Case No. 20-6010

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA,
*Plaintiff-Appellee*,

v.

JERRY WAYNE WILKERSON,
*Defendant-Appellant.*

Appeal from the United States District Court
for the Eastern District of Tennessee
The Honorable Harry S. Mattice, No. 1:18-cr-00011-1

# BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT-APPELLANT WAYNE WILKERSON

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## STATEMENT PURSUANT TO FRAP 29(a)(4)(E)

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *amicus curiae* certifies that (i) no party's counsel authored this *amicus* brief in whole or in part; (ii) no party's counsel contributed money that was intended to fund preparing or submitting the brief; and (iii) no person-other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. Counsel has been in contact with counsel for all parties to the appeal, and all consent to the filing of this brief *amicus curiae*, which is submitted in support of Appellants.

## STATEMENT OF INTEREST

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 was founded in 1958. It has a nationwide membership of many thousands of direct members, 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. NACDL is dedicated to advancing the proper, efficient, and just

administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme 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 has a particular interest in the scope of criminal statutes, especially with respect to the applicable standard of intent, *i.e.*, *mens rea*, and essential elements of the federal fraud statutes, *i.e.*, the necessity of an identifiable, recognized duty to disclose.

## SUMMARY OF ARGUMENT

This brief *amicus curiae* addresses two issues raised by Appellants: whether the District Court erred in (1) dispensing with a *mens rea* standard of intent. *See* Appellant Wilkerson's Brief (ECF Dkt # 14), at 28-34; and (2) finding a duty to disclose without identifying a cognizable duty. *See Id*., at 35-39.

In both instances, it is respectfully submitted that the District Court did indeed err. This brief will not repeat the specific factual and legal analyses performed by appellants in their brief(s), both of which this brief adopts. Rather, this brief will discuss the fundamental importance of demanding specific intent – *mens rea* – before imposing criminal liability in fraud cases, and the considerable dangers of relaxing that requirement. Similarly, this brief will discuss the need, in the context of fraud statutes, for a defendant to possess a cognizable duty to

disclose before non-disclosure can be deemed fraudulent, and the perils of imposing a duty to disclose absent such articulable obligation.

As NACDL Executive Director Norman L. Reimer, Esq., and Edwin Meese III, then-Chair of the Heritage Foundation pointed out in their Foreword to the April 2010 report issued jointly by NACDL and The Heritage Foundation, *Without Intent – How Congress Is Eroding the Criminal Intent Requirement in Federal Law* ("*Without Intent*"), "[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[]" because "[o]nly in such circumstances is a person truly blameworthy and thus deserving of criminal punishment."[1] Moreover, "[t]his is not just a legal concept; it is the fundamental anchor of the criminal justice system." *Id*.

Indeed, in many instances *mens rea* is what distinguishes criminal activity from negligent or unknowing behavior. It is therefore a defining feature of fraudulent criminal conduct. Imposing criminal liability without the necessary level of intent would expand the scope of the federal fraud statutes immeasurably,

[1] The Report, authored by Brian W. Walsh and Tiffany M. Joslyn, is available at bit.ly/3mn8MYU.

and allow prosecutions absent "a clearly articulated nexus between a person's conduct and his mental culpability[,]" *id*., at vi, and "subject the innocent to unjust prosecution and punishment for honest mistakes or actions that they had no reason to know are illegal." *Id*. The District Court's application of the fraud statutes in this case below threatens to enable such prosecutions to flourish unchecked by statutory limitations or common law tradition.

Likewise, some recognized duty to disclose material information has always been a prerequisite for finding criminal liability for *non*-disclosure of such information. That duty must be based on some statute, regulation, or relationship that establishes the obligation to disclose. Here, however, the District Court found a duty absent any formal obligation or traditional relationship to which any duty would attach. Indeed, the District Court could not even identify the applicable duty, or its basis.

Again, affirming that standard would significantly expand criminal liability in a manner that would ensnare innumerable business persons and professionals who are not encumbered by any duty, and who in most instances would not be aware of a standard of disclosure untethered to any pre-existing duty.

The overcrminalization described above – implemented not by statute, but by prosecutorial discretion and subsequent judicial interpretation and application –

is of a character that NACDL has devoted significant time and effort to curtail. As set forth below, in its reports and other publications, NACDL, relying on the traditional principles that have guided federal and common law jurisprudence for centuries, has endeavored to illustrate the dangers and unfairness of such expanded criminal liability.

In fact, in reporting on the work of the U.S. House of Representatives' "Overcriminalization Task Force of 2013," NACDL noted that "[o]vercriminalization is a dangerous trend that NACDL's policy staff battles daily[,]" because expansive and elastic application of criminal statutes "backlogs the judiciary, overflows prisons, and forces innocent individuals to plead guilty not because they actually are, but because exercising their constitutional right to a trial is prohibitively expensive and too much of a risk." Shan Tara-Regon, "White Collar Crime Policy," *The Champion*, September 2014.[2]

Accordingly, it is respectfully submitted that the District Court's judgments of conviction should be reversed.

[2] The issue is available at bit.ly/3mjCu0A. *The Champion* is NACDL's monthly magazine.

## ARGUMENT

### POINT I

### THE DISTRICT COURT ERRED BY NOT REQUIRING *MENS REA*, WHICH IS A CORNERSTONE REQUIREMENT FOR CRIMINAL LIABILITY AND PUNISHMENT

*Mens rea* describes a culpable mental state. As the Supreme Court has stated repeatedly, "'the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" *United States v. Freed*, 401 U.S. 601, 613 (1971) (Brennan, J., *concurring*), *quoting Dennis v. United States*, 341 U.S. 494, 500 (1951) (Vinson, C.J., *announcing judgment*) and *Smith v. California*, 361 U.S. 147, 150 (1959). *See also Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005) (in obstruction of justice context), *citing Aguilar v. United States*, 515 U.S. 593, 602 (1995).

This Court, too, has reiterated that principle in the specific context of health care fraud. *See United States v. Nora*, No. 18-31078, 2021 WL 716628, at *6 (5th Cir. Feb. 24, 2021) (defendant's violation must be performed "knowingly" and "willfully"). *See also United States v. White*, 492 F.3d 380, 394 (6th Cir. 2007) ("the government must prove the defendant's specific intent to deceive") (*quoting United States v. Frost*, 125 F.3d 346, 354 (6th Cir. 1997)).

As the joint NACDL/Heritage Foundation report explained, "[f]ew protections against unjust criminal conviction and punishment are as essential as ensuring that every criminal offense includes a meaningful *mens rea*, or 'guilty mind,' requirement.[]" *Without Intent*, at 1. As a result, "[w]ith rare exception, no person should be convicted of a crime without the government having proved that he acted with a guilty mind – that is, that he intended to violate a law or knew that his conduct was unlawful or sufficiently wrongful so as to put him on notice of possible criminal liability." *Id*.

The *mens rea* requirement has deep historical roots, and has been a critical component of Anglo-American criminal jurisprudence for more than six centuries.[3] In *Morisette v. United States*, 342 U.S. 246 (1952), the Supreme Court characterized *mens rea* as constituting a principle "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*., at 251.

In addition, the Model Penal Code has consistently required *mens rea* for

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[3] *See* Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 Hastings L.J. 815, 821-46 (1980) (discussing, *inter alia*, development in the 13th century English courts of the legal doctrine that a criminal defendant could be convicted only upon proof that he acted with a guilty mind).

any offense carrying the prospect of imprisonment. For instance, in the comment to the relevant section of the Model Penal Code, Comment, §2.05(1)(a) (Tent. Draft No. 4, 1955), the drafters declared, "[t]his section makes a frontal attack on absolute or strict liability in penal law, whenever the offense carries a possibility of sentence of imprisonment."

The Model Penal Code's drafters also provided the rationale for their conclusion:

> [c]rime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was wrong. This is too fundamental to be compromised. The law goes far enough if it permits the imposition of a monetary penalty in cases where strict liability has been imposed.

*Id*.

Another commentator, surveying opinions on the issue, and reflecting on the merits, summarized the academic consensus as concluding that "to punish conduct without reference to the actor's state of mind is both inefficacious and unjust." Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup.Ct. Rev. 107, 109, bit.ly/3cOCX84. *See also* Professor Henry Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Prob. 401 (1958),bit.ly/3wuQvgz.

Regarding the former, not requiring *mens rea*

> is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed.

*Id*.

Regarding the latter, eliminating *mens rea* would be "unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy." *Id*. As a result, "on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea*." *Id*.

Conversely, "strict liability" in criminal law traditionally has been limited to "general welfare" statutes that, *inter alia*, provide relatively mild potential sanctions. *See e.g., Morissette*, 342 U.S. at 256; *Levas & Levas v. Village of Antioch*, 684 F.2d 446, 455 (7th Cir. 1982). Consistent with this doctrine, this Court, in *United States v. Wulff*, 758 F.2d 1121 (6th Cir. 1985), reaffirmed the importance of *mens rea* in ruling that a felony provision [16 U.S.C. §707(b)] of the Migratory Bird Treaty Act violated Due Process because the maximum sentence of two years' imprisonment and a $2,000 fine was too severe a penalty to be imposed pursuant to a "strict liability" crime.

As this Court explained in *Wulff*, in order to convict under "a crime unknown to the common law which carries a substantial penalty, Congress must require the prosecution to prove the defendant acted with some degree of scienter." 758 F.2d at 1125. *See also United States v. St. Pierre*, 578 F. Supp. 1424 (D.S.D. 1983); *Planned Parenthood Assoc. of Kansas City, Mo., Inc. v. Ashcroft*, 483 F. Supp. 679, 692 (W.D. Mo. 1980), *aff'd* 664 F.2d 687 (8th Cir. 1981), *aff'd in part on other grounds, rev'd in part on other grounds*, 462 U.S. 476 (1983).

The *mens rea* requirement is also essential to preserving the core principle that a criminal statute must provide fair notice of what conduct is proscribed, a concept incorporated in the Fifth Amendment's constitutional due process protection, and described in the NACDL/Heritage Foundation report as "a cornerstone of our criminal justice system since the nation's founding . . ." *Without Intent*, at ix. *See also Morisette*, 342 U.S. at 251-252 (fair notice implicates the necessity for the government to prove both "an evil-meaning mind" and "an evil-doing hand" before criminal punishment may be imposed).

Thus, as the NACDL/Heritage Foundation report emphasizes, "one of the critical functions served by an adequate *mens rea* requirement is to protect those who are reasonably mistaken about or unaware of the law." The distinctions

between pure *malum in se* conduct, such as murder, and *malum prohibitum* conduct, reinforce that the latter be accompanied by specific intent.[4]

In addition, the rule of lenity, which directs a court, when construing an ambiguous criminal law, to resolve the ambiguity in favor of the defendant, provides further basis for requiring *mens rea*. As the Supreme Court has instructed, "when choice has to 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." *United States v. Bass*, 404 U.S. 336, 347 (1941). *See also United States v. Santos*, 533 U.S. 507 (2008).

The dangers of dispensing with *mens rea* are manifest, particularly in the context of intensively regulated industries and activities. Entire categories of conduct previously treated – at worst – as perhaps meriting civil liability would be susceptible of criminal prosecution and conviction, and the attendant deprivation of liberty and imposition of financial penalties.

Negligence, mistake, and inadvertence would provide the basis for criminal

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[4] In instances of *malum in se* offenses – unlike here – the prohibited act or object is not subject to interpretation. All that matters is whether or not the conduct was performed. *See, e.g., United States v. Baycon Industries, Inc.*, 744 F.2d 1505, 1507 (11th Cir. 1984).

liability, resulting not only in unjust convictions and imprisonment, but also in a marked increase in essentially unreviewable prosecutorial discretion, as well as in the federal courts' criminal dockets. Nor would it serve any salutory purpose; as noted **ante**, it would not satisfy any moral principle, or deter future conduct, since even *un*intentional acts would be covered.

Moreover, allowing convictions for fraud without requiring *mens rea* would risk criminalizing ordinary and customary business practices without proper notice of their wrongfulness. *See* Marie Gryphon, *It's a Crime?: Flaws in Federal Statutes That Punish Standard Business Practice*, Manhattan Inst. Civil Justice Report No. 12, at 10 (Nov. 2009),bit.ly/31NVGdK.

Accordingly, as the NACDL/Heritage Foundation report concludes, "[a]bsent a meaningful mens rea requirement, a defendant's other legal and constitutional rights cannot protect him from unjust punishment for making honest mistakes or engaging in conduct that he had no reason to know was illegal." *Without Intent*, at 1. Permitting the District Court's construction of the statutes at issue would therefore create an environment in which prosecutorial discretion and unjust convictions and punishment would multiply without limits.

## POINT II

## THE DISTRICT COURT ERRED IN PREMISING THE FRAUD CONVICTIONS ON NON-DISCLOSURE ABSENT ANY COGNIZABLE DUTY TO DISCLOSE

At Appellant Chatfield's sentencing, the District Court remarked "that there was probably some duty to disclose the relationship of that cost to be charged to the insurance company to the medical efficacy of the creams themselves." Chatfield Sentencing, R. 547, Page ID # 11394-95.

Yet the District Court did not identify any precise duty to disclose, or the source from which it emanated. Indeed, at Appellant Wilkerson's sentencing, the District Court, while acknowledging that "it would have been much better if the law had been clear about exactly where the duty was," nevertheless concluded "that there is somehow this overarching duty to disclose." Wilkerson Sentencing Tr., R. 549, Page ID # 11602.

The District Court's verdict convicting appellants absent some cognizable duty to disclose represents a radical and insupportable departure from established law and precedent, and threatens to expand dramatically the scope of federal fraud statutes to situations never before within their ambit.

It is axiomatic that a duty to disclose is essential for a federal fraud conviction based on *non*-disclosure. In turn, any duty to disclose must spring from

"a statute, regulation, or formalized legal relationship between the parties." *Langford v. Rite Aid of Alabama, Inc.*, 231 F.3d 1308, 1312 (11th Cir. 2000).

Indeed, the Supreme Court, in its historic decision in *McNally v. United States*, 483 U.S. 350 (1987), noted in the mail fraud context that "[i]n the private sector, purchasing agents, brokers, union leaders, and others with clear fiduciary duties to their employers or unions have been found guilty of defrauding their employers or unions by accepting kickbacks or selling confidential information." *Id*., at 363 (footnote omitted).

Subsequently, in *United States v. Cochran*, 109 F.3d 660 (10th Cir. 1997), the Tenth Circuit held that a defendant co-manager of a bond underwriter did *not* have a duty to disclose a commission fee he received for brokering an investment contract. *Id*., at 665-69. *See also United States v. Irwin*, 654 F.2d 671, 679 (10th Cir. 1981) ("there can be no criminal conviction for failure to disclose when no duty to disclose is demonstrated").[5] In *Cochran*, the Court noted that "[a]t oral argument, the government could not inform us of any statute, regulation, common law or contractual provision that required disclosure of the fee." 109 F.3d at 665.

[5] In the analogous securities fraud context, the Supreme Court, in its landmark opinion in *Chiarella v. United States*, 445 U.S. 222 (1980), ruled that "[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." *Id*., at 235.

Allowing a conviction absent a clearly defined, pre-existing duty to disclose would present any defendant with a constantly moving and elusive target that would be impossible to ascertain in advance. Again, it would expand prosecutorial discretion impermissibly and unwisely, and subject defendants to application of statutes without adequate notice of what conduct is in fact prohibited.

The Supreme Court's jurisprudence circumscribing the scope of federal fraud statutes – from *McNally* through *Cleveland v. United States*, 531 US. 12 (2000), and most recently *Kelly v. United States*, ___ U.S. ___, 140 S. Ct. 1565 (May 7, 2020) – has made it clear that not all misconduct is criminal, and that there must be fidelity to the narrow application of the particular requisite elements – here, *mens rea* as well the source of any duty to disclose – in order to avoid convictions outside a specific fraud statute's boundaries. *See also Arthur Andersen*, 544 U.S. at 703; *Aguilar*, 515 U.S. at 600.

Here, it is respectfully submitted that the District Court exceed those boundaries by dispensing with *mens rea* and the need for a recognized, articulable basis for any duty to disclose.

## Conclusion

Accordingly, for all the reasons set forth above, as well as in Appellants' Briefs, it is respectfully submitted that the District Court's judgment(s) of conviction below should be reversed.

Dated: April 5, 2021

Respectfully submitted,

/s/ Stephen Ross Johnson
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## CERTIFICATE OF COMPLIANCE

Excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,065 words. I certify that this document complies with the word limit of Fed. R. App. P. 29(a)(5).

Dated: April 5, 2021

By: /s/ Stephen Ross Johnson
Stephen Ross Johnson

## CERTIFICATE OF SERVICE

I certify that the foregoing was served electronically through this Court's CM/ECF system upon all counsel of record on April 5, 2021. Notice of this filing is sent by the Court's electronic filing system to all parties indicated on the electronic filing receipt.

Dated: April 5, 2021

By: /s/ Stephen Ross Johnson
Stephen Ross Johnson