No. 05-20604

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID KAY and DOUGLAS MURPHY,

Defendants-Appellants.

On Appeal From the United States District Court
For the Southern District of Texas

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 13,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations. In furtherance of this and its other objectives, the NACDL files approximately 35 amicus curiae briefs each year, addressing a wide variety of criminal justice issues.

NACDL has decided to submit an amicus brief in this case because it offers a particularly troubling example of federal prosecutors' efforts to prosecute commercial conduct that is not obviously unlawful under vaguely worded statutes. To ensure that defendants in such cases have fair warning that their conduct may result in criminal sanctions, courts must diligently enforce key protections, including proper interpretation of the mens rea elements that the statutes contain

and strict application of such doctrines as the rule of lenity and the prohibition against federal common law crimes. Because the district court afforded the appellants none of those protections in this case, NACDL decided to submit this amicus brief.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

1. In recent years, federal prosecutors have sought to impose criminal sanctions on an ever-wider range of commercial behavior. In response to this trend, courts have emphasized two protections for criminal defendants. First, as the regime of criminal sanctions has become more complex and has reached conduct that is not obviously criminal or even wrong, courts have increasingly insisted that the government prove that the defendant knew that his conduct was illegal.

2. Second, courts have enforced several doctrines to limit the tendency of federal prosecutors to expand vaguely worded statutes to cover conduct that Congress never considered. These doctrines include the requirement, as a matter of due process, that statutes provide fair warning of the conduct they prohibit; the rule of lenity, which requires that ambiguities in criminal statutes be construed in the defendant's favor; and the prohibition against federal common law crimes.

3. In combination, and when applied rigorously, these doctrines afford substantial protections to defendants. The requirement that the government prove knowledge of illegality ensures that the criminal sanction is reserved for persons with a proven willingness to violate the law. For those who cut corners or breach ethical standards but do not understand that their conduct is illegal, civil and administrative sanctions are available. And the combined protections of due process, the rule of lenity, and the prohibition against common law crimes ensure that the criminal sanction remains within bounds that are clearly defined in advance.

4. This case reflects the abandonment of these basic protections. Two men face lengthy prison terms for violating a statute that this Court previously found "ambiguous as a matter of law," United States v. Kay, 359 F.3d 738, 746 (5th Cir. 2004), and without a finding by the jury that they knew their conduct was illegal. The Court should reverse the convictions to preserve the legitimacy of the criminal process.

ARGUMENT

I. THE FOREIGN CORRUPT PRACTICES ACT REQUIRES PROOF OF KNOWLEDGE OF ILLEGALITY.

Throughout the course of American criminal law, two principles of culpability have stood in tension. On the one hand, "[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is

deeply rooted in the American legal system." Cheek v. United States, 498 U.S. 192, 199 (1991). "Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law." Id.

On the other hand, a "proliferation of statutes and regulations," coupled with broad and vaguely worded criminal prohibitions, has made it difficult for persons, especially in commercial settings, to know the extent of their legal duties and obligations. Id. at 199-200.[1] This difficulty increasingly has led courts to interpret sometimes opaque mens rea elements--particularly the element "willfully"--to require proof that the defendant knew his conduct was illegal.

This trend began with tax offenses. See, e.g., Cheek, 498 U.S. at 200-01; United States v. Pomponio, 429 U.S. 10, 12-13 (1976) (per curiam); United States v. Bishop, 412 U.S. 346, 360 (1973); United States v. Murdock, 290 U.S. 389, 396 (1933). Over the past twenty years it has accelerated. The Supreme Court has required proof of knowledge of illegality in cases involving food stamp fraud, Liparota v. United States, 471 U.S. 419, 426 (1985); the structuring of financial transactions to avoid reporting requirements, Ratzlaf v. United States, 510 U.S. 135, 149 (1994); the sale of firearms without a license, Bryan v. United States, 524

[1] This Court has recently confronted this trend in the context of the "honest services" theory of mail and wire fraud. See United States v. Brown, 459 F.3d 509 (5th Cir. 2006); United States v. Brumley, 116 F.3d 728 (5th Cir. 1997) (en banc).

U.S. 184, 193 (1998); and, most recently, obstruction of justice, Arthur Andersen LLP v. United States, 544 U.S. 696, 705-07 (2005).

The Foreign Corrupt Practices Act falls squarely in the class of statutes for which knowledge of illegality is required. For individual criminal liability, the FCPA requires proof that the defendant acted not only "corruptly," but also "willfully." 15 U.S.C. §§ 78dd-1, 78ff(c)(2)(A). Interpreting the "willfully" element to require knowledge of illegality gives effect to both terms. Conversely, the government's view, adopted by the district court--that "corruptly" subsumes the concept of willfulness--effectively reads the "willfully" element out of the statute. Ratzlaf, which involved a similar statutory structure, makes clear that such judicial rewriting of criminal statutes is impermissible. The Ratzlaf Court observed that the lower courts' construction of the structuring statute treated the statute's "willfulness" requirement "essentially as surplusage--as words of no consequence." 510 U.S. at 140. It declared that "[j]udges should hesitate so to treat statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense." Id. at 140-41.

In addition, the FCPA--like the statutes at issue in Liparota, Bryan, Ratzlaf, and Arthur Andersen--extends to a range of conduct that an ordinary person would not necessarily understand to be unlawful. The conduct charged in this case, for example, if within the scope of the FCPA at all, was not clearly so. The evidence

at trial showed that in the chaotic context of Haitian commerce, defendants' conduct was routine and expected. This is precisely when the element of knowledge of illegality is most significant. By eliminating that element, the district court denied appellants a fundamental protection to which they were entitled under the FCPA and as a matter of basic fairness.

II. THE FCPA, AS APPLIED, DENIED APPELLANTS FAIR WARNING.

Apart from reading the "willfully" element out of the FCPA, the district court denied appellants several related protections against conviction based on conduct they did not know violated the law: the requirement of fair warning, the rule of lenity, and the prohibition against federal common law crimes. These protections, like the requirement that the government prove the defendant knew his conduct was illegal, ensure that society reserves the criminal sanction for the most culpable actors.

It is a bedrock principle of criminal law that "'fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'" United States v. Aguilar, 515 U.S. 593, 600 (1995) (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)); see, e.g., Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."); United

States v. Orellana, 405 F.3d 360, 371 (5th Cir. 2005) (quoting McBoyle). The fair warning principle ensures that a person can "conform [his] conduct to law . . . by reading the face of a statute--not by having to appeal to outside legal materials." Sabetti v. DiPaolo, 16 F.3d 16, 17 (1st Cir. 1994) (emphasis in original; quotation omitted) (Breyer, J.).

The fair warning principle manifests itself in three closely related doctrines. United States v. Lanier, 520 U.S. 259, 266 (1997). First, the vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983). Thus, before a defendant may be convicted, the statute at issue must clearly prohibit the defendant's alleged conduct. See Fasulo v. United States, 272 U.S. 620, 629 (1926) ("There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute.").

Second, if a criminal statute is ambiguous, a court must apply the rule of lenity. Under this rule, "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." McNally v. United States, 483 U.S. 350,

359-60 (1987); see, e.g., Scheidler v. NOW, 537 U.S. 393, 403 n.8 (2003); Cleveland v. United States, 531 U.S. 12, 25 (2000).

Third, under the prohibition on federal common law crimes, "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." Liparota, 471 U.S. at 424; see United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) ("[A]ll exercise of criminal jurisdiction in common law cases . . . is not within [courts'] implied powers.").

These doctrines, taken together, ensure that persons have fair notice of the line between criminal and non-criminal conduct. See, e.g., McBoyle, 283 U.S. at 27; City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (plurality opinion); Lanzetta, 306 U.S. at 453; Connally v. General Construction Co., 269 U.S. 385, 391 (1926). Lack of notice creates a "trap for the innocent," United States v. Cardiff, 344 U.S. 174, 176 (1952), and "violates the first essential of due process," Connally, 269 U.S. at 391. These doctrines also require sufficient certainty in criminal statutes to prevent "arbitrary enforcement." Kolender, 461 U.S. at 358; see, e.g., Morales, 527 U.S. at 60-64. Thus, "a legislature [must] establish minimal guidelines to govern law enforcement," because in the absence of such guidelines "a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Kolender, 461 U.S.

at 358 (quotations omitted); see, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (ordinance void for vagueness because it "encourages arbitrary and erratic arrests and convictions" (quotation omitted)).

The district court denied appellants these basic protections. Appellants were convicted of violating the FCPA's prohibition on making payments to foreign officials to secure any improper advantage to assist "in obtaining or retaining business." 15 U.S.C. § 78dd-1(a)(1) (the "business nexus element"). In Kay, this Court held as a matter of law that the language of the business nexus element is ambiguous. 359 F.3d at 746 (holding that "[a]s the statutory language itself is amenable to more than one reasonable interpretation, it is ambiguous as a matter of law"); see id. at 745 ("[N]either the ordinary meaning nor the provisions surrounding the disputed text are sufficiently clear to make the statutory language susceptible of but one reasonable interpretation."). By parsing the statute's convoluted legislative history, however, Kay concluded that it could reach the conduct alleged in the indictment. Having performed this laborious analysis to reach a conclusion "in diametric opposition" to the district court, id. at 756, it is hardly surprising that the Court expressly flagged for consideration on remand the rule of lenity and fair warning arguments that appellants had raised in the district court and on appeal. Id. at 760 n.96.

The district court erred in rejecting these arguments on remand. A United States District Judge, after full briefing and oral argument and with the assistance of judicial clerks, could not discern that procurement of lower customs duties and sales taxes constitutes "obtaining or retaining business." United States v. Kay, 200 F. Supp. 2d 681, 686 (S.D. Tex. 2002), rev'd 359 F.3d 738 (2004). This Court found the statutory language ambiguous and needed a 30-page opinion to arrive at a contrary interpretation. This disagreement among experienced federal judges, requiring resort to obscure legislative history, demonstrates conclusively that ordinary persons like appellants did not have fair warning, and that the statute was not "reasonably clear." Lanier, 520 U.S. at 267. "[D]ue process 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." Id. at 266; see, e.g., Marks v. United States, 430 U.S. 188, 191-92 (1977); Bouie v. Columbia, 378 U.S. 347, 352 (1964). Here, neither the statutory language nor any prior judicial decision fairly disclosed that "obtaining or retaining business" encompassed efforts to avoid paying taxes.

The unconstitutional vagueness of the FCPA as applied in this case is heightened by the district court's erroneous conclusion that the government need not prove that the appellants knew their conduct was illegal. The Supreme Court "has long recognized that the constitutionality of a vague statutory standard is

closely related to whether that standard incorporates a requirement of mens rea." Colautti v. Franklin, 439 U.S. 379, 395 (1979), overruled in part on other grounds, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989). For example, in Screws v. United States, 325 U.S. 91 (1945), the Court noted that "[t]he requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain[,] [b]ut it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." Id. at 102. Here, the FCPA's business nexus element is vague as a matter of law and the district court ruled that the government need not prove knowledge of illegality. The lack of fair warning or proof of knowledge of illegality renders appellants' convictions infirm.

Likewise, lenity compels the reversal of the convictions. Under the rule of lenity, unless the government's interpretation is unambiguously correct, the defendant's interpretation must control. See United States v. Granderson, 511 U.S. 39, 54 (1994); see also McNally, 483 U.S. at 359-60 (holding 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"); Orellana, 405 F.3d at 370-71 ("The rule of lenity provides that when [a] choice must be made between two readings of what conduct Congress has made a crime, it is appropriate, before choosing the harsher alternative, to require that

Congress should have spoken in language that is clear and definite" (internal quotation marks and citation omitted)).

This Court held as a matter of law that the business nexus element is ambiguous. Kay, 359 F.3d at 746. This ambiguity concerning the ambit of the FCPA must be resolved in favor of lenity. See, e.g., Scheidler, 537 U.S. at 403 n.8 (applying rule of lenity to reject broad reading of "obtain" as used in the Hobbs Act); Jones v. United States, 529 U.S. 848, 858 (2000) (applying rule of lenity to reject position that the federal arson statute encompasses arson of an owner-occupied home); Rewis v. United States, 401 U.S. 808, 812 (1971) (finding Travel Act ambiguous and therefore no violation by out-of-state gamblers frequenting a gambling operation).

Appellants' convictions also violate the prohibition on federal common law crimes. As the Supreme Court long ago noted,

> [t]he rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

United States v. Wiltberger, 18 U.S. (5 Wheat) 76, 95 (1820). Thus, "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence" before any person may be charged with a federal offense. Hudson, 11 U.S. at 34;

see Krulewitch v. United States, 336 U.S. 440, 456-57 (1949) (Jackson, J., concurring) ("[I]t is well and wisely settled that there can be no judge-made offenses against the United States and that every federal prosecution must be sustained by statutory authority"). To allow defendants to stand convicted where Congress has not clearly included the conduct at issue within the ambit of the FCPA is in essence the creation of a common law crime. See McBoyle, 283 U.S. at 341 (holding that criminal statutes should not be extended beyond their ordinary meaning "simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used").

Given this Court's "repeated exhortation against expanding federal criminal jurisdiction beyond specific federal statutes to the defining of common-law crimes," it should "resist the incremental expansion of a statute that is vague and amorphous on its face and depends for its constitutionality on the clarity divined from a jumble of [legislative history]." United States v. Brown, 459 F.3d 509, 523 (5th Cir. 2006). Instead, the Court should apply the fair warning doctrine, the rule of lenity, and the prohibition on common law crimes to reverse appellants' convictions, because "the narrower, reasonable interpretation . . . here excludes the [appellants'] conduct." Id.

CONCLUSION

This case affords the Court an opportunity to reinforce the protections essential to fair treatment of defendants charged under broadly worded criminal statutes with commercial conduct that is not obviously illegal. Because the district court refused to require the government to prove that appellants knew their conduct was illegal, and because that court did not correctly apply the related doctrines of fair notice, lenity, and the prohibition against federal common law crimes, this Court should reverse the convictions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I certify that the foregoing brief complies with the type-volume requirements of Fed. R. App. P. 32(a)(7)(B) because it contains 3,145 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2003 in Times New Roman typeface, using 14 point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 2006, two copies of the foregoing were served by federal express upon:

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