Nos. 20-1410, 21-5261

IN THE

Supreme Court of the United States

XIULU RUAN,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

SHAKEEL KAHN,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writs of Certiorari
To the United States Courts of Appeals
For the Tenth and Eleventh Circuits

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

Tara S. Morrissey
Andrew R. Varcoe
U.S. CHAMBER LITIGATION CENTER
1615 H St. NW
Washington, DC 20062

Bruce Pettig
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036

Michael R. Dreeben
Counsel of Record
Daniel Lautzenheiser
Nina Oat
O'MELVENY & MYERS LLP
1625 I St. NW
Washington, DC 20006
(202) 383-5400
mdreeben@omm.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

Statutes

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

IN THE
Supreme Court of the United States

Nos. 20-1410, 21-5261

XIULU RUAN,
Petitioner,
v.
THE UNITED STATES OF AMERICA,
Respondent.

SHAKEEL KAHN,
Petitioner,
v.
THE UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari
To the United States Courts of Appeals
For the Tenth and Eleventh Circuits

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation.

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, other than *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All of the parties have consented to the filing of this brief.

It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community. The Chamber's members have an interest in the bedrock principle of criminal law that (unless Congress has clearly specified otherwise) felony liability must be predicated on a defendant's culpable mental state with respect to the element or elements of the offense that make his conduct unlawful.

SUMMARY OF ARGUMENT

This Court has long adhered to a presumption that criminal liability requires knowledge of the facts that distinguish lawful from unlawful conduct. That presumption applies both to statutes that lack an express *mens rea* element and to statutes where the scope of a textual *mens rea* requirement is unclear. This presumption applies across the realm of felony punishment in criminal law. The presumption of scienter not only vindicates deeply rooted legal principles that require consciousness of wrongdoing to justify serious criminal sanctions, but also protects important due process interests. A stringent scienter requirement helps alleviate notice issues that may arise from vague, complex, or indefinite legal standards.

The requirement of strong *mens rea* standards has particular force in complex regulatory schemes. There, technical and complicated legal requirements can result in violations without conscious awareness of wrongdoing. A statutory willfulness requirement often protects against criminal liability when the actor has no purpose to disobey or disregard the law. But even absent such statutory text, the Court has applied background principles of *mens rea* to require knowledge of harmful and proscribed consequences to justify criminal liability. The Sherman Act presents a paradigmatic example of that practice. In interpreting the Act, the Court has recognized that *mens rea* requirements are essential to avoid criminalizing business practices that fall into a gray area. And where criminal liability turns on whether conduct is legally authorized or on a defendant's legal status, knowledge of that fact is necessary to avoid criminalizing innocent conduct. To the extent that lower courts have expanded the concept of public welfare offenses to allow felony liability for violations without consciousness of wrongdoing, those decisions have gone astray.

The presumption of *mens rea* also serves the valuable purpose of avoiding overdeterrence. In many regulatory contexts, socially beneficial activity may lie near the margins of prohibited conduct. Criminal and other punitive sanctions that dispense with *mens rea* concerning the facts on which liability turns may lead to undue caution about lawful conduct. That overdeterrence is harmful to society. And given the wide array of non-punitive civil remedies that encourage law compliance and compensate injured parties, the presumption of *mens*

rea is particularly warranted to avoid overextending the criminal law in ways that discourage valuable activity.[2]

ARGUMENT

A "vast network of regulatory offenses . . . make up a large part of today's criminal law." 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.6(d) (3d ed. Dec. 2021 update). Prohibitions that trigger felony-level punishment provide strong incentives to comply with the law. But administrative regulations are often vague, far-reaching, and complex. If criminal sanctions are imposed for regulatory violations absent consciousness of wrongdoing, the criminal law risks overdeterring innocent, socially beneficial conduct. This Court's presumption of *mens rea* is vital to alleviate those concerns. The Court should therefore reaffirm the principle that unless Congress has unmistakably specified otherwise, felony-level criminal liability for regulatory offenses attaches only on proof of conscious wrongdoing.

A. Bedrock Criminal-Law Principles Make Consciousness Of Wrongdoing A Presumptively Necessary Ingredient Of A Felony Offense

1. It is a foundational principle of our criminal law that "wrongdoing must be conscious to be criminal." *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (quoting *Morissette v. United States*, 342

---

[2] The foregoing principles apply generally to a wide range of statutory and regulatory contexts. The Chamber expresses no view on the specific application of these principles to the criminal convictions in these cases.

U.S. 246, 252 (1952)). "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." *Id.* at 2012. Rather, this Court regularly interprets "criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *Id.* at 2009 (quoting *United States v. X–Citement Video, Inc.*, 513 U.S. 64, 70 (1994)).

This interpretive rule, sometimes called the "presumption in favor of scienter," applies to statutes that omit a mental state element altogether. *See id.* at 2004, 2010 (18 U.S.C. § 875(c)); *Staples v. United States*, 511 U.S. 600, 602–03 (1994) (26 U.S.C. § 5861(d)); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 427 (1978) (15 U.S.C. § 1); *Morissette*, 342 U.S. at 248 (18 U.S.C. § 641). It equally applies to statutes where it is unclear whether the specified mental state covers all elements. *See Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019) (18 U.S.C. § 924(a)); *Flores-Figueroa v. United State*s, 556 U.S. 646, 647 (2009) (18 U.S.C. § 1028A(a)(1)); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) (18 U.S.C. § 1512(b)(2)); *X-Citement Video, Inc.*, 513 U.S. at 65–66 (18 U.S.C. § 2252); *Liparota v. United States*, 471 U.S. 419, 420 (1985) (7 U.S.C. § 2024(b)(1)).

In both contexts, the "mere omission" of a mental state attached to the element in question "should not be read as dispensing with it." *Elonis*, 135 S. Ct. at 2009 (internal quotation marks omitted). Instead, the critical question is whether the element "separat[es] legal innocence from wrongful conduct." *X-Citement Video, Inc.*, 513 U.S. at 72–73 ("[The]

presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct."); *Flores-Figueroa*, 556 U.S. at 652. If the element plays that role, the Court generally requires proof of knowledge or intent for that element. *See, e.g.*, *Gypsum*, 438 U.S. at 442; *Staples*, 511 U.S. at 619. Put differently, the Court "read[s] into [the] statute . . . that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct." *Carter v. United States*, 530 U.S. 255, 269 (2000) (internal quotation marks omitted).[3]

In *Liparota v. United States*, for example, the Court considered a statute proscribing knowing possession or use of food stamps "in any manner not authorized by [the statute] or the regulations." 471 U.S. at 420 (quoting 7 U.S.C. § 2024(b)(1)). The question was whether the statute merely required proof that the defendant knowingly used or possessed

---

[3] The Model Penal Code categorized the various mental states as purpose, knowledge, recklessness, and negligence. Model Penal Code § 2.02 (1985). Purpose denotes the actor's "conscious object" to achieve a result, while knowledge indicates awareness "that his conduct is of [the specified] nature or that [the specified attendant] circumstances exist." *Id.* § 2.02(2)(a)(i) & (b)(i). The Court has "characterized the distinction between [purpose and knowledge] as 'limited,' explaining that it 'has not been considered important' for many crimes." *Borden v. United States*, 141 S. Ct. 1817, 1823 (2021) (plurality opinion) (quoting *United States v. Bailey*, 444 U.S. 394, 404 (1980)). This brief does not address crimes where the distinction between purpose and knowledge may matter. Instead, it addresses crimes where the presumption of *mens rea* requires the actor's awareness of the facts and circumstances that make his conduct wrongful.

food stamps, or whether it additionally required proof of knowledge that such use or possession was "not authorized." The Court adopted the latter interpretation, explaining that otherwise the statute "would have criminalized 'a broad range of apparently innocent conduct' and swept in individuals who had no knowledge of the facts that made their conduct blameworthy." *Elonis*, 135 S. Ct. at 2009 (quoting *Liparota*, 471 U.S. at 426).

Similarly, in *Arthur Andersen LLP v. United States*, the Court considered a statute that proscribes "knowingly us[ing] intimidation or physical force, threate[ning], or corruptly persuad[ing] another person" with intent to withhold records from an official proceeding. 544 U.S. at 698 (quoting 18 U.S.C. § 1512(b)(2)). The government had charged Arthur Andersen with violating the statute by encouraging its employees to destroy documents related to the Enron accounting scandal in accordance with the company's document retention policy. The district court instructed the jury that it could convict "even if [Arthur Andersen] honestly and sincerely believed" that it was lawfully following its policy, and the court of appeals affirmed. *Id.* at 702, 706 (citation omitted). This Court reversed, construing "knowingly . . . corruptly persuades" to require "awareness, understanding, or consciousness of wrongdoing." *Id.* at 705–06. The Court explained that the statute's knowledge requirement is the "key" to separating innocent from wrongful conduct. *Id.* at 704–06. Absent proof of a defendant's consciousness of wrongdoing, the statute would reach a range of innocent conduct that results in withholding documents—including lawful adherence to document

retention policies and lawful invocation of attorney-client privilege. *Id.*

Similar distinctions run throughout other cases interpreting felony offenses, reflecting the Court's adherence to the principle that "wrongdoing must be conscious." *Morissette*, 342 U.S. at 252. Where the element in question makes the conduct wrongful, scienter is required. *See, e.g.*, *X-Citement Video, Inc.*, 513 U.S. at 72–73, 78 (requiring knowledge, for child-pornography trafficking offense, that performers are in fact underage); *Staples*, 511 U.S. at 614–15, 619 (requiring knowledge, for firearm-registration offense, of features that subject firearm to registration requirement). Where the element is not necessary to establish the wrongfulness of the conduct, the presumption of *mens rea* may be overcome in light of other interpretive principles. *See United States v. Balint*, 258 U.S. 250, 251–54 (1922) (construing drug offense to require only proof that defendant knowingly sold dangerous drugs, not that he knew such drugs were "narcotics" within statutory ambit); *United States v. Freed*, 401 U.S. 601 (1971) (upholding regulation of unregistered-hand-grenade possession without proof of scienter); *see also Staples*, 511 U.S. at 608–14 (distinguishing *Balint* on this basis).

The only context in which the Court does not always apply the "presumption in favor of scienter" is in interpreting what have been called public welfare offenses. *See Staples*, 511 U.S. at 617–18 & n.3; *Morrisette,* 342 U.S. at 254–56 (describing rise of these regulatory violations, many of which seek to minimize the "danger or probability" of harm from "particular industries, trades, properties or

activities"). But the cases originating that doctrine "almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences," *Staples*, 511 U.S. at 616 (citation omitted), where "conviction does no grave damage to an offender's reputation," *Morissette*, 342 U.S. at 256. By contrast, where the full force of criminal law is brought to bear through a felony charge, the Court adheres to the presumption that proof of the defendant's consciousness of wrongdoing is required. *See Rehaif*, 139 S. Ct. at 2197; *Staples*, 511 U.S. at 617; *Gypsum*, 438 U.S. at 438.

2. The presumption in favor of scienter protects vital due process interests. "It is common ground that this Court, where possible, interprets congressional enactments so as to avoid raising serious constitutional questions." *Cheek v. United States*, 498 U.S. 192, 203 (1991). Serious due process concerns arise when a criminal "law [is] so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). "The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning." *Screws v. United States*, 325 U.S. 91, 101 (1945) (plurality opinion). "Vague laws contravene the 'first essential of due process of law' that statutes must give people of 'common intelligence' fair notice of what the law demands of them." *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

This Court has "long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*." *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (citing, *inter alia*, *Gypsum*, 438 U.S. at 434–46). Where statutes with indefinite standards incorporate strong *mens rea* requirements, they are less likely to prompt vagueness concerns. *See, e.g.*, *Skilling v. United States*, 561 U.S. 358, 412 (2010) (statutory *mens rea* requirement in honest-services prosecutions under 18 U.S.C. § 1346 "blunts any notice concern").

The same principle is at work when the Court relies on the presumption of scienter to infer a *mens rea* requirement. For example, in *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513 (1994), the Court held that the absence of a "knowingly" requirement in the text did not mean "that Congress intended to dispense entirely with a scienter requirement," *id.* at 522, and went on to reject a constitutional vagueness challenge in part because "the scienter requirement that we have inferred in [the statute] assists in avoiding any vagueness problem," *id.* at 526. This analysis confirms that by requiring proof of the defendant's awareness of every element that makes his conduct wrongful, the presumption of scienter alleviates vagueness concerns that may otherwise cast doubt on statutes that impose criminal liability based on imprecise standards.

B. *Mens Rea* Requirements Have Particular Importance Where Complex Regulatory Schemes Are Backed By Criminal Penalties

The foregoing analysis applies across the spectrum of federal criminal law, but especially for

laws that impose felony-level punishment for regulatory violations. In multiple regulatory contexts, such as tax law and antitrust, strong *mens rea* requirements are the only bulwark against criminalization of innocent conduct. And when necessary to protect against penalizing innocent conduct, the presumption of *mens rea* can require knowledge of the legal consequences of facts as well as knowledge of the facts themselves. Lower courts that deviate from these principles misconstrue this Court's precedent and underscore why the presumption of *mens rea* must apply when complex regulatory schemes carry serious criminal penalties.

1. Where statutes criminalize the "willful" violation of complex regulatory schemes, this Court has held that "willfulness" requires knowledge of the law. "Willful" "is a word of many meanings, its construction often being influenced by its context." *Spies v. United States*, 317 U.S. 492, 497 (1943). "[W]hen used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.'" *Bryan v. United States*, 524 U.S. 184, 191 (1998). Generally, "in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'" *See id.* at 191–92 (quoting *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994)) (upholding conviction for willfully dealing in firearms without a federal license when defendant knew his conduct was unlawful, even though he did not know the specific federal licensing requirement that he violated).

In certain situations, however, this Court has required a "more particularized showing" of willfulness. *See id.* This principle applies in

technical, complex areas of the law where a higher level of awareness is indispensable to finding culpable conduct. For example, *Cheek v. United States* concerned certain provisions of the federal tax code that criminalized "willfully attempt[ing]" to evade taxes and "willfully fail[ing]" to file federal tax returns. 498 U.S. at 194. "The proliferation of statutes and regulations," this Court reasoned, "has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws." *Id.* at 199–200. Accordingly, the Court held that willfulness in the tax context requires the government to prove "actual knowledge of the pertinent legal duty." *Id.* at 202. A defendant's subjective, good-faith misunderstanding of the law negates the requisite *mens rea* to convict him. *Id.* at 206–07.[4]

Similarly, in *Ratzlaf v. United States*, the defendant purchased cashier's checks from multiple banks, each for less than $10,000, the threshold at which the bank was required under federal law to report a cash transaction. 510 U.S. at 137. He was charged with "structuring" financial transactions for the purpose of evading the bank's federal reporting requirements. *Id.* The Court held that it was not enough for the government to prove that the defendant structured cash transactions and did so

---

[4] The Court also observed that "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws" and will infer the requisite knowledge. 498 U.S. at 203–04.

with a purpose to avoid the bank's reporting duty—it must also show that he did so with knowledge of his own "duty not to avoid triggering such a report." *Id.* at 140, 147.

Both *Cheek* and *Ratzlaf* "involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct." *Bryan*, 524 U.S. at 194; *see also Liparota*, 471 U.S. at 426 (requiring a showing that defendant knew his conduct was unauthorized by statute or regulations, because to hold otherwise "would be to criminalize a broad range of apparently innocent conduct"). Several lower courts have relied on the same principle to require a heightened showing of willfulness in complex fields such as election law and health care fraud. For example, in *United States v. Curran*, 20 F.3d 560 (3d Cir. 1994), the court of appeals overturned the defendant's conviction for "willfully" causing a campaign treasurer to submit false contribution reports when the defendant did not know his conduct was unlawful. *Id.* at 567–69. And in *Hanlester Network v. Shalala*, 51 F.3d 1390 (9th Cir. 1995), the court of appeals construed "knowingly and willfully" in the Medicare/Medicaid anti-kickback provision of the Social Security Act, 42 U.S.C. § 1320a-7b(b)(7), as requiring the government to prove, in part, that the defendant had the specific intent to disobey the law. *Id*. at 1400.

2. Even absent a statutory "willfulness" requirement, when the line between criminalized conduct and socially desirable conduct is hard to discern, some level of "knowledge" of wrongfulness is required before criminal liability can attach. The

paradigmatic example is the Sherman Act. By its text, the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade," 15 U.S.C. § 1, and any "monopol[y], or attempt to monopolize" interstate or foreign commerce, *id.* § 2. Violations of either Section 1 or Section 2 are felonies that carry a maximum of 10 years imprisonment and a fine of up to $1,000,000 (for individuals) or $100 million (for corporations). *Id.*

The Sherman Act has been described as possessing a "generality and adaptability comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359–60 (1933). On its face, the Sherman Act sits uneasily with criminal law. "The prohibitions of the Sherman Act are, after all, quite vague and general." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 303 (3d ed. 2006). As this Court has observed, "[t]he Sherman Act, unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes." *Gypsum*, 438 U.S. at 438. Rather, it authorizes "[b]oth civil remedies and criminal sanctions" for "the conduct proscribed—restraints of trade or commerce and illegal monopolization—without reference to or mention of intent or state of mind." *Id.* And "judicial elaboration of the Act [has not] always yielded the clear and definitive rules of conduct which the statute omits." *Id.*

Absent *mens rea* protections, these ambiguities could threaten criminal sanctions for business decisions taken in good faith. The leading antitrust

treatise has noted the inherent "unfairness of punishing a reasonable person who saw or weighed the relevant economic or other data differently from a later judge or jury pronouncing the conduct unreasonable." Areeda & Hovenkamp, *supra*, ¶ 303. Accordingly, despite the absence of an express *mens rea* provision, this Court has construed the Sherman Act's criminal offenses as requiring proof of intent. *See Gypsum*, 438 U.S. at 443. Warning of the risks of imposing "criminal liability on a corporate official . . . for engaging in such conduct which only after the fact is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken," *id.* at 441, the *Gypsum* Court rejected the government's argument that intent could be inferred from any agreement that had the effect of raising prices, *id.* at 435–36. Instead, to establish criminal liability, the government must also prove that the defendant acted with at least "knowledge of [the] probable consequences" that an action would have an anticompetitive effect. *Id.* at 444. This holding reflected the general requirement of *mens rea* as an element of a crime and ensured that the Act would criminalize only "conscious and calculated wrongdoing" as opposed to good-faith business conduct. *Id.* at 442.

3. Beyond requiring knowledge of the facts that separate innocent from criminal conduct, this Court has applied the presumption of *mens rea* to the legal consequences of facts when necessary to draw the line between wrongful and socially desirable behavior. *Liparota v. United States* exemplifies that principle. As noted, the statute in that case criminalized the

unauthorized use or possession of food stamps. 471 U.S. at 420. To protect against criminalizing the use of food stamps to make "innocent" purchases—such as in a store that illegally charged higher prices to food-stamp customers—the Court required that "the defendant knew his conduct to be unauthorized by statute or regulations." *Id.* at 425–26.

More recently, the Court applied this principle to hold that a person charged with unlawful possession of a firearm must know of the status that made his possession unlawful. *Rehaif,* 139 S. Ct. at 2195–97 (construing 18 U.S.C. § 922(g)). The Court rejected the government's argument that requiring knowledge of status—for example, whether an alien is "illegally or unlawfully in the United States," 18 U.S.C. § 922(g)(5)(A)—"is a question of law, not fact," and thus falls within "the well-known maxim that 'ignorance of the law' (or a 'mistake of law') is no excuse." 139 S. Ct. at 2198 (citation omitted). The Court explained that the maxim does not apply "where a defendant 'has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct,' thereby negating an element of the offense." *Id.* (quoting 1 Wayne R. LaFave & Austin W. Scott, *Substantive Criminal Law* § 5.1(a), at 575 (1986)).[5]

---

[5] As the Court noted, the Model Penal Code embraces this same principle: "[A] mistake of law is a defense if the mistake negates the 'knowledge . . . required to establish a material element of the offense[.]'" *Rehaif*, 139 S. Ct. at 2198 (ellipsis in original) (quoting Model Penal Code § 2.04, at 27).

Accordingly, where regulatory offenses separate lawful from unlawful conduct based on whether statutes or regulations authorize the defendant's conduct, or whether the defendant had a particular status or responsibility, the presumption of *mens rea* requires proof that the actor knew that his conduct was not authorized or that he had the relevant status. Otherwise, the law risks punishing conduct without awareness of wrongdoing.

4. Lower court decisions that deviate from these principles underscore the need for this Court to reaffirm that strong *mens rea* requirements presumptively apply to felony violations of criminal-regulatory statutes. One context featuring such deviations involves the public-welfare-offense doctrine applied in *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558 (1971).

For example, the Clean Water Act (CWA), which regulates discharges of pollutants into United States waters, makes it a felony to "knowingly violate[]" various provisions within the statute. 33 U.S.C. § 1319(c)(2)(A). In *United States v. Weitzenhoff*, 35 F.3d 1275, 1283 (9th Cir. 1993), the court of appeals upheld a jury instruction that the government need not prove that the defendant knew that "his act or omissions were unlawful." Relying on *International Minerals*—which held that the defendant's knowledge of a corrosive-liquid-transportation regulation was not required to obtain a misdemeanor conviction for violating that regulation, 402 U.S. at 562–63—the court concluded that "knowingly violates" refers to the acts that constituted the violation, but not to the existence of the requirements that the defendant has violated. 35 F.3d at 1285. And because the CWA is

"clearly designed to protect the public at large from the potentially dire consequences of water pollution," the court found that the criminal provisions of the CWA qualify as public welfare offenses and therefore do not require a presumption of scienter. *Id.* at 1286; *see also United States v. Hopkins*, 53 F.3d 533, 537–38, 540 (2d Cir. 1995) (holding that CWA provision creates a public welfare offense and that a violation does not require knowledge that conduct violated any provision of the law or regulation); *United States v. Sinskey*, 119 F.3d 712, 715–16 (8th Cir. 1997) (silent on whether CWA violation is a public welfare offense but holding that defendant did not need to have knowledge that his conduct violated CWA).

Similarly, the Clean Air Act, the federal statute that regulates air pollution, makes it a felony for "any person" to "knowingly violate[]" certain provisions of the statute. 42 U.S.C. § 7413(c). As with the decisions concerning the Clean Water Act, some courts have applied *International Minerals* to the Clean Air Act, holding that it is a public welfare statute and that consciousness of wrongdoing is not required to establish a felony violation. In *United States v. Weintraub*, 273 F.3d 139 (2d Cir. 2001), for example, the court of appeals acknowledged that "[o]n its face, the phrase ['knowingly violates'] appears to suggest that the government must prove that the defendant knew he was violating the law." *Id.* at 147. But relying on *International Minerals* and its CWA precedent in *Hopkins*, the court rejected that interpretation and held that "the phrase 'knowingly violates' requires knowledge of facts and attendant circumstances that comprise a violation of the

statute, not specific knowledge that one's conduct is illegal." *Id.*

These decisions risk making felons out of people engaging in innocent conduct that inadvertently steps over the line drawn by complex and technical regulatory schemes. Stringent *mens rea* requirements are necessary to protect against that risk. Although the courts in *Weitzenhoff* and *Weintraub* cited *International Minerals* in forgoing ordinary *mens rea* requirements, that decision does not justify relaxing *mens rea* requirements for felony-level punishment in complex regulatory schemes. *International Minerals* does not dispense with a knowledge-of-wrongdoing requirement under any statute that regulates any sort of hazardous materials. *See Weitzenhoff*, 35 F.3d at 1285. *International Minerals* concerned a regulation specific to "corrosive liquid," 402 U.S. at 559—not a statute that *also* covered materials that a lay person would not recognize as likely to be regulated. The Clean Water Act's definition of "pollutant" covers sewage, garbage, and radioactive materials. 33 U.S.C. § 1362(6). But it also covers heat, rock, and sand. *Id.* The Clean Air Act's definition of "air pollutant" covers "*any* air pollution agent or combination of such agents, including *any* physical, chemical, [or] biological substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g) (emphasis added). To apply *International Minerals*, which concerned a misdemeanor violation of a regulation limited to "dangerous or deleterious devices or products or obnoxious waste materials," is to step outside the lines this Court carefully drew in that case, where the

Court noted that "[i]n *Balint* the Court was dealing with drugs, in *Freed* hand grenades, in this case with sulfuric and other dangerous acids." 402 U.S. at 564–65. On the facts of *International Minerals*, "the probability of regulation is so great that anyone who is aware that he is in possession of [dangerous acids] or dealing with them must be presumed to be aware of the regulation." *Id.* But that is not automatically true in all regulation that may protect against pollution.

The public welfare doctrine applies in "limited circumstances." *Gypsum*, 438 U.S. at 437. Those circumstances do not include statutes that regulate—in addition to toxic waste—rock, sand, and heat. 33 U.S.C. § 1362(6) (defining "pollutant"). Additionally, the doctrine is reserved for offenses that "almost uniformly involve[] statutes that provide[] for only light penalties such as fines or short jail sentences," *Staples*, 511 U.S. at 616, and for which conviction "does no grave damage to an offender's reputation." *Morissette*, 342 U.S. at 256. Extending this exception to serious felonies runs counter to the principle that "offenses that require no *mens rea* generally are disfavored" and that the penalty is a "significant consideration in determining whether the statute should be construed as dispensing with *mens rea*." *Staples*, 511 U.S. at 606, 616.

5. Requiring *mens rea* about the wrongfulness of conduct does not allow individuals to redefine the legal or professional standards that govern their liability. Defining those standards objectively is fully compatible with demanding that before felony criminal liability is imposed, the government must prove subjective knowledge of their requirements.

See, *e.g.*, *Posters 'N' Things*, 511 U.S. at 517–25 (construing drug-paraphernalia statute to require an objective definition of drug paraphernalia before holding that the government must prove that the defendant "knew that the items at issue are likely to be used with illegal drugs"); *United States v. Hurwitz*, 459 F.3d 463, 478–82 (4th Cir. 2006) (construing controlled-substances statute to embody an "objective" standard of "proper medical practice," before holding that the defendant cannot be convicted if he acted in good faith to conform to that standard); *United States v. Feingold*, 454 F.3d 1001, 1009–13 (9th Cir. 2006) (describing with approval jury instructions referring to a "national standard of care" for physicians before holding that the government must prove that a physician "intentionally" prescribed drugs "for no legitimate medical purpose and outside the usual course of professional practice"). But absent a showing of consciousness of wrongdoing for felony liability, the law would punish violators even when they make honest attempts to comply with recondite, ambiguous, or debatable regulatory standards. To "separat[e] legal innocence from wrongful conduct," *X-Citement Video, Inc.*, 513 U.S. at 72–73, the presumption in favor of *mens rea* must apply to the facts that mark the dividing line, thereby preserving the guiding principle that "wrongdoing must be conscious," *Morrissette*, 342 U.S. at 252.

C. Overdeterrence Considerations Support Requiring *Mens Rea* For The Relevant Facts Separating Lawful From Unlawful Conduct

Mens rea requirements also serve the important purpose of reducing the risk of overdeterrence of

productive and socially valuable conduct in regulated industries.

1. Regulatory crimes are often "byproducts of activities that society does not wish to prohibit entirely." *See* Mark A. Cohen, *Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes*, 82 J. Crim. L. & Criminology 1054, 1062 (1992). As departures from "legitimate business activities," *id.* at 1104, these crimes are "generally 'conditionally deterred'" by statute, because society stands to "benefit[] from the underlying activity that gives rise to the regulatory violation," *id.* at 1062. That means that the definition of criminal sanctions must be carefully calibrated to avoid overdeterrence. Strict penalties and stringent standards might increase deterrence of harmful conduct within regulated industries. But *excess* deterrence imposes costs on society. *See id.*; *cf.* Bruce H. Kobayashi, *Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 Geo. Wash. L. Rev. 715, 716 (2001). *See generally Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492–513 (2008).

The risk of overdeterring productive and lawful conduct is heightened when complex regulations are enforced through criminal statutes or, for that matter, through civil statutes with punitive provisions, such as the False Claims Act, 31 U.S.C. § 3729, *et seq*. *See Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 182 (2016) (civil penalties of the False Claims Act are "essentially punitive in nature" (citation omitted)). As a general matter, "[t]he harsher the sanctions for

violation, the greater the overdeterrence and the resulting costs in socially beneficial conduct forgone." Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. Chi. L. Rev. 263, 280 (1982). And the risk of overdeterrence is heightened where standards for criminal liability are unclear: "[S]ocially efficient behavior can be deterred when there is a possibility of legal error, i.e., when the criminal law is erroneously applied to legal behavior." Kobayashi, *supra*, at 732, 735. Both of these conditions—criminal penalties and uncertain legal standards—often combine in complex business regulation. *See Gypsum*, 438 U.S. at 439 ("Modern business patterns . . . are so complex that market effects of proposed conduct are only imprecisely predictable."). In these contexts, requiring the government to prove knowingly wrongful conduct before imposing criminal liability is indispensable to avoid discouraging individuals from engaging in innovative, productive, and creative business activities that lie within the "gray zone of socially acceptable and economically justifiable" conduct. *Cf. id.* at 440–41.

2. The Court has used just that approach to counter the risk of overdeterrence in the antitrust context. In *Gypsum*, this Court recognized that the Sherman Act, "unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes." 438 U.S. at 438. Citing concerns about criminalizing "salutary and procompetitive conduct" by good-faith actors, *Gypsum* rejected a reading of the Sherman Act that would have dispensed with a *mens rea* requirement. *Id.* at 441. Because "procompetitive

conduct" can lie "close to the borderline of impermissible conduct," the Court was "unwilling to construe the Sherman Act as mandating a regime of strict-liability criminal offenses." *Id.* at 436, 441.

The *Gypsum* Court explained that it held a "generally inhospitable attitude to non-*mens rea* offenses" and that this attitude was "reinforced by an array of considerations" in the antitrust context. *Id.* at 438. Specifically, the Court reasoned that it may "be difficult . . . to tell" when "projected actions will run afoul of the Sherman Act's criminal strictures," and given this uncertainty, the "imposition of criminal liability on a corporate official . . . without inquiring into the intent" behind his conduct "holds out the distinct possibility of overdeterrence." *Id.* at 439, 441. As a result, the Court expressed wariness about imposing criminal liability without proof of *mens rea*. *See id.* at 438, 441.

Concerns about overdeterrence are not limited to the antitrust realm. Lawful and productive conduct can be chilled on the (often vague and broad) margins of tax, financial, and environmental regulation if liability is imposed without conscious fault. And while "overdeterrence is the characteristic vice of broad [statutory] construction," overdeterrence can "be reduced by careful specification of . . . statutory limits." Posner, *supra*, at 280–81. *Mens rea* requirements play precisely this role: requiring consciousness of wrongdoing reduces the risk that individuals will refrain from "socially acceptable and economically justifiable business conduct" within these regulated industries out of excess caution. *Cf. Gypsum*, 438 U.S. at 441.

3. Avoiding overdeterrence from the risk of inadvertent regulatory violations is particularly appropriate given the wide array of alternative civil remedies to compensate victims and deter violations. These include civil administrative sanctions, *see Hudson v. United States*, 522 U.S. 93, 105 (1997) (noting that civil "money penalties and debarment sanctions will deter others from emulating petitioners' conduct"); administrative oversight, *see, e.g.*, 33 U.S.C. § 1318(a) (empowering the Environmental Protection Agency to inspect books, records, and facilities relevant to CWA enforcement); and in certain circumstances private actions, *see Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 174–75 (2000) (describing Clean Water Act's citizen-suit provisions). And even in the civil arena, this Court has been careful to ensure that available remedies strike the right balance "to reach a generally accepted optimal level of penalty and deterrence." *See Exxon Shipping Co.*, 554 U.S. at 500 (affirming availability of punitive damages under maritime common law but reducing amount awarded). The *in terrorem* effect of federal criminal law is too blunt an instrument to be the sole vehicle to achieve the socially beneficial ends of encouraging law compliance and redressing the harm from regulatory violations.

For these reasons as well, this Court's continued adherence to the presumption in favor of scienter is of vital importance. Where complex regulatory schemes are enforced through criminal sanctions, specifying a *mens rea* standard can decrease the risk that individuals will "shun[]" productive and beneficial work to avoid criminal punishment for "a good-faith

error of judgment." *Gypsum*, 438 U.S. at 441. The absence of a *mens rea* requirement would shift the focus of felony liability toward "regulat[ing] business practices" rather than "punish[ing] conscious and calculated wrongdoing." *Id.* at 442.

CONCLUSION

For the foregoing reasons, the Court should reaffirm the presumption that a showing of *mens rea* on the elements of an offense that distinguish lawful from unlawful conduct is a necessary prerequisite for felony punishment for regulatory offenses.

Respectfully submitted,

Tara S. Morrissey
Andrew R. Varcoe
U.S. CHAMBER LITIGATION CENTER
1615 H St. NW
Washington, DC 20062

Bruce Pettig
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036

Michael R. Dreeben
Counsel of Record
Daniel Lautzenheiser
Nina Oat
O'MELVENY & MYERS LLP
1625 I St. NW
Washington, DC 20006
(202) 383-5400
mdreeben@omm.com

December 27, 2021