No. 13-8527

IN THE
Supreme Court of the United States

SAMARTH AGRAWAL,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Second Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae 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 was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice and files numerous amici briefs each year in the U.S. Supreme Court and numerous 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

[1] Pursuant to Rule 37.6, no counsel for a party authored any part of the brief, nor did any person or entity, other than amicus or its counsel, make a monetary contribution to the preparation or submission of this brief. Parties have consented to the filing of this Brief and timely notice has been given pursuant to Rule 37(a).

criminal justice system as a whole. NACDL has a particular interest in this case as it seeks to assure that all individuals, including the criminally accused, not be subjected to prosecutorial overreaching. NACDL members have an interest in assuring that 18 U.S.C. § 2314, the National Stolen Property Act, be strictly construed.

SUMMARY OF THE ARGUMENT

This is a case involving convictions under the National Stolen Property Act (NSPA), 18 U.S.C. § 2314, and the Economic Espionage Act (EEA), 18 U.S.C. § 1831, where the government is using these two criminal statutes in an attempt to enforce a private civil employer-employee fiduciary relationship. This brief focuses specifically on the NSPA, a statute which states

> [w]hoever transports, transmits or transfers in interstate or foreign commerce any *goods, wares, merchandise,* securities or money of the value of $5,000 or more knowing the same to been stolen, converted, or taken by fraud… [s]hall be fined under this title or imprisoned not more than ten years, or both. (emphasis added)

The indictment accused the Petitioner of "remov[ing] from the offices of the Financial Institution proprietary computer code for the Financial Institution's high frequency trading business."

United States v. Agrawal, 726 F.3d 235, 240 (2d Cir. 2013); see also Petitioner's Brief, Indictment App. 33.

The NSPA does not define "goods, wares, merchandise," but the plain meaning of these terms identifies them as things that are movable, hold monetary value, and are meant to reach the marketplace. Most importantly, the NSPA does not include trade secrets, items that are not meant for the marketplace.[2]

The government's expansion of this statute beyond its clear language, in an attempt to include paper containing "trade secrets" as "goods, wares, merchandise," is unsupported by its legislative history, contrary to Congress's original intent, and contrary to this Court's holding in *Dowling v. United States,* 473 U.S. 207 (1985). Other federal statutes using the terms "goods, wares, merchandise" have excluded "technical data" when interpreting this language.

The prosecutorial expansion of the NSPA to include trade secrets as "goods, wares, [or] merchandise" has resulted in confusion in lower courts. One finds conflicting decisions on what determines intangibility, with some courts allowing items placed on paper and others limiting the NSPA to whether the victim owned the paper. The rule of lenity demands that the government not be allowed to circumvent the NSPA's explicit language and not

[2] In presenting the inapplicability of the NSPA to trade secrets, this brief does not concede or support the government's belief that the EEA applies to conduct presented here.

be permitted to expand the NSPA to include the theft of trade secrets.

ARGUMENT

I. The National Stolen Property Act's (NSPA) terms "Goods, Wares, Merchandise" are Limited to Tangible Items that are Offered for Sale in the Marketplace

Strict construction of criminal statutes is required to assure due process notice to those who are accused of violating the law. The government uses the National Stolen Property Act (NSPA), 18 U.S.C. § 2314, to target private civil conduct between an employer and employee that is beyond the scope of the statute, and contrary to this Court's holding in *Dowling v. United States*, 473 U.S. 207 (1985). Specifically, the government's expansion of the terms "goods, wares, merchandise" exceeds the plain language of the statute and Congress's intent in enacting this legislation.

A. The Plain Language of the NSPA Limits "Goods, Wares, Merchandise" to Movable Items that are Meant to Reach the Marketplace.

The NSPA does not define the terms "goods, wares, merchandise." "When a term is undefined," in the text of a statute, "we give it its ordinary meaning." *United States v. Santos*, 553 U.S. 507, 511 (2008).

Webster's Third New International Dictionary (1961) (hereinafter *Webster's*) defines "goods" as "tangible movable personal property having intrinsic value usually excluding money and other choses in action. . ." *Id.* at 978. The *Oxford English Dictionary Online* (hereinafter *Oxford*) emphasizes the transferability of goods, by characterizing them as "property and possessions; now in a more restricted sense, movable property."[3] *Black's Law Dictionary* (9th ed. 2011) (hereinafter *Black's*) synthesizes these definitions by explaining that "goods" are "tangible or movable personal property other than money; especially articles of trade or items of merchandise." *Id.* at 762.

The plain meaning of the term "wares" emphasizes that they are manufactured articles for sale. *Webster's* defines "wares" as "manufactured articles, products of art or craft, or farm produce offered for sale: articles of merchandise; goods, commodities." *Id.* at 2576. *Oxford* defines wares as "the things that a merchant, tradesman, or peddler has to sell."[4]

"Merchandise" is defined as "the commodities or goods that are bought and sold in business: the wares of commerce." *Webster's* at 1413. *Oxford* uses the same language, defining merchandise as "the commodities of commerce; goods to be bought and

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[3] *See Goods Definition*, OED, *available at*: http://www.oed.com/view/Entry/79925?rskey=RilbVr&result=1&isAdvanced=false#eid (September 2013).

[4] *See* "wares" definition, *available at* http://www.oed.com/view/Entry/225693?rskey=KGAvwE&result=4&isAdvanced=false#eid.

sold."[5] *Black's* further characterizes merchandise as an object that is meant to enter the marketplace:

> [i]n general, a movable object involved in trade or traffic; that which is passed from one person to another by purchase and sale; in particular, that which is dealt in by merchants; an article of trading or the class of objects in which trade is carried on by physical transfer; collectively, mercantile goods, wares, or commodities, or any subjects of regular trade, animate as well as inanimate.

Id. at 1076.

Noscitur a sociis provides that a word is "given a more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008). The NSPA's list of terms, "goods, wares, merchandise" are all destined to reach the marketplace, where they can be bought or sold. They are created or manufactured for the sole purpose of being placed in commerce. Since they command a price, they are also things that can be measured. Therefore, applying "goods, wares, merchandise," to unmarketable products would be beyond Congress's intent.

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[5] *See* "merchandise" definition, *available at*: http://www.oed.com/view/Entry/116642?rskey=0yWiYN&result=1&isAdvanced=false#eid.

B. Congress Restricted the Language of the NSPA by Using the Narrow Terms "Goods, Wares, Merchandise" and Rejected Amendments to Expand the Language to Include Trade Secrets.

The NSPA originates from an extension of the National Motor Vehicle Theft Act. In examining the legislative history surrounding this statute, it is clear that Congress not only deliberately chose restrictive terms in passing this new legislation, but later rejected several opportunities to extend the statutory language to permit a broader application.

Congress enacted 18 U.S.C. §2312, the National Motor Vehicle Theft Act, as an "attempt to supplement the efforts of the States to combat automobile thefts." *United States v. Dowling*, 473 U.S. 207, 218-19 (1985). "Congress acted to fill an identical enforcement gap when in 1934 it '[extended] the provisions of the National Motor Vehicle Theft Act to other stolen property' by means of the National Stolen Property Act." *Id.* at 219. "Again, Congress acted under its commerce power to assist the states' efforts to foil the 'roving criminal,' whose movement across state lines stymied local law enforcement officials." *Id.* at 220 (*citing* statement of Attorney General Cummings).

Before the passage of §2314 in 1934, Congress considered similar legislation that offered statutory terms broader than those of the NSPA. *See United States v. Taylor*, 178 F.Supp. 352, 355 (E.D. Wis. 1959). Terms that were considered by Congress were "any property or thing of value" (National Stolen

Property Law, H.R. 119, 71st Cong., (1930)) and "money, goods, or any property of any character whatsoever" (National Property Theft Act, S. 1871, 69th Cong., (1925)). Congress instead elected to limit the scope of the statute to "goods, wares, merchandise," choosing limited terms tied to commerce.

In later amendments to § 2314, Congress expanded the list of specific types of property that it intended to protect from theft under the NSPA, adding tax stamps,[6] pre-retail medical products,[7] and veterans' memorials.[8] Had Congress intended to include trade secrets, information, or intangible objects, it could have included these items by explicitly adding them to the language of the statute. The Canon of statutory construction *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) confirms that Congress did not intend the statute to reach information.

Moreover, Congress could not have meant the NSPA to reach the misappropriation of trade secrets because on two occasions it explicitly rejected attempts to add trade secrets to the NSPA's list of stolen items. Two bills introduced in the House in

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[6] An Act to Amend Title 18 of the United States Code to Prohibit the Transportation of Fraudulent State Tax Stamps in Interstate and Foreign Commerce, and for Other Purposes, Pub. L. 87-371 (1961).

[7] Strengthening and Focusing Enforcement to Deter Organized Stealing and Enhance Safety Act of 2012, Pub. L. 112-186 § 4(d)(1) (2012).

[8] National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239 § 1084(a)(1-3) (2013).

1963 and 1965 offered legislators the opportunity to add the transportation or theft of trade secrets as part of § 2314. *See* A Bill to Amend Title 18 of the United States Code to Make it a Crime to Steal Certain Trade Secrets or to Transport Stolen Trade Secrets in Interstate or Foreign Commerce and for Other Purposes, H.R. 5217, 88th Cong. 1st Sess. (1963);[9] A Bill to Amend Title 18 of the United States Code to Make it a Crime to Steal Certain Trade Secrets or to Transport Stolen Trade Secrets in Interstate or Foreign Commerce and for Other Purposes, H.R. 5578, 89th Cong. 1st Sess. (1965).[10] H.R. 5578, introduced on March 1, 1965, proposed to make the stealing of a trade secret transmitted in interstate commerce or used in connection with a product in interstate commerce a federal crime. This legislation defined trade secret as "any confidential technical or other confidential information, *regardless of whether it is in written or other tangible form*, which is not generally available to the public and which gives one who uses it an advantage over competitors…" *Id.* (emphasis added). Neither of these amendments proceeded beyond the Judiciary Committee.

Furthermore, over a decade ago, Congress heard testimony on the need to amend the NSPA because the statute had proved ineffective to prosecutors in reaching the theft or improper transfer of proprietary information. Specifically, then-FBI Director Freeh testified that the principal statute relied upon by federal prosecutors, § 2314, is

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[9] 109 Cong. Rec. 5012 (March 28, 1963).

[10] 111 Cong. Rec. 3896 (March 1, 1965).

"not well suited to deal with situations involving 'intellectual property,' property which by its nature is not physically transported from place to place." Economic Espionage Act of 1996, H.R. Rep. No. 104-788 at 6-7 (1996). He stated that § 2314 "[does] not specifically cover the theft or improper transfer of proprietary information...and [is] insufficient to protect this type of information." *Id.*

Therefore, including trade secrets as "goods, wares, or merchandise," would be stretching § 2314 beyond its plain meaning and Congress's clear intent.

C. Other Federal Statutes Limit the Terms "Goods, Wares, Merchandise" to Items Destined for Sale.

The terms "goods, wares, merchandise" have been used extensively throughout the United States Code, and one can find these terms in statutes dating back to 1789. *See* Collection Act of July 31, 1789 (1 Stat. 29 (1789)). This historical base confirms that the terms were meant for items that were destined to be sold, that were subject to taxation, and that had to be valued to support that taxation. *Id*.

Currently these words are used together, and individually, in at least ten different Titles of the United States Code. Although no statute within Title 18 defines these terms, their usage throughout the Code offers insight into Congressional intent of how they should be interpreted. Under 50 App. U.S.C. § 2415, the term "good" means "any article, natural or

manmade substance, material, supply or manufactured product, including inspection and test equipment, and *excluding technical data*" (emphasis added). "Merchandise," is defined as "goods, wares, and chattels of every description, and includes merchandise the importation of which is prohibited, and monetary instruments . . . ." *See* 19 U.S.C. § 1401 (1930).

One may find a broader definition of the term "goods" outside of the United States Code, but in a context that is not restricted by Congress's powers under the Commerce Clause. *See* Uniform Commercial Code § 2-105. On an international level, the inclusion of software "sales" in the United Nations Convention on Contracts for the International Sale of Goods (CISG) proves the controversial nature of this subject. It has been recommended that "[w]hen dealing with software, as in other borderline areas, it seems prudent to state in the contract whether the Convention applies." John O. Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention, §56.4, p. 61 (ed. Harry M. Flechtner 4th ed. 2009).

Therefore, to bring the transfer of computer source code within the scope of the NSPA, under the theory that computer source code is a "good," would deprive accused citizens who have engaged in this activity of due process, since the language of the statute does not put them on notice that such conduct is prohibited.

D. This Court in *Dowling v. United States* limits "goods, wares, merchandise" to items that implicate traditional property rights.

In *Dowling v. United States,* 473 U.S. 207 (1985) this Court ruled that the government could not invoke the NSPA to prosecute individuals who had transported bootleg phonorecords across state lines. *Id.* at 215-16. The defendants in *Dowling* had not physically taken anything from the original owner of the recording; instead, they had copied the recording for a purpose that could not qualify as fair use. *Id.* at 214. Interpreting the NSPA in *Dowling*, this Court stated: "these cases and others prosecuted under §2314 have always involved physical "goods, wares, [or] merchandise" that have themselves been "stolen, converted, or taken by fraud." *Id.* at 216.

Distinguishing copyright infringement from ordinary theft, the *Dowling* Court stated,

> [T]he Government's theory here would make theft, conversion, or fraud equivalent to wrongful appropriation of statutorily protected rights in copyright. The copyright owner, however, holds no ordinary chattel. A copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections.

Id. at 216. The Court then explained that these interests, "have a character distinct from the

possessory interest of the owner of simple goods, wares, [or] merchandise." *Id*. at 217.

The government's attempt to find physical identity merely because the item is placed on paper, as was done in this case, directly contradicts the Court's mandate from *Dowling*. As was stated by the Court in *Dowling*, "the provision seems clearly to contemplate a physical identity between the items unlawfully obtained and those eventually transported, and hence some prior physical taking of the subject goods." *Id*.

In requiring a physical identity for "goods" stolen under § 2314, the *Dowling* Court rejected the government's theory, which equated "theft, conversion, or fraud" to the "wrongful appropriation of statutorily protected rights in copyright." *Id*. at 216. The Court warned against expanding § 2314 to include copyright infringement stating that it would lead to "broad consequences…both in the field of copyright and in kindred fields of intellectual property law." *Id*. at 227. It was the Court's opinion that applying the NSPA to prosecute copyright infringement "would support its extension to significant bodies of law that Congress gave no indication it intended to touch." *Id*. at 229.

Theft, in its common law form as larceny, requires the taking, asportation (carrying away) of the personal property of another, with the intent to permanently deprive the owner of its use.[11] The theft and disclosure of a trade secret does not result in the

[11] Black's Law Dictionary, 959 (9th Ed. 2009).

original owner being deprived of the use of the property. The original owner retains the use and possession of the trade secret along with others who may access the information. This distinction separates trade secrets from "goods, wares, merchandise" which are items that are destined to reach the marketplace and implicate traditional property rights including being subject to permanent deprivation.

II. The nature of trade secrets renders them antithetical to the category of stolen items - "goods, wares, merchandise" that fall within the ambit of the NSPA.

Trade secrets are intangible information to which intellectual property rights attach. They are deliberately kept secret, and as such, are not destined for the marketplace. Trade secrets require the following two components: (1) "the owner thereof has taken reasonable measures to keep such information secret; and (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public." 18 U.S.C. 1839 (3)(A)-(B). A trade secret does not cover the information or invention itself, but rather the secrecy of the information under the given set of circumstances. *See Kewanee Oil Co. v. Bicron Corp.* 416 U.S. 470, 475-78 (distinguishing trade secrets from patents). An essential element of making something a trade secret is its secrecy. *Id.* at 475 (stating that "the subject of a trade secret must be secret").

Trade secrets are by nature intangible. It is not the information or tangible invention itself, rather it is an intangible secretive shield maintained to protect the information or invention. This Court has confirmed this in stating that a trade secret does not protect against independent invention or reverse engineering of the item kept secret. *Id.*at 476. It is simply an intangible wall of secrecy erected to protect certain information or inventions that would otherwise be available for public use. Therefore, once a trade secret has been disclosed or provided to someone under no obligation to protect the confidentiality of the information, the trade secret rights are extinguished. *Ruckelshaus v. Monsanto,* 467 U.S. 986, 1002 (1984). The prior owner has no lasting rights in order to get the information or invention back. The intangible right to secrecy has been broken, and the information is now in the public domain.

Second, the economic value of a trade secret lies solely in the competitive advantage it gives its owner over competitors *Id.* at 1011. The necessary element of secrecy is not lost as long as the owner only reveals the trade secret to others in confidence and imposes an obligation not to disclose it. Therefore the protection accorded to the owner of a trade secret is against the improper disclosure or misappropriation of the information. *See Kewanee*, 416 U.S. at 475. Thus, an essential component of being a trade secret is its protective shield of secrecy in order to keep the information out of commerce. Once a trade secret reaches the marketplace, or is used by others, it loses its value. *Ruckelshaus,* 467 U.S. at 1012.

Trade secrets are by their very nature intangible, and as trade secrets they are deliberately kept out of the marketplace, and lose the trade secret qualities upon disclosure. Since "goods, wares, and merchandise" under § 2314 are tangible items that are explicitly destined for the marketplace, trades secrets do not fit under the NSPA.

III. Applying the NSPA to trade secrets has led to varying decisions in lower courts.

The government's aggressive and circuitous use of the NSPA to include trade secrets despite its clear omission from the terms "goods, wares, merchandise" has caused confusion among lower courts. Courts disagree on factors surrounding the tangibility of the trade secret in question, with some looking to whether the trade secret is contained upon paper that was stolen, a hard drive taken, or who had ownership of the item carrying the trade secret. Little consideration is given to the historical roots of the NSPA and that "goods, wares, merchandise" necessitate an item being aimed for the marketplace, something that clearly eliminates trade secrets, the mere paper containing the trade secret, or the hard drive used to store this information.

In this case, the Second Circuit finds that the taking of sheets of paper "makes all the difference" in whether the NSPA is violated. *Agrawal*, 726 F.3d at 252. But in truth, the placing of computer information on paper is indistinguishable from cases without the paper. This is because the NSPA was not

intended to apply to copyrights, patents, or trade secrets, all distinct from traditional property rights.

The erratic way courts have interpreted the statute presents a due process violation in that individuals are not provided adequate notice of what constitutes criminality. "It is well established that a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process." *Wright v. Georgia*, 373 U.S. 284, 293 (1963).

In the wake of *Dowling*, and with the emergence of computer technology as an essential means of conducting business, the government has attempted to use the NSPA with intangible stolen items that lack a "physical identity." In an attempt to adhere to the statute and *Dowling*, some courts have held that the NSPA requires the item stolen to have a "physical identity" and they then proceed to examine the identity of the object containing the trade secret. For example, in *United States v. Brown*, 925 F.2d 1301 (10th Cir. 1991), the Tenth Circuit held that computer code- transported across state lines on an employee's hard drive- did not fall within the purview of the statute because the company did not own the hard drive. *See also GP Industries, LLC v. Bachman*, 514 F.Supp. 2d 1156, 1168 (D. Neb. 2007) (holding that "trade secrets, which are a form of intangible intellectual property, are not "goods" covered by Sections 2314 and 2315").

Other courts have also rejected prosecutions under the NSPA when trade secrets are the crux of the item taken. For example, in *United States v.*

Stafford, 136 F.3d 1109, 1114 (7th Cir. 1998), the Seventh Circuit held that "comdata" codes used to cash checks were not "goods" for purposes of §2314 because they are merely information, and information is not considered a "good." Likewise, in *United States v. Aleynikov*, 676 F.3d 71 (2d Cir. 2012), the Second Circuit declined to extend the NSPA to cover downloaded source code.

Other courts have failed to adhere to the statute's plain language, finding trade secrets included in §2314. For example, in *United States v. Riggs*, 743 F. Supp. 556 (N.D. Ill. 1990), the district court discarded the tangibility requirement, ruling that electronic files containing a company's confidential information were "goods, wares, merchandise" under the NSPA. *See also United States v. Alavi*, 2008 WL 1971391 (D. Ariz. 2008) (holding that proprietary computer code loaded onto a laptop computer meets the definition of "goods, wares, or merchandise"); *United States v. Bottone*, 365 F.2d 389 (2nd Cir. 1966) (upholding a conviction under the NSPA even though nothing belonging to the employer was stolen nor transported).

IV. The Rule of Lenity mandates a strict construction of "goods, wares, merchandise."

This Court has instructed that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971). The rule of lenity is based on two long-standing policies of tradition: that the law should provide fair warning of the line between

criminal and noncriminal conduct, and that "legislatures and not courts should define criminal activity." *United States v. Bass,* 404 U.S. 336, 348 (1971). This Court has refused to approve prosecutor's sweeping expansions of federal criminal jurisdiction that exceed the bounds of the statutory language. *See Cleveland v. United States,* 531 U.S. 12 (2000) (finding state poker licenses do not constitute "property" under the mail fraud statute). Lenity, therefore, necessitates that the terms "goods, wares, merchandise" be restricted to the language of the statute. As the Court recently stated in *Burrage v. United States*, 134 S.Ct. 881, 891 (2014), "we cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant."

The NSPA does not cover partial source code, and specifically does not cover trade secrets. It is improper to allow the government to extend the NSPA to cover private civil employer-employee fiduciary conduct that clearly exceeds the plain language of the statute. This Court should grant certiorari to resolve the existing confusion in lower courts on the bounds of the NSPA. It is particularly important to correct the holding of the Second Circuit, as this circuit has a high volume of white collar cases and other courts may look to this circuit for guidance. Broad application of the NSPA in a case like this one unmoors the act from any realistic limitation and would thereby expand federal jurisdiction, at the whim of a prosecutor, to all forms of theft in the United States.

CONCLUSION

For the foregoing reasons, NACDL urges this Court to grant the Petition for *Writ of Certiorari*.

Respectfully Submitted,

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