No. 19-1087

IN THE

Supreme Court of the United States

CHARLES M. HALLINAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1958, the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL has a nationwide membership of many thousands of direct members (up to 40,000 with affiliate members), including private criminal defense lawyers, public defenders, law professors, and judges. The only nationwide professional bar association for public defenders and private criminal defense lawyers, NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. It files numerous *amicus curiae* briefs each year in this Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL submits this brief in support of petitioner because the issues presented here—namely, the proper *mens rea* for the crime of collecting an unlawful debt under the Racketeer Influenced and Corrupt Organizations Act ("RICO") and the scope of "property" under the federal fraud statutes—implicate areas of great concern to criminal defendants and defense lawyers throughout the country.

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[1] All parties have consented to the filing of this brief and received timely notice of *amicus'* intent to file as required by Rule 37. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Criminal law works only when it punishes people who choose to do wrong freely. Otherwise, prosecutors wield too much authority; criminal punishments lose their power to deter and rehabilitate; and the moral authority of our criminal justice system is diminished. Judges and scholars have recognized this for centuries. Yet the Court of Appeals here cut a new—and dangerous—path. In affirming petitioner's RICO conviction for conducting the affairs of an enterprise through "collection of an unlawful debt"—a crime lacking an explicit scienter requirement—the Third Circuit said lenders can be sent to federal prison for knowingly collecting debt that *happens to be* unlawful under a welter of state and tribal usury laws. That conclusion violates settled background principles requiring an "evil mind" and thus knowledge that the debt is indeed "unlawful." It conflicts with decades of precedent from this Court and others. And it turns this serious RICO offense into a trap for the unwitting. The Court should rectify the Third Circuit's error.

The Court should also correct the Third Circuit's separate—but equally erroneous—reading of the federal fraud statutes. The Court of Appeals held, without precedent, that lying during civil proceedings deprives litigants of "property," in the form of unvested legal claims, and is therefore fraud under federal law. Were that true, every instance of perjury under state law would also be a federal felony. That is plainly untenable. This Court has consistently rejected similarly sweeping expansions of federal criminal jurisdiction in the past, and it should do so again here. Unvested legal claims, unlike judgments creating a legal entitlement to money, are not property.

ARGUMENT

I. THE COURT SHOULD REVIEW THE SCIENTER ELEMENT OF RICO'S UNLAWFUL-DEBT OFFENSES.

The RICO statute is best known for its prohibitions on conducting the affairs of an enterprise through a pattern of "racketeering activity." But the statute also forbids conducting the affairs of an enterprise through the "collection of unlawful debt." 18 U.S.C. § 1962(c). Debt is "unlawful" if it is unenforceably usurious and arose from a usurious lending business. *Id.* § 1961(6).

The question in this case concerns the element of scienter for this serious federal crime. For decades, courts uniformly accepted that an individual does not violate these prohibitions unless he collects debt that he *knows to be* "unlawful"—and thus acts *willfully* to violate the law. *See, e.g.*, *United States v. Biasucci*, 786 F.2d 504, 513 (2d Cir. 1986); *United States v. Aucoin*, 964 F.2d 1492, 1498 (5th Cir. 1992); *United States v. Pepe*, 747 F.2d 632, 676 (11th Cir. 1984). Under that rule, a good-faith belief that the debt was lawful would be a complete defense to the RICO charges.

In its decision below, however, in an unprecedented ruling, the Third Circuit held otherwise: It suffices if the defendant knowingly collected debt that *happens to be* "unlawful"—*i.e.*, there is no willfulness element to the offense. Pet. App. 11a. Per the Court of Appeals, the Government "need only prove that a defendant knew that the debt collected 'had the characteristics that brought it within the statutory definition of an unlawful debt.'" *Id.* In other words, if a 25% rate is usurious, and the defendant knew he was collecting a debt incurred at a 25% rate, he is guilty, even if he did not know that a 25% rate is unlawful.

That holding, in conflict with the long-held judicial understanding of this statute, is wrong and untenable, and it is important that this Court correct it.

A. The decision below is plainly wrong under a straightforward application of the Court's decision in *Liparota v. United States*, 471 U.S. 419 (1985). The statute in that case forbade the use or acquisition of food stamps in a manner "not authorized" by the relevant law and regulations. *See id.* at 420. Like the statute here, that left room for ambiguity regarding whether a defendant must *know* that his conduct is legally unauthorized, or whether it is enough if he knowingly engages in conduct that, as a matter of fact, is unauthorized by law. Recognizing that ambiguity, this Court invoked the "background assumption of our criminal law" that conduct is criminal "only when inflicted by intention." *Id.* at 426-27. Accordingly, the Court read the statute to "require[] a showing that the defendant knew his conduct to be unauthorized by statute or regulations." *Id.* at 425.

RICO's "unlawful debt" provisions present precisely the same ambiguity: To commit this offense, must the defendant know the debt being collected is unlawful? As in *Liparota*, and "[a]bsent indication of contrary purpose in the language or legislative history," *id.*, the answer should be yes. The background principle that a crime requires an "evil-meaning mind," *Morissette v. United States*, 342 U.S. 246, 251 (1952), calls for resolving the ambiguity in favor of requiring scienter as an element of the offense. So does the venerable canon of construction that any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971) (quoted by *Liparota*, 471 U.S. at 427).

To be sure, it is a general principle that "ignorance of the law is no excuse." But the critical point, as the *Liparota* Court explained, is that the statute there—like the statute here—includes "a legal element in the definition of the offense." 471 U.S. at 425 n.9. The defendant therefore cannot be said to have committed the crime with the requisite *mens rea* unless he knew that this "legal element" was satisfied. That is not a "mistake of law" defense, because "it is not a defense ... that one did not know that possessing food stamps in a manner unauthorized by statute or regulations was illegal." *Id.* It is, however, a defense "that one did not know that one's possession was unauthorized." *Id.* To extend that logic to this case, it would not be a defense that one did not know that collecting illegal debt is a RICO violation. It would, however, be a defense that that one did not know that the debt was "illegal."

The Third Circuit's contrary holding is also untenable, as it would effectively turn this serious offense—punishable by up to 20 years in prison, *see* 18 U.S.C. § 1963(a)—into a strict liability crime, thereby "criminaliz[ing] a broad range of apparently innocent conduct." *Liparota*, 471 U.S. at 426.

A couple examples will illustrate the problem. *First*, consider petitioner here, who genuinely believed and was advised that loans issued with Indian tribes are governed by tribal law. Perhaps that individual could still be convicted of usury *simpliciter*, despite his good-faith error. But to convict him of *RICO violations* is beyond the pale. Of course, a properly instructed jury could find as a matter of fact that petitioner did not truly believe the loans were lawful. But this jury was never asked to make that finding, and the Court of Appeals held that such a finding was *unnecessary*.

Or consider a lender who is confused by the choice-of-law implications of an interstate loan. Say that he believes, reasonably and in good faith, that the loan is governed by the law of a state that does not outlaw usury. The district court concludes otherwise. Under the Third Circuit's construction, that is a federal crime—even if a jury would have accepted that the defendant acted reasonably and in good faith. Does it make any sense to lock that person up for 20 years? Could that really be what Congress meant when it prohibited collecting "unlawful" debt? Surely not.

The Third Circuit's confused rationale does not address these problems. To distinguish *Liparota*, the court invoked the following syllogism: "Reasonable people would know that collecting unlawful debt is unlawful." Pet. App. 11a. Reasonable people would likewise know that unauthorized use of food stamps is unauthorized. Petitioner's whole point is that, for that proposition to apply, the defendant must know that the debt is unlawful or that the use of the stamps is unauthorized—*i.e.*, a "willfulness" state of scienter. Yet the district court instructed otherwise: that the prosecutors did "not need to prove" that petitioner "knew that the criminal usury rate was 25 percent or that the enforceable rate of interest was six percent," and that it was enough if he "generally kn[e]w the facts that ma[d]e his conduct fit into the definition of the charged offense." Pet. App. 126a. The reasoning of the Court of Appeals is thus not responsive.

The Third Circuit also analogized to *Carter v. United States*, in which this Court ruled that a general intent standard suffices for an offense involving the "forceful taking" of property. 530 U.S. 255, 269-70 (2000). But engaging in a voluntary loan transaction,

by contrast, is not *malum in se*; indeed, not every state prohibits usury. The two offenses are only comparable if the defendant intends to collect "illegal" debt—*i.e.*, acts willfully, knowing the debt to be illegal. Again, that is precisely what the Third Circuit erroneously held was *not* required.

B. Correcting this error is gravely important. Criminal law "governs the strongest force that we permit official agencies to bring to bear on individuals," and its "promise as an instrument of safety is matched only by its power to destroy." Wechsler, *The Challenge of A Model Penal Code*, 65 Harv. L. Rev. 1097, 1098 (1952). Accordingly, criminal law "must be firmly grounded in fundamental principles of justice," Walsh & Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, at 3 (Heritage Found. & NACDL 2010), *available at* https://tinyurl.com/rg7eyvu ("*Without Intent*"), and one such fundamental principle is that "wrongdoing must be *conscious* to be criminal," *Morissette*, 342 U.S. at 252 (emphasis added).

This principle—that "[t]here can be no crime, large or small, without an evil mind," Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 974 (1932)—is not "provincial or transient," *Morissette*, 342 U.S. at 250. "It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Id.* "Biblical, Greek, Roman, Continental and Anglo-American law" have all recognized that the criminal law's purpose is to punish only those "free agent[s]" who, when "confronted with a choice between doing right and doing wrong," "choos[e] freely to do wrong." *Id.* at 250 n.4.

These principles serve the pragmatic aims of our system of criminal justice. Requiring a "vicious will" promotes deterrence, for example. A prospective wrongdoer can consciously choose to avoid conduct punished as criminal "if the offense is a matter which the will can control." Radin, *Criminal Intent*, 7 Encycl. Soc. Sci. 126, 126 (1932) ("*Criminal Intent*"). But if the offense requires no showing of evil will—such as the "offense" of collecting a debt reasonably and in good faith thought to be lawful—"imprisonment loses its moral opprobrium" and thus its power to deter. *United States v. Weitzenhoff*, 35 F.3d 1275, 1293 (9th Cir. 1993) (Kleinfeld, J., dissenting from denial of rehearing en banc). The same is true for rehabilitation: "[I]t is only the wicked will that can be the subject of correction and reformation." *Criminal Intent*, *supra* at 126. How (and why) would one "correct" the will to engage in conduct reasonably and in good faith believed to be lawful? Deterrence and rehabilitation are thus "illusory" absent this "mental element." *Morissette*, 342 U.S. at 251 n.5.

Robust *mens rea* requirements also act as a critical check on the "vast power" and "immense discretion … in the hands" of prosecutors. *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting). As this Court has recognized, the "obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction." *Morissette*, 342 U.S. at 263. The easier a case is to try, the more power a prosecutor wields in plea negotiations, and the more concentrated government authority becomes. At bottom, "[d]ilution of the traditional requirement of a criminal state of mind ... reduces the moral authority

of our system of criminal law" as a whole. *Weitzenhoff*, 35 F.3d at 1293 (opinion of Kleinfeld, J.).

This problem will not fix itself. Congress has enacted offenses that at least appear not to require scienter at an accelerating rate. For example, a 2010 study conducted by *amicus* NACDL, in partnership with the Heritage Foundation, found that over 57% of the 466 non-violent and non-drug criminal offenses considered by the 109th Congress included only a weak *mens rea* requirement—such as "us[ing] the terms 'knowingly' or 'intentionally' in a blanket manner or as part of the introductory language of the offense"—or no *mens rea* at all. *Without Intent*, *supra* at 12, 35. Despite this decrease in clear *mens rea* requirements, however, this Court has been a bulwark against attempts to interpret federal criminal statutes as criminalizing innocent conduct. *E.g.*, *Liparota*, 471 U.S. 419. The same result is justified here.

II. THE COURT SHOULD REVIEW WHETHER A LEGAL CLAIM CONSTITUTES "PROPERTY" UNDER THE FRAUD STATUTES.

The Third Circuit separately erred by holding that a litigant commits property fraud by lying, in the course of civil litigation, about facts that could affect the perceived value of a cause of action. Petitioner was thus convicted of criminal fraud for falsely testifying at his deposition about his relationship with a certain corporate entity, on the theory that this lie deprived the civil plaintiffs of their unvested cause of action. *See* Pet. App. 3a-5a, 14a-15a.

Treating a mere cause of action as "property" threatens to transform every act of perjury into wire fraud, thereby conflicting with this Court's repeated

teaching that "property" under these criminal statutes must be limited to traditional property rights.

As this Court explained in *Cleveland v. United States*, the fraud statutes should not be construed in a manner that would effect "a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." 531 U.S. 12, 24 (2000). In that case, the Court rejected a broad interpretation of "property" that "would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities." *Id.* And the Court emphasized that, in construing that ambiguous term, the rule of lenity is an "especially appropriate" tool, given that mail and wire fraud are predicates for both RICO and money laundering offenses, which carry exceptionally harsh penalties. *Id.* at 25.

The Court of Appeals' decision runs afoul of those principles. Perjury in civil litigation is traditionally regulated by the states, yet the Third Circuit's view would turn every such instance of state perjury into a federal felony. It would also inject federal prosecutors into every civil settlement negotiation, searching for misrepresentations and duties to disclose. That would effect a truly "sweeping expansion" of federal criminal jurisdiction. *Id.* at 24. To NACDL's knowledge, this is an unprecedented extension of the statute.

The much better reading is that a mere cause of action is not "property" under the statute. Of course, when a cause of action is reduced to a *judgment*, that judgment is a legal entitlement to money and so itself constitutes a property right. *See Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Elahi*, 556 U.S. 366, 381 (2009) (noting that a

judgment is "for certain" a type of property). But a mere cause of action is simply a *potential* claim that does not yet have any attributes of property.

The Third Circuit reasoned that a "right to be paid money" is property under the fraud statutes. Pet. App. 14a (quoting *Pasquantino v. United States*, 544 U.S. 349, 356 (2005)). True, but a cause of action is not a right to be paid money. Only a judgment is. A cause of action is just an unadjudicated legal claim—*i.e.*, an *assertion* that one is entitled to be paid money. That is not a traditional property right.

The Third Circuit also cited cases recognizing that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Id.* (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)). But the Due Process Clause carries no criminal implications and thus, unlike the mail- and wire-fraud statutes, does not trigger the rule of lenity. *Cf. Cleveland*, 531 U.S. at 25. Litigants are entitled to constitutional due process when they assert claims, but that doesn't mean that someone who tells a lie in the course of adjudicating such a claim has necessarily committed federal fraud.

In the alternative, NACDL suggests that the Court hold this petition for *Kelly v. United States* (No. 18-1059), which involves review of another Third Circuit decision adopting an unduly broad reading of "property" under the mail- and wire-fraud statutes. Petitioner in *Kelly* has asked the Court to reiterate that the fraud statutes prohibit only the deprivation of traditional property rights, not (in that case) the sovereign right to make policy decisions about the use of public resources. This Court's analysis of the

"property" element could undercut the Third Circuit's broad interpretation of that term in this case and thus warrant a GVR for reconsideration.

CONCLUSION

The Court should grant the petition and reverse the judgment below.

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