

No. 17-_____

In the Supreme Court of the United States

WILLIAM HUGH WEYGANDT,

Petitioner,

—v—

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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MARCH 2, 2018

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QUESTIONS PRESENTED

In this case, the Ninth Circuit held that a corporate officer could be found guilty of a criminal conspiracy to defraud under 18 U.S.C. § 38(a)(3), not because he agreed with or directed anyone to commit fraud, but because he failed to purchase equipment. The Ninth Circuit's decision raises two important questions:

1. Whether a conviction for conspiracy under federal law may be based on a mere failure to act.

2. Whether strict or vicarious criminal liability may be imposed on a responsible corporate officer under 18 U.S.C. § 38(a), in the absence of express Congressional intent.

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OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit, dated March 9, 2017, is reproduced in the appendix at App.1a. The Order of the Ninth Circuit Granting a Motion to Stay the Mandate pending disposition of the Petition for Writ of Certiorari, dated October 13, 2017, is reproduced in the appendix at App.9a. The Eastern District of California's post-trial Order Denying the Defendant's Motion for Judgment of Acquittal, dated November 20, 2013 is reproduced at App.11a. These opinions are unpublished.



JURISDICTION

The Court of Appeals entered an Order Denying a timely Petition for Rehearing En Banc on October 5, 2017. (App.21a). Justice Kennedy granted an application extending the time to file until March 4, 2018. (Sup. Ct. No. 17A659). This Court has jurisdiction under 28 U.S.C. § 1254(1).



STATUTORY PROVISIONS

- **18 U.S.C. § 38—Fraud Involving Aircraft or Space Vehicle Parts in Interstate or Foreign Commerce**

(a) Offenses.—

Whoever, in or affecting interstate or foreign commerce, knowingly and with the intent to defraud—

(1)

(A) falsifies or conceals a material fact concerning any aircraft or space vehicle part;

(B) makes any materially fraudulent representation concerning any aircraft or space vehicle part; or

(C) makes or uses any materially false writing, entry, certification, document, record, data plate, label, or electronic communication concerning any aircraft or space vehicle part;

(2) exports from or imports or introduces into the United States, sells, trades, installs on or in any aircraft or space vehicle any aircraft or space vehicle part using or by means of a fraudulent representation, document, record, certification, depiction, data plate, label, or electronic communication; or

(3) attempts or conspires to commit an offense described in paragraph (1) or (2), shall be punished as provided in subsection (b).



INTRODUCTION

The Ninth Circuit has created its own brand of criminal conspiracy—conspiracy by omission. The court adopted the theory that Petitioner William Weygandt was guilty of conspiracy because, as the government unabashedly proclaimed, he “did nothing.” The Ninth Circuit’s expansion of conspiracy law to include mere failure to act is the sort of boundless interpretation of criminal law that this Court and scholars have warned threatens—as happened in this case—to ensnare the innocent in an overzealous prosecutor’s net.

Mr. Weygandt was President of WECO, a family-owned business which, among other things, repaired and overhauled aviation parts. When WECO technicians completed the repairs, they signed certifications attesting that they had conducted testing in compliance with specific component manufacturer manuals (“CMMs”). To ensure compliance, Mr. Weygandt relied on countless internal and external audits, including by the FAA, all of which confirmed WECO’s compliance, and the company maintained a perfect safety record. Nevertheless, unbeknownst to Mr. Weygandt, WECO employees had falsely certified that they had complied with CMMs when in fact they had not. To explain their conduct, the employees asserted that they did not have the necessary equipment to perform certain tests. Based on Mr. Weygandt’s alleged failure to purchase the equipment, the government concocted its aggressive charge under a little-known statute, 18 U.S.C. § 38, that Mr. Weygandt was guilty of conspiracy to commit fraud in connection with aircraft parts.

The Ninth Circuit endorsed this novel theory, stating that Mr. Weygandt “intended to further the conspiracy by failing to acquire equipment and deflecting employees’ requests.” *United States v. Weygandt*, 681 Fed. Appx. 630, 632 (9th Cir. 2017).

The trouble with the Ninth Circuit’s endorsement of the government’s conspiracy theory is that there was no evidence of a conspiracy. Virtually every employee involved in the subject repairs and certifications testified pursuant to plea agreements with the government, yet not a single one could identify an agreement with Mr. Weygandt, or with anyone for that matter, to make false certifications. Mr. Weygandt never directed the employees to falsely certify their repairs, and no employee ever told Mr. Weygandt they were doing so. Although employees occasionally came to Mr. Weygandt with equipment requests, there is no evidence Mr. Weygandt ever refused to purchase equipment he knew to be necessary for compliance or insisted that the employees perform non-compliant repairs.

This case is a perfect illustration of the dangers of overcriminalization through enforcement. It is a prosecutor’s dream to make a case of fraud that runs all the way up to the top. For this reason, we see all too often examples of prosecutors, left unchecked, stretching and straining to find a theory of criminal liability that will sweep in higher profile, higher level defendants. Indeed, this case likely would never have received the media attention it did if it had only involved the isolated conduct of miscreant employees. Yet, even with the pressure on the cooperating defend-

ants to bring down “Mr. Big,”¹ none could identify any affirmative act or statement evidencing criminal knowledge or intentional participation by Mr. Weygandt in an agreement to commit fraud. The expansion of conspiracy law to sweep in mere inaction, without evidence that such inaction was anything other than mere negligence, forgetfulness, or misunderstanding, flies in the face of authority from other circuits and this Court, and indeed centuries-old jurisprudence, requiring consciously wrongful conduct to impose criminal liability.

The only exception to the long-standing *mens rea* requirement has been in the narrow class of cases where Congress has expressly imposed strict or vicarious criminal liability, typically on responsible corporate officers in certain highly regulated industries. Congress did not make clear such an intent in 18 U.S.C. § 38, however, instead requiring knowledge and intent to defraud. Here, since there was no evidence of Mr. Weygandt’s direct intentional participation in any conspiracy, his criminal liability for failure to act could only be based on his position as a corporate officer. This Court should revisit the responsible corporate officer doctrine to ensure that the relaxation of the requirements of knowing and intentional conduct, as exhibited in this case, does not result in an unwarranted expansion of the responsible corporate officer doctrine to encompass situations where Congress has not expressed its intent to impose criminal liability on corporate officers for the conduct of their employees.

¹ This was a phrase coined by one of the defendants’ counsel during negotiations with the government to describe Mr. Weygandt. The charges against that defendant were dismissed.

The lower courts recognized the significance of the issues presented in this case. In granting Mr. Weygandt bail pending appeal, the district court noted that the government presented a “unique theory of prosecution” and that, because the government relied entirely on Mr. Weygandt’s failure to act, the question is “legally is that enough to make him a member of the conspiracy? Or is it mere presence? . . . [W]as he really convicted simply because of his status as opposed to his participation in a crime?” (ER 1375-76.) The district court further noted that as to these important questions, “there is little or no guidance” and “we need guidance.” (ER 1379.) Ignoring the district court’s plea for guidance, the Ninth Circuit attempted to sweep under the rug in an unpublished disposition its endorsement of this startling theory of criminal liability. Yet, even the Ninth Circuit recognized the significance of the issue, as the panel granted a stay of the mandate pending this Court’s disposition based on the existence of a substantial question for this Court’s review.

This case presents a perfect vehicle for the Court to provide the much-needed guidance on these issues. While the record may appear complex, the government’s case actually rested on a handful of snippets of testimony. More importantly, the facts essential for this Court’s review are not in dispute. The government itself fully admits that its case rests on the fact that Mr. Weygandt “did nothing,” stating as much to the jury no fewer than eight times during closing argument. The Ninth Circuit likewise expressly rested its decision on Mr. Weygandt’s failure to purchase equipment. Thus, the questions of whether a corporate officer’s failure to act can be sufficient to sustain a conviction for conspiracy under 18 U.S.C. § 38(a)(3), either directly or as

an application of the responsible corporate officer doctrine, are cleanly and squarely presented, and this Court should grant certiorari in this case to decide these important questions of law.



STATEMENT OF THE CASE

A. Factual History

Defendant William H. Weygandt was president of WECO, an FAA licensed repair station which, among other things, repaired and overhauled aviation parts. With respect to repair and overhaul, WECO performed approximately 12,000 repairs per year, involving countless different parts within different divisions and locations of the company. (*See, e.g.*, ER 793.) As part of the repair process under FAA regulations (“FARs”), WECO technicians would sign FAA form 8130-3 (“8130”) attesting that a repair or overhaul complied with the FARs. While the FARs provided three ways to comply, WECO employees certified compliance with each respective part’s specific component manufacturer manual (“CMM”). Each part had its own CMM, and each manufacturer of that part produced its own CMM with specific requirements which are constantly revised and updated. (*See, e.g.*, Trial Exs. 202.1, 202.2, 202.3, 402.1, 402.2, 402.3, 502.1, 502.2.) The CMMs were highly detailed sets of instructions, some up to 250 pages long, specifying the technical parameters required to repair or overhaul one of many individual pieces of a larger part.

Mr. Weygandt participated in production meetings, was the FAA designated accountable manager for WECO's Lincoln facility, and was in charge of major equipment purchases. While Mr. Weygandt was in charge of WECO in a managerial capacity, he was not involved in the day-to-day operations. In fact, Mr. Weygandt had neither the authorization nor the requisite technical knowledge to repair parts or to sign 8130s. (ER 352-53.) Thus, he did not do bench work and delegated the task of compliance and signing 8130s to his employees with the requisite technical expertise and FAA authorizations. These employees included his Chief Inspector, his Designated Manufacturer's Inspection Representative (DMIR), his Director of Quality Assurance, and his lead technicians. (ER 354-55, 520, 828.)

Such delegation by the accountable manager was common in the industry and not only authorized, but expected, by the FAA. (ER 577-78, 976.) In fact, the DMIR, as an individual with the technical expertise at a repair station, not the accountable manager, is "responsible for inspection of manufactured parts" and has "a duty as DMIR to report violations of the FARs." (ER 520-21; 1550-51.) In fact, it was not Mr. Weygandt's "job to make sure that the 8130 is accurate"; rather, it was the responsibility of the inspector who returns the article to service, specifically the lead technician who signed the 8130s. (ER 311a, 539, 628, 766.) Training and certifications for authorization to sign off on the 8130 forms were extensive. (*See, e.g.*, ER 598, 603.)

Mr. Weygandt also relied on countless internal and external audits to ensure compliance. These audits

were conducted by the FAA and by customers, all of which confirmed WECO's compliance. (*See, e.g.*, ER 282-83, 286, 306-07.) The FAA audits specifically revealed that "most inspections were satisfactory . . . with high ratings" and that in 10 years of audits, no enforcement action was ever taken against WECO by the FAA. (ER 1042.) Internal audits, conducted by the DMIR, reported that there were no significant issues at WECO and that everything was compliant with the CMMs. (ER 347, 416.)

Despite these safeguards, it surfaced that WECO employees were not always complying with certain CMMs and were falsifying 8130s with respect to those CMMs. To explain their conduct, the employees asserted that they did not have the necessary equipment to perform certain tests. Although employees occasionally came to Mr. Weygandt with equipment requests and concerns, no employee ever informed Mr. Weygandt that employees were falsifying 8130s or that WECO needed new equipment to be compliant with particular CMMs.

In fact, when employees confronted Mr. Weygandt with concerns, Mr. Weygandt expressed his understanding that the equipment was adequate. He explained his belief, based on the audits, that "everything is fine" and they had "been having no problems." (ER 396-97, 463-64, 563.) Nevertheless, with respect to most of the requested equipment, he promised to "put it on the list" and "look at it." (ER 396-97, 463-64.) In the lone instance where Mr. Weygandt affirmatively declined a request for equipment, Mr. Weygandt's technical advisors had discussed with him

the relevant piece of equipment and determined that it was not necessary. (ER 830.)

B. Procedural History

1. Indictments and Government Agreements

In September 2011, a grand jury in the Eastern District of California returned an indictment charging several WECO employees with conspiracy to commit fraud involving aircraft parts, in violation of 18 U.S.C. § 38; 20 counts of fraud involving aircraft parts, in violation of 18 U.S.C. § 38; and 15 counts of mail fraud in violation of 18 U.S.C. §§ 1341, as well as criminal forfeiture under 18 U.S.C. § 38(d). (ER 107-38.) Mr. Weygandt was not indicted.

After various defendants pleaded guilty pursuant to cooperation plea agreements, the grand jury returned a superseding indictment, naming Mr. Weygandt as a defendant. (ER 139-71.) Despite the lack of evidence of Mr. Weygandt's personal knowledge that his employees had falsified 8130s or of evidence of any agreement with employees to falsify 8130s, the government charged Mr. Weygandt with conspiracy to commit aviation fraud in violation of 18 U.S.C. § 38. In the superseding indictment, the government alleged that Mr. Weygandt participated in a conspiracy to commit fraud whereby he and others "directed and caused" the falsification of 8130s, though the government ultimately abandoned that theory at trial. (ER 145.) The indictment also alleged that WECO employees had falsified 8130 forms by stating that they had complied with the CMMs when WECO did not have adequate testing equipment for such compliance. (ER 148-49.)

In the lead-up to trial, two of the chief inspectors at WECO, and the signers of the majority of the false 8130s, were never indicted, and one was granted immunity. (ER 233-34.) Three co-defendants entered guilty pleas pursuant to cooperating agreements, and indictments against other cooperating witnesses were dismissed. (*See, e.g.* ER 189.)

2. Trial Proceedings

In October, 2013, the case proceeded to trial with Mr. Weygandt as the sole defendant. Given the complexity of the facts at issue, Mr. Weygandt requested to waive jury trial, but the government refused to consent and the case was presented to a jury. (ER 228.)

At trial, the government relied primarily on its cooperating witnesses to advance its theory that Mr. Weygandt was guilty of conspiracy to commit aviation fraud because he “did nothing” in response to his employees’ requests for new equipment. Yet cooperating witnesses testified to only a handful of conditionals over decades of employment at WECO where they informed Mr. Weygandt of any equipment needs. Further, the government failed to provide evidence of any action Mr. Weygandt took in furtherance of the alleged conspiracy. Additionally, not one cooperating witness testified that they informed Mr. Weygandt that they needed particular equipment to comply with CMMs, and those same witnesses specifically testified that they never agreed with anyone to skip tests or to falsify 8130s. (ER 630-31, 691-92, 897-901.) In fact, multiple cooperating witnesses testified that they did not believe they were committing fraud and that, despite pleading guilty, they did not believe they had fraudulently signed 8130s. (*See, e.g.*, ER 687, 896-97.)

In closing, the government reiterated the fact that Mr. Weygandt did “nothing, absolutely nothing” at least eight times. (*See* ER 1078, 1079, 1085, 1087, 1091, 1092, 1095, 1097.) The government also claimed that Mr. Weygandt “essentially put[] his head in the sand.” (ER 1073.)

After the government rested its case-in-chief, Mr. Weygandt moved for judgment of acquittal under Rule 29. (ER 936-943.) Although denying the motion, the district court acknowledged that this case “is an inaction case. It is a bury your head in the sand case . . . Everyone is looking to the CEO to do something, and he does nothing. He implicitly then is instructing his employees to continue on with violating the law.” (ER 943.)

Despite the fact that no witness testified to ever having informed Mr. Weygandt of the noncompliance and no witness testified that they had an agreement with Mr. Weygandt or anyone else at WECO to falsify 8130s, the jury returned a guilty verdict against Mr. Weygandt on the lone conspiracy count.

3. Sentencing

At the July 2014 sentencing hearing, the government sought the statutory maximum of a 120-month term of imprisonment. Mr. Weygandt sought probation, submitting over 200 letters of support from family and friends. Ultimately, the district court varied substantially from the Sentencing Guidelines and sentenced Mr. Weygandt to a 30-month term of imprisonment.

4. Bail Pending Appeal

On September 20, 2014, in finding the appellate issues substantial enough to warrant bail pending appeal, the district court recognized that the government's "theory always was, and as was proven at trial, that [Mr. Weygandt] did nothing." (ER 1369.) As such, the district court stated that the government presented "a unique theory of prosecution," and noted "the issue is legally, is that enough to make him a member of the conspiracy, or is it mere presence? Or is it misprision of a felony or . . . was he really convicted simply because of his status as opposed to his participation in a crime?" (ER 1375-76.) The district court concluded by stating that there was "little to no guidance," and that the court was in need of guidance on the theory at issue, "whether one becomes a participant through inaction is sufficient under this statute to warrant a conviction." (ER 1379.)

5. Appeal

On March 9, 2017, the Ninth Circuit adopted the government's unique theory of participation through inaction and affirmed Mr. Weygandt's conviction in a memorandum disposition, opining that Mr. Weygandt "intended to further the conspiracy by failing to acquire equipment and deflecting employees' requests." (Mem. Dispo. at 3.)

Mr. Weygandt filed a petition for rehearing and/or rehearing en banc. After requesting a response from the government, the Ninth Circuit ultimately denied. Although the Ninth Circuit denied the petition, the court granted Mr. Weygandt's motion for a stay of mandate, necessarily concluding that the certiorari

petition would present “a substantial question and that there is good cause for a stay.” *See* Fed. R. App. P. 41(d)(2)(A).



REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS THE IMPORTANT QUESTION OF WHETHER, UNDER FEDERAL LAW, ONE CAN BECOME A MEMBER OF A CONSPIRACY BY FAILING TO ACT

In affirming Mr. Weygandt’s conviction, the Ninth Circuit concluded that the evidence was sufficient because “he intended to further the conspiracy by failing to acquire equipment and deflecting his employees’ requests.” (Mem. Dispo. at 3). As noted by the district court, this conspiracy-by-omission theory is unique and unprecedented. (ER 1375-76, 1379.) Significantly, the Ninth Circuit’s rejection of the intentional act requirement and its holding that Mr. Weygandt could be liable for his failure to act reflects the troubling erosion of the *mens rea* requirement in criminal law and a startling expansion of conspiracy law. This Court should grant certiorari to define the contours of criminal conspiracy under 18 U.S.C. § 38 and avoid the dangerous extension of conspiracy law to include mere inaction without evidence of agreement, participation, knowledge, or intent.

A. The Ninth Circuit's Analysis Effectively Eliminates Several Essential Elements of Conspiracy

The statute at issue, 18 U.S.C. § 38, expressly requires knowledge and an intent to defraud. While subsection (a)(3) provides criminal liability for conspiracy to commit an offense under the statute, it does not define the elements of conspiracy. Thus, courts must look elsewhere to find the elements of conspiracy under federal law. As the Court recently articulated in other conspiracy contexts, “the Government must prove beyond a reasonable doubt that two or more people agreed to commit a crime covered by the specific conspiracy statute (that a conspiracy existed) and that the defendant knowingly and willfully participated in the agreement (that he was a member of the conspiracy).” *Smith v. United States*, 586 U.S. 106, 111 (2013).

“[U]nder established case law, the fundamental characteristic of a conspiracy is a joint commitment to an ‘endeavor which, if completed, would satisfy all of the elements of [substantive] criminal offense.’” *Salinas v. United States*, 522 U.S. 52, 65, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997); *see* 2 J. Bishop, Commentaries on the Criminal Law § 175, p. 100 (rev. 7th ed. 1882) (“Conspiracy, in the modern law, is generally defined as a confederacy of two or more persons to accomplish some unlawful purpose”); J. Hawley & M. McGregor, *The Criminal Law* 99–100 (3d ed. 1899) (similar); W. LaFave, *Criminal Law* 672 (5th ed. 2010) (similar).” *Ocasio v. United States*, 136 S.Ct. 1423, 1429 (2016). “The essence of conspiracy is ‘the combination of minds in an unlawful purpose.’” *Smith*, 586

U.S. at 111 (quoting *United States v. Hirsch*, 100 U.S. 33, 34 (1879)).

The Ninth Circuit's conclusion that Mr. Weygandt could be properly convicted of participation in a criminal conspiracy under 18 U.S.C. § 38 because he "fail[ed] to acquire equipment and deflect[ed] his employees requests" eliminates virtually all of the traditional elements of conspiracy. The Ninth Circuit disregarded the complete absence of any evidence of the most fundamental element of conspiracy—an agreement. Despite the fact that virtually every involved employee cooperated with the government and testified at trial, not one witness testified to having agreed with Mr. Weygandt or with anyone else at WECO to commit fraud. To the contrary, witnesses expressly disavowed any such agreement with Mr. Weygandt or anyone else. (*See, e.g.*, ER 630-31, 687-88, 765-66, 896-97, 899-900.)

Without evidence of the foundational element of an agreement to commit a crime, all the other elements of conspiracy necessarily fall. There can be no knowledge of agreement, no intent to further an agreement, and no willfully participation in an agreement when no agreement exists.

In the absence of any evidence of a criminal meeting of the minds, the government fell back on the familiar prosecutor's refrain that the agreement to commit a crime may be "implicit." While true enough as far as it goes, *see, e.g., United States v. Melchor-Lopez*, 627 F.2d 886, 890 (9th Cir. 1980), the bounds of an "implicit" agreement cannot be so broad as to encompass a non-existent agreement. The government's unique theory rests on the unique premise that parti-

cipation in an implicit agreement can be established, not by a concert of action, but by an absence of action. Therein lies the problem: If “doing nothing” is sufficient evidence to establish a conspiratorial agreement, then there could be no bounds on sweeping into a supposed conspiracy those who are truly innocent, *i.e.*, those who “did nothing.”

The Court has “explicitly [held] that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358 (1970). This includes blameworthiness and consciousness of wrongdoing, which may not be assumed but must be proven beyond a reasonable doubt. *See Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943). This is because, as this Court has held, a “presumption of intent would conflict with the overriding presumption of innocence.” *Morissette v. United States*, 342 U.S. 246, 275 (1952).

The Ninth Circuit’s approach runs afoul of these fundamental principles. If wrongdoing may be presumed from inaction, then the presumption of innocence has truly been turned on its head. As Justice Jackson long ago observed, “[f]ew instruments of injustice can equal that of implied or presumed or constructive crimes.” *Krulewitch v. United States*, 336 U.S. 440, 457-58 (1949) (concurring).

It is these troubling ramifications that led the district court to identify the important questions presented here: “legally is [inaction] enough to make [a defendant] a member of the conspiracy? Or is it mere presence? Or is it misprision of a felony or . . . was he really convicted simply because of his status as opposed

to his participation in a crime?” (ER 1375-76.) This Court should heed the district court’s plea for guidance and determine the important question of when, if ever, a failure to act can be sufficient to establish participation in a conspiracy.

B. This Court Should Again Grant Certiorari to Prevent Further Erosion of the *Mens Rea* Requirement

The Court has granted certiorari in a number of cases in recent years to address the contours of the *mens rea* requirement in criminal law. *See, e.g., Elonis v. United States*, 575 U.S. ___, 135 S.Ct. 2001, 2009 (2015); *Rosemond v. United States*, 134 S.Ct. 1240 (2014); *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011); *Flores-Figueroa v. United States*, 556 U.S. 646 (2009); *see also* Paul J Larkin, Jordan Richardson & John-Michael Seibler, *The Supreme Court on Mens Rea: 2008-2015*, The Heritage Foundation, January 14, 2016 (discussing Supreme Court’s recent *mens rea* jurisprudence). Despite the Court’s effort to bring clarity to this area, lower courts continue to make inroads on the *mens rea* requirement. This case is a stunning example of the need to preserve the *mens rea* requirement, as the Ninth Circuit’s analysis that criminal intent could be inferred from inaction eliminates any meaningful adherence to the principle that criminal liability requires consciousness of wrongdoing.

This Court has long held that “*mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.” *United States v. Gypsum Co.*, 438 U.S. 422, 436 (1978). Recently, this Court made clear that a criminal conviction—

absent express statutory authority—cannot be founded on negligence. *Elonis*, 135 S.Ct. at 2009 (2015). Recognizing “the basic principle that ‘wrongdoing must be conscious to be criminal,’” *id.*, the Court expressly rejected imposing criminal liability based on a “reasonable person” standard, explaining that “[s]uch a reasonable person standard is a familiar feature of civil liability in tort law,” but “we ‘have long been reluctant to infer that a negligence standard was intended in criminal statutes.’” *Id.* at 2011 (quoting *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring)). Specifically, the *Elonis* Court stated that the *mens rea* requirement must separate wrongful conduct from otherwise innocent conduct. *Id.* at 2010.

The Court has also had occasion to consider the extent to which intent may be inferred from active conduct, but the Court has never held that intent may be inferred from a lack of action. As the Court has explained, the “intent requirement [is] satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense.” *Rosemond*, 134 S.Ct. at 1248-49 (2014) (emphasis added).

Even in the civil context, this Court has held that in order to be liable for “willful blindness” or “deliberate ignorance” it must be clear that the defendant took “deliberate actions to avoid confirming high probability of wrongdoing” and had “actually known” critical facts. *Global-Tech*, 563 U.S. at 769 (emphasis added). In *Global-Tech*, this Court rejected the Federal Circuit’s “deliberate indifference” test specifically because it “[did] not require active efforts by an indu-

cer to avoid knowing.” *Id.* at 770. The deliberate indifference test fails because, without active effort, the court is left guessing or assuming the defendant’s *mens rea* and exposes defendants to the risks of liability based on recklessness or negligence. Certainly, such concerns apply with greater force in the criminal context.

Here, 18 U.S.C. § 38(a), adheres to the traditional requirement of *mens rea*. Far from expressing a Congressional intent to dispense with such a requirement, the statute specifically requires evidence that the defendant acted “knowingly and with intent to defraud.”

Contrary to the terms of the statute, it was all too easy for a jury—just as it was for the Ninth Circuit—to be drawn into the conclusion that Mr. Weygandt was guilty because, as president of WECO, he should have known, should have stepped in, and should have stopped the criminal conduct. Indeed, the panel’s comments at oral argument repeatedly devolved into what Mr. Weygandt “should have” known and “should have” done. Yet, this analysis disregards the Court’s recent efforts to make clear that, absent express Congressional intent to the contrary, criminal liability cannot be based on mere negligence. *See Elonis*, 135 S.Ct. 2001.

The Ninth Circuit pointed to absolutely no evidence, because none existed, that Mr. Weygandt’s failure to purchase equipment was the result of intent to commit fraud as opposed to a mistake, forgetfulness, or an honest difference of opinion about the necessity of the equipment (particularly in light of the multiple audit reports confirming WECO’s compliance). What

the Ninth Circuit described as “deflection” actually reflected Mr. Weygandt’s understanding (perhaps a misunderstanding) that the equipment was adequate, but nevertheless that he was willing to consider employees’ requests and to purchase equipment when necessary. (*See, e.g.*, ER 463 “everything is fine . . . We’ll put it on the list.”) The only instance in which Mr. Weygandt affirmatively declined a request for equipment involved a request to purchase a vibration table, which Mr. Weygandt’s technical advisors had discussed and determined not to be necessary. (ER 830).

Nor could the Ninth Circuit point to any “deliberate actions” to avoid knowledge, as required in *Global-Tech*, 563 U.S. at 769. Precisely the opposite, the Ninth Circuit relied on Mr. Weygandt’s failure to act to presume intent. This novel approach cannot be squared with the principle, emphasized by this Court, that criminal liability is generally only to be imposed upon those who act with consciousness of wrongdoing, or at a minimum, deliberately act to avoid such consciousness.

C. The Court Should Weigh in to Stop the Troubling Trend Toward Overcriminalization in the Conspiracy Context

Legal scholars, organizations, and business leaders have expressed concern about overcriminalization, and particularly the “overfederalization” of crime. As the National Association of Criminal Defense Lawyers (NACDL) has expressed in prior amicus briefing to the Court:

Overcriminalization, and the overfederalization of traditionally state offenses, places a growing burden on the administration of justice—often resulting in ludicrous federal convictions for offenses better resolved with civil penalties and that, traditionally, fell outside constitutionally anticipated federal purview. In recent years, NACDL and others, as *amicus curiae*, have brought the phenomena of overcriminalization and overfederalization to the attention of the federal courts.

(NACDL Amicus Curiae Brief submitted in support of petition for writ of certiorari in *Yates v. United States*, No. 13-7451, at 2-3.)

In amicus briefing in the Ninth Circuit, prominent business leaders expressed similar concern. As they explained, “[a]ffirming a conviction of a company official for inaction in the face of misconduct by employees waters down the critical element of scienter, contravenes well establish[ed] case authority, and expands criminal liability to a breaking point.” (Amicus Curiae Brief of Business Leaders Concerned with Overcriminalization at 3 (9th Cir., Dkt. 83).)

“Creativity in prosecution should not be welcomed. Rather, prosecutors should limit their cases to clear violations of applicable law.” Ellen S. Podger, *Criminal Culpability: Who Deserves Punishment?: “What Kind of Mad Prosecutor” Brought Us this White Collar Case*, 41 Vt. L. Rev. 523, 534-35 (2017). Such creativity is more troubling in the federal context, where prosecutorial power is limited to crimes expressly created by Congress. The government’s “unique theory” of conspir-

acy by omission, adopted here, was certainly nothing short of “creative.”

This Court has long recognized the need to limit overcriminalization and overfederalization, stating that “[t]he spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute.” *Morissette*, 342 U.S. at 249-50. Recently, in *McDonnell v. United States*, ___ U.S. ___, 136 S.Ct. 2355, 2375 (2016), the Court reiterated its concern about “the Government’s boundless interpretation” of federal criminal law. Even though there, the defendant’s conduct was “no doubt . . . distasteful,” the Court’s concern was “with the broader legal implications.” *Id.* This case provides the Court a clear vehicle with which to remind courts of this critical limitation and to curtail the continued unprincipled expansion of federal criminal law, in the face of the Court’s recent law to the contrary.

Nowhere is the concern about overcriminalization more acute than in the area of conspiracy. As the Seventh Circuit aptly stated, “prosecutors seem to have conspiracy on their word processors as Count I; rare is the case omitting such a charge.” *United States v. Reynolds*, 919 F.2d 435, 439 (7th Cir. 1990). “Learned Hand described the conspiracy charge as the ‘darling of the modern prosecutor’s nursery.’ Its attraction has not diminished with the passage of years; nor, consequently, has the need for courts to harken back to the basic principles underlying conspiracy liability when reviewing closely the evidence supporting such charges.”

R. Hugh and Nolie A. Haynes, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Even More Troubling Area*, 1 Wm. & Mary Bill Rts. J. 1, 45 (1992). As Justice Jackson wrote in his *Krule-witch* concurrence, “[conspiracy’s] history exemplifies the ‘tendency of a principle to expand itself to the limit of logic.’ . . . [L]oose practice as to this offense constitutes a serious threat to fairness in our administration of justice.” 336 U.S. at 445-46; *see also United States v. Spock*, 416 F.2d 165, 188 (1st Cir. 1969) (Coffin, J., dissenting) (“[T]he absence of clear definitions of the elements of conspiracy creates a serious risk . . . [Conspiracy] is . . . not well-defined and experience teaches that even its traditional limitations tend to disappear.”).

Commentators have noted that while conspiracy charges are not to be made by piling inference upon inference, the reality is that, because juries may infer an agreement, the standards of proof have become relaxed. Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405, 412 (1959). As Professor Steven R. Morrison has observed, modern criminal conspiracy is particularly problematic because “proof of one element of the crime often serves as proof of all elements, one piece of evidence may be used to prove all elements of the conspiracy, and all pieces of evidence may simultaneously serve to prove a particular element or elements of the conspiracy.” Steven R. Morrison, *The System of Modern Criminal Conspiracy*, 63 Cath. U. L. Rev. 371, 412 (2014). Such a system allows for broad prosecutorial discretion, obscurity of constitutional rules and ultimately, high levels of governmental abuse (or, just as important, the appearance of abuse) and outcome unreliability.

Id. at 413. This case presents the prime example of such a result.

Here, the Ninth Circuit's adoption of the government's expansive theory of criminal conspiracy liability for failure to act is part of this well-recognized trend toward overcriminalization. The Ninth Circuit's loose application of conspiracy law demonstrates that this troubling trend is particularly in need of review in the conspiracy context. Just as Professor Morrison warned, here the "proof" of a single element was used to prove all elements. Even more troublingly, the evidence used to prove one and all elements was the lack of any action by Mr. Weygandt.

D. The Ninth Circuit's Expansion of Criminal Liability Conflicts with Other Circuits' Decisions Regarding Criminal Conspiracy

Not surprisingly, no other circuit has held that a failure to act suffices to sustain a criminal conspiracy conviction; in fact, circuits have come to the opposite conclusion. The Ninth Circuit's new theory conflicts with opinions of multiple circuits which have found that evidence of acquiescence, indifference, or failure to act is insufficient to demonstrate intentional participation in a criminal conspiracy, instead finding that "a showing of knowing participation is required." *See, e.g., United States v. Lyons*, 53 F.3d 1198, 1201 (11th Cir. 1995). Intervention by this Court is necessary to clarify and ensure uniformity on this important question of federal law, namely whether a defendant can be found guilty of criminal conspiracy based on his failure to act.

The D.C. Circuit requires proof of intentional action for participation in a criminal conspiracy. Recently, the D.C. Circuit vacated a defendant's conviction, holding that working in a fraudulent business "does not show the requisite specific intent" to participate in a conspiracy to commit fraud. *United States v. Davis*, 863 F.3d 894, 906 (D.C. Cir. 2017). In *Davis*, the defendant worked with his mother in a tax preparation service. While the tax returns proved fraudulent and the defendant knew the business was under investigation by the IRS, the court held that these facts did not demonstrate that the defendant knew his mother was committing tax fraud, much less that he was involved in falsifying tax returns. *Id.* at 904-05. Thus, while there was evidence of the defendant's participation in fraudulent business activities, the D.C. Circuit focused on the lack of evidence of defendant's knowledge or intentional participation in the fraudulent conduct of others. Due to this lack of intentional participation, the D.C. Circuit held that evidence of the defendant's *mens rea* was equivocal and therefore insufficient to sustain a conviction. *Id.* at 906. As the court explained, "[b]eing present and working on clients' tax returns, without more, does not show the requisite specific intent." *Id.* at 904.

The Tenth Circuit's requirements for proof of participation in a conspiracy are consistent with that of the D.C. Circuit. In *United States v. Rahseparian*, 231 F.3d 1257, 1262 (10th Cir. 2000), the Tenth Circuit held that "[a] defendant's knowledge of the purpose of the criminal conspiracy must be shown by 'clear, unequivocal evidence.'" *Id.* (citing *United States v. Austin*, 786 F.2d 986, 988 (10th Cir. 1986)). Only then can the government have proven intentional par-

ticipation. The *Rahseparian* court found that circumstantial evidence, although it may raise suspicions of guilt, does not support a jury's inference of guilt when the jury engaged in a "degree of speculation and conjecture that renders its findings a guess or mere possibility." *Id.*

In line with the D.C. and Tenth Circuits, the Seventh Circuit has held that in order to demonstrate proof of participation in a conspiracy beyond a reasonable doubt, "intent is more than knowledge, acquiescence, carelessness, indifference or lack of concern, but rather is informed and interested cooperation, stimulation, and instigation." *United States v. Gabriel*, 810 F.2d 627, 634 (7th Cir. 1987). In affirming the conviction in that case, the Seventh Circuit specifically noted the requisite evidence of defendants' actions demonstrating "informed and interested cooperation" in the conspiracy to commit arson. *Id.* This evidence included discussions between the defendants about plans for and logistics of the underlying crime of arson, and meetings among all co-conspirators to discuss the dates to burn the restaurant for insurance proceeds. *Id.* at 631. These actions were sufficient for a jury to infer the requisite meeting of the minds for criminal conspiracy. *Id.* at 634.

Similarly, in *United States v. Arbane*, 446 F.3d 1223 (11th Cir. 2006), the Eleventh Circuit found that "it was the government's burden to prove the 'essential element' of 'an agreement between two or more persons to violate [United States] laws.'" *Id.* at 1229 (citing *United States v. Fernandez*, 797 F.2d 943, 948-49 (11th Cir. 1986)). Because there was no evidence that the defendant took any action to agree

with his other would-be coconspirators, the Eleventh Circuit held that there was insufficient evidence to sustain defendant's conviction for conspiracy. Despite evidence that the defendant knew that he was being paid to guard the vacuum-sealed cocaine at issue, the Eleventh Circuit stated that "the record is devoid of any evidence that [defendant] knew of the existence of a plan to import the drugs into the United States, much less its purpose or his role in furtherance thereof." *Id.* at 1231.

As discussed, in direct conflict with these circuits, the facts that the Ninth Circuit relied upon do not support a reasonable inference that Mr. Weygandt's failure to act demonstrated informed and interested cooperation in any agreement to commit fraud. Instead, the Ninth Circuit found that Mr. Weygandt's failure to act satisfied the *mens rea* requirement because there was evidence that Mr. Weygandt was a "hands-on manager . . . and was knowledgeable about the technical aspects of the business[,]" and that various employees had testified that they notified Mr. Weygandt of equipment needs. *Id.* Beyond the fact that Mr. Weygandt had neither the technical knowledge nor the requisite authorizations to sign off on the relevant forms certifying compliance (ER 352-53) and in fact did not participate directly in repairs or certifications, there is no evidence that any employee directly informed Mr. Weygandt that WECO was falsely certifying 8130s.

The Ninth Circuit, relying on the government's theory of conspiracy by omission, failed to address any action on Mr. Weygandt's part demonstrating intent to participate in a criminal conspiracy or even

to enter into an agreement. The Ninth Circuit did not conclude, nor could it based on the evidence, that Mr. Weygandt made a conscious decision not to buy the relevant equipment (much less a conscious decision to commit fraud) as opposed to failing to buy equipment due to forgetfulness, inattention, or indifference. Thus, at most, the evidence that Mr. Weygandt “fail[ed] to acquire equipment and deflect[ed] employees’ requests” demonstrated acquiescence. Upholding a conviction for criminal conspiracy without evidence of intentional action is a departure from nearly every other circuit. Given this circuit conflict over a question with serious implications, it is critical that this Court weigh in and clarify the requirements for criminal conspiracy.

II. THIS COURT SHOULD GRANT REVIEW TO DEFINE THE LIMITATIONS ON THE USE OF THE RESPONSIBLE CORPORATE OFFICER DOCTRINE

A. The Ninth Circuit’s De Facto Expansion of the Responsible Corporate Officer Doctrine to Apply to 18 U.S.C. § 38 Contravenes Congressional Intent

Criminal liability based on corporate officer responsibility has been limited to a very narrow class of regulatory legislation creating “public welfare offenses” that “dispense with the conventional requirement for criminal conduct—awareness of some wrongdoing.” *See, e.g., United States v. Dotterweich*, 320 U.S. 277, 281 (1943) (imposing strict liability in misdemeanor cases under Federal Food, Drug and Cosmetic Act [“FDCA”]); *see also United States v. Park*, 421 U.S. 658, 669-671 (1975) (applying *Dotterweich* to uphold

responsible corporate officer liability under FDCA); *United States v. Iverson*, 162 F.3d 1015, 1022-23 (9th Cir. 1998) (applying corporate responsible officer doctrine to conviction under Clean Water Act).

This Court has only recognized the applicability of the responsible corporate officer doctrine where Congressional intent to impose vicarious liability is clear. *See Dotterweich*, 320 U.S. at 292 (“The dangers inherent in any attempt to create liability without express Congressional intent or authorization are illustrated by this case.”). Such must be the case, as “a mere showing that an executive failed to detect or correct or prevent the wrongdoing is not the same as saying that the executive had a hand in the misconduct and is morally blameworthy for it.” Dennis J. Baker, *The Moral Limits of Criminalizing Remote Harm*, 10 New Crim. L. Rev. 370, 372-73 (2003).

The statute here, 18 U.S.C. § 38(a), expresses no intent to impose liability on responsible corporate officers. To the contrary, the statute expressly requires proof that the defendant acted “knowingly and with intent to defraud.” The FAA regulations further make clear that, while an aviation repair station is required to designate an “accountable manager,” that designation is not intended to impose personal liability, much less criminal liability. (ER 202; *citing* Federal Register Vol. 66, No. 151 at 41093 (August 6, 2001).) Yet, as the district court characterized it, this case was “an inaction case. [. . .] Everybody is looking to the CEO to do something, and he does nothing.” (ER 943.) In recognizing the substantial question for appellate court review, the district court even asked, “was [Mr. Weygandt] really convicted simply because

of his status as opposed to his participation in a crime?” (ER 1375-76.)

The Ninth Circuit glossed over this issue, but in upholding the government’s “do nothing” theory and concluding that Mr. Weygandt could be found guilty for “failing to acquire equipment,” Mr. Weygandt’s conviction was necessarily based on the conduct of others. The Ninth Circuit’s conclusion that Mr. Weygandt’s failure to intervene, as president or manager, subjects him to criminal liability is a de facto application of the responsible corporate officer doctrine. Applying the responsible corporate officer doctrine to 18 U.S.C. § 38 in the absence of express Congressional intent is a dangerous expansion of this narrow exception to the *mens rea* requirement. “Ordinarily, it is considered ‘morally objectionable’ to hold someone criminally responsible for the conduct of others ‘because it ignores the separateness of each person as a responsible autonomous agent.’” Katrice Bridges Copeland, *The Crime of Being in Charge: Executive Culpability and Collateral Consequences*, 51 Am. Crim. L. Rev. 799, 805 (2014). It is certainly morally objectionable to hold Mr. Weygandt to be a member of a non-existent conspiracy to defraud where he did not know of, much less agree to commit, any fraud and simply failed to purchase equipment he did not know.

B. The Ninth Circuit’s Assignment of Criminal Liability Based on Corporate Officer Status Conflicts with the Law of Other Circuits

Other circuits have refused to apply the responsible corporate officer doctrine under circumstances similar to those presented here. Interpreting the Resource

Conservation and Recovery Act (RCRA), the First Circuit has held that “it must be shown that the officer had a direct responsibility for the activities that are alleged to be illegal. Simply being an officer or even president of a corporation is not enough.” *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 59 (1st Cir. 1991). In *MacDonald*, as here, the defendant was president and owner of a company and was dubbed a “hands-on” manager. These facts, however, did not relieve the government of its burden to prove knowledge and intentional participation. *See id.* at 50. The First Circuit reasoned that to convict on any lower standard would amount to strict liability and “we know of no precedent for failing to give effect to a knowledge requirement that Congress has expressly included in a criminal statute [. . .] [e]specially [when] the crime is a felony carrying possible imprisonment.” *Id.* at 51-52.

The Eleventh Circuit [also] recognized the inapplicability of the responsible corporate officer doctrine where the offense carries a penalty of imprisonment. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1367 (11th Cir. 1999). That court concluded that while criminal liability on the basis of a ‘responsible relation,’ with no intentional action, may be acceptable if the penalty does not involve imprisonment, “due process prohibits the state from imprisoning a person without proof of some form of personal blameworthiness more than a ‘responsible relation.’” *Id.*

Here, [t]he statute did not express an intent to create a strict liability offense or to impose vicarious liability on corporate officers. The conviction was a felony, and a serious one at that, carrying a 10-year

maximum sentence, and Mr. Weygandt was in fact sentenced to 30 months imprisonment. To impose such liability on Mr. Weygandt runs afoul of the due process concerns identified in these other circuits.

C. The Court Should Act to Circumscribe Misuse of the Responsible Corporate Officer Doctrine

Commentators have written extensively on the dangers of the responsible corporate officer doctrine. As one commentator warns, “Given the lack of empirical data evidencing its deterrent effect and misguided notions of risk allocation, legislatures and courts should be . . . cautious in their use of the RCO doctrine.” Petrin, *Circumscribing the ‘Prosecutor’s Ticket to Tag the Elite’—a Critique of the Responsible Corporate Officer Doctrine*, 84 Temple Law Rev. 283, 324 (2012).

A principal concern with the responsible corporate officer doctrine is that it undermines the *mens rea* requirement. “[C]ourts often use the doctrine in connection with strict liability provisions, in which case a responsible corporate officer’s liability is independent of any degree of wrongdoing.” *Id.* at 300-01. Given this Court’s recent pronouncements regarding *mens rea*, it is important for the Court to revisit the decades-old responsible corporate officer doctrine and to reconcile the limited application of the doctrine with the Court’s affirmation of the long-standing *mens rea* requirement.

The Court should likewise take this opportunity to ensure that misguided and sub silentio use of the responsible corporate officer doctrine does not undermine the burden of proof in criminal cases. “It is hard

to reconcile how the Supreme Court could approve the RCO doctrine to be used in criminal prosecutions while prohibiting the use of mandatory presumptions in such cases because they impermissibly remove the government's burden of proof as to a statute's required elements, and thereby offend due process." Clark, *The Responsible Corporate Officer Doctrine A Re-Emergent Threat to General Counsel and Corporate Officers*, 14 J. Health Care Compliance 5, 6 (2012). These due process concerns are nowhere more apparent than in this case, where proof on every single element of the crime of conspiracy—agreement, knowledge, intent, and participation—was lacking, and in its place stood only the "inference" of guilt based on Mr. Weygandt's role as a corporate officer and his failure to act.

The resolution of these issues goes beyond academic issues of criminal jurisprudence. The Ninth Circuit's expansion of the responsible corporate officer doctrine stifles business growth and leaves corporate officers in an untenable position. Any evidence that an officer may be "hands-on" or involved in the day-to-day business of the company subjects the officer to criminal liability for any bad conduct of employees. Officers therefore are left with the decision to be entirely hands-off and removed from the day-to-day business operations of their company, risking being unaware of violations they could and should correct; or they must effectively take on every aspect of that day-to-day business, choking their ability to effectively manage. Under such a model, the growth of small businesses such as WECO becomes impossible. This Court should address these unsettled, critical issues.

III. THE COURT SHOULD NOT ALLOW THE NINTH CIRCUIT TO INSULATE FROM REVIEW ITS UNPRECEDENTED EXPANSION OF CRIMINAL CONSPIRACY LAW THROUGH MISUSE OF AN UNPUBLISHED OPINION

As many legal and scholarly commentators have noted, unpublished opinions “create[] decisions beyond the reach of the systematic imperative to treat like cases alike.” Elizabeth Y. McCusky, *Submerged Precendent*, 16 Nev. L.J. 515, 556 fn. 199. “The widespread use of unpublished, nonprecedential opinions provides incentives to appellate judges to insulate from en banc and Supreme Court review decisions that are controversial, unpopular, deviate from or even conflict with circuit precedent[.]” David C. Vladeck, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 Wash. & Lee L. Rev. 1667, 1681 (2005). Although unpublished opinions may be a necessary evil of our over-burdened system, judges themselves have noted the critical problems these opinions often create as they allow judges to strategically insulate themselves from review. As D.C. Circuit Judge Patricia M. Wald wrote:

[A] double-track system allows for deviousness and abuse. I have seen judges purposely compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls. I have seen wily would be dissenters go along with a result they do not like so long as it is not elevated to a precedent. We occasionally do sweep troublesome issues under the rug [. . .].

Hon. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 Chi. L. Rev. 1371, 1374 (1995).

Judge Donna S. Stroud of the North Carolina Court of Appeals reiterated this sentiment, writing that “[t]he assumption that every unpublished case is so designated because it is entirely uncontroversial or has nothing to add to the development of the law is simply incorrect.” Hon. Donna S. Stroud, *The Bottom of the Iceberg: Unpublished Opinions*, 37 Campbell L. Rev. 333, 339 (2015).

In fact, this Court itself has chastised appellate courts for misusing the unpublished opinion. In *United States v. Edge Broadcasting Company*, 509 U.S. 418, 425 n.3 (1993), the Court stated, “we deem it remarkable and unusual that although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished per curiam opinion.” Similarly, in his dissent to the denial of certiorari in *Plumley v. Austin*, 135 S.Ct. 828 (Mem. 2015) (Thomas, J., dissenting), Justice Thomas argued that the fact that the decision was unpublished “in itself is yet another disturbing aspect of the Fourth Circuit’s decision, and yet another reason to grant review [. . .] It is hard to imagine a reason that the Court of Appeals would not have published this opinion except to avoid binding law for the Circuit.”

Similarly, here, it is remarkable that the Ninth Circuit affirmed this conviction based on a “unique theory of prosecution” and found it appropriate to announce such judgment in an unpublished opinion.

That the Ninth Circuit did so in the face of district court statements that “there is little to no guidance,” on the issue and that “we need guidance” on this unique theory is even more concerning. (ER 1379.) The Ninth Circuit, for the first time, announced a rule that evidence of a failure to act was sufficient to demonstrate the requisite *mens rea* for a conspiracy conviction. The opinion in this case satisfied the Ninth Circuit’s own criteria for publication, as it (1) established, altered, or modified a rule of federal law, and (2) involves “a legal or factual issue of unique interest or substantial public importance,” as recognized by the district court. 9th Cir. R. 36-2(a),(d). Moreover, the fact that there was a separate concurrence, concurring only in the result, suggests just the sort of compromise that makes use of an unpublished opinion inappropriate. *See* Wald, *Rhetoric of Rulings*, 62 Chi. L. Rev. at 1374; *see also* 9th Cir. R. 36-2(g). Further, as discussed, the rule is directly at odds with decisions of this Court and of the Courts of Appeals.

That the Ninth Circuit’s opinion is unpublished does not diminish its importance. First, since the change in the Federal Rule of Appellate Procedure to allow citation of unpublished opinions, such decisions can have de facto precedential effect and are often used to persuade courts to adopt a similar rule in similar circumstances. Further, whether published or not, the Ninth Circuit’s decision emboldens prosecutors to continue to bring overaggressive and improper prosecutions. Indeed, the Ninth Circuit’s ruling is of grave concern to business and industry leaders, as reflected by the two amicus curiae briefs submitted in support of Mr. Weygandt’s petition for rehearing.

Far from providing a reason to deny review, the fact that the Ninth Circuit did not publish its decision militates in favor of review. The use of unpublished opinions allows this and other sub silentio expansions and perversions of federal law to go unchecked. This Court should not allow the Ninth Circuit to insulate itself from review and should instead step in to provide certainty and clarity regarding the bounds of federal criminal law.



CONCLUSION

For the foregoing reasons, Petitioner William Weygandt respectfully requests that the Court grant his petition for writ of certiorari.

Respectfully submitted,

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MARCH 2, 2018