variant; legal theory of this apparent *res nova* warrants special examination. Since this furthered retroactive elimination of Petitioner's preemption defenses, its analysis elucidates the issue infra.

This occurrence's origin equates the provenance of *Evans v. Michigan*, 568 U.S. 313 (2013); the elementally fallacious argument of counsel. Evans' undeserved acquittal was inveigled by defensive invention of an unproven arsonous element. *Id.* at 316. Similarly, Petitioner's wrongful conviction was facilitated by Respondent's purloining of legal duty's elemental status. Said status was undisputed at trial, with the safe workplace duty imposed as a basis of liability arising from the employment special relationship (App.177c-179c), but regressed on appeal.

While the precise genesis of the "duty-free" theory is elusive, it likely arose from a description of

offense modalities in *Gibson* as "(2) in negligently doing some act lawful in itself, or (3) by the negligent omission to perform a legal duty" 4 Md.App. at 242. That description shouldn't have been read as implying discrete offenses with elemental exclusivity, however this view strangely prevailed.

Petitioner raised his regulatory preemption defenses (discussed infra) at trial (App.172c-173c) and renewed them briefing his special appeal (App.216g-218g). Respondent concocted its "duty-free" theory as a stratagem to avoid preemptive acquittal without statutory interpretation, replying "Only if [the Court of Special Appeals] finds... evidence... insufficient... of... grossly negligent.... manslaughter does it have to consider... the 'legal duty' theory." (App.222g). Despite citing no authority for this peculiar proposition, Respondent misled the special intermediate court into "affirm[ing]... gross negligence... manslaughter without deciding... legal duty... manslaughter" 249 Md.App. at 379;App.125b-126b. The special intermediate court ignored the "special kind of defenses" preempting liability under the special relationship, instead retroactively bifurcating the offense and decreeing a special verdict imposing absolute liability (*See* 249 Md.App. at 378-82;App.125b-129b). The legal duty element disappeared in the special circumstances of this immensely special irregularity, *proscribing non-negligent conduct*.

Petitioner attempted elemental retrieval below (App.254g-257g) and persisted arguing pre-

emption (App.224g-251g). Respondent relinquished its "duty-free" idea, yet still vicariously beguiled the Court of Appeals with the Court of Special Appeals' special verdict. To Petitioner's great consternation, Maryland's high court didn't restore the duty element. It held "Legal duty... manslaughter is not a lesser-included offense of depraved heart murder... [the former] has an extra element – the existence of a legal duty... that... murder does not... Gross negligence... manslaughter is, however, a lesser-included offense of depraved heart murder." 477 Md. at 455-56;App.59a-60a. Respondent's appellate asportation of duty's elemental status thusly completed; the legal duty element was illegally carried away into the field of absolute liability. *Omnibus breviatus.*

Consequently, the appellate courts *conflated evidence of mere unreasonableness as a matter of fact with evidence of negligence as a matter of law*.

EXAMINING ABSOLUTE LIABILITY "*NEGLIGENCE*" IN THE NEW OFFENSE OF "*ILLEGAL DUTY*" *MANSLAUGHTER*

The new offense chiseled below is an oxymoronic hybridization of negligence and absolute liability, illustrating why conduct rules must be distinguished from decision rules.

The duty element's perplexing disappearance is plainly not an "incremental and reasoned development of precedent" *Rogers*, 532 U.S. at 461,

but rather a mere obtuse judicial vicissitude from failing to consider why legal elements shouldn't appear in jury instructions. The Court of Appeals *raison d'être* for its holding was duty's omission from depraved-heart murder's jury instruction being dispositive of elemental status (477 Md. at 455;App.60a), without considering that *juries are not supposed to resolve legal issues*. Depraved-heart murder is a common-law cause enforcing a standard of reasonable care, it thereby definitionally imposes a duty under mainstream jurisprudence. Even the special intermediate court below noted "it seems possible that the negligent omission of a lawful duty... could...be elevated to... depraved heart murder." 249 Md.App. at 352 n.10;App.95b. In no case was non-negligent conduct proscribed by either offense, until the opinion below.

"Establishment of a legal duty is a prerequisite to a claim of negligence... for *negligence is the breach of some duty*" *Jones v. State*, 425 Md. 1, 19 (2012) (emphasis added). Since legal duty has a "legal ring" and imparts legal significance to an action's standard of care, restricting the action's field of proscribed conduct, it is an element. *See Richardson v. U.S.*, 526 U.S. 813, 818 (1999). In *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472 (2013), this Court compared "what we will call a 'strict-liability' regime (in which liability does not depend on negligence, but still signals the breach of a duty) with... an 'absolute-liability' regime (in which liability does not reflect the breach of any duties at

all, but merely serves to spread risk)" *Id.* at 481. Negligence and absolute liability are mutually exclusive, yet amalgamated into a new offense below.

For technical purity, the new offense is aptly characterized as *common-law grossly unreasonable absolute liability involuntary manslaughter;* formerly grossly negligent manslaughter, except missing the duty element. To reflect its functionality in illegally imposing retroactive duties, and to distinguish it from "legal duty" manslaughter, Petitioner will refer to it as "*illegal* duty" manslaughter. This new offense is unobjectionable so long as a defendant coincidentally happens to breach a legal duty. Problems arise only where grossly unreasonable conduct breaches no legal duty; the defendant is non-negligent, yet is denied acquittal for an entirely different offense. *See Cole v. Arkansas,* 333 U.S. 196 (1948) (Due Process violated by affirming conviction under statutory provision never sent to jury).

The breach- and enforcement aspects of duty have decoupled, such that an absolute duty of reasonable care is being illegally enforced, even with respect to *ex-ante* deregulated conduct. This has the draconian effect of *delegating legislative power to juries*—the ability to retroactively create negligence from non-negligent conduct.

Put simply, *illegal* duty manslaughter is a textbook prejudicial example of "a freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions"

Schad v. Arizona, 501 U.S. 624, 640 (1991), violating Due Process. Other jurisdictions universally recognize duty as an element of similar offenses when confronted with cognizability issues. *See State v. White,* 204 Conn. 410, 427 (Conn. 1987) (directing acquittal where no duty was breached); *People v. Nix,* 556 N.W.2d 866, 869 (Mich. 1996) (directed verdict of acquittal based on failure to prove duty element implicates Double Jeopardy); *People v. Sanford*, 4 Misc.3d 180, 184 (N.Y.Sup.Ct. 2004) (dismissing indictment where no duty was breached); *State v. Lisa,* 194 N.J. 409, 411 (N.J. 2008) (indictment defective where defendant lacked fair warning of duty); *State v. Back*, 775 N.W.2d 866, 871-72 (Minn. 2009) (directing acquittal where no duty was breached).

Sources generally recognize involuntary manslaughter as only validly divisible into 'criminal-negligence' manslaughter and 'unlawful-act' manslaughter. W.R. LaFave, *2 Substantive Criminal Law* § 15.4 (3d ed. October 2020 update). Maryland's preeminent homicide treatise also viewed grossly negligent manslaughter as a singular offense which "May Consist of Acts of Omission... the modality of commission and that of omission" Hon. C.E. Moylan, Jr., *Criminal Homicide Law* § 12.9, 235-236 (2002). Prior caselaw viewed the "legal duty" modality as a kind of gross negligence. *See Fabritz v. Traurig,* 583 F.2d 697, 701 (4th Cir. 1978). *Accord State v. Kanavy*, 416 Md. 1, 10 (2010) (construing reckless endangerment statute with identical mens rea as

indivisible offense). Prior use of the term "modality" is significant, given its implication of a singular offense. *See Watts v. State*, 457 Md. 419, 439 (2018) (holding that statutory second degree assault is a singular offense with various "modalities"). There are two modalities of the same grossly negligent manslaughter offense in mainstream jurisprudence: means of commission and omission. Merely omitting express enumeration of the duty element in prior gross negligence manslaughter jurisprudence did not make its abrogation foreseeable, as negligence actions implicitly require the element. *See Walpert v. Katz*, 361 Md. 645, 655-56 (2000) (tort of negligent misrepresentation always required duty element, even before its express recognition).

Gross negligence is defined as "A conscious, voluntary act or omission in reckless disregard of a legal duty" *Black's Law Dictionary* 1134 (9th ed. 2009). "Criminal negligence" is then defined as "[g]ross negligence so extreme that it is punishable as a crime." *Id.* The "legal duty" label on manslaughter merely reflects that a special relationship generally must be proven to plead cognizable omissive homicide, but does not imply the element's absence in the "gross negligence" modality. It also doesn't imply that a special relationship creates a duty as a matter of law, contrary to what the trial court believed. *See Hevener v. U.S.*, No. 17-2577 (RJL), 2019 WL 367917 at *9 n.5 (D.D.C. Jan. 30, 2019) (common-law liability under special relationship preempted by FTCA). *Accord Klayman*

v. Mark Zuckerberg & Facebook, Inc., 753 F.3d 1354, 1360 (D.C. Cir. 2014) ("simply invoking the label 'special relationship' cannot transform... a[] waived contract claim into a non-preempted tort action.")

As this Court will see infra, *illegal* duty manslaughter is a mischievous cause of action for its ability to trespass preempted fields and impose absolute liability for deregulated conduct. It is a sort of Trojan horse cause, with the factual veneer of negligence concealing its illegal payload of absolute liability. A court's actions are "grossly unfair... [for] retrospectively eliminating an element of the offense... the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption" *Carmell*, 529 U.S. at 532.

Although *illegal* duty manslaughter is a new cause begotten by the botched appeals below, it reflects criminal law's systemic doctrinal failure to properly distinguish *ex-ante* primary conduct rules (requirements or prohibitions) from *ex-post* adjudication rules for grading culpability. *See* P.H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U.Pa.L.Rev. 335, 369-75 (2005) (distinguishing rules that proscribe certain conduct from rules for grading its culpability and commenting on a failure to separate them). *See also* M. Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv.L.Rev. 625, 630-34 (1984) (commenting on the problems with blurring these two classes of rules).

RETROACTIVE IMPOSITION OF DUTY TO INSTALL SMOKE DETECTORS

The imposition upon Petitioner of a duty to install smoke detectors is among the most egregious of retroactivity violations in judicial history, squarely overruling precedent on that precise conduct.

The case of *Salvatore v. Cunningham*, 305 Md. 421 (1986) is an instance of a negligence tort dismissed on state-law regulatory field preemption grounds. Quite significantly, the allegation was *omission of a smoke detector* in a demised dwelling house premises rented as a ski chalet. The Court of Appeals held that the building's physical configuration—not the parties' relationship—controlled the legal analysis. *Id.* at 429. Furthermore, the court held that express exemption of dwelling houses from compliance with Maryland's first smoke detector regulations had "rooted out" any common-law duty to install smoke detectors. *Id.* at 430.

While not explicated, *Salvatore's ratio decidendi* is a textbook example of the "special kind of defense" discussed supra where the defendant is immunized from liability for any conduct within the scope of the preemptively regulated subject matter which doesn't violate a positive enactment.

The regulations in *Salvatore* were eventually replaced by MD Code, Public Safety, §9-106 prior to the fire (App.205f-206f). Subsection (c) places the installation duty upon "the landlord or property owner" *Id.* The Court of Appeals' only intervening

smoke detector case, *Pittway Corp. v. Collins*, 409 Md. 218 (2009), did not overrule *Salvatore*.

In Petitioner's case, *without even acknowledging prior precedent or the statute supra*, the Court of Appeals rejected Petitioner's preemption defense and *sub silento* overruled *Salvatore* by holding that "to fulfill the duty to provide [decedent] with a reasonably safe workplace... install[ing] a smoke detector [is a] measure[] that could have been taken... but [was] not" 477 Md. at 448;App.50a-51a.

While Petitioner does not contest that workplaces containing smoke detectors may be factually safer, he takes the utmost Constitutional umbrage at appellate courts so capriciously hopping over prior precedent *on the precise conduct at issue*.

Prejudice to Petitioner is substantial, as Respondent never alleged decedent was Petitioner's tenant, and the evidence established Petitioner didn't own the premises (App.178c). Consequently, Respondent couldn't plead 'parallel claims' to its statute, but nonetheless essentially attained Petitioner by *ex-post facto* judicial decree. It is impossible to say that the jury did not attribute decedent's death, at least in part, to Petitioner's omission of a smoke detector, given testimony by a fire investigator that smoke detectors provide "reasonable warning" (App.266g) and testimony by his assistant that she didn't observe one inside Petitioner's bunker (App.296g), combined with opening statements asking the jury to consider it

(App.263g). This would warrant a new trial, assuming, *arguendo*, otherwise sufficient evidence was presented. *See Bachellar v. Maryland*, 397 U.S. 564, 571 (1970). *Cf. U.S. v. Marcus*, 560 U.S. 258, 264-65 (2010) (*Bouie*-type violation may be harmless).

Petitioner's predicament is far more flagrant than even *Bouie* itself: if prior precedent had expressly repealed common-law trespass offenses, yet Bouie was prosecuted for one, equivalence is aptly illustrated.

RETROACTIVE ELIMINATION OF PREEMPTION BY FIRE CODE DEFENSE

This Court is likely familiar with Maryland's State Fire Prevention Code ("Fire Code") only from its citation on the ubiquitous maximum occupancy placards adorning the walls of Maryland's restaurants and other places of public assembly. In the proceedings below, it has the peculiar significance of a preemptive "*Get-Out-of-Jail-Free-Card*" that the judiciary indefensibly refused to honor. As this Court will see infra, it is a preeminent reference-grade example of preemptive regulatory legislation.

The Fire Code's enabling statute is MD Code, Public Safety §6-206 (App.202f-204f). Subsection (a)(1)(i) provides that "To protect life and property from the hazards of fire and explosion, the Commission shall adopt comprehensive regulations as a State Fire Prevention Code." *Id.* This clause expressly

occupies the subject matter of fire safety with "comprehensive regulations" from *mandatory* promulgation by the Commission. Under *ex-ante* precedent, this is interpreted as an implied field preemption. *See City of Baltimore v. Sitnick*, 254 Md. 303, 323 (1969) ("the legislature may so forcibly express its intent to occupy a specific field of regulation that the acceptance of the doctrine of pre-emption by occupation is compelled"); *Pepco*, 319 Md. at 523 (cases applying *Sitnick*); *Genies v. State*, 426 Md. 148, 154-55 (2012) ("the statute... addresses the entire subject matter, known as field preemption... occupied on a comprehensive basis"); *Accord Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 161 (1978) (comprehensive regulatory scheme delegating mandatory authority implicitly preempts field).

The Fire Code does more than merely regulate, it "establishes the minimum requirements" for its subject matter per subsection (d)(1). *Use of the term "requirements" is highly significant* given this Court's holdings in *Cipollone*, 505 U.S. at 521 and *Riegel*, 552 U.S. at 324 ("requirements includes... common-law duties"); *Accord Ginsberg*, 572 U.S. at 281-82; it expands the occupied field to *cover all corresponding common-law duties*. It is apparent that Maryland's General Assembly intended its Fire Code to supersede the legally required standard of care for its subject matter, repealing and replacing all substantive common-law conduct rules therein.

Differential linguistic comparison of sub-sections (d)(1) and (d)(2) greatly bolsters the plain

meaning interpretation, as the latter saves from implied repeal "a more stringent... state or local law or regulation" which this Court has held includes only positive enactments and excludes common-law duties in *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002); *Accord Ginsberg*, 572 U.S. at 283; *a fortiori* more stringent common-law duties are implicitly repealed. *Expressio unius est exclusio alterius. Cf. Medtronic, Inc. v. Lohr*, 518 U.S. 470, 489-90 (1996) (anomalous use of "requirements" in statute only referring to positive enactments). Accepting a narrow meaning of "requirements" as in *Lohr*, or a broader meaning of "a law or regulation" contrary to *Sprietsma*, would run counter to the plain meaning and render the linguistic distinction meaningless. As such, the Fire Code created a regulatory floor for municipalities, but its requirements (or lack thereof) were supposed to be absolutely binding upon the courts, as the field's superintendency lies exclusively with the State Fire Prevention Commission per subsection (d)(3). *Cf. Freightliner Corp. v. Myrick*, 514 U.S. 280, 286 (1995) citing *Ray* (intent "to centralize all authority over the regulated area in one decisionmaker").

Expressly occupying a field of requirements while saving positive enactments is the implied equivalent of expressly preempting common-law duties different from, or in addition to, positive enactments, precisely like *Riegel*. Put another way, the Fire Code unambiguously set the legal maximum occupancy for the fire safety field at positive

enactments.

The scope of *ex-ante* preemptive effect extended beyond tort duties, and also covered substantive criminal law, given the penalty provision of MD Code, Public Safety, §6-601(b) (App.204f). *Cf. Kansas v. Garcia*, 140 S. Ct. 791, 805 (2020) (IRCA does not occupy field of state prosecution). In sum, 'parallel claims' were required, as in *Riegel,* as Maryland's fire safety common-law was entirely superseded by statute.

In regulating its field, the State Fire Prevention Commission has promulgated COMAR 29.06.01.06 (App.208f), incorporating by reference, *inter alia*, the NFPA 1 Fire Code (2015 ed.). In applying this Court's *Easterwood* to determine whether a preemptable requirement is superseded by administrative regulations, the dispositive inquiry is whether the safety concern addressed by the preemptable requirement covers the same subject matter as the preemptive regulation. *See CSX Transp., Inc. v. City of Plymouth*, 92 F.Supp.2d 643, 650 (6th Cir. 2000).

Proceeding to compare relevant NFPA 1 regulations (App.209f-211f) with conduct decreed proscribed by the Court of Appeals (*See* 477 Md. at 440-41;App.41a-42a), there is perfect overlap with the *ex-ante* preempted field. Compare "debris and trash blocking... route out" with "means of egress... shall be maintained free and unobstructed" §4.4.3.1.1; "without a reliable way for [decedent] to

contact [Petitioner]" with "fire alarm systems shall be provided where necessary to warn occupants" §4.4.4; "failure to provide reliable electricity... result in a lack of light" with "Illumination of means of egress shall be provided" §4.4.3.2.3; "switch the power to a different circuit... and replace extension cords" with "wiring... shall be installed in accordance with NFPA 70, *National Electrical Code*" §11.1.2.1 and "unless determined to present an imminent danger... shall be permitted to be maintained" §11.1.2.2.

If the fire *sub judice* had occurred in a classification of building other than a dwelling house, the issue of harmlessness in pleading deficiency could have arisen, as 'parallel claims' to the Fire Code could have been alleged. The dwelling house, however, is a very special instrumentality under Maryland's fire safety regulations, with very special *ex-ante* cognizability problems. Pursuant to COMAR 29.06.01.03.D (App.207f-208f), the Fire Code's "provisions... do not apply to... dwelling houses" *Id.* This is not due to a jurisdictional limitation upon the Fire Prevention Commission's powers, as they are expressly plenary over all fire safety instrumentalities per §6-206(a)(2)(ii) "If the Commission determines that an installation, plant, or equipment is a hazard so inimicable to the public safety as to require correction, the regulations adopted under this subsection apply to the installation, plant, or equipment." *Id.* There is also no inference to be drawn that the Commission simply forgot about

dwelling houses, since they are expressly addressed. *Compare Isla Petrol*, 485 U.S. at 504. Instead, this is a textbook case of "inaction joined with action" *Id.* at 503, where a general subject matter of conduct has been preemptively regulated, while occurrence of that same conduct in particular circumstances has been deregulated.

As this Court held in *Napier*, "The fact that the commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating power... it was intended to occupy the field. The broad scope of the authority conferred upon the commission leads to that conclusion... [other] requirements... are precluded" 272 U.S. at 613. In other words, dwelling house fire safety had been unregulated with respect to municipalities, but deregulated with respect to courts.

Respondent's only opportunity to plead a 'parallel claim' would have required Petitioner's violation of a more stringent local fire code, yet there was another layer of legal deficiency. The only relevant provision, §22-40(d) of Montgomery County's Fire Code (App.211f), also exempts "individual dwelling units" from its substantive proscription of obstructive egress deficiency. *This conclusively discredits the legitimacy of the proceedings against Petitioner.*

If positive enactments were the only *ex-ante* existing fire safety law, yet Petitioner is convicted

solely at common-law, one conclusion is ineluctable: ***Respondent has miscarried its judiciary!***

Respondent has variously pursued three related theories of liability: (1) absolute liability (see supra), which is really a mutated variant of; (2) the common-law general duty of reasonable care to refrain from acts of risk creation, and (3) the safe workplace duty. *See* 477 Md. at 447 n.20;App.51a.

The fatal flaw in all three specious syllogisms is enforcement of substantive conduct rules requiring compliance with a standard of reasonable care that was barred *ab initio* by statute, and is now preempted by the Due Process Clause. *See Riegel*, 552 U.S. at 344-45 (Ginsburg, J., dissenting) (effect of majority interpretation is an "automatic bar to state common-law tort claims... suits will be barred *ab initio*"). The proceedings below evince complete misunderstanding of what preemption means, which is finely illustrated by a pithy example from formal logic:

> "[A]lthough we are told that Tweety is a penguin, penguins are birds, and birds fly, the conclusion we naturally draw is that Tweety does not fly. The conclusion that Tweety flies is preempted by information to the effect that penguins don't fly. Because penguins are a kind of bird, information as to whether penguins fly is more specific than information about whether birds fly, and thus overrides it. We conclude that Tweety does not fly. The

> notion of preemption captures this formally, using only topological properties of the network itself."

G.A. Antonelli, *Grounded Consequences for Defeasible Logic*, 30 (2005). Respondent has wrongly focused on the general attributes of a workplace and risk creation in purporting the cognizability of its case, while disregarding specific preemptive regulations covering the subject matter of conduct. This is equivalent to fallaciously assuming that any mammal with fur and a tail walks on four legs, while in actuality kangaroos fulfill these attributes, but instead hop on two legs. The problem is a lack of specificity in reference frame. The lower courts' leaps of logic over the defeasibility principle must be intercepted by the Due Process Clause. *Accord O'Melveny & Myers v. Federal Deposit Insurance*, 512 U.S. 79, 86 (1994) (discussing tort's defeasibility by defense).

Petitioner doesn't contest fair warning that general duties of reasonable care applied to employers and people generally. *The narrow issue here is their applicability to fire safety, given the existence of specific statutes and regulations.* This is the Due Process corollary of precisely the same defeasibility issue this Court confronted in *Riegel*, 552 U.S. at 328; that preemptive regulations covering specific conduct supersede liability imposed under general common-law duties.

Because negligence is the breach of a duty and

ex-ante fire safety duties were only found in positive enactments, *Respondent actually presented no evidence of ex-ante negligent fire safety*. What has occurred, then, was a sham trial retroactively validated by decrees of attainder from the appellate courts.

The true touchstone of the analysis is whether Petitioner could reasonably predict that Maryland's courts would disregard *comprehensive preemptive requirements* on fire safety in favor of supplementing the real Fire Code with their own decrees ostensibly beyond their *ex-ante* jurisdiction. The answer to this is certainly in the negative. As subsection (a)(1)(iii) states "The State Fire Prevention Code has the force and effect of law in the political subdivisions of the State." As subsection (d)(3) states "If there is a question whether a State or local law or regulation governs, the decision of the Commission determines: (i) which law or regulation governs[.]" *There is no subsection (d)(4) authorizing the Court of Appeals to decree additional fire safety requirements.*

The Court of Appeals' heavy reliance on *Com. v. Godin*, 371 N.E.2d 438 (Mass. 1977) (*See* Md. 477 Md. at 449-50;App.52a-53a) is entirely misplaced, as *Godin* was properly a common-law case; there was no regulatory preemption issue. The court's reliance on other fire prosecutions such as *Com. v. Welansky*, 55 N.E.2d 902 (Mass. 1944) is inapt for the same reason. *Far West Water and Sewer Inc.* did involve preemption, properly identifying it as a dispositive defense, yet the Court of Appeals entirely ignored

this threshold inquiry.

The omission of statutory construction below is a prime example of "unexpected and indefensible". Maryland's judiciary has been injudiciously officious with Petitioner; its inexplicable disability with regards to interpretation of conflagration mitigation legislation is all the more Constitutionally offensive for not even attempting to distinguish prior preemption precedent or this Court's *Bouie*. The courts below pretended there simply was no Fire Code, while this Court has held that even invalid statutes influence the right to fair warning in *Dobbert v. Florida*, 432 U.S. 282, 297-98 (1977). This is such an unprecedented departure from the norm of simply "follow[ing] the plain and unambiguous meaning of the statutory language" *Salinas v. U.S.*, 522 U.S. 52, 57 (1997), as to warrant this Court's disapprobation. *See also Bostock v. Clayton County*, 140 S.Ct. 1731, 1737 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").

Although Maryland's appellate courts omitted discussion of Petitioner's regulatory preemption defenses (except 477 Md. at 422-23;App.20a) and *Bouie*, federal review is not precluded, since the defenses were presented at every level and necessarily implicitly overruled by finding liability for conduct covered thereby. *See C.B.Q. Ry. v. Illinois*, 200 U.S. 561, 580 (1906) (Harlan, J.).

RETROACTIVE ELIMINATION OF IMMUNITY DEFENSE UNDER ENGLISH FIRE ACTS

This Court would only have to consider this preemption contention if the others didn't prove case dispositive, but it is likewise dispositive. It involves an ancient series of English immunity statutes "as unusual as the facts of the case" 477 Md. at 419;App.16a. Statutes 6 *Ann.*, Ch. 31, §6 though 14 *Geo. III*, Ch. 78, §86 (the *Fires Prevention (Metropolis) Act of 1774*) provided in relevant part "That no Action... shall be... prosecuted... against any Person in whose House... any Fire shall... accidentally begin... any Law, Usage, or Custom to the contrary notwithstanding" (App.200f-202f).

These statutes were passed to abrogate an ancient common-law rule of liability for the occurrence of fires on one's land, known as *ignis suus*. *See Koos v. Roth*, 652 P.2d 1255, 1263-64 (Or. 1982). *Ignis suus* originated in the case of *Beaulieu v Finglam* (1401) B. & M. 557 and persisted through *Turberville v Stampe* (1697) 91 ER 1072. Whether *ignis suus* was a form of strict liability or absolute liability has been subject to historical debate. *See* P.H. Winfield, *The Myth of Absolute Liability*, 42 L.Q.R. 37, 46-50 (1926) (discussing cases from *Beaulieu* to *Turberville* and concluding "inevitable accident" provided a defense). Sir William Blackstone opined that the acts exculpated householders from liability for all fires not willfully ignited. *See* W. Blackstone, *1 Commentaries on the*

Laws of England, 431 (10th Ed. 1787) ("But now the common law is, in the former case, altered by statute 6 *Anne,* c. 3[1], which ordains that no action shall be maintained against any, in whose house or chamber any fire shall accidentally begin: for their own loss is sufficient punishment for their own or their servant's carelessness.").

Petitioner initially raised this immunity issue as a jurisdictional express field preemption defense (App.224g-234g) under the English statutory provision of Md. Decl. Rts., Art. 5(a)(1) (App.199f) in the Court of Appeals, which went on to hold the issue non-jurisdictional, the statutes inapplicable to Maryland, and as supplying no defense to Petitioner. *See* 477 Md. at 420-28;App.16a-27a. Ordinarily, this authoritative exposition of Maryland law would terminate the inquiry, as federal courts don't "reexamine state-court determinations on state-law questions." *Estelle v. McGuire,* 502 U.S. 62, 68 (1991). However, as this Court must now be well aware, Petitioner's case is quite extraordinary for its staggering plethora of Constitutional violations. The Court of Appeals' countertextual reading of the *Metropolis Act* provides no exception.

The dispositive inquiry, then, is the defense's prior existence in Maryland law. While less pellucidly entrenched than the modern fire statutes supra, its loss was still indefensible. *Cf. Lancaster*, 569 U.S. at 366-68 (finding common-law defense better established than that in *Rogers*, yet holding its abrogation foreseeable by preemption).

Purportedly an exercise in statutory construction, the Court of Appeals' deportment is more accurately characterized as a farce of statutory destruction—an exercise of judicial veto power. As this Court has recognized in *Ex Post Facto* Clause jurisprudence, "where a complete defense has arisen... it cannot be taken away" *Stogner v. California*, 539 U.S. 607, 618 (2003).

First and foremost, the Court of Appeals had held that negligently ignited fires were outside the defense's scope, implying its application to accidental fires, in *Bodman v. Murphy*, 35 Md. 154, 156 (1872).

As this Court held in *Rogers*, 532 U.S. at 463-64, other jurisdictions' treatment of the issue is relevant to the fair warning analysis. The defense's geographic scope was first considered, and held unlimited, in *Richards v Easto* (1846), 15 M&W 244, 251. This holding was reaffirmed in *Filliter v Phippard* (1847), 11 Q.B. 347, 355, cited in *Bodman*. The defense has been held applicable in almost every other jurisdiction to consider it. *See Kellogg v. Chicago & N.W. Ry. Co.*, 26 Wis. 223, 272 (Wis. 1870); *Canada Southern Ry. Co. v. Phelps* (1884), 14 S.C.R. 132, 133 (applied in Canada); *Hunter v Walker* (1888), 6 NZLR 690, 694 (applied in New Zealand); *Rogers v. Atlantic Gulf and Pac. Co.*, 107 N.E. 661, 662 (N.Y. 1915); *Torr v. Davidson*, (1920) 216 LRK 170, 173 (applied in Kenya); *Goldman v Hargrave* (1966) 115 CLR 458, 468 (applied in Australia). Significantly, the defense also still applies in the United Kingdom. *See Stannard v Gore*

[2012] EWCA Civ 1248. The statutes are generally accepted as having modified American common-law. *See* W.P. Keeton *et al.*, *Prosser & Keeton on The Law of Torts*, § 77 "*Fire*" 543-44 (5th ed. 1984). This Court likewise recognized the statutes' impact on common-law in *St. Louis & S.F. Ry. Co. v. Mathews*, 165 U.S. 1, 6 (1897).

Against the weight of authorities supra, it was not reasonably foreseeable that the Court of Appeals would overrule *Bodman* and hold the defense inapplicable based upon the mere *ipse dixit* of Maryland's late Chancellor Kilty. The court's assertion that this is "the long-prevailing view" (477 Md. at 426;App.25a) is at odds with not only its own precedent and the mainstream views of most courts, but also the unambiguous plain statutory language. While Kilty's opinion of English statutory applicability had typically been followed, the Court of Appeals had overruled his opinion in two prior cases. *See State v. Magliano*, 7 Md.App. 286, 293 (1969) n.5 (citing *Sibley v. Williams*, 3 Gill. & J. 63 (1830) and *Shriver v. State*, 9 Gill & J. 1, 11 (1837) (both overruling Kilty's opinion)).

As the *Easto* court discussed, there is no text restricting geographical application of the immunity defense, while other provisions in the same statutory schemes do include geographic limitations, leading to the inference that geographical restriction of immunity was rejected. Accepting Kilty's view requires addition of this restriction absent in the plain text. As in *Bouie*, this was "clearly at odds with

the statute's plain language" *Rogers*, 532 U.S. at 458; unlike *Rogers*, this issue does involve "the precise meaning of the words of a particular statute" *Id.* at 464.

The Court of Appeals' analysis of the defense's operation, or lack thereof, was brazenly countertextual. This defense is plainly a species of express field preemption. *See Easterwood*, 507 U.S. at 664 (court must interpret express preemption clause). In *Weinberger v. Salfi*, 422 U.S. 749, 757 (1975), this Court held the core "no action shall be" language is "sweeping and direct" in dispossessing courts of jurisdiction. Whether a fire's surrounding circumstances are generally a proper object of common-law prosecution (which they aren't *sub judice* as argued supra) is irrelevant to the inquiry of whether the case is an "Action... prosecuted... against any Person in whose House... any Fire shall... accidentally begin" triggering immunity under the *Metropolis Act*. The accidental nature of the fire, its occurrence in a dwelling house, and prosecution of an action against a person are the only legally relevant facts, obligating activation of the defense under its plain meaning. The Court of Appeals' reliance on the existence of other fire prosecutions not involving the defense added nothing to the task of statutory interpretation.

"It is important to emphasise the scope of the change effected by section 86. Not only does it apply notwithstanding any custom to the contrary (which would include liability under the *ignis suus*

principle), it also applies notwithstanding any law to the contrary. This would, as a matter of ordinary statutory construction, include any other route at common law to liability" *Stannard* supra, (Lewison, L.J. at 91). So long as Respondent was not litigating landlord-tenant disputes within the savings clause, no exception conferring jurisdiction applied under the plain text. *Accord Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 494 (1983) (holding action against foreign sovereign must fall within statutory exception to comprehensive Foreign Sovereign Immunities Act to confer subject matter jurisdiction). *See also Brownback v. King,* 141 S. Ct. 740, 749 (2021) (subject matter jurisdiction defective under FTCA unless statutory elements pled).

In disposing of the defense, the Court of Appeals displayed an exceedingly irregular interpretation of subject matter jurisdiction. It posited that the sole dispositive inquiry was the existence of authority to adjudicate a particular classification of cause of action, irrespective of the conduct's subject matter. *See* 477 Md. at 422; App.19a. This departed from the legal mainstream.

In this Court's landmark *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), states were held to be "ousted of all jurisdiction" to adjudicate labor relations disputes. *Id.* at 245. This is considered to be a "true" or "fundamental" defect in jurisdiction. *See* D.B. Dobbs, *Trial Court Error as an Excess of Jurisdiction*, 43 Tex.L.Rev. 854, 886-88 (1965). Courts applying *Garmon* do not merely

examine general jurisdiction over the classification of cause, but whether the case involves conduct in the labor relations subject matter. *See Williams v. NFL*, 582 F.3d 863, 881-82 (8th Cir. 2009). The Court of Appeals had previously adhered to this mainstream understanding of jurisdiction applying *Garmon* in *Law v. Int'l Union*, 373 Md. 459, 480 (2003). "It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 292 (1971). Departing from this test was unexpected and indefensible in the case *sub judice*.

The Court of Appeals' misinterpretation of subject matter jurisdiction emanates from the same source as the asportation of duty's elemental status: pollution of the court's reasoning process by meretricious legal theories of Respondent(App.261g).

Petitioner "did not have fair warning that a court, when faced with an unambiguous statute, would reject the literal interpretation" as in *Magwood v. Warden*, 664 F.3d 1340, 1349 (11th Cir. 2011). The plain meaning interpretation of the fire immunity statutes supplies an independently case-dispositive unwaivable jurisdictional defense that Petitioner is entitled to under the Due Process Clause. Because the defense only became inapplicable, inoperative, and non-jurisdictional during Petitioner's appeal, federal review is not precluded. "On rare occasions [this] Court has re-examined a state-court interpretation of state law when it appears to be an obvious subterfuge to evade

consideration of a federal issue." *Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1975); *Accord Bouie*, 378 U.S. at 354; *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 680-81 (1930).

Petitioner hastens to add that he is not *merely* challenging the subject matter jurisdiction of the state courts, as this *alone* is not a cognizable federal issue. *Cf. Dowdy v. Warden, Broad River Corr. Inst.*, No. 8:07-cv-1706-PMD, 2008 WL 2462823, at *4 (D.S.C. June 13, 2008). Instead, Petitioner is challenging the Court of Appeals' "unexpected and indefensible" expansion of subject matter jurisdiction to retroactively criminalize primary conduct as a federal Due Process violation.

SECOND ISSUE

This Court would only have to reach this issue if the first issue didn't compel acquittal, but could alternatively reach it to direct the same.

NATIONAL IMPORTANCE

This Court has previously addressed quantitative evidentiary sufficiency rules in *Ex Post Facto* Clause jurisprudence. *See Carmell*, 529 U.S. 513. Petitioner's secondary issue provides this Court the opportunity to decide the *Carmell* of *Bouie* claims: the Due Process limitations on states' retroactive judicial abrogation (*Bouie*) of quantitative evidentiary sufficiency rules (*Carmell*).

ARGUMENT SUMMARY

Maryland's controlling precedent for grossly negligent manslaughter before the fire had included a quantitative evidentiary sufficiency rule requiring a defendant's conduct be prohibited at least on a statewide basis to impose liability. This rule was abandoned when a new sufficiency test was formulated by intervening precedent. Petitioner was prejudiced by retroactive application of the new test to fire safety conduct which wasn't *ex-ante* proscribed statewide. Additionally, Petitioner's conduct with respect to prior defects in electrical instrumentalities was illegally used as direct evidence of negligence without expert testimony, contravening prior rules requiring expert testimony and proscribing its use as direct evidence of negligence.

QUANTITATIVE EVIDENTIARY SUFFICIENCY RULES

This type of rule is one which "governs the sufficiency of... facts for meeting the burden of proof" *Carmell*, 529 U.S. at 545. In *Carmell*, the burden of proof of his offenses was retroactively lowered by legislation eliminating a corroboration requirement for the sufficiency of the victim's testimony. *Id.* at 517-19. "[U]nder the new law, [Carmell] could be (and was) convicted on the victim's testimony alone, without any corroborating evidence." *Id.* at 530. This Court held an *Ex-Post Facto* Clause violation occurred, as "the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction." *Id.* at 533. This Court went on to distinguish "witness competency rule[s]" which merely regulate the admissibility of evidence, without changing the quantum of evidence necessary to convict. *Id.* at 544.

ABROGATION OF *PAGOTTO* SUFFICIENCY RULE

The *malum-in-se* and *malum-prohibitum* conduct classification scheme is a vestige of ecclesiastical jurisdiction, dividing immoral conduct universally proscribed at common-law from conduct statutorily proscribed in limited circumstances. *See Thomas* infra, 464 Md. at 162 n.9-10; *Com. v. Samson*, 196 A. 564, 567 (Pa.Super.Ct. 1938).

The old English rule (*See State v. Horton,* 51 S.E. 945 (N.C. 1905)) that only *malum-in-se* conduct could prove manslaughter was expressly addressed in Maryland with Judge Moylan's *Pagotto v. State,* 127 Md.App. 271, 332 (1999), with the holding that "the quality of gross criminal negligence has to be something inherently dangerous, something of a *malum in se* character, rather than a mere *malum-prohibitum*-type of regulatory violation that may vary from year to year and county to county." Affirming this holding, the Court of Appeals decreed a sufficiency rule requiring conduct be proscribed statewide to prove grossly negligent manslaughter. *See State v. Pagotto,* 361 Md. 528, 551 (2000). This was Maryland's latest holding on evidentiary sufficiency for grossly negligent manslaughter at the time of the fire. Perhaps unsurprisingly by this point, the law later morphed to Petitioner's detriment.

The week after Petitioner's first sentencing, Maryland's high court decided *State v. Thomas,* 464 Md. 133 (2019), involving unintentional poisoning by opioid distribution. Despite victory below spurred by *dictum* analyzing his conduct as *malum-prohibitum* character (*Thomas v. State,* 237 Md.App. 527, 534 (2018)), Thomas made the "nonsensical" argument that he committed a *malum-in-se* and was therefore too guilty to be convicted. The court seized upon the opportunity to hold both *malæ* could now prove manslaughter. 464 Md. at 162-63. It didn't discuss the former *Pagotto* rule when citing that case. *Id.* at

158. The court announced an entirely new sufficiency test assaying "the inherent dangerousness of the act engaged in... combined with environmental risk factors... likely at any moment to bring harm to another." *Id.* at 159.

Petitioner argued the *Pagotto* rule's application in his special appeal (App.218g), but the special intermediate court didn't oblige, applying *Thomas*. *See* 249 Md.App. at 362;App.106b. Petitioner renewed this contention below (App.251g-252g), but it again proved ineffective against retroactivity. *See* 477 Md. at 440;App.41a.

Application of the new *Thomas* test has grievously prejudiced Petitioner by unforeseeably reducing Respondent's burden, allowing it to be illegally carried with *ex-ante* insufficient evidence.

Assuming, *arguendo,* COMAR 29.06.01.03.D (App.207f-208f) didn't deregulate dwelling fire safety with respect to the courts, it nonetheless conclusively determines that no act or omission of dwelling house fire safety was *ex-ante* required or prohibited on a statewide basis. As such, Respondent was *categorically precluded from prosecuting grossly negligent manslaughters for dwelling house fire safety* under the old *Pagotto* rule, given heterogeneous intra-state regulation. An analogous *Bouie* claim regarding burden reduction this Court has considered was *Marks*, 430 U.S. at 191-192, although *Carmell* and *Stogner* were more similar to Petitioner's case given that Respondent's burden

couldn't be legally carried *ex-ante,* but was illegally carried *ex-post facto.* Refusing to acquit Petitioner under the *Pagotto* rule is the same "kind of extreme variant" except perpetrated by courts. *Stogner*, 539 U.S. at 630. *Accord State v. Mauchley*, 67 P.3d 477, 492-93 (Utah 2003) (declining to retroactively apply abrogation of *corpus delicti* rule); *State v. Jones*, 466 Md. 142, 168 (2019) (declining to retroactively apply abrogation of accomplice testimony corroboration rule). *Cf. Com. v. Allshouse,* 36 A.3d 163, 188-89 (Pa. 2012) (distinguishing *Carmell* where rule involved witness competency); *Palmer v. Clarke*, 408 F.3d 423, 432-33 (8th Cir. 2005) (same).

EXPERT TESTIMONY REQUIREMENT RULE

Another burden-reducing retroactivity wrinkle arises from the appellate courts below using evidence of Petitioner interacting with various electrical instrumentalities to infer negligence. In conducting its sufficiency review, the Court of Appeals recounted "a basement with a faulty supply of electricity for light and airflow... [Petitioner] reacted casually... upon learning of the two power outages in the basement... Electricity to the tunnel was provided by multiple extension cords that had a history of failing and making the circuit breaker trip. In response to power outages, [Petitioner] would switch the power to a different circuit or wait, believing that the circuit breaker might reset itself, and replace extension cords rather than make any meaningful improvement to the electrical source." 477 Md. at

440-41;App.41a-42a.

In its *ex-ante* negligence jurisprudence, Maryland had adhered to a rule categorically requiring expert standard of care testimony to infer negligence from the wielding of complex scientific and technical instrumentalities. *See Moser v. Agway Petroleum Corp.*, 866 F.Supp. 262, 264 (D.Md. 1994) (proving defect in heater involves "mechanical parts, combustion, and electrical circuits" thusly requiring expert). *Accord Steamfitters Local Union No. 602 v. Erie Ins. Exch.*, 469 Md. 704, 749 (2020) ("expert testimony was not required" for fire started by cigarette in mulch); *State v. Payne*, 440 Md. 680, 718 (2014) (expert required to interpret cell tower records); *Crickenberger v. Hyundai Motor Corp.*, 404 Md. 37, 53 (2008) ("without expert testimony, [plaintiff]'s allegations of a[n electrical] defect in this case amount to mere speculation."); *Wood v. Toyota Motor Corp.*, 134 Md.App. 512, 516-20 (2000) (expert testimony required to prove defective airbag); *Fink v. Steele*, 166 Md. 354, 361 (1934) (expert required in malpractice action against dentist). Petitioner raised this issue below, after the special intermediate court violated this rule (App.252g-253g). Since it is "inextricably interrelated" with the argument of general failure to prove mens rea first raised in the trial court and repeated in the special intermediate court, it was not waived. *See Unger v. State*, 427 Md. 383, 408 (2012).

Respondent did present the testimony of an expert electrical engineer, but that testimony only

covered factual observations of electrical instrumentalities, background regarding their operation, and conclusions on purely accidental ignition, not the standard of care evidence required by the rule discussed supra (App.270g-295g). The only electrical standard of care testimony in the record appears during the cross examination of a fire investigator, establishing no causal connection between electrical issues and no unreasonableness in resetting circuit breakers (App.267g-268g). Inferring negligence on such a record, in light of the rule, violated Petitioner's Due Process rights.

PRIOR DEFECT EVIDENTIARY USE RULE

Even assuming, *arguendo,* that the courts were entitled to infer the most extremely depraved electrical negligence worthy of the common-law's most delectable epithets, such evidence was still *ex-ante* barred from legal use.

Maryland had previously abided by a combined admissibility and quantitative sufficiency rule for prior defect evidence, conditionally admitting it to prove notice of similar circumstances to a causative occurrence, but categorically forbidding its use as direct evidence of negligence. *See Blanco v. J.C. Penney Co.*, 251 Md. 707, 712-13 (1967) citing *Locke v. Sonnenleiter*, 208 Md. 443, 447-48 (1955) (outlining rule's scope); *Southern Management Co. v. Mariner*, 144 Md.App. 188, 195 (2002) (clogged dryer hose caused previous fires, so prior defect evidence

probative); *Bottling Co. v. Lowe*, 176 Md. 230, 241 (1939) (where "entirely different incident occurred in the plant of the appellant, under different circumstances and when different machinery was in use, had no direct bearing on the subsequent incident"); *Sims v. American Ice Co.*, 109 Md. 68, 71-72 (1908) (evidence that locomotives in different county emitted sparks "did not tend to show negligence in the case under consideration and was no way connected with the fire in question"; *Wise v. Ackerman*, 76 Md. 375, 391 (1892) (occurrence of prior accident with different freight elevator not probative). Petitioner also raised this issue below after its violation by the special intermediate court (App.247g), which was proper given the *Unger* doctrine discussed supra. As with the rule supra, it should have applied to the electrical evidence.

Between inaccurate news reports and the evidence supra, one could *incorrectly* surmise that Petitioner negligently failed to prevent the fire. Crucial to this rule's application, however, the Court of Appeals did admit "the evidence demonstrated that the fire likely started as the result of a latent defect in an electrical outlet and that [Petitioner] would not have been aware of the defect" 477 Md. at 453;App.57a. Therefore, the prior defect evidence could not have been used for its sole legal purpose under the rule, and was illegally used to prove an entirely collateral matter of mens rea irrelevant to homicide. In the same logical vein, the late Justice Cardozo said "Proof of negligence in the air, so to

speak, will not do" in *Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928). The Court of Appeals' indefensible refusal to exclude evidence of Petitioner's electrical conduct from its sufficiency analysis violated Petitioner's Due Process rights.

Although this rule does have an admissibility component (rooted in Maryland Rule 5-403), it is not a qualitative rule; rather, certain evidence is categorically excluded from the burden of proof of negligence, so it is actually a kind of negative quantitative evidentiary sufficiency rule. Whether the evidence is admissible (which petitioner never challenged) is separate and distinct from what the evidence is allowed to prove, thusly distinguishing cases such as *Hopt v. Territory of Utah*, 110 U.S. 574, 590 (1884) and *Thompson v. Missouri*, 171 U.S. 380, 387 (1898) (both involving witness competency rules).

THIRD ISSUE

If this Court grants certiorari on either or both other issues and finds a non-harmless *Bouie* violation, it must determine whether Respondent presented *ex-ante* sufficient evidence to permit retrial. *See Parker v. Matthews*, 569 U.S. 37, 41-42 (2012). Because thoroughly addressing this issue would necessitate consideration of several possible alternative partial holdings on the first two issues, Petitioner will expand upon this issue in briefing if plenary review is granted.

As discussed supra, the factual reasonableness of Petitioner's conduct is irrelevant to resolution of this issue, in light of field preemption and the quantitative sufficiency rules.

Although lower courts did recount some conduct outside the scope of preemption, for example that "There were no toilet facilities." (477 Md. at 444;App.46a), this Court may simply find as a matter of fact that there is no evidence linking decedent's death to anything besides the fire.

There is one potentially material factual error in the Court of Appeals' opinion, the claim that decedent "was found dead in the tunnels" *Id.* As the special intermediate court recounted, decedent was in fact found "in the middle of the basement" 249 Md.App. at 351;App.11a. *Accord* App.276g.

THIS CASE PRESENTS AN EXCELLENT VEHICLE TO ADDRESS IMPORTANT DUE PROCESS ISSUES

Petitioner's case presents this Court with a vitally important issue: the Due Process implications of field preemption. This is the perfect corollary to *Lancaster*, and significantly impacts the reliance interests of many regulated industries. Petitioner's case involves an easy application of this Court's *Fiore* and *Bouie*: when a defendant must be preemptively exculpated by the plain meaning of unambiguous statutes, state courts cannot avoid acquittal by countertextual interpretation, or the omission of statutory interpretation altogether. The core regulatory preemption issue was presented at every level, and the English defense was properly raised in the Court of Appeals. Although the issue with the duty element adds some complexity, this Court should have little trouble applying *Cipollone* and *Schad* to restore the element as a matter of federal Double Jeopardy law.

Likewise, addressing the quantitative evidentiary sufficiency rule issue would help guide state appellate courts in the limitations of retroactive burden reduction, ensuring appellants are not unfairly surprised by changing precedent, an issue only partially explored by this Court's *Marks* and *Carmell*. This issue is also plainly preserved, only having ripened on appeal by changing precedent.

SUMMATION

Petitioner has presented beyond a *prima facie* case of judicial attainder, equating (or exceeding) the flagrancy of historic legislative examples including Sir John Fenwick or the Earls of Strafford and Clarendon. Petitioner's case is the classic core of what *Bouie* proscibes: the retroactive criminalization of primary conduct by the judiciary. The unique spectrum of retroactivity issues presented *sub judice* all merit direct review by this Court, greatly advancing its Due Process and regulatory preemption jurisprudence.

The opinion below is a radical demonstration of judicial legislation, exhibiting antitextualism and atextualism to a degree rarely (if ever) encountered in judicial history. "[T]he notion of a common-law crime is utterly anathema... the connection between *ex post facto* lawmaking and common-law judging would not have become widely apparent *until* common-law judging *became* lawmaking, not (as it had been) law declaring... What occurred in the present case, then, is precisely what Blackstone said — and the Framers believed — would not suffice." *Rogers*, 532 U.S. at 476-77 (2001) (Scalia, J., dissenting). Put simply, the very core of fair warning is fairly exculpating a criminal defendant when the plain meaning of an unambiguous statute compels this result. Denying acquittal in such circumstances is the definition of "unexpected and indefensible".

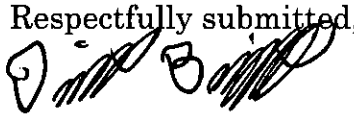
Petitioner anticipates Respondent will parrot its trite trope from the courts below that *Petitioner was never charged under the real Fire Code*. This is nothing beyond a specious attempt to misdirect this Court's attention away from Petitioner's comprehensive defensive preemption contentions, and a tacit admission to attaining Petitioner with the chiseling of a *fake fire code at common-law* by acting as *the Pied Piper of absolute liability*. Squarely contrary to the Constitution's Due Process Clause, *Respondent's judiciary has been* ***very miscarried***, and must be reversed by this Court.

"Obedience to law is the method by which our faculties are quick in their just action; and true obedience is true liberty." Henry Ward Beecher, *Proverbs From Plymouth Pulpit*, 227 (1887).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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