

No. 08-1394

In the
Supreme Court of the United States

—◆—
JEFFREY K. SKILLING,
Petitioner,

v.

UNITED STATES
OF AMERICA,
Respondent.

—◆—
**On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

—◆—
**BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION
AND CATO INSTITUTE
IN SUPPORT OF NEITHER PARTY**

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QUESTIONS PRESENTED

1. Whether the federal “honest services” fraud statute, 18 U.S.C. § 1346, requires the government to prove that the Defendant’s conduct was intended to achieve “private gain” rather than to advance the employer’s interests, and, if not, whether Section 1346 is unconstitutionally vague.

2. When a presumption of jury prejudice arises because of the widespread community impact of the Defendant’s alleged conduct and massive, inflammatory pretrial publicity, whether the government may rebut the presumption of prejudice, and, if so, whether the government must prove beyond a reasonable doubt that no juror was actually prejudiced.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF) and Cato Institute respectfully submit this brief amicus curiae in support of neither party.¹

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the constitutional right of all individuals to earn a living by pursuing their chosen occupations without unreasonable government interference. PLF has appeared in state and federal courts across the country in cases involving the vagueness of statutory or common law restrictions on business, such as "public nuisance" claims brought against businesses to recover damages for alleged pollution. *See In re Lead Paint Litig.*, 886 A.2d 662 (N.J. 2005), *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 464 (R.I. 2008), *People v. General Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). PLF believes

¹ Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici, their members, or their counsel made a monetary contribution to its preparation or submission.

its public policy experience will assist this Court in considering the merits of this case.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts. This case interests Cato because vague criminal laws lead to the arbitrary use of government power and the violation of individual liberties.

SUMMARY OF ARGUMENT

Justice Robert Jackson warned more than fifty years ago:

If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case . . . it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this

realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies.

Robert H. Jackson, *The Federal Prosecutor*, 31 J. Am. Inst. of Crim. L. & Criminology 3, 5 (1941).

As serious as this danger is in the realm of vague criminal law, it is equally real with regard to civil law—and the danger may be even greater when the vague law being enforced is a common law legal theory rather than a statute. This Court has repeatedly invoked the principles of due process to hold that individual criminal defendants are entitled to fair warning of what the law forbids and what the likely punishment will be. Those principles should apply with equal force when the defendant is a sophisticated business entity, or when the laws at issue are classified as civil rather than criminal, or when the case involves a common law tort rather than a statute.

Amici take no position on whether or not the “honest services fraud” statute can be construed in a way that satisfies due process principles, or whether the particular Defendant in this case violated that statute. But regardless of how the Court answers those questions, criminal and civil defendants—including white collar and business defendants—deserve the protection of the Due Process Clause’s prohibition against vagueness.

ARGUMENT**I****VAGUE STATUTES OFFEND THE
PRINCIPLES OF DUE PROCESS**

The principle behind the “void for vagueness” doctrine is that it is fundamentally unfair to punish a defendant who does not have, and cannot have, reasonable warning that the conduct at issue was illegal. A person must be able to know with some realistic degree of certainty whether a particular act will violate the law. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (“No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”). This requirement prevents arbitrary punishment, which would violate the constitutional prohibition against depriving a person of liberty without due process of law. *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

Due process of law, as Daniel Webster explained almost two centuries ago, means “‘the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,’ so ‘that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.’” *Hurtado v. California*, 110 U.S. 516, 535-36 (1884) (quoting *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 581 (1819) (argument of Mr. Webster)). For the government to act arbitrarily or against specific persons, rather than pursuant to general, comprehensible, and pre-announced rules, would render the law an instrument of arbitrary will in

the hands of government officials. Thus due process prohibits “acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man’s estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power.” *Id.* at 536.

These requirements of fair notice and warning, and the prohibition against the arbitrary and vindictive use of the laws, are often simply called the rule of “fundamental fairness.” *See, e.g., Rogers v. Tennessee*, 532 U.S. 451, 460 (2001). They forbid the government from enforcing laws which are written “in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Punitive laws must “employ[] words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, or a well-settled common-law meaning, notwithstanding an element of degree in the definition as to which estimates might differ.” *Id.* (citations omitted).

Vague laws involve three basic dangers. First, they “may trap the innocent” by failing to give people “a reasonable opportunity to know what is prohibited.” Second, they encourage “arbitrary and discriminatory enforcement” because vague laws “delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis.” Third, because citizens will try to “steer far wider of the unlawful zone” than necessary, vague laws “inhibit the exercise of . . . freedoms.” *Grayned v. City of Rockford*,

408 U.S. 104, 108-09 (1972) (citations and quotation marks omitted).

Vague statutes invite abuse by enforcement agencies—not only police officers, but as Justice Jackson warned, particularly by government prosecutors or private plaintiffs. See Jackson, *supra*; see also John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 197 (1985) (“Prosecutors in this country have enormous discretion, and their decisions are largely unconstrained by law.”). Vagueness gives plaintiffs and prosecutors leverage to make unfair demands of defendants, to threaten defendants with punishment for relatively minor infractions, or to exploit their positions of authority for improper motives. Indeed, because vague laws are enforced in an ad hoc and subjective manner, they essentially give enforcement officials “the *de facto* power of determining what the criminal law in action shall be.” Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 428 (1958).

Also, vagueness undermines the capacity of democratic institutions to control the operations of government. James Madison famously observed that it would “be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if . . . no man, who knows what the law is to-day, can guess what it will be to-morrow.” *The Federalist* No. 62, at 381 (James Madison) (Clinton Rossiter ed., 1961). When statutes are so vaguely worded that the public finds them incomprehensible, voters will not be able to predict, understand, or discipline the conduct of government

officials, who can rationalize their arbitrary conduct by pointing to a statute that seems to authorize their actions in broad and imprecise terms. See Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. Rev. 1491, 1554 (2008) (“When enforcers use open-textured statutes to address new behaviors, and courts interpret such statutes to facilitate these efforts, criminal law develops outside of the legislative process.”).

Meanwhile, private interest groups that stand to gain from particular interpretations of statutes can exploit that authority for their own self-interest while portraying their conduct as public spirited. See Keith N. Hylton & Vikramaditya Khanna, *A Public Choice Theory of Criminal Procedure*, 15 Sup. Ct. Econ. Rev. 61, 104 (2007) (“[Excessive] discretion gives enforcement agents wide power to extract wealth through the criminal law enforcement process. This raises the specter of rent-seeking.”).

Examples of the abuse of vague statutes abound. For instance, in *United States v. Councilman*, 245 F. Supp. 2d 319 (D. Mass. 2003), *aff’d*, 373 F.3d 197 (1st Cir. 2004), *rev’d*, 418 F.3d 67 (1st Cir. 2005) (en banc), the defendant was charged with violating the federal wiretapping statute (18 U.S.C. § 2511), which forbids the interception of transmitted messages. The defendant was charged with accessing electronic messages while they were stored, and *not* while in transit. Confronted with the question of whether one could conceivably “intercept” a message that was not in transit, the district court ruled for the defendant. 245 F. Supp. 2d at 321. The court of appeals panel affirmed this conclusion, 373 F.3d at 204, but the en banc court reversed. 418 F.3d at 82-85.

Astonishingly, the en banc court rejected the defendant's vagueness challenge, and held that the statute clearly and unambiguously prohibited him from accessing stored messages, even though the district court and the appellate panel, as well as the Courts of Appeals for the Ninth, Third, Eleventh, and Fifth Circuits had all ruled to the contrary, *see id.* at 87 (Torruella, J., dissenting) (citing cases), and even though the en banc majority acknowledged that the statute suffered from "continuing ambiguity," *id.* at 76, that tendered "the plain text [of the statute] . . . not so plain." *Id.* at 73. Indeed, the en banc court turned to legislative history to determine the statute's meaning, *id.* at 76-79, even though use of legislative history is only called for when statutory language is ambiguous. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). If federal courts of appeals are in disarray as to the statute's meaning, and must consult legislative history to resolve its "continuing ambiguity," it can hardly be said to be clear enough to provide a layman with guidance as to what is and is not legally allowed.

Even more abusive was the prosecution of the Arthur Andersen accounting firm. *United States v. Arthur Andersen, LLP*, 374 F.3d 281 (5th Cir. 2004), *rev'd*, 544 U.S. 696 (2005). Arthur Andersen refused to agree to the Department of Justice's offer to defer prosecution in exchange for disclosure of certain information and a promise to testify against its former client, Enron. *See* Harvey A. Silverglate, *Federal Criminal Law: Punishing Benign Intentions—A Betrayal of Professor Hart's Admonition to Prosecute Only the Blameworthy*, in *In the Name of Justice* 65, 81 (Timothy Lynch ed., 2009). In retaliation for this

refusal, the Department indicted the company for obstruction of justice, alleging that the company's management "corruptly persuaded" employees to destroy documents. *Id.* at 82. After the defendants were convicted, this Court unanimously reversed. The company's destruction of documents pursuant to a routine office policy was "by itself innocuous," *Arthur Andersen*, 544 U.S. at 703, and the vagueness of the charge against Arthur Andersen was "striking." *Id.* at 706. That vagueness gave federal prosecutors unwarranted power to manipulate or threaten potential defendants for potentially "innocent conduct." *Id.*

The instructions to the jury were so broadly worded that it was not necessary for the prosecutor to prove the defendant's dishonesty, "and it was enough for petitioner to have simply 'impede[d]' the Government's factfinding ability." *Id.* This definition would include conduct that "is not inherently malign," *id.* at 704, so that prosecutions could be brought against "anyone who innocently persuades another to withhold information from the Government." *Id.* at 707. A narrowing construction of the statute was therefore appropriate.

In *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008), the district court found that the government had "let its zeal get in the way of its judgment" and "violated the Constitution it is sworn to defend," *id.* at 336, when prosecutors used threats of prosecution to obtain concessions from the company KPMG, even though it was never proven to have violated any law. See generally Harvey A. Silverglate, *Three Felonies a Day* 138-57 (2009).

The government asserted that KPMG sold tax shelters that were illegal, but the firm argued that its actions were lawful. The laws governing tax shelters are so byzantine that it is virtually impossible for a business to know before prosecution whether they are or are not legal. *See* Patricia B. Hsue, *Lessons From United States v. Stein: Is the Line Between Criminal and Civil Sanctions for Illegal Tax Shelters a Dot?*, 102 Nw. U. L. Rev. 903, 929 (2008) (“Given the uncertainty in judicial determinations of the legality of tax shelters, it will be difficult for the government to demonstrate that the defendants (or anyone) knew that the tax shelters that KPMG designed and marketed were illegal.”). Indeed, the applicable jurisprudence is “a myriad of seemingly contradictory decisions.” *Id.* at 917 (citing cases).

Given this vagueness, the government’s attorneys chose not to prosecute their case, but instead increased pressure on KPMG. The government promised to refrain from indicting the firm in exchange for a concession that the tax shelters were illegal, and for KPMG’s agreement not to pay for the legal defense of its directors. *Stein*, 435 F. Supp. 2d at 344. Judge Kaplan concluded that these tactics violated the Sixth Amendment.

Justice is not done when the government uses the threat of indictment—a matter of life and death to many companies and therefore a matter that threatens the jobs and security of blameless employees—to coerce companies into depriving their present and even former employees of the means

of defending themselves against criminal charges.

Id. at 381-82.

This type of unfair leverage is made possible by vague laws that, as attorney Harvey Silverglate writes, empower prosecutors to “target individuals in all sectors of civil society for having broken laws by committing acts that they did not, and could not reasonably, know were illegal.” Silverglate, *Federal Criminal Law, supra*, at 92. The vague definitions of such statutes “serve to ensnare those who did not intend to break the law and who believed in good faith that their conduct was lawful.” *Id.*

There is perhaps no statute more vague than the “honest services fraud” statute, as indicated by the futile efforts of many federal courts to devise a consistent interpretation of it. Rather than devising an authoritative interpretation, the result has been a kaleidoscope of inconsistent and inconclusive tests. The Fifth Circuit held that the statute only prohibits conduct that is already unlawful under state law, *see, e.g., United States v. Brumley*, 116 F.3d 728, 735 (5th Cir. 1997) (en banc), while the Seventh Circuit holds that it prohibits the breach of broader fiduciary duties, not just those imposed by state law. *United States v. Martin*, 195 F.3d 961, 966-67 (7th Cir. 1999). The Seventh Circuit holds that the statute only prohibits conduct that benefits the defendant personally, *United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998), while the Third Circuit holds that this is not a required element. *United States v. Panarella*, 277 F.3d 678, 692 (3d Cir. 2002).

In *United States v. Handakas*, 286 F.3d 92, 104 (2d Cir. 2002), a panel of the Court of Appeals concluded that “the text of § 1346 simply provides no clue to the public or the courts as to what conduct is prohibited.” That decision was later overruled by a divided en banc court, but if legal scholars, lawyers, and appellate judges are unable to agree on a coherent definition of “the intangible right to honest services,” it is unfair to hold that the statute provides fair warning to the lay public. *Id.* at 109 n.10. *See also id.* at 104 (“[A] penal statute must speak for itself so that a lay person can understand the prohibition. It is not enough to say that judges can intuit the scope of the prohibition if [the defendant] could not.” (citation omitted)).

When the en banc court overruled *Handakas* in *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003), it went to heroic lengths to “properly curtail the statute’s reach.” *Id.* at 135 n.7. Admitting that judges would “labor long and with difficulty in seeking a clear and properly limited meaning” of the statute “simply by consulting a dictionary for the literal, ‘plain’ meaning of the phrase,” *id.* at 135, the court relied on case law antedating the statute’s enactment to promulgate a set of elements for proving a violation. The deprivation of the intangible right of honest services

means a scheme or artifice to use the mails or wires to enable an officer or employee of a private entity . . . purporting to act for and in the interests of his or her employer . . . secretly to act in his or her or the defendant’s own interests instead, accompanied by a material misrepresentation made or

omission of information disclosed to the employer or other person.

Id. at 141-42. The problem with this definition is that it would appear to criminalize all contractual disputes and all breaches of fiduciary duties to employers. David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 Stan. L. Rev. 1371, 1419 (2008). Indeed, the *Rybicki* test does not include any requirement that the employer or other “victim” suffer any foreseeable injury—merely that the defendant form an intention to breach a duty. This means that the only breaches of duty not covered by the statute are accidental ones; otherwise, the *Rybicki* test sweeps in all sorts of self-benefitting dishonesty. “Provided it is established that the defendant concealed a breach of fiduciary duty (the actus reus of the offense), it should be easy for the prosecutor to convince the trier of fact to infer that the breach was intentional and therefore conclude that the requisite mens rea was satisfied.” Andrew B. Matheson, *A Critique of United States v. Rybicki: Why Foreseeable Harm Should Be an Aspect of the Mens Rea of Honest Services Fraud*, 28 Am. J. Trial Advoc. 355, 378 (2004).

Thus there is much truth to Justice Scalia’s observation that, taken literally, the honest services fraud statute “would seemingly cover a salaried employee’s phoning in sick to go to a ball game.” *Sorich v. United States*, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari).

Whatever the intrinsic value of the *Rybicki* factors, the language of the statute itself does not give fair warning to the lay public that it is the applicable test. Indeed, federal judges have not agreed on the

Rybicki test. The en banc decision included several dissents and concurrences. The dissenting judges argued not only that the statute “imposes insufficient constraint on prosecutors, gives insufficient guidance to judges, and affords insufficient notice to defendants,” 354 F.3d at 157 (Jacobs, J., dissenting), but also that whatever value the newly established test might have, it “gets us nowhere in terms of limits on prosecutorial power and *notice to the public*,” because it “requires *lay persons* to do lawyer-like tasks that few lawyers would have the skills to perform.” *Id.* at 158-59 (emphasis added). If the en banc court of appeals could not agree on the complex analytical framework woven together in the leading case on the meaning of “honest services fraud,” then surely the statute cannot be clear enough to provide sufficient warning to defendants. “Ordinary people cannot be expected to undertake such an analysis; rare is the lawyer who could do it; and no two lawyers could be expected to agree independently on the elements of an offense that must be defined by such a project.” *Id.* at 160. Meanwhile, at least one other court has declined to adopt the *Rybicki* test. *See United States v. Chandler*, 376 F.3d 1303, 1313 (11th Cir. 2004) (post-*Rybicki* decision agreeing with *Handakas*).

The wide variety of appellate decisions demonstrate that even the professional bar cannot agree on the meaning of the statute’s language. As Professor Hart observed, *supra*, at 420, condemning a layman “for a default of technical judgment in a matter which causes trouble even for professional judges is, in many cases, so manifestly beyond reason that courts have developed various makeshift devices to avoid condemnation in particular situations.” Here, the makeshift devices formulated by courts of appeals have

failed to lay out authoritative guidelines for applying the statute. The law appears to be the prototypical vague statute proscribing “bad conduct.” *Cf. Junction 615, Inc. v. Ohio Liquor Control Comm’n*, 732 N.E.2d 1025, 1032-33 (Ohio Ct. App. 1999) (finding legal prohibition of “improper conduct” unconstitutionally vague). It is simply too vague to explain to any individual what conduct is and is not permitted, and cannot withstand due process analysis.

II

THE COURT SHOULD CLARIFY THAT THE VOID FOR VAGUENESS DOCTRINE PROTECTS SOPHISTICATED DEFENDANTS AND BUSINESS ENTITIES AS WELL AS INDIVIDUAL CRIMINAL DEFENDANTS

The case at bar involves a white collar crime prosecuted under federal criminal law. But the dividing line between criminal and civil law is often unclear, and this Court should clarify that the void for vagueness doctrine applies not only in the context of routine criminal trials but also with regard to complex business regulations and to civil statutes. “[E]nforcing a sharp dividing line between civil and criminal due process rules is untenable because there is not a comparably sharp dividing line between criminal and civil cases.” Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 *Yale L. & Pol’y Rev.* 1, 52 (2006). There is no justification in the void for vagueness doctrine—let alone in the Due Process Clause—for discriminating between criminal and civil law, or between simple criminal infractions and sophisticated white collar crime.

**A. The Distinction Between
Criminal and Civil Law Is
Indistinct, Particularly in White
Collar Crime and Business Regulation**

Although the distinction between civil and criminal laws at first seems clear, it often becomes indistinct on close inspection. “If one were to judge from the notions apparently underlying many judicial opinions, and the overt language of some of them, the solution of the puzzle is simply that a crime is anything which is *called* a crime So vacant a concept is a betrayal of intellectual bankruptcy.” Hart, *supra*, at 404.

This Court has often struggled to conceptualize the distinction between civil and criminal law. *See, e.g., Smith v. Doe*, 538 U.S. 84, 92-106 (2003). The collapse of that distinction is particularly noteworthy when civil penalties incur such sanctions as punitive damages, *see Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 47-48 (1991) (O’Connor, J., dissenting) (“Here . . . the civil/criminal distinction is blurry. Unlike compensatory damages, which are purely civil in character, punitive damages are, by definition, punishment . . . [and therefore subject to the] void for vagueness [doctrine].”), or asset forfeiture, *see United States v. Bajakajian*, 524 U.S. 321, 331 n.6 (1998) (“some recent federal forfeiture laws have blurred the traditional distinction between civil in rem and criminal in personam forfeiture”), or physical confinement. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346, 361-65 (1997) (concluding that state could confine an individual civilly after he completed his criminal sentence).

When a corporation commits criminal wrongdoing, the distinction between criminal and civil crumbles even more. See Sharon Finegan, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law*, 111 Penn St. L. Rev. 625, 652-54 (2007) (discussing “the blurring of criminal and civil liability” in cases against corporations); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 Harv. L. Rev. 1477, 1497-1512 (1996) (civil sanctions against corporations are essentially identical with criminal sanctions). Corporations, of course, do not make decisions—only individual people do—and cannot be imprisoned. Thus the most obvious difference between civil and criminal penalties cannot apply in criminal prosecutions of corporate defendants.

Civil and criminal penalties can both result in the loss of liberty and property. Both can impose a long and complicated series of court processes on defendants. Both embody society’s expression of disapproval of, and its imposition of punishment for, wrongful behavior. Both civil and criminal defendants are entitled to “an impartial and disinterested tribunal,” *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980), and to “fair notice not only of the conduct that will subject [the defendant] to punishment, but also of the severity of the penalty that a State may impose.” *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996). Given the difficulty of establishing a clear line between criminal and civil law, there is no warrant for treating them as categorically distinct for purposes of the void for vagueness doctrine. “It is the importance of the right to the individual, not the technical distinction between civil and criminal, which should be

of importance to a court in deciding what procedures are constitutionally required in each case.” *Lee v. Habib*, 424 F.2d 891, 901 (D.C. Cir. 1970).

**B. Basic Due Process Protections,
Including the Clarity Requirement,
Apply to Both Civil and Criminal Law**

Although most cases involving the “constitutional requirement of definiteness,” *United States v. Harriss*, 347 U.S. 612, 617 (1954), have dealt with criminal statutes, the definiteness requirement also applies outside the criminal context. *Boutilier v. INS*, 387 U.S. 118, 123 (1967) (“[T]he ‘void for vagueness’ doctrine [is] applicable to civil as well as criminal actions.”); *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964) (applying vagueness doctrine to requirement that teachers take loyalty oaths); *Geo-Tech Reclamation Indus., Inc. v. Hamrick*, 886 F.2d 662, 666 (4th Cir. 1989) (applying vagueness doctrine to law determining sites for landfills).

In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), for example, the Court invalidated a rule of the Nevada state bar as void for vagueness. That rule prohibited attorneys from making public statements to the press that “the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding,” *id.* at 1033 (citation omitted), although the rule contained an exception allowing attorneys to “state without elaboration . . . the general nature of the . . . defense.” *Id.* at 1048. This language was not clear enough to satisfy the requirements of due process:

Given this grammatical structure, and absent any clarifying interpretation by the

state court, the Rule fails to provide “fair notice to those to whom [it] is directed.” A lawyer seeking to avail himself of [the exception] must guess at its contours. The right to explain the “general” nature of the defense without “elaboration” provides insufficient guidance because “general” and “elaboration” are both classic terms of degree. In the context before us, these terms have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.

Id. at 1048-49 (quoting *Grayned*, 408 U.S. at 112). It was not necessary for the attorney to show that the rule had been arbitrarily enforced; the fact that the rule was so vague as to make arbitrary enforcement likely was sufficient. *Id.* at 1050. The Court emphasized the fact that even attorneys, presumably experts in interpreting rules like the one at issue, were unable to settle on the actual meaning of the rule in question: “The fact that Gentile was found in violation of the Rules after studying them and making a conscious effort at compliance demonstrates that [the rule] creates a trap for the wary as well as the unwary.” *Id.*

In a series of cases in the 1920s, this Court also found provisions of the Lever Act (40 Stat. 276 (1917)) unconstitutionally vague. *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233 (1925), *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921), *Weeds, Inc. v. United States*, 255 U.S. 109 (1921). That Act prohibited any person from “mak[ing] any unjust or

unreasonable . . . charge in . . . dealing in or with any necessities” or “exact[ing]” an “excessive price[]” for “any necessities.” *American Sugar Refining Co.*, 267 U.S. at 238. These terms rendered the statute “so vague and indefinite that no one could know what it was.” *Id.* at 238-39. Indeed, the statute’s language provided no ascertainable standard of guilt, nor did it inform a person charged with violating it of the nature of the accusation. *L. Cohen Grocery Co.*, 255 U.S. at 89. The language “forb[ade] no specific or definite act.” *Id.* Notably, while *L. Cohen Grocery Co.* and *Weeds, Inc.*, both involved charges of felonious conduct, *American Sugar Refining Co.* was a civil case in which the defendant relied upon the Lever Act as a defense to a charge of breach of contract.

Courts also frequently apply the vagueness principle in the context of nuisance law. For example, in *Grayned*, 408 U.S. at 112, a protestor was convicted of violating a noise-abatement ordinance which prohibited a person from making “any noise or diversion which disturbs or tends to disturb the peace or good order” of a nearby school campus. 408 U.S. at 108. The protestor claimed that the law was unconstitutionally vague. While rejecting this claim, Justice Marshall explained that “a basic principle of due process” requires that the law “clearly define[]” its “prohibitions.” *Id.* So, too, in *Grove Press Inc. v. City of Philadelphia*, 418 F.2d 82 (3d Cir. 1969), the Third Circuit Court of Appeals held that Pennsylvania authorities could not use a public nuisance theory to prohibit an allegedly obscene film. The court acknowledged that the state could regulate obscenity, but “the standard of regulation [may not] be so vague and indefinite ‘that men of common intelligence must necessarily guess at its meaning.’” *Id.* at 87 (quoting

Connally, 269 U.S. at 391). Terms like “injury to the public,” and “unreasonableness,” were “too elastic and amorphous a standard” to satisfy the requirement of definiteness; such terms were so “indefinite” that the “executive and judicial branches” were left with “too wide a discretion in its application.” *Id.* at 88 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940)). *Accord*, *Rubin v. City of Santa Monica*, 823 F. Supp. 709, 713 (C.D. Cal. 1993); *Connick v. Lucky Pierre’s*, 331 So. 2d 431, 434-35 (La. 1976).

There is therefore no warrant for distinguishing between civil and criminal law in the application of the void for vagueness doctrine. Civil statutes no less than criminal laws can impose severe sanctions on individuals and businesses. Indeed, courts often have difficulty even determining what punitive statutes qualify as “civil” and what qualify as “criminal.” This confusion is even worse in the context of common law causes of action such as “public nuisance,” which was originally a common law crime, but is today regarded as a common law civil tort.

**C. Vague Common Law
Concepts Like “Public Nuisance”
Lend Themselves to Frequent Abuse**

If vague statutory crimes are subject to exploitative and unequal enforcement, vague common law theories are even more subject to abuse. This is particularly evident with the theory of “public nuisance.” Although it originated as a common law crime, *see* 2 William Blackstone, *Commentaries* *220, modern courts generally consider it a common law civil tort. Yet it is enforced by public officials, and the government can obtain punitive damages for violations. *See, e.g., Camden County Bd. of Chosen*

Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 538 (3d Cir. 2001) (public nuisance suit seeking punitive damages against gun maker for selling firearms). It is not at all clear whether a public nuisance claim, brought by a public official seeking punitive damages, is actually any different from a criminal prosecution.

There is no legal consensus on what constitutes a “public nuisance.” Indeed, this concept is so vague that legal scholars have referred to it as a “‘wilderness’ of law,” Horace Wood, *The Law of Nuisances* iii (3d ed. 1893); a “mystery,” Warren A. Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 Harv. L. Rev. 984, 984 (1952); a “legal garbage can” full of vagueness, uncertainty and confusion, William L. Prosser, *Nuisance Without Fault*, 20 Tex. L. Rev. 399, 410 (1942); a “mongrel” doctrine “intractable to definition,” F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. Rev. 480, 480 (1949); a “sprawling doctrine,” *Grove Press Inc.*, 418 F.2d at 88, and a “quagmire,” John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 Ecology L.Q. 241, 241 (1972).

Thanks to this vagueness, public officials have frequently exploited the theory of public nuisance to seek massive civil penalties against business entities for allegedly wrongful acts. Indeed, public officials have invoked the nuisance doctrine against businesses for legal and non-tortious acts, such as the production and sale of electricity, see *Connecticut v. Am. Elec. Power Co. Inc.*, 582 F.3d 309 (2d Cir. 2009), or firearms, see *Beretta, U.S.A. Corp.*, 273 F.3d at 538; *James v. Arms Tech., Inc.*, 820 A.2d 27 (N.J. Super. Ct. App. Div. 2003), or automobiles, see *General Motors Corp.*, 2007 WL 2726871, or petroleum products,

see Comer v. Murphy Oil USA, No. 07-60756, 2009 WL 3321493 (5th Cir. Oct. 16, 2009), or the sale of lead paint when lead paint was legal. *See, e.g., In re Lead Paint Litig.*, 924 A.2d 484, *Lead Indus. Ass’n, Inc.*, 951 A.2d 428, *County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal. App. 4th 292 (2006).

The elements of public nuisance are so imprecise and broadly worded that the tort sweeps in an enormous variety of conduct and appears to allow public officials to punish anything that they consider to be bad for the public—even if the conduct was lawful and non-tortious at the time it was committed. The due process definiteness requirement ought to apply to all government attempts to punish, whether classified as criminal or civil, whether brought under statutes or common law theories.

D. There Is No Warrant for a Categorical “Sophistication” Exception

This Court has unfortunately stated at times that the clarity requirement is less stringent in cases involving businesses. *See, e.g., Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). The basis for this view is that laws regulating business conduct are generally of a more narrow scope, and because businesses can afford to obtain legal counsel to advise them on the legality of their activities, or to seek administrative relief where a business regulation requires some amendment. *See id.* But while these justifications may initially appear reasonable, in the present day context they are often inapplicable.

First, many laws regulating business conduct do not have a narrow scope. The Sherman Antitrust Act,

for example, prohibits “[e]very contract . . . in restraint of trade or commerce among the several States.” The Robinson-Patman Act prohibits any person “either directly or indirectly” to “discriminate in price between different purchasers of commodities of like grade and quality,” if that discrimination “may . . . substantially [] lessen competition or tend to create a monopoly.” See further *United States v. Nat’l Dairy Products Corp.*, 372 U.S. 29, 34-36 (1963) (adopting narrowing construction to avoid vagueness problems with Robinson-Patman). Some common law torts relating to businesses are even broader. As noted above, there has never been a consensus among legal scholars or judges as to the meaning of “public nuisance.” Likewise, the tort of “interference with contract” is so broad that one expert characterized it as making “the whole competitive order of American industry . . . prima facie illegal.” See Gary D. Wexler, *Intentional Interference with Contract: Market Efficiency and Individual Liberty Considerations*, 27 Conn. L. Rev. 279, 279 (1994) (quoting Carl Auerbach).

Second, while as a general rule, businesses are probably more able to afford legal advice than are individuals, overly vague and complicated statutes are often incomprehensible even to expert attorneys. Modern law, both civil and criminal, both statutory and common law, is often so complicated and vaguely worded that even the most expert attorneys cannot understand them or advise clients with any degree of certainty about what conduct is and is not proscribed. This is obvious in the case of vague criminal statutes like that at issue here, the meaning of which is disputed amongst federal appellate judges, but today’s pervasively regulated state also imposes a labyrinth of highly technical regulations, incomprehensible even to

specialist attorneys. As the chief judge of the Ninth Circuit Court of Appeals recently wrote, “[i]t is impossible to know how many Americans are federal criminals. There are thousands of federal crimes and hundreds of thousands of federal regulations that can be criminally enforced . . . that make people criminals for unwittingly breaking complex environmental, shipping, and worker safety rules.” Alex Kozinski & Misha Tseytlin, *You’re (Probably) a Federal Criminal*, in Lynch, *supra*, at 44-45.

Administrative regulations, too, are often written in such broad language that their actual meaning or applicability is impossible to predict. Michael B. Enzi, *The Safety Advancement for Employees Act*, 35 Harv. J. on Legis. 335, 338 (1998) (“Many of OSHA’s regulations are so vague that to expect a small business employer to correctly interpret them is practically inconceivable.”).

In *Cape & Vineyard Div. of New Bedford Gas & Edison Light Co. v. Occupational Safety & Health Review Comm’n*, 512 F.2d 1148, 1152 (1st Cir. 1975), for example, an OSHA regulation was unconstitutionally vague where it required workers to use protective equipment whenever it was “necessary by reason of hazards . . . encountered in a manner capable of causing injury . . . through physical contact.” *Id.* This regulation lacked ascertainable standards, and “[did] not provide constitutionally adequate warning.” *Id.*

In *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1036 (D.C. Cir. 1980), the court of appeals found a Treasury Department regulation overly vague where it defined the term “educational institution” so broadly that government officials had “no objective standard by

which to judge which applicant organizations are advocacy groups—the evaluation is made solely on the basis of one’s subjective notion of what is ‘controversial.’”

In *Trinity Broad. of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000), the court of appeals found that a regulation “fail[ed] to make clear” the definition of “minority-controlled” television stations. *Id.* at 628. The regulation was so unclear that the agency itself “struggle[d] to provide a definitive reading of the regulatory requirements,” and thus failed to provide constitutionally required notice of the legal requirements. *Id.* at 632 (citation omitted). *See also United States v. Chrysler Corp.*, 158 F.3d 1350, 451 (D.C. Cir. 1998) (Highway Traffic Administration rule too vague to give fair warning); *General Elec. Co. v. U.S.E.P.A.*, 53 F.3d 1324, 1328-34 (D.C. Cir. 1995) (EPA regulation too vague); *Gates & Fox Co., Inc. v. Occupational Safety & Health Review Comm’n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (OSHA regulation too vague). And, as noted above, common law civil torts like “public nuisance” are even more dangerously vague, since they cannot even be definitively categorized as civil or criminal, let alone defined in terms of specific elements.

Nor is it true that businesses are regularly able to afford legal assistance. While Fortune 500 companies can obtain the skills of top attorneys, most businesses in America are small businesses, who cannot easily afford access to legal help. Janet W. Steverson, *I Mean What I Say, I Think: The Danger to Small Businesses of Entering into Legally Enforceable Agreements That May Not Reflect Their Intentions*, 7 J. Small & Emerging Bus. L. 283, 308-09 (2003).

These businesses are often at the mercy of plaintiffs who exploit broadly worded statutes, such as California's "extremely vague" unfair competition law. Eugene S. Suh, *Stealing from the Poor to Give to the Rich? California's Unfair Competition Law Requires Further Reform to Properly Restore Business Stability*, 35 Sw. U. L. Rev. 229, 230 (2006). This law, which prohibits "any unlawful, unfair or fraudulent business act or practice," Cal. Bus. & Prof. Code § 17200, has become notorious for its abuse in the hands of opportunistic litigants and "professional plaintiffs." *Molski v. Mandarin Touch Rest.*, 347 F. Supp. 2d 860, 868 (C.D. Cal. 2004). Plaintiffs generally exploit the fact that small businesses cannot afford legal representation and once a complaint is filed, will settle for a few thousands dollars at a time. *See Consumer Def. Group v. Rental Hous. Indus. Members*, 137 Cal. App. 4th 1185, 1216 n.22 (2006) ("small businesses were the particular province of [legal] shakedowns, because such businesses would often be willing to spend around \$2,000 to buy their peace rather than the same amount on an attorney to defend the case.").

Although ignorance of the law is generally held to be no excuse, *Bryan v. United States*, 524 U.S. 184, 195 (1998), that rule, like any other, cannot apply where the reason for the rule is inapplicable. Ignorance of the law is no excuse only where a reasonable person should be aware of the legal limits because they are a matter of general common sense, or where the person is capable of, and has a duty to, investigate what law applies to his conduct. But ignorance of the law must be an excuse in at least some extreme cases—and particularly in cases involving "highly technical statutes that present[] the danger of ensnaring

individuals engaged in apparently innocent conduct.”
Id. at 194.

In *Gentile*, 501 U.S. 1030, the statute regulating attorney conduct was too vague for the attorney to comprehend. So, too, are many statutes and common law theories that affect businesses, that are written in terms so vague that even legal experts cannot agree on an interpretation of their terms. No amount of consultation with legal experts can ensure that a business entity can comply with such vague standards; they are, therefore, vague “not in the sense that [they] require[] a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.” *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

“A philosopher of note has said that ‘ought’ implies ‘can,’” *United States v. Jefferson*, 760 F.2d 821, 828 n.5 (7th Cir.), *rev’d*, 474 U.S. 806 (1985), and where the laws are so incomprehensible that even legal experts cannot advise citizens on how to consist with the demands of the law, it is unjust to hold citizens to such a standard of conduct. *See also Pope v. Illinois*, 481 U.S. 497, 517 (1987) (Stevens, J., dissenting) (“Under ordinary circumstances, ignorance of the law is no excuse But . . . [i]f a legislature cannot define the crime, [citizens] should not be expected to. Criminal prosecution under these circumstances ‘may be as much of a trap for the innocent as the ancient laws of Caligula.’” (quoting *United States v. Cardiff*, 344 U.S. 174, 176 (1952))).

CONCLUSION

The due process requirements of fair warning and definiteness that apply through the “void for vagueness” doctrine are equally vital in the context of white collar business crimes, business torts, and civil regulations. This Court should clarify that the constitutional prohibition on vague laws protects sophisticated and unsophisticated defendants in the realms of economic regulation as well as criminal law.

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