No. 16-888

IN THE

Supreme Court of the United States

TODD S. FARHA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* CATO INSTITUTE AND REASON FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The Cato Institute was established forty years ago as a nonpartisan, public-policy research organization dedicated to advancing individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies, established in 1989, promotes the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual Cato Supreme Court Review, and files *amicus* briefs.

Reason Foundation was established in 1978 as a nonpartisan and nonprofit public-policy organization dedicated to advancing a free society. Reason develops and promotes policies that advance free markets, individual liberty, and the rule of law—which allow individuals and private institutions to flourish. To support these principles, Reason publishes *Reason* magazine, produces commentary on its websites, and issues policy research reports. And in significant public-policy cases, Reason selectively files *amicus curiae* briefs.

This case concerns *amici* because the decision below erodes mens rea requirements, enables overcriminalization, and threatens principles for which *amici* stand. Both Cato and Reason appeared as *amici* below supporting the rehearing petition.

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[1] In accordance with Supreme Court Rule 37.2(a), counsel of record received timely notice of the intention to file this brief, and all parties have consented in writing to the filing of this brief. As required by Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel made any monetary contribution intended to fund this brief.

SUMMARY OF ARGUMENT

I. Federal criminal law is plagued by a deep pathology of overcriminalization and excessive punishment. *Yates* v. *United States*, 135 S. Ct. 1074, 1100-01 (2015) (Kagan, J., dissenting); *see id.* at 1087-88 (plurality). This pathology has metastasized out of "the twentieth century pursuit of 'regulatory crimes.'" Paul Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL. 715, 728 (2013).

Although Congress, urged on by the Justice Department, is the primary culprit, courts have a role in ameliorating the pathology's spread—by, at a minimum, consistently enforcing Congress's stated mens rea line between criminal conduct and mere civil wrongdoing. Enforcing high and clear mens rea standards safeguards liberty, preventing morally undeserved punishment and guaranteeing the fair warning necessary to enable law-abiding citizens to avoid committing crimes.

II. Such enforcement is particularly crucial in the context of highly regulated industries. There, regulatory crimes are plentiful and zealously prosecuted, and the risk of overreach is at its peak.

Companies in these industries operate in especially complicated and shifting legal environments. And they must interact frequently with the government—in contracting, inspections, audits, and the like. This volatile mix leaves regulated companies and their employees especially vulnerable to claimed error and potential felony criminal prosecution, even when the government's legal theory is unsound.

Indeed, meaningful review of those theories is rare because such companies are understandably reluctant even to risk indictment—a likely corporate death sentence. Knowing this, prosecutors have every incentive to swing for the fences in their charging decisions, and, left unchallenged, these theories become the de facto law, adding yet another layer of complexity to regulated companies' fraught operating environment.

Ironically, the factors that increase risk to companies also undercut any grounds the government might claim for aggressively expanding criminal sanctions. Particularly in this context, the government can more readily detect wrongdoing and amply remedy it civilly. For example, laws like the civil False Claims Act deter, punish, and remediate wrongdoing by imposing civil penalties and treble damages. And regular government contractors face additional remedies, including debarment.

III. The Eleventh Circuit's opinion below shatters the confidence that participants in regulated industries ought to have when dealing with the government, that, at least when Congress *says* that conviction requires "knowledge," courts will require the government to prove it. That court's dilution of "knowledge" with the civil recklessness standard of "deliberate indifference" injects uncertainty that exacerbates overcriminalization. The effects are potentially far-reaching, involving numerous federal statutes that require prosecutors to prove knowledge, including in contexts where governmental interactions are common. This Court should take this opportunity to reinforce a fundamental boundary between crimes and civil wrongs.

ARGUMENT

I. THIS COURT CAN MITIGATE FEDERAL OVERCRIMINALIZATION BY POLICING MENS REA AS A LINE BETWEEN CRIMINAL AND CIVIL LIABILITY.

A. The federal code holds at least 4,450 separate federal criminal offenses, 40 percent of which have been enacted since about 1980. *See* HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT 202 (2009). And that is just the crimes that appear in the statutes themselves. Others lurk in regulations, which the criminal code incorporates by reference. Include those, and the estimate balloons to 300,000 potential separate federal crimes. Larkin, 36 HARV. J.L. & PUB. POL. at 729. And as Congress and agencies gorge themselves on criminal law, they are producing directives that are "poorly defined in ways that exacerbate their already considerable breadth and punitiveness, maximize prosecutorial power, and undermine the goal of providing fair warning of the acts that can lead to criminal liability." Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 565 (2012).

It is thus commonly accepted that federal criminal law suffers from a "deep[ ] pathology" of "overcriminalization and punishment," including "giv[ing] prosecutors too much leverage"—even if the solution is a matter of intense debate. *Yates*, 135 S. Ct. at 1100-01 (Kagan, J., dissenting); *see id.* at 1087-88 (plurality) (narrowly construing statute to avoid unusual application); *see also*, *e.g.*, *McDonnell* v. *United States*, 136 S. Ct. 2355, 2372-73 (2016) (in

choice between reading criminal statute as a "meat axe or a scalpel," unanimously choosing the latter notwithstanding government's promise to "use [statute] responsibly"); *Skilling* v. *United States*, 561 U.S. 358, 399-414 (2010) (narrowly construing honest-services-fraud statute and then reversing conviction under it); *id.* at 415 (Scalia, J., concurring in judgment) (finding statute unconstitutionally vague).

Among the general symptoms of this pathology is the growth of crimes that are "properly characterized as *malum prohibitum*—wrong because prohibited," not prohibited because morally wrong. Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 657 (2006). This outsized proportion of regulatory *malum prohibitum* offenses "shifts [the] ground from a demand that every responsible member of the community understand and respect the community's moral values to a demand that everyone know and understand what is written in the statute books." Harvey A. Silverglate & Monica R. Shah, *The Degradation of the "Void for Vagueness" Doctrine: Reversing Convictions While Saving the Unfathomable "Honest Services Fraud,"* 2009-2010 CATO SUP. CT. REV. 201, 220 (2010) (internal quotation marks omitted). And as such laws become "too confusing and impractical, . . . they also become useless and unjust." *Id.*

B. Although Congress, in cooperation with the Justice Department, is the primary source of the pathology (which puts a full cure beyond the reach of the courts), courts have a constitutional role to play

in alleviating the disease. One way is by ensuring the appropriate use of mens rea as the line between conduct that warrants criminal punishment and conduct merely subject to civil liability.

The defining feature of *criminal* conduct, one "universal and persistent in mature systems of law," is criminal intent. *Morissette* v. *United States*, 342 U.S. 246, 250-52 (1952) (footnotes omitted). For there to be a crime, there must be a "vicious will." *Id.* Mens rea requirements therefore set the boundary between innocent or merely prohibited conduct on the one hand, and deliberate, criminal conduct on the other.

And the "conventional mens rea element," "firmly embedded" among the "background rules of the common law," "would require that the defendant know the facts that make his conduct illegal." *Staples* v. *United States*, 511 U.S. 600, 605 (1994). Especially where Congress has delineated the bounds of criminal liability with a high mens rea requirement, as here, lesser mens rea standards for civil liability—such as recklessness—provide no substitute. High and clear mens rea standards set firm boundaries between civil and criminal liability and thereby safeguard liberty, "preventing morally undeserved punishment and guaranteeing the fair warning necessary to enable law-abiding citizens to avoid committing crimes." STEPHEN F. SMITH, HERITAGE FOUNDATION, LEGAL MEMORANDUM NO. 135, A JUDICIAL CURE FOR THE DISEASE OF OVERCRIMINALIZATION, 3 (2014).

Even—perhaps especially—where someone's conduct may have been at odds with some regulatory

requirement, mens rea is a bulwark between the government's power to pursue civil remedies and its wielding of the heavy arsenal of criminal sanctions, which is traditionally reserved for immoral and deliberate wrongdoing. *See Morissette*, 342 U.S. at 264 ("Congress . . . has seen fit to prescribe that an evil state of mind … will make criminal an otherwise indifferent act ….''). A clear and high mens rea bar performs this function by "narrow[ing] the scope of the . . . prohibition and limit[ing] prosecutorial discretion." *Gonzales* v. *Carhart*, 550 U.S. 124, 150 (2007).

To serve those narrowing and limiting functions, however, mens rea must be a clear line that is consistently applied. As the government itself argued in a case decided this Term, robust mens rea requirements help to calm "concerns about" whether expansive actus reus elements will lead to "unlimited and indeterminate liability." *Salman* v. *United States*, 137 S. Ct. 420, 427 (2016). In *Salman*, this Court answered whether a "tippee" may be prosecuted for insider trading that involved a "personal benefit" to the tipper other than money, property, or something else of tangible value. *Id.* at 426. Salman argued that an affirmative answer, allowing prosecution upon a mere gift of information between friends or family, would improperly lead to unlimited liability for tippees. *Id.*

The government in response emphasized that a prosecutor "must [still] prove that the tippee *knew* that the tipper ... disclosed the information for a personal benefit" and breached a fiduciary duty. *Id.* at 427 (emphasis added). That is, the government claimed, no matter how expansive the actus reus

elements of a crime, the criminal prohibition can be materially narrowed and safely applied, and the prosecutor's discretion limited, if the government at least must prove the exacting mental state of knowledge. This Court correspondingly emphasized the tippee's undisputed knowledge of the benefit and the breach. *See id.* at 425, 428.

But if, as here, "knowledge" is then watered down to include mental states short of knowledge, even in the face of Congress's express language, the government has pulled a bait and switch on the courts and citizens, and both have lost one of the few practical palliatives available to them against the symptoms of overcriminalization. In the present felony case, for example, the Eleventh Circuit essentially allowed knowledge to be redefined as recklessness. Pet. 4. If such a precedent can stand, then the ostensibly clear and high protection of a "knowing" mens rea requirement—to mitigate excessive, expansive, and unclear actus reus elements—is illusory.

II. IT IS CRUCIAL IN THE CONTEXT OF REGULATED INDUSTRIES TO KEEP THE MENS REA LINE BETWEEN CRIMINAL AND CIVIL MISCONDUCT BOTH HIGH AND CLEAR.

Many of the *malum prohibitum* offenses noted above derive from "the twentieth century pursuit of regulatory crimes," such as those governing commerce, finance, the environment, and public health. Larkin, 36 HARV. J. L. & PUB. POL. at 728. Correspondingly, companies and individuals working in those highly regulated areas, such as health care, banking, securities, and government contracting, face

unique hazards. As they find themselves subject to many and shifting rules, they also interact regularly with the governmental bodies eager to claim violations of those rules; yet they are particularly impaired in resisting aggressive criminal prosecutions. And the very characteristics that increase the hazards to companies and individuals in this area also specially enable extensive civil remedies. It is thus particularly crucial in this context that courts not let slip the line between criminal and civil misconduct.

A. Regulated industries involve especially complicated and continually changing legal environments. In interacting with governmental agencies, companies and their executives must navigate a complex and shifting web of statutes, regulations, agency interpretations, official guidance memoranda, forms, and worksheets, among other sources of *de jure* as well as *de facto* law. In many cases, highly regulated companies must satisfy not only complex federal requirements, but also related and equally complicated state laws and regulations.

This inherent complexity often leads to ambiguity in underlying statutory and regulatory compliance requirements, which in turn creates genuine uncertainty regarding whether a given business structure or transaction qualifies under applicable compliance standards. And agencies cannot be counted on to resolve ambiguities even when aware of them. *E.g.*, Pet. 7. These realities have in turn produced a corporate culture and cottage industry obsessed with "compliance." Rather than focusing on the ethics and morality of their conduct, some overregulated companies may "begin to gear the

system to comply with the regulations in such a way that they are adhering to the letter of the law but the actual spirit of it has totally evaporated." Note, *The Good, the Bad, and Their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behavior*, 116 HARV. L. REV. 2123, 2141 (2003) (internal quotation marks omitted).

Moreover, precisely because they operate in this intricate and complex environment, highly regulated companies and their officials find themselves regularly interacting with the government—whether by entering into, renewing, and submitting invoices and forms under contracts (as here), by making periodic representations to the government about their statutory and regulatory compliance, by facing inspections, or otherwise. *See, e.g.*, *United States ex rel. Bunk* v. *Gosselin World Wide Moving N.V.*, 741 F.3d 390, 405-10 (4th Cir. 2013) (defense contractor submitted over 9000 invoices, leading to multi-million-dollar civil penalty notwithstanding absence of actual damages); *Hays* v. *Hoffman*, 325 F.3d 982, 993-94 (8th Cir. 2003) (erroneous requests for Medicaid reimbursement affected payment rates, which in turn affected hundreds of subsequent requests); *United States* v. *Advance Tool Co.*, 902 F. Supp. 1011, 1018-19 (W.D. Mo. 1995) (defendant who sold deficient tools to government submitted 686 invoices, for 73 different types of tools). Those interactions increase the risks both of actual error and, more important in the real world, of being accused of error—including wrongly accused.

This case illustrates that dynamic regardless of the merits of the underlying conduct: WellCare contracted with the Florida government to

participate in the federally and state subsidized Medicaid program; faced shifting statutory and regulatory requirements, some of which were incorporated into the contract; annually reported to a state agency certain expenditures; and, in connection with making those expenditures, created an affiliate of which that regulating agency was aware. Pet. 6, 9.

This brew of legal complexity and ambiguity with frequent government interaction is potent. And it calls for courts to carefully apply the antidote of enforcing a robust mens rea requirement to counteract overcriminalization.

B. Not only are companies and officers in regulated industries more vulnerable to the risks of overcriminalization, they also are less able to counter those risks—which in turn increases them further.

For any criminal defendant, an indictment is a daunting prospect. One reason is that—unlike with relatively common orders dismissing a complaint, *see generally Ashcroft* v. *Iqbal*, 556 U.S. 662, 677-87 (2009)—courts go out of their way to avoid dismissing indictments, even though the terms of the corresponding rules of procedure are functionally identical. *Compare* Fed. R. Civ. P. 8(a)(2) & 12(b)(6) *with* Fed. R. Crim. P. 7(c)(1) & 12(b)(3)(B)(v). So federal criminal law lacks "any effective mechanism to decide legal questions early in criminal prosecutions." James M. Burnham, *Why Don't Courts Dismiss Indictments? A Simple Suggestion for Making Federal Criminal Law a Little Less Lawless*, 18 GREEN BAG 2d 347, 351 (2015). Thus, "purely legal judicial opinions construing criminal statues in the context of a discrete set of assumed facts," akin to

opinions on a 12(b)(6) motion to dismiss a complaint, are comparatively rare. *Id.* at 348. Instead, such legal questions are deferred until post-trial appellate review. As a result, the accused faces the choice of either pleading or else enduring the ordeal of trial and only then appealing in a context in which courts are reluctant to throw out the result of months or years of work. *Id.* These incentives clear the path for the government in "pursuing aggressive, questionable legal theories that would present large targets for motions to dismiss." *Id.* at 358.

Such hazards and imbalances are all the worse in the context of businesses—especially those in regulated industries. At least since the demise of Arthur Andersen, it has been commonplace that, "[i]n business, particularly in the financial services industry . . . an indictment can ruin a firm, or a career, well before trial," because of the reputational effect. Dale A. Oesterle, *Early Observations on the Prosecutions of Business Scandals of 2002-03*, 1 OHIO ST. J. CRIM. L. 443, 471-72 (2004). Challenging the government's legal theory post-trial may provide merely a pyrrhic victory. *See Arthur Andersen LLP* v. *United States*, 544 U.S. 696 (2005) (unanimously reversing conviction based on error with respect to intent, following collapse of firm shortly after its indictment).

Courts also have recognized this dynamic—that a company, "faced with the fatal prospect of indictment," "could be expected to do all it could, assisted by sophisticated counsel, to placate and appease the government." *United States* v. *Stein*, 541 F.3d 130, 142 (2d Cir. 2008). Even sacrificing its own employees. *See id.* at 142-43.

Prosecutors see this too. As one result, "federal prosecutors and potential corporate defendants, both aware of the power prosecutors wield, have reached an 'entente cordiale' wherein corporations under suspicion enter into deferred-prosecution agreements ('DPAs'), pay enormous penalties, and undertake massive internal reforms." Dane C. Ball & Daniel E. Bolia, *Ending a Decade of Federal Prosecutorial Abuse in the Corporate Criminal Charging Decision*, 9 WYO. L. REV. 229, 251 (2009).

More generally, prosecutors with companies or company officials in their sights are specially incentivized to be aggressive from the outset, including stretching the statutory elements of a crime to cover even noncriminal conduct. That increases the hazard to the target—at little to no cost to the prosecutor or the government.

The inevitable resulting settlement means that the law is never developed through litigation, and the prosecutors' theory of what a vague statute means becomes the *de facto* law. Corporate criminal investigations involving statutes commonly applied to companies or company officials, such as the Foreign Corrupt Practices Act, "have developed a 'prosecutorial common law,' allowing [the government] to impose burdensome compliance costs without having to prove in court that criminal activity has actually occurred or is likely to occur." John S. Baker, Jr. & William J. Haun, *Criminal Law & Procedure: The "Mens Rea" Component Within the Issue of the Over-Federalization of Crime*, 14 ENGAGE 2, 26 (July 2013).

Another common example involves the federal Food, Drug and Cosmetic Act. Even though it is lawful to *prescribe* for "off label" uses drugs that the Food and Drug Administration ("FDA") has approved for other purposes, the FDA decreed that it is criminal "misbranding" to *promote* off-label uses. Notwithstanding an obvious, substantial First Amendment issue, this policy went largely unchallenged. It took an individual victim of the FDA's policy, Alfred Caronia, to bring this to a head. He was convicted of conspiring to promote off-label uses, appealed, and the Second Circuit threw out his conviction based on the First Amendment. *United States* v. *Caronia*, 703 F.3d 149, 168-69 (2d Cir. 2012).

This came only after "the Department of Justice had successfully pursued dozens of off-label marketing cases and recouped billions of dollars in criminal penalties and civil settlements." Robert Radick, Caronia *and the First Amendment Defense to Off-Label Marketing: A Six Month Re-Assessment*, FORBES, THE INSIDER (May 29, 2013, 12:05 pm).[2] The reason was obvious: "Unlike individuals, corporations are not in the ideal position to vigorously advance a defense and wage battles against the Department of Justice that, if unsuccessful, might result in felony indictments." *Id.*

In a system so stacked in favor of the government, without regard to the merit of its position, one of the few ways to keep some balance is for courts to hold

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[2] https://www.forbes.com/sites/insider/2013/05/29/caronia-and-the-first-amendment-defense-to-off-label-marketing-a-six-month-re-assessment/#3b738c65380e.

firmly to high, clear mens-rea requirements. That means, at a minimum, that when Congress explicitly calls for "knowledge," courts enforce that requirement without dilution. More than that, the law also needs to be clear enough that a court *will* do so, such that potential defendants can have confidence from the first moment they hear from prosecutors.[3]

C. The very characteristics and dynamics that make the criminal law a special hazard for regulated industries also make it easier for the government both to detect wrongdoing and to remedy it civilly. That regulated companies and their officials are repeat actors means the government is more likely to know what they are doing and more readily able to hold them accountable in various noncriminal ways.

A simple example is the False Claims Act, in the shadow of which many companies in health care and other industries operate. Its civil cause of action provides not only for remedial damages against a contractor for submitting or causing to be submitted false claims to the government, but also for both civil penalties and treble damages. 31 U.S.C. § 3729(a)(1)(G). These various civil remedies go beyond basic restitution for a defrauded agency to also provide retribution and ample deterrence. *See Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 784 (2000) ("[T]he FCA

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[3] This is true regardless of whether one understands "willfull blindness" as involving something other than *de facto* knowledge, given both the "long history" of such an instruction in criminal law and that the deliberate-indifference instruction here set a plainly lower (and likely outcome determinative) threshold for conviction. *See Global-Tech Appliances, Inc.* v. *SEB S.A.*, 563 U.S. 754, 768 (2011); Pet. 27.

imposes damages that are essentially punitive in nature . . . ."); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 551 (1943) (a chief purpose of the FCA is "to provide for restitution to the government of money taken from it by fraud"); *supra* at 8-9.

Moreover, companies that depend on doing business with the government also face the looming specter of being barred from participating in federal programs. *See, e.g.*, 48 C.F.R. § 9.406-2(a)(5) & (c). Such debarment can be for conduct as wide-ranging as (1) "any . . . offense indicating a lack of business integrity or business honesty" and (2) "any other cause of [a] serious or compelling nature." 48 C.F.R. § 9.407-2(a) & (c) (the "catch-all" provision of the Federal Acquisition Regulations (FAR)).

In other contexts, aggressive criminal sanctions may be considered necessary to deter elusive improper conduct. Under-detection may be said to justify over-punishment when a violation is detected, including with the arsenal of criminal law. *See, e.g.*, Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 753 (2002) (arguing that "particularly sophisticated crimes" are "typically the most difficult to detect," and therefore "may justify harsher . . . penalties"). Here, by contrast, government contracting and the work of regulated industry happen in public settings in which scrutiny is accepted and institutionalized.[4]

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[4] Additionally, although its scope was somewhat narrowed in *City of Los Angeles* v. *Patel*, 135 S. Ct. 2443 (2015), the administrative-search exception to the Fourth Amendment's

Indeed, placing companies under the bureaucratic microscope enables the government to structure its interactions with them to elicit exactly the information it wants. That is one reason why—with respect to mens rea and otherwise—the burden and cost of any ambiguity should be on the agency rather than the regulated entity. *See, e.g.*, *Gen. Elec. Co.* v. *EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) ("[W]here the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not . . . impos[e] civil or criminal liability."); *see also United States* v. *Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995) ("[T]he responsibility to promulgate clear and unambiguous standards is on the [agency]. . . . If the language is faulty, the [agency] had the means and obligation to amend.") (second and third alterations in original; internal quotation marks omitted).

This case illustrates the logic of this understanding. Although the Eleventh Circuit omitted such details, the Florida agency here permitted health-care plans to subcontract behavioral health-care services; the agency knew that WellCare had done so; the agency knew that WellCare had done so to an affiliate; and the agency knew of the ambiguity in Florida law but did not clarify the issue for its participating plans. Pet. 7, 9. The case is in large measure a contract dispute between two repeat actors, one of which has superior bargaining power. And even if WellCare's

(continued…)

warrant requirement provides another powerful tool for the government to peer into highly regulated companies' operations.

interpretation of the government's position was wrong, the full force of federal criminal law is not required to provide an adequate remedy. Indeed, the government decided to seek only monetary compensation from another leading health plan that had pursued a similar reporting methodology as WellCare—and ultimately settled for nothing. *See* Pet. 26 n.11.

For these same reasons, there is nothing pernicious—and certainly nothing that would justify distorting criminal law—in a company's reasonably interpreting unclear statutes, regulations, or contractual terms to its financial advantage and structuring its affairs accordingly. *See* Pet. 8-9. Indeed, an attempt to structure transactions "at the outer limits permitted" by law is "not fraud" for purposes of the criminal statute that prohibits a "knowing" false or fraudulent claim to a U.S. agency. 18 U.S.C. § 287. *See Siddiqi* v. *United States*, 98 F.3d 1427, 1430 (2d Cir. 1996) (finding no crime when medical provider took advantage of a regulatory term susceptible of varying interpretations, absent a controlling definition from the agency); *see also United States* v. *Siddiqi*, 959 F.2d 1167, 1170 (2d. Cir. 1992).

Even civil liability under the False Claims Act—which premises liability on either knowledge *or recklessness*—cannot be imposed where the defendant merely "took advantage of a disputed legal issue." *Hagood* v. *Sonoma Cty. Water Agency*, 81 F.3d 1465, 1478-79 (9th Cir. 1996); *see also United States ex rel. Donegan* v. *Anesthesia Assocs. of Kansas City, PC*, 833 F.3d 874, 879 (8th Cir. 2016) (reasonable interpretation of ambiguous provision was

"regulatory noncompliance, not an FCA claim") (internal quotation marks omitted); *United States ex rel. Lamers* v. *City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) (reasoning that "faulty calculations," "flawed reasoning," "imprecise statements," or "differences in interpretation" are not "false").

If, as Learned Hand famously opined, "[a]ny one may so arrange his affairs that his taxes shall be as low as possible," and is "not bound to choose that pattern which will best pay the Treasury," all the more should doing so not make a business or its employees *criminal*, absent (as relevant here) genuine knowledge that statements they make to the government are false. *Helvering* v. *Gregory*, 69 F.2d 809, 810 (2d Cir. 1934). If there "is nothing sinister" in pursuing such financial advantage, all the more is there nothing warranting jail. *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505, 511 n.4 (1992) (internal quotation marks omitted).

In sum, regulated industries should be able to act, and interact with the government, firm in the confidence that, at least when Congress *says* "knowledge," courts will require the government to *prove* "knowledge." If, instead, "Congress meant to demand only recklessness, it could have and would have said so." JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME, Sec. D, at 7 (6th ed. 2016). Where it has not, however, "reading a statute that demands 'knowledge' to be satisfied by 'recklessness,' . . . contravenes long-established distinctions in degrees of mens rea as well as congressional intent." *Id.*

III. THE DECISION BELOW LOWERS AND BLURS THE LINE BETWEEN CRIMINAL AND CIVIL MISCONDUCT UNDER STATUTES APPLYING TO REGULATED INDUSTRIES.

This Court's holding in *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769-70 (2011)—that proof of deliberate indifference cannot satisfy a requirement to prove knowledge—is the high and clear standard that comports with the text of the health-care fraud statute, the "background rules of the common law," *Staples*, 511 U.S. at 605, and the importance of legal clarity to alleviate the symptoms of overcriminalization. The Eleventh Circuit's contrary holding—that deliberate indifference toward falsity may stand in for knowledge of falsity—improperly lowered the mens rea standard and blurred the civil/criminal line by importing an essentially civil standard of liability. And by substituting "a lesser mental state for statutorily prescribed knowledge," that court also "encroache[d] on the legislative prerogative of defining criminal conduct." Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 194-95 (1990); *see also United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) ("It is the legislature, not the Court, which is to define a crime and ordain its punishment.").

The effects of this decision are potentially far-reaching. *See* Pet. 25-26. A significant subset of the numerous federal criminal statutes requires prosecutors to prove knowledge. And opportunities to apply that subset of statutes arise frequently in the context of government contracting and regulated industries discussed above in Part II—precisely

where a clear and high standard, consistently applied, is crucial.

Some of these laws, like the statute at issue in the Eleventh Circuit's decision, require knowledge in the context of executing a fraudulent scheme, and thus are most directly implicated. *E.g.*, 18 U.S.C. § 1031 (Major Fraud Statute, prohibiting, with identical structure as the health-care fraud statute, "knowingly" executing a scheme to defraud); *id.* § 1348 (prohibiting "knowingly" executing a securities fraud scheme). Of course, as the Petition explains, that a statute requires *both* knowledge of a false statement and an intent to defraud hardly means that establishing the latter excuses a failure to establish the former. *See* Pet. 20-21, 25.

Other statutes require knowing falsity in other contexts where interactions with the government are common. *E.g.,* 18 U.S.C. § 287 (prohibiting the "knowing" false, fictitious, or fraudulent claim to any person in civil, military, or naval service of the United States *or to any department or agency thereof*); 18 U.S.C. § 1001(a)(2) (prohibiting "knowingly and willfully" making a materially false statement or representation in any matter within the jurisdiction of *any* United States branch of government); 18 U.S.C. § 1350 (prohibiting the CEO and CFO of an issuer from certifying any statement in a publicly filed financial report "knowing" that it does not comport with stated requirements, including that the report "fairly" presents, in all "material" respects, the financial condition of the company); 18 U.S.C. § 1520 (prohibiting "knowingly and willfully" violating a section or *any* rule or regulation of the SEC). *See generally* Pet. 26.

As shown above in Part II, the government has every incentive to bypass myriad adequate civil remedies in favor of its heavy criminal artillery, because defending against those weapons is particularly difficult for government contractors, regulated industries, and their employees. The Eleventh Circuit's decision creates a new weapon for the government in such prosecutions, not only in that important circuit but beyond. Pet. 25-26. With the deck so stacked in favor of the government, and with myriad civil remedies available, there is no logical or legal reason to add the weapon of a diluted mens rea to the government's arsenal. This Court should take this opportunity to say so.

CONCLUSION

For the foregoing reasons and those stated by Petitioner, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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FEBRUARY 13, 2017