No. 09-5201

In the Supreme Court of the United States

MICHAEL GARY BARBER, *et al.*,
Petitioners,

v.

J.E. THOMAS, Warden, FCI Sheridan,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* PIERCE O'DONNELL IN SUPPORT OF PETITIONERS

George J. Terwilliger III*
Daniel B. Levin
White & Case LLP
701 Thirteenth Street, NW
Washington, DC 20005
(202) 626-3628

**Counsel of Record for*
Amicus Curiae Pierce O'Donnell

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

The Solicitor General of the United States consents to the filing of this *amicus curiae* brief. Petitioners have withheld their consent to the filing of this *amicus curiae* brief.

Pierce O'Donnell respectfully requests leave to file this *amicus curiae* brief. O'Donnell supports reversal of the court of appeals' decision, but believes that additional argument would assist the Court in the resolution of this case.

O'Donnell argues that, if the federal good time credit statute, 18 U.S.C. § 3624(b), is an ambiguous criminal statute, reversal of the United States Court of Appeals for the Ninth Circuit is compelled by long-established constitutional principles requiring clarity in criminal statutes and requiring that when a criminal statute is susceptible of two readings, the harsher one can be adopted only "when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987) (citations omitted), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346) (defining a "scheme or artifice to defraud" as including "a scheme or artifice to deprive another of the intangible right of honest services"). The rule of lenity, on which Petitioners focus, is one, but not the exclusive, judicial expression of the relevant principles applied in *McNally*. The Petitioners did not cite *McNally* in support of reversal in their brief on the merits, and *amici curiae* National Association of Criminal Defense Lawyers ("NACDL"), *et al.*, did

not cite *McNally* in support of the petition for certiorari. While Petitioners and *amici* have briefly identified the broader constitutional principles at stake, *see* Pet. Br. 37, 39-40; NACDL Br. on Cert. 12-13, O'Donnell respectfully believes that additional argument in support of reversal on these grounds is warranted.

O'Donnell's interest in this case arises as a result of the dismissal of an indictment against him for campaign finance-related crimes. The United States has appealed the dismissal of O'Donnell's indictment and has argued, *inter alia*, that deference to the Federal Election Commission's ("FEC") interpretation of the Federal Election Campaign Act precludes application of the constitutional principles applied in *McNally* concerning the interpretation of criminal statutes, including the rule of lenity. Gov't Br. 55-57, *United States v. O'Donnell*, 09-50296 (9th Cir. Sept. 14, 2009). Thus, the Court's ruling in this case could affect application of the broad principles articulated in *McNally*, of which the rule of lenity is but one expression, to the question of whether O'Donnell may be convicted for violating the FEC's interpretation of an ambiguous statute.

O'Donnell's circumstances are representative of the many cases in which an alleged criminal violation turns on agency interpretation of often ambiguous, opaque, and complex statutory, administrative, and/or regulatory standards, either through direct prosecution under a criminal provision incorporating such standards or by prosecutorial use of such standards under statutes of more general application, such as the conspiracy or false statements statutes. If, as the United States

has urged in O'Donnell's case, agency interpretations of such standards and requirements are entitled to deference, then judicial review under *McNally* principles will be foreclosed in a vast range of cases. Thus, this case presents issues of much greater import to the administration of criminal justice than simply its impact on the calculation of good time credit for federal sentences. For this reason, as well, additional argument would assist the Court.

O'Donnell respectfully submits that the arguments contained in this *amicus curiae* brief are relevant, and neither the parties nor the other *amici* have given these arguments sufficient attention. Accordingly, leave to file this *amicus curiae* brief should be granted.

Respectfully submitted this 21st day of January, 2010.

George J. Terwilliger III*
Daniel B. Levin
White & Case LLP
701 Thirteenth Street, NW
Washington, DC 20005
(202) 626-3628

* *Counsel of Record for Amicus Curiae Pierce O'Donnell*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

DOCKETED CASES

FEDERAL STATUTES AND REGULATIONS

MISCELLANEOUS

INTEREST OF *AMICUS CURIAE* PIERCE O'DONNELL[1]

Pierce O'Donnell's interest in this case is that of a criminal defendant whose indictment was dismissed and as to which, in a pending appeal, the United States has asserted that deference to an agency's interpretation of an ambiguous criminal statute trumps application of the constitutional principles applied in *McNally v. United States*, 483 U.S. 350 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346) (defining a "scheme or artifice to defraud" as including "a scheme or artifice to deprive another of the intangible right of honest services"), including the rule of lenity. *See* Gov't Br. 55-57, *United States v. O'Donnell*, 09-50296 (9th Cir. Sept. 14, 2009). If the Court determines in this case that 18 U.S.C. § 3624(b) is an ambiguous criminal statute, the balance the Court strikes between constitutional principles governing the interpretation of ambiguous criminal statutes and agency deference could affect the outcome in O'Donnell's case and, more broadly, the myriad circumstances where criminal offenses are established for transgression of regulatory standards, requirements, and/or proscriptions in the modern, federally-regulated state.

---

[1] Neither party's counsel authored this brief, in whole or in part, nor did such counsel or the parties make a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* Pierce O'Donnell or his counsel made such a monetary contribution.

O'Donnell was subject to a three-count indictment in the Central District of California alleging a violation of 2 U.S.C. § 441f, a conspiracy to violate 2 U.S.C. § 441f in violation of 18 U.S.C. § 371, and causing a campaign treasurer to make a false statement to the Federal Election Commission ("FEC") in violation of 18 U.S.C. §§ 2(b) and 1001. Indictment, *United States v. O'Donnell*, 2:08-cr-872 (C.D. Cal. July 24, 2008). Section 441f provides:

> No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

The indictment alleged that other persons "ma[de] contributions" to a presidential campaign committee, and that O'Donnell promised to and did reimburse them for "their contributions." Indictment 4, 5, 7, *United States v. O'Donnell*, 2:08-cr-872 (C.D. Cal. July 24, 2008).

The United States opposed a motion to dismiss the indictment claiming, *inter alia*, that the FEC interpreted Section 441f to include "reimbursements" of others' contributions, and that the rule of lenity did not apply. Opp'n to Mot. to Dismiss, *United States v. O'Donnell*, 2:08-cr-872 (C.D. Cal. Apr. 16, 2009).

The district court granted O'Donnell's motion to dismiss as to the Section 441f count and the conspiracy count. Order, *United States v. O'Donnell*, 2:08-cr-872 (C.D. Cal. June 8, 2009). The district

court agreed that the plain meaning of Section 441f unambiguously does not proscribe reimbursements, that construing Section 441f to proscribe reimbursements would render superfluous 2 U.S.C. § 441a(a)(8) (permitting and regulating so-called "conduit" contributions), and that even if Section 441f were ambiguous, the rule of lenity would require the district court to adopt an interpretation of Section 441f that did not proscribe reimbursements. *Id.*

On appeal, the United States and several *amici*, including the FEC, argued that if Section 441f were ambiguous, the courts should defer to the FEC's interpretation of Section 441f. *See, e.g.*, Gov't Br. 55-57, *United States v. O'Donnell*, 09-50296 (9th Cir. Sept. 14, 2009); FEC Br. as *Amicus Curiae* 11-13, *United States v. O'Donnell*, 09-50296 (9th Cir. Sept. 23, 2009). O'Donnell urged affirmance of the district court's dismissal, relying on, among other arguments, the *McNally* principles, including the rule of lenity. Defendant-Appellee Br. 49-56, *United States v. O'Donnell*, 09-50296 (9th Cir. Nov. 9, 2009). The appeal was argued and submitted on January 13, 2010.

SUMMARY OF THE ARGUMENT

The rule of lenity is one expression of broader principles, expressed and applied in *McNally*, governing judicial review of ambiguous criminal provisions. In *McNally*, this Court held that the deprivation of an intangible right to honest services was not a property interest that could give rise to a mail fraud violation under 18 U.S.C. § 1341. 483 U.S. at 360-61. The Court held that the numerous

prior cases reading abridgement of an intangible right into the injury element of that statute were of no moment because such an interpretation was contrary to the statute's plain language. *Id.* at 358-61. The Court held that because there are no constructive criminal offenses, before one can be punished for a criminal offense, the United States must show that the allegedly proscribed conduct is plainly within the statute, and that when faced with competing interpretations of a criminal statute, adopting the harsher interpretation is only warranted "when Congress has spoken in clear and definite language" in its favor. *Id.* at 359-60. While *McNally* used language similar to that used in rule of lenity decisions, the majority opinion did not cite the rule of lenity.[2] Rather, *McNally* is grounded in broader constitutional principles that should trump deference to agency interpretations of ambiguous criminal statutes, because such deference is simply a doctrine of judicial restraint. Resolving the conflict between the constitutional principles identified in *McNally* and agency deference assumes even greater importance in today's administrative state, which is characterized by the explosion in the criminalization of regulatory offenses.

[2] The dissent in *McNally*, however, characterized the majority opinion as an application of the rule of lenity. *See id.* at 375 (Stevens, J., dissenting).

ARGUMENT

I.

The Constitutional Principles Identified in *McNally* Require Reversal.

The principles discussed in *McNally* are dispositive if the Court concludes that 18 U.S.C. § 3624(b) is an ambiguous criminal statute.

A.

McNally Is Broader Than the Rule of Lenity.

In *McNally*, the defendants were convicted of violating the mail fraud statute, 18 U.S.C. § 1341, which prohibits "devis[ing] or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . ." 483 U.S. at 352-55. Under the defendants' scheme, an insurance agency selected to provide policies for the Commonwealth of Kentucky shared commissions with insurance companies designated by a former state official, including a company controlled by the former official and nominally owned by defendant McNally. *Id.* at 353. The mail fraud count "alleged that [the defendants] had devised a scheme . . . to defraud the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly." *Id.*

The jury convicted the defendants on the mail fraud and conspiracy counts, and the Sixth Circuit affirmed those convictions. *Id.* at 355. The Sixth

Circuit relied on a long line of circuit court decisions "holding that the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government." *Id.* at 355.

This Court reversed. *Id.* at 356. The Court noted that courts previously had interpreted the mail fraud statute as protecting the intangible right to honest services, but stated that these holdings could not be reconciled with the text of the statute. *Id.* at 358. Rather, "[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." *Id.*

The Court concluded that Congress's purpose in enacting the mail fraud statute "was to protect the people from schemes to deprive them of their money or property." *Id.* Additionally, an amendment to the statute added the words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," *id.* at 357 (internal quotation marks omitted), which the Court interpreted as reinforcing Congress's intent that the statute reach only "frauds involving money or property." *Id.* at 359. Although numerous circuit courts had recognized "intangible rights" as protected by the mail fraud statute, *id.* at 358, this Court held that the statute did not encompass intangible rights:

> The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. As the Court said in

> a mail fraud case years ago: "There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." . . . [W]e read [the mail fraud statute] as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.

Id. at 359-60 (citations omitted).[3]

McNally, and the cases on which it relied, expressed distinct but inter-related principles. First, the rule of lenity compels courts confronted with two rational readings of an ambiguous statute to choose the reading more favorable to the defendant. 483 U.S. at 359-60 (citing, *inter alia*, *United States v. Bass*, 404 U.S. 336, 347 (1971), *superseded by statute*, Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(b), 100 Stat. 449, 459 (1986) (repealing the statute that the defendant was convicted of violating)). A plurality of this Court recently reiterated the importance of this broad principle:

---

[3] In response, Congress passed 18 U.S.C. § 1346, which expressly defined a "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508. As the Court in *McNally* stated, a clear statement by Congress is precisely what is required to impose criminal liability, 483 U.S. at 360, as opposed to deferring to agency interpretations of criminal statutes. The precise parameters of when to defer to agency interpretations are currently before the Court in this case.

> Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead. . . . We interpret ambiguous criminal statutes in favor of defendants, not prosecutors.

United States v. Santos, 128 S. Ct. 2020, 2025, 2028 (2008) (plurality opinion) (citations omitted), *superseded by statute*, Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 2(f)(1)(B), 123 Stat. 1617, 1618 (defining "proceeds" in the money laundering statute to include "gross receipts" of "unlawful activity").

Second, due process prohibits constructive offenses: a criminal statute must clearly proscribe certain conduct before the United States may punish a person for engaging in such conduct. *McNally*, 483 U.S. at 360 (citing *Fasulo v. United States*, 272 U.S. 620, 629 (1926) (refusing to construe the mail fraud statute in manner inconsistent with the statute's language and context)); *see Bass*, 404 U.S. at 347 (broad reading of criminal statute improper absent

clear direction from Congress). Due process also requires notice of what conduct criminal statutes prohibit: it "bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997) (citing *Marks v. United States*, 430 U.S. 188, 191-92 (1977); *Rabe v. Washington*, 405 U.S. 313 (1972) (*per curiam*); *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964)); *see Bass*, 404 U.S. at 348 (citing, *inter alia*, *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).

Although the rule of lenity is frequently discussed in connection with these principles, many cases, including *McNally* itself, apply these principles without invoking the rule of lenity. *See, e.g.*, *United States v. Williams*, 553 U.S. 285, ___, 128 S. Ct. 1830, 1845 (2008) (applying due process analysis in a vagueness challenge to a statute and holding that a "conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement"); *Boulware v. United States*, 552 U.S. 421, ___, 128 S. Ct. 1168, 1178 (2008) ("[t]he spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute") (citation and internal quotation marks omitted).

B.

The Broader Principles of *McNally* Compel Reversal.

Assuming that the statute at issue in this case is classified as a criminal statute as to which these principles must be applied, and that it is ambiguous, the principles identified in *McNally* compel reversal. Petitioners and *amici* demonstrate that the Bureau of Prisons' interpretation of 18 U.S.C. § 3624(b) is irreconcilable with the rule of lenity, which is but one expression of these broader principles. *See* Pet. Br. 37-46; NACDL Br. on Cert. 11-19; *cf. McNally*, 483 U.S. at 359-60.

Separately, the Bureau of Prisons' interpretation of Section 3624(b) amounts to the constructive authorization of additional deprivations of liberty, beyond the plain meaning of Section 3624(b), in contravention of due process. *Cf. McNally*, 483 U.S. at 360.

II.

Agency Deference Cannot Eradicate the Constitutional Principles of *McNally*, Including the Rule of Lenity.

Agency deference cannot overcome the *McNally* principles. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), should not be considered to the contrary. In a footnote in *Babbitt*, the Court held that a Department of the Interior regulation defining "harm" was reasonable and could be the basis of a criminal prosecution, notwithstanding the rule of

lenity. *Id.* at 703-04, 704 n.18. The Court, however, considered only the "notice" principle underlying the rule of lenity, and concluded that the regulation in question provided sufficient notice:

> We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement. Even if there exist regulations whose interpretations of statutory criminal penalties provide such inadequate notice of potential liability as to offend the rule of lenity, the "harm" regulation, which has existed for two decades and gives a fair warning of its consequences, cannot be one of them.

Id. at 704 n.18.

Thus, *Babbitt* does not include consideration that, in addition to requiring sufficient notice (which the Court found existed), due process also forbids constructive offenses not apparent from the face of the statute.

More fundamentally, *Babbitt*, which was a facial challenge to the validity of an agency regulation in a declaratory judgment action rather than a criminal prosecution, did not present this Court with an opportunity to squarely address the interplay between the *McNally* principles and agency deference in the criminal context. This interplay assumes even greater importance in light of the vast criminalization of regulatory violations that

permeates the administrative state.[4] Indeed, the impact of deferring to agency interpretations of

---

[4] *See, e.g.*, John S. Baker, Jr., Federalist Society for Law and Public Policy Studies White Paper, *Measuring the Explosive Growth of Federal Crime Legislation*, at 4 (May 2004), available at http://www.fed-soc.org/doclib/20070404_crimreportfinal.pdf (noting difficulty of identifying and accounting for numerous "regulatory or tort-like" criminal offenses); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991) (noting that, as of the early 1990's, there were by one estimate "over 300,000 federal regulations that may be enforced criminally"); George J. Terwilliger III, *Under-Breaded Shrimp and Other High Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 Am. Crim. L. Rev. 1417, 1417-19, 1428-30 (2007). In *United States v. Whiteside*, 285 F.3d 1345 (11th Cir. 2002), the defendants' convictions for making false statements, under 18 U.S.C. § 1001, in Medicare and Medicaid cost reimbursement forms and related offenses were reversed because the circuit court determined that the Medicare and Medicaid regulations giving rise to the alleged false statements were ambiguous and the defendants' interpretation that gave rise to the alleged false statements "was not unreasonable." 285 F.3d at 1350-52. However, the court noted that if there had been an existing administrative interpretation of those regulations that was inconsistent with that relied upon by the defendants, the court could have deferred to it and upheld the convictions. *Id.* at 1352-53. Similarly, in *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003), the defendants were prosecuted under the Lacey Act Amendments of 1981, which prohibited the importation of "fish or wildlife taken, possessed, transported, or sold in violation of . . . any foreign law." 331 F.3d at 1232; Pub. L. No. 97-79, 95 Stat. 1073 (codified at 16 U.S.C. § 3372(a)(2)(A)). Defendants allegedly failed to comply with Honduran regulations and statutes concerning the harvesting, processing, and packaging of lobsters. 331 F.3d at 1232-33. The Eleventh Circuit affirmed the defendants' convictions, notwithstanding significant uncertainty regarding the meaning of the relevant Honduran laws. *Id.* at 1247. *(cont'd)*

criminal statutes is even greater than may appear at first impression, given that prosecutors can use such broad regulatory standards as the basis for alleging violations of general criminal proscriptions such as 18 U.S.C. §§ 371 and 1001.[5] A rule providing that, in addressing ambiguity in a criminal statute, agency deference takes precedence over the fundamental constitutional principles described in *McNally* largely vitiates those important principles.[6]

Indeed, the Embassy of Honduras filed an *amicus curiae* brief on appeal in support of *defendants*' position. *See id.* at 1240 n.23. These cases illustrate that the interplay between agency deference and established principles regarding judicial review of prosecutions based on ambiguous standards is an issue of potentially broad application, which raises fundamental concerns regarding the preservation of the courts' role in applying well-established constitutional principles in cases where prosecution is founded upon uncertain regulatory standards.

[5] For example, O'Donnell was charged with a false statement in violation of 18 U.S.C. § 1001 based on the FEC's interpretation of 2 U.S.C. § 441f. Indictment 8, *United States v. O'Donnell*, 2:08-cr-872 (C.D. Cal. July 24, 2008).

[6] The United States may argue, as it has in O'Donnell's case, that applying the rule of lenity would result in courts applying a different meaning of a statute in a criminal proceeding than courts or agencies apply in civil or administrative proceedings. *See* Reply Br. 23-27, *United States v. O'Donnell*, 09-50296 (9th Cir. Dec. 9, 2009). But, as this Court has unanimously explained:

> Even if [18 U.S.C.] § 16 lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner's favor. Although here we deal with § 16 in the deportation context, § 16 is a criminal statute,

(cont'd)

CONCLUSION

If 18 U.S.C. § 3624(b) is an ambiguous criminal statute, the fundamental constitutional principles identified in *McNally* require that Petitioners' requested relief be granted, notwithstanding the Bureau of Prisons' interpretation of the statute. More broadly, the principles applied in *McNally*, of which the rule of lenity is simply one expression, dictate that deference to agency interpretations should not control courts' interpretations of ambiguous criminal statutes.

> and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies. Cf. *United States v. Thompson/Center Arms Co.,* 504 U.S. 505, 517-518, 112 S. Ct. 2102, 119 L. Ed. 2d 308 (1992) (plurality opinion) (applying the rule of lenity to a tax statute, in a civil setting, because the statute had criminal applications and thus had to be interpreted consistently with its criminal applications).

Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004).

Respectfully submitted this 21st day of January, 2010.

George J. Terwilliger III*
Daniel B. Levin
White & Case LLP
701 Thirteenth Street, NW
Washington, DC 20005
(202) 626-3628

* *Counsel of Record for Amicus Curiae Pierce O'Donnell*