No. 14-12373

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

PETER E. CLAY, et al.,
Appellants.

Appeal from the United States District Court
for the Middle District of Florida
No. 8:11-cr-00115-JSM-MAP
The Honorable James S. Moody, Jr.

BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, WASHINGTON LEGAL FOUNDATION, CATO INSTITUTE, REASON FOUNDATION AND TWELVE CRIMINAL AND BUSINESS LAW PROFESSORS IN SUPPORT OF DEFENDANT-APPELLANT TODD S. FARHA'S PETITION FOR REHEARING AND REHEARING *EN BANC*

Jonathan S. Jeffress
Adam Zurbriggen
KAISER DILLON PLLC
1401 K Street, NW, Ste. 601
Washington, DC 20005
T: (202) 640-2850
jjeffress@kaiserdillon.com

Shana-Tara O'Toole
Director, White Collar Crime Policy
National Association of Criminal Defense Lawyers (NACDL)
1660 L Street, NW, 12th Fl.
Washington, DC 20036
T: (202) 465-7627

William N. Shepherd
HOLLAND & KNIGHT LLP
222 Lakeview Ave., Ste. 1000
West Palm Beach, FL 33401
T: (561) 833-2000
william.shepherd@hklaw.com

Date: September 12, 2016

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the National Association of Criminal Defense Lawyers states that it is a corporation organized under section 501(c)(6) of the Internal Revenue Code. It has no parent corporation or any stock owned by a public company.

Pursuant to Federal Rule of Appellate Procedure 26.1, the Washington Legal Foundation, the Cato Institute, and the Reason Foundation state that they are nonprofit corporations organized under section 501(c)(3) of the Internal Revenue Code. They have no parent corporation or any stock owned by a public company.

Pursuant to Eleventh Circuit Rule 26.1-1, the *amici* identify themselves and their counsel as persons interested in the outcome of this case:

*Antos, Joseph *(amicus curiae)*

Cato Institute (*amicus curiae*)

Dervan, Lucian E. (*amicus curiae*)

Gallini, Brian (*amicus curiae*)

Griffin, Lissa (*amicus curiae*)

*Hasnas, John (*amicus curiae*)

Jeffress, Jonathan S. (counsel for *amici curiae*)

Krause, Joan H. (*amicus curiae*)

Leo, Richard A. (*amicus curiae*)

*National Association of Criminal Defense Lawyers (*amicus curiae*)

O'Sullivan, Julie Rose (*amicus curiae*)

*Parker, Jeffrey (*amicus curiae*)

Reason Foundation (*amicus curiae*)

Robbins, Ira P. (*amicus curiae*)

*Saltzburg, Stephen (*amicus curiae*)

*Shepherd, William N. (counsel for *amici curiae*)

*Smith, Stephen F. (*amicus curiae*)

Washington Legal Foundation (*amicus curiae*)

Yaffe, Gideon (*amicus curiae*)

Zurbriggen, Adam (counsel for *amici curiae*)

*Interested persons marked by an asterisk appeared as *amicus* or counsel before the panel. The briefs already filed in this matter have identified all of the remaining persons so interested.

/s/ William N. Shepherd
William N. Shepherd
HOLLAND & KNIGHT LLP
222 Lakeview Ave., Suite 1000
West Palm Beach, FL 33401
T: (561) 833-2000

Attorney for Amici Curiae National Association of Criminal Defense Lawyers, et al.

RULE 35-5(c) CERTIFICATION

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of the Supreme Court of the United States and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

Global-Tech Appliances, Inc. v. SEB S.A.,
563 U.S. 754, 131 S. Ct. 2060 (2011)

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance:

Whether a jury instruction permitting conviction upon a finding of deliberate indifference is proper for a criminal statute requiring proof of knowledge.

/s/ William N. Shepherd
William N. Shepherd
Counsel for Amici *National Association of Criminal Defense Lawyers, et al.*

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

The *amici curiae* are the National Association of Criminal Defense Lawyers, the Washington Legal Foundation, the Cato Institute, the Reason Foundation, and Twelve Criminal and Business Law Professors Lucian E. Dervan, Brian Gallini, Lissa Griffin, John Hasnas, Joan H. Krause, Richard A. Leo, Julie Rose O'Sullivan, Jeffrey Parker, Ira P. Robbins, Stephen Saltzburg, Stephen F. Smith, and Gideon Yaffe.[2] Their identity and interests are more fully described in the Motion for Leave To File *Amici Curiae* Brief and in the Addendum to this brief.

All *amici* are concerned that the panel in this case sanctioned a jury instruction on *mens rea* that would allow "deliberate indifference" to suffice to prove a knowing violation of criminal law, contrary to the Supreme Court's decision in *Global-Tech Appliances, Inc. v. SEB S.A.,* 563 U.S. 754 (2011) and fundamental principles of justice. If left to stand, *mens rea* would be so eroded as to criminalize conduct that would not even be sufficient to impose liability in some civil fraud or contract disputes with the government.

---

[1] Counsel for no party to this appeal authored any part of this brief. No person who is not an *amicus*, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

[2] The law school professors' appearance as *amici* do not purport to present their school's institutional views, if any.

ISSUE WARRANTING EN BANC CONSIDERATION

Whether, under *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011), a jury instruction permitting conviction upon a finding of deliberate indifference is proper for a criminal statute requiring proof of knowledge.

STATEMENT OF THE RELEVANT FACTS[3]

Under Florida's so-called "80/20 Statute," managed care plans were required to spend at least 80 percent of such Medicaid funds given them for "the provision of behavioral health care services," or refund the difference to Florida's Agency for Health Care Administration (AHCA). This prosecution arises from a dispute over the methodology for calculating expenditures for "the provision of behavioral health services." In short, the issue is whether WellCare executives could include in that 80 percent the amounts they paid to a wholly-owned subsidiary.

The healthcare fraud statute criminalizes conduct where a person knowingly and willfully executes a scheme to defraud by means of false or fraudulent representations related to a material fact *and* acted willfully and intended to defraud. *See* 18 U.S.C. § 1347(a). The government must thus prove beyond a reasonable doubt that the defendants had the *mens rea* for both the false submissions *and* intent to defraud.

[3] The *amici* adopt the Statement of Facts at pages 2-6 of the Petition for Rehearing and Rehearing *En Banc* Defendant-Appellant Todd S. Farha ("Appellant's petition"). They recite here only those facts necessary as background for their arguments in this brief.

Unfortunately, the district court did not require the jury to find that Defendants knew the Plans' submissions were "false representations" before convicting them of healthcare fraud. Instead, the court instructed the jury that it could convict if either (1) Defendants knew the Plans' submissions were "untrue" *or* (2) they acted "with *deliberate indifference* as to the truth" of the submissions. The district court did so over Defendants' objections, based on *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011), that "deliberate indifference" cannot substitute for a statutory knowledge requirement. The jury found various Defendants guilty of healthcare fraud in connection with certain of the Plans' submissions. *Amici* submit the source of the confusion was the defective jury instructions.

ARGUMENT

The concept of knowledge is central to American notions of criminal responsibility. Courts have long relied upon the bedrock principle that a defendant must have knowledge of the underlying facts giving rise to criminal liability in order to be adjudged guilty of an offense. *See, e.g., United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994) (statute criminalizing distribution of child pornography requires defendant knew that those depicted are minors, as that is "the crucial element separating legal innocence from wrongful conduct"); *Staples v. United States*, 511 U.S. 600, 618 (1994) (statute criminalizing machine gun

ownership requires proof that defendant knew that his weapon possessed automatic firing capability); *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 524 (1994) (conviction for the sale of drug paraphernalia requires proof that defendant knew items were likely to be used with drugs); *Liparota v. United States*, 471 U.S. 419, 420 (1985) (statute criminalizing the possession of food stamps in an unauthorized manner requires that defendant knew facts that made use of food stamps unauthorized). While courts have permitted a single variant of the knowledge *mens rea* in the form of "willful blindness," that doctrine is very limited and sparingly employed.[4]

The district court's substantive jury instruction defining false representations, and the appellate panel's opinion upholding that instruction, represent a significant departure from this established tradition. By permitting a criminal conviction based on "deliberate indifference" towards the accuracy of one's statements—as opposed to knowledge of their falsity—the panel's opinion would fundamentally alter the jurisprudential landscape for numerous federal offenses and dramatically expand the bounds of federal criminal liability. The opinion would incorporate a standard

[4] Courts have generally permitted willful blindness to serve as a proxy for knowledge under the view that a willful blindness instruction is not supplanting knowledge at all, but rather providing an alternative method for the government to prove that the defendant committed the offense knowingly. *See, e.g., United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990); *see also Global-Tech*, 563 U.S. at 766 ("It is . . . said that persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts.").

reserved primarily for determining *civil* liability into federal *criminal* law. In doing so, the panel's decision would ignore the vital separation of powers and also further open the already-porous floodgates of over-criminalization, transferring an even greater amount of discretion to federal prosecutors currently vested with ample options for turning the average citizen into a federal criminal defendant.

Given the fundamental nature of the legal question underlying Appellant's petition, as well as the exceptionally high stakes at issue, *amici* respectfully urge the Court to grant the petition for rehearing and rehearing *en banc*, hold that "deliberate indifference" is not a legally adequate alternative for the *mens rea* of knowledge, and remand for a new trial.

THE COURT SHOULD GRANT APPELLANT'S PETITION FOR REHEARING AND REHEARING *EN BANC*.

"In a criminal appeal where a *mens rea*-related jury instruction may have made a difference to the conviction and sentence, it is critically important that the jury had a correct understanding of the relevant law." *United States v. Williams*, -- F.3d --, 2016 WL 4576023, *9 (D.C. Cir. Sept. 3, 2016) (Kavanaugh, J., concurring); *see also id.* at *15 (concurring to reverse the appellant's murder conviction "to underscore the critical importance of accurate instructions to the jury on *mens rea* requirements"). There are at least three reasons why, contrary to the *Clay* panel's opinion, the jury in this case was erroneously instructed when the district court allowed "deliberate indifference" to supplant knowledge as an

operative *mens rea* requirement under 18 U.S.C. § 1347. First, the Supreme Court in *Global-Tech* answered definitively any question about whether proof of "deliberate indifference" suffices to demonstrate knowledge—the answer was "no." And contrary to the panel's characterization, *Global-Tech* was not limited to actions for induced patent infringement. Second, vitiating the knowledge requirement through the significantly lower "deliberate indifference" standard would undermine the *mens rea* safeguard by replacing a criminal standard with a civil one. While punishing reckless but not knowingly fraudulent or false representations is permissible in some civil and regulatory settings, recklessness is not the operative standard under 18 U.S.C. § 1347 or any number of other federal criminal statutes where knowledge is an element. Third, and relatedly, permitting "deliberate indifference" to pass for "knowledge" has potentially disastrous consequences for the federal criminal code generally. Among other ill effects, this fundamental change in how criminal statutes are defined—and therefore proven—would tip the already skewed balance between criminalization and over-criminalization in precisely the wrong direction, expanding even further the power of prosecutors to indict and imprison those whose conduct was merely reckless.

A. The Supreme Court In *Global-Tech* Expressly Held That "Deliberate Indifference" Is A Less Demanding And Therefore Inadequate Formulation Of "Knowledge."

The requirement that one must understand the falsity of one's representations in order to be convicted of violating a statute involving false statements is firmly ensconced in criminal law. Courts have jealously guarded this requirement, consistently rejecting the lower standard of deliberate indifference (which is the same as recklessness) as an adequate *mens rea* standard.[5]

To the extent there was any doubt about the above, the Supreme Court definitively resolved this issue in *Global-Tech*. *Global-Tech* involved an action for inducing patent infringement under 35 U.S.C. § 271(b). Although the statutory language of § 271(b) makes no mention of intent, the Court inferred from the text that a plaintiff must prove a mental state of knowledge. *See Global-Tech*, 563 U.S. at 760. The Court then considered whether proof of willful blindness satisfied the knowledge requirement, and answered that question in the affirmative. *Id.* 766-68. The Court also held, however, that the "deliberate indifference" standard the lower

[5] The Supreme Court has expressly stated that "deliberate indifference" is considered the "equivalent [of] reckless[ness]." *Farmer v. Brennan,* 511 U.S. 825, 836 (1994). *See also United States v. Francisco-Lopez*, 939 F.2d 1405, 1411 (10th Cir. 1991); *United States v. Kelm*, 827 F.2d 1319, 1324 (9th Cir. 1987); *United States v. Hanlon*, 548 F.2d 1096, 1101-02 (2d Cir. 1977) (condemning use of the word "reckless" in a deliberate ignorance jury instruction); Alexander F. Sarach, *Willful Ignorance, Culpability, and the Criminal Law*, 88 St. John's L. Rev. 1023, 1031-1040 (2014) (discussing how willful ignorance differs from recklessness).

court had relied upon "departed from the proper willful blindness standard" as, *inter alia*, it failed to "require active efforts by an inducer to avoid knowing about the infringing nature of the activities." *Id.* The Court noted that, contrary to the "deliberate indifference" standard, an appropriate willful blindness theory *excludes* "a reckless defendant . . . who merely knows of a substantial and unjustified risk of . . . wrongdoing." *Id.* at 770.

The *Global-Tech* Court's rejection of the "deliberate indifference" standard as a substitute for knowledge or even willful blindness did not turn on the specific context of the case.[6] To the contrary, the Court engaged in an extended discussion of the *mens rea* requirements of criminal law, citing the Model Penal Code and numerous criminal cases in order to resolve the proper *mens rea* for actions brought under § 271(b) and whether a willful blindness instruction was appropriate. *See id.* at 768 (holding that "[g]iven the long history of willful blindness and its wide acceptance in the Federal Judiciary, we can see no reason why the doctrine should not apply in civil lawsuits for induced patent infringement under 35 U.S.C. § 271(b)").

Diminishing the *mens rea* for healthcare fraud under 18 U.S.C. § 1347 from knowledge to "deliberate indifference" plainly conflicts with *Global-Tech* and the

[6] Indeed, as *Global-Tech* was a civil patent-infringement case instead of a criminal one where the loss of liberty was at stake, the Supreme Court's willingness to accept a lower *mens rea* requirement such as deliberate indifference would have been greater, not less.

large body of *mens rea* case law the Supreme Court drew upon. As a result, *amici* respectfully submit that the Court should grant Appellant's petition for rehearing and reject the use of "deliberate indifference" as a substitute for knowledge.

B. "Deliberate Indifference" Is Not Knowledge.

Under the Model Penal Code ("the Code"), knowledge of a fact is satisfied by finding an "awareness of a high probability" that it existed. Model Penal Code § 2.02(7). The drafters of the Code have explained that they defined knowledge in this manner so as to also include "willful blindness," which courts and commentators have also described as "deliberate ignorance," "conscious avoidance," "purposeful avoidance," "willful ignorance," "deliberate shutting of the eyes," and a "conscious purpose to avoid the truth." *Id.* § 2.02(7) cmt. 9. All of these variations, however, reflect the same essential purpose of the willful blindness doctrine, which is to reach the defendant who has intentionally structured matters so as to later maintain plausible deniability as to his knowledge of facts.

The "deliberate indifference" standard the panel endorsed here is significantly different in kind and would vitiate § 1347's knowledge requirement. *See, e.g., Farmer*, 511 U.S. at 835 (noting that "the cases are . . . clear that [deliberate indifference] is satisfied by something less than . . . knowledge"); *see also id.* ("[D]eliberate indifference l[ies] somewhere between the poles of negligence at one end and . . . knowledge at the other."). Use of the lower standard

would sweep in far less culpable defendants by, *inter alia*, greatly expanding the available kinds of proof. Allowing "deliberate indifference" to serve as a proxy for knowledge would incorporate a civil standard of liability into federal criminal law; an assimilation the Supreme Court has resisted. *See, e.g., Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) (declining to adopt recklessness as standard for federal threats statute, 18 U.S.C. § 875(c)). Indeed, the facts of *Clay* underscore this danger, where, in a closely analogous context involving another health care provider, Florida Health Partners, AHCA ultimately accepted the company's similar methodology and settled the civil case for *nothing*. *See* Brief of Appellant Paul L. Behrens at 65 n.31; Reply Brief of Appellant Paul L. Behrens at 14 n.7. This kind of disparate treatment of similarly situated actors is an inevitable consequence of weakening protections as fundamental as *mens rea* standards.

Furthermore, even in the civil context, courts do not find that a defendant "knowingly" made false statements where the defendant could reasonably have believed that the submissions were not, in fact, false. *See, e.g., United States ex rel. Donegan v. Anesthesia Assoc. of Kansas City, PC* -- F.3d --, 2016 WL 4254939, **3-4 (8th Cir. Aug. 12, 2016) (holding that relator's claim that Medicare provider submitted *arguably* false claims "belie[d] the scienter necessary to establish a claim of fraud under the" False Claims Act and was "'a claim of regulatory noncompliance,' not 'an FCA claim of knowing fraud'" (quoting *United States ex*

rel. Ketroser v. Mayo Found., 729 F.3d 825, 831-32 (8th Cir. 2013))). Where the law does not even impose *civil* liability, it cannot be that an individual should face the loss of his or her liberty.

C. Permitting Knowledge To Be Satisfied By Proof Of "Deliberate Indifference" Would Eliminate An Essential Check On Prosecutorial Power, Violate The Separation Of Powers, And Open The Floodgates For Further Overcriminalization.

There are a wide variety of offenses requiring knowledge as the governing *mens rea*. These "state of mind, or *mens rea*, requirements are of vital importance in preventing morally undeserved punishment and guaranteeing the fair warning necessary to enable law-abiding citizens to avoid committing crimes." Stephen F. Smith, *A Judicial Cure for the Disease of Overcriminalization* (Heritage Foundation, Legal Memorandum No. 135, Aug. 21, 2014) at 3.

Displacing the requirement of knowledge with a watered-down "deliberate indifference" standard would eliminate an essential layer of protection for ordinary Americans while transferring even greater power to federal prosecutors—a group in no need of further discretion. *See, e.g., Yates v. United States*, 135 S. Ct. 1074, 1100-01 (2015) (Kagan, J., dissenting) (discussing the "overcriminalization and excessive punishment in the U.S. Code" and noting that the statute at issue, by "giv[ing] prosecutors too much leverage" is "an emblem of a deeper pathology in the criminal code"); *see also* Paul J. Larkin, Jr., *Regulation, Prohibition, and*

Overcriminalization: The Proper and Improper Uses of the Criminal Law, 42 Hofstra L. Rev. 745 (2014). Under this newly assimilated standard, any number of disputes currently resolved civilly would become potentially criminal, supplementing further the prosecutorial quiver with many additional arrows.

Downgrading a knowledge requirement to "reckless indifference" also implicates concerns regarding the separation of powers. Congress enacted the federal fraud and false statement statutes against a backdrop of the judicial branch's requiring that a defendant have knowledge of the underlying facts making his or her conduct illegal. *See, e.g., X-Citement Video*, 513 U.S. at 70; *Staples*, 511 U.S. at 618; *Posters 'N' Things*, 511 U.S. at 524; *Liparota*, 471 U.S. at 420. When "the judiciary substitutes a lesser mental state for statutorily prescribed knowledge, then it encroaches on the legislative prerogative of defining criminal conduct." Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal* Mens Rea, 81 *Journal of Crim. L and Criminology* 2, 194-95 (1990); *see also United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 93 (1820) ("It is the legislature, not the court, which is to define a crime and ordain its punishment."); Julie R. O'Sullivan, *Federal White Collar Crime* (6th ed. 2016), Sec. D, at 7 ("If Congress meant to demand only recklessness, it could have and would have said so. Reading a statute that demands 'knowledge' to be satisfied by 'recklessness,' then, contravenes long-established distinctions in degrees of *mens rea* as well as congressional intent.").

Moreover, in the specific context of 18 U.S.C. § 1347, Congress explicitly criminalized only the behavior of those persons who "knowingly and willfully execute[], or attempt[] to execute, a scheme or artifice" to commit health care fraud (emphasis added). Their use of the combined phrase "knowing and willful" is powerful evidence of the fact that the legislature did not intend to allow prosecutors to graft on lesser standards—or allow merely reckless behavior to be enough to send someone to jail—and this Court should not countenance the government's attempts to replace a Congressional mandate with its own judgment.

The Court need not look far to recognize the sweeping changes that would result to the federal criminal code were proof of "deliberate indifference" deemed sufficient for knowledge. There are numerous federal criminal provisions that currently require a *mens rea* of knowledge and would therefore be affected.[7]

[7] *See, e.g.* 18 U.S.C. § 1001(a) (knowingly making false statements to an executive, legislative, or judicial branch of the U.S. government); 18 U.S.C. § 1015(a), (c), (d) (multiple crimes relating to naturalization, citizenship status, or alien registry); 18 U.S.C. § 641 (knowingly converting a voucher, money, or thing of value of the United States for personal use); 18 U.S.C. § 1425 (knowingly procuring or attempt to procure the naturalization of an alien with unlawful documentary evidence); 18 U.S.C. § 1542 (knowingly making any false statement on passport application);18 U.S.C. § 2314 (knowingly transporting falsely made, forged or counterfeited securities in interstate commerce); 18 U.S.C. § 152(1-6)(8)(9) (multiple crimes relating to concealment of assets and false oaths); 18 U.S.C. § 2252(a) (knowingly transporting or receiving child pornography via interstate or foreign commerce). In addition to these general intent offenses, which require that a defendant act with "knowledge," there are many specific intent offenses would also be affected, as they, like the statute at issue in this case, require general "knowledge" in addition to a specific intent to accomplish a certain end. *See, e.g.*, 18 U.S.C. § 1519

Amici respectfully submit that neither the law nor sound policy supports vitiating the *mens rea* requirement for 18 U.S.C. § 1347 or the numerous other federal statutes potentially impacted under the panel's opinion. "A core principle of the American system of justice is that individuals should not be subjected to criminal prosecution and conviction unless they intentionally engage in inherently wrongful conduct or conduct that they know to be unlawful. Only in such circumstances is a person truly blameworthy and thus deserving of criminal punishment. This is not just a legal concept; it is the fundamental anchor of the criminal justice system."[8]

CONCLUSION

For all of the above reasons, *amici* NACDL, *et al*., respectfully urge the Court to grant Appellant's petition for rehearing and rehearing *en banc.*

(destruction, alteration, or falsification of records in federal investigations and bankruptcy); most offenses under 18 U.S.C. § 1029 (fraud and related activity in connection with access devices); 18 U.S.C. § 1031 (major fraud against the United States); 18 U.S.C. § 1002 (possession of false papers to defraud United States).

[8] Brian Walsh and Tiffany Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*, The Heritage Found & NACDL, April 2010, *available at* www.nacdl.org/WithoutIntent.

Respectfully submitted,

/s/ William N. Shepherd
William N. Shepherd
HOLLAND & KNIGHT LLP
222 Lakeview Ave., Suite 1000
West Palm Beach, FL 33401
T: (561) 833-2000
william.shepherd@hklaw.com

Jonathan S. Jeffress
Adam Zurbriggen
KAISER DILLON PLLC
1401 K Street NW, Ste. 601
Washington, DC 20005
T: (202) 640-2850
F: (202) 280-1034
jjeffress@kaiserdillon.com

Shana-Tara O'Toole
Director, White Collar Crime Policy
National Association of Criminal
Defense Lawyers (NACDL)
1660 L Street, NW, 12th Fl.
Washington, DC 20036
T: (202) 465-7627

Attorneys for Amici Curiae National Association of Criminal Defense Lawyers, Washington Legal Foundation, Cato Institute, Reason Foundation and Twelve Criminal and Business Law Professors

ADDENDUM

IDENTITY OF *AMICI CURIAE*

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. A professional bar association founded in 1958, NACDL's many thousands of direct members in 28 countries—and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. NACDL is recognized by the American Bar Association as an affiliated organization, and has full representation in the ABA's House of Delegates.

NACDL files numerous *amicus curiae* briefs each year in the U.S. Supreme Court, the federal courts of appeals, the highest courts of numerous states, and other 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 has a particular interest in this case because of the importance of *mens rea* requirements in criminal law and the protection for behavior that is non-criminal in nature. NACDL is also concerned

about the use of the criminal law as an enforcement mechanism in what would otherwise be a contract dispute subject to state civil and/or administrative adjudication.

The Washington Legal Foundation (WLF) is a public interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited, accountable government, and the rule of law. As part of its ongoing Business Civil Liberties Project, WLF has regularly appeared as amicus curiae before the Supreme Court and numerous other federal and state courts in cases addressing the proper scope of criminal prosecutions against members of the business community. In addition, WLF's Legal Studies Division, the publishing arm of WLF, frequently publishes articles and sponsors media briefings on the problem of overcriminalization—the growing trend at the federal level to criminalize ordinary business activities.

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 promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and

studies, conducts conferences, issues the annual *Cato Supreme Court Review,* and files amicus briefs.

The Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason magazine, as well as commentary on its websites, www.reason.com and www.reason.org, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases raising significant constitutional issues.

Lucian E. Dervan is an associate professor of law at Southern Illinois University School of Law, where he focuses on domestic and international criminal law. He is the author of two books and dozens of book chapters and articles. He is also the recipient of numerous national and international awards for his teaching and scholarship.

Brian Gallini is Professor of Law and Associate Dean for Faculty at the University of Arkansas- Fayetteville. His scholarship focuses on law enforcement discretion issues in the context of interrogation methods, consent searches, and profiling. His work has been recognized nationally by the Southeastern Association

of American Law Schools and his expert commentary has also been featured in global media outlets including The Wall Street Journal, Chicago Tribune, and Los Angeles Times.

Lissa Griffin is the James D. Hopkins Professor of Law at the Elisabeth Haub Law School at Pace University, where she teaches Criminal Law, Criminal Procedure, Comparative Criminal Procedure, and Evidence. She is also the Director of the Pace Criminal Justice Institute at the Law School. Professor Griffin has authored two treatises and many law review articles addressing criminal law and procedure issues from both a domestic and comparative perspective.

John Hasnas is Associate Professor of Ethics at Georgetown University's McDonough School of Business, Associate Professor of Law (by courtesy) at the Georgetown University Law Center, and Executive Director of the Georgetown Institute for the Study of Markets and Ethics. Professor Hasnas conducts research and publishes in the area of corporate criminal liability.

Joan H. Krause is the Dan K. Moore Distinguished Professor of Law at the University of North Carolina School of Law, with secondary appointments at the University of North Carolina School of Medicine and the Gillings School of Global Public Health. She has written and lectured extensively on health care fraud issues.

Richard A. Leo, Ph.D., J.D. is the Hamill Family Professor of Law and Psychology at the University of San Francisco. He is a leading expert on police interrogation, false confessions and the wrongful conviction of the innocent, and has authored more than one hundred articles and six books on these subjects.

Julie Rose O'Sullivan, a member of the Georgetown Law Center's faculty, is a former federal prosecutor and criminal defense lawyer. She teaches and writes in the area of federal white collar crime and, in particular, *mens rea* issues in the federal criminal code.

Jeffrey Parker is a Professor of Law at George Mason University School of Law. He teaches in the fields of criminal law and sentencing and has published on the topics of corporate criminal liability and sentencing. Professor Parker formerly served as Deputy Chief Counsel and Consulting Counsel to the United States Sentencing Commission.

Ira P. Robbins is the Barnard T. Welsh Scholar and Professor of Law and Justice at American University, Washington College of Law. He has served as Special Consultant to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States, as well as a reporter for or member of several American Bar Association criminal-justice-related task forces or committees. Professor Robbins has authored many books and articles on criminal law and procedure, including on *mens rea* issues.

Stephen Saltzburg is the Wallace and Beverley Woodbury University Professor of Law at The George Washington University Law School. He was Chair of the Criminal Justice Section of the American Bar Association from 2007-2008 and has previously served as a reporter for, and a member of, the Advisory Committee on the Federal Rules of Criminal Procedure. Professor Saltzburg has authored numerous textbooks and articles on criminal law and procedure.

Stephen F. Smith is a professor of law at the University of Notre Dame Law School. Professor Smith came to Notre Dame Law School in 2009 from the University of Virginia where he was the John V. Ray Research Professor. Professor Smith's area of research is criminal law and procedure. He teaches courses on criminal law, criminal adjudication, and federal criminal law.

Gideon Yaffe is Professor of Law & Professor of Philosophy and Psychology at Yale Law School. He is the author of numerous books and articles concerned with the criminal law, focusing on *mens rea* issues. He is also a member of the MacArthur Foundation's law and neuroscience project and leader of the subgroup investigating criminal mental states.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 11th Cir. R. 35-6 because this brief does not exceed 15 pages, exclusive of the items required by 11th Cir. R. 35-5(a)-(d) and (j).

1. This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 29(c) and 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

September 12, 2016

/s/ William N. Shepherd
William N. Shepherd
HOLLAND & KNIGHT LLP
222 Lakeview Ave., Suite 1000
West Palm Beach, FL 33401
T: (561) 833-2000

CERTIFICATE OF SERVICE

I certify that today, September 12, 2016, I electronically filed the foregoing Brief for *Amici Curiae* National Association of Criminal Defense Lawyers, Washington Legal Foundation, Cato Institute, Reason Foundation, and Twelve Criminal and Business Law Scholars with the Clerk of the Court using the appellate CM/ECF system. Counsel of record for all parties will be served by the appellate CM/ECF system.

I further certify that today, September 12, 2016, I caused fifteen paper copies of the foregoing to be dispatched to the clerk by Federal Express for delivery within three days.

September 12, 2016

/s/ William N. Shepherd