Nos. 07-1286, 07-1287

IN THE
Supreme Court of the United States

W.R. GRACE & CO.,
Petitioner,

v.

UNITED STATES,
Respondent.

HENRY A. ESCHENBACH, ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION OF MANUFACTURERS, AND AMERICAN CHEMISTRY COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Jeffrey T. Green
Jonathan Rackoff
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Kristina Silja Bennard
Counsel of Record
Matthew D. Clark
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue
Suite 2200
Seattle, WA 98101
(206) 622-3150

(Additional counsel listed on inside cover)

Additional Counsel for *Amici Curiae*

Jan S. Amundson
Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 637-3000

Leslie A. Hulse
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Blvd.
Arlington, VA 22209
(703) 741-5165

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Other Authorities

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION OF MANUFACTURERS, AND AMERICAN CHEMISTRY COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs in this Court and other courts throughout the country.[1]

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all

---

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to American's economic future and living standards.

The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to create innovative products and services that make people's lives better, healthier, and safer. The business of chemistry is a $664 billion enterprise and a key element of the nation's economy. Safety and security have always been primary concerns of ACC members, and they work closely with government agencies to improve security and defend against any threat to the nation's infrastructure.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The federal government indicted petitioners W.R. Grace and certain of its employees for violating the Clean Air Act (CAA) by releasing a substance constituting or comprising "asbestos" into the ambient air. Petitioners argued, and the district court agreed, that this substance did not qualify as a "hazardous air pollutant" under Environmental Protection Agency (EPA) definitions applicable to both the civil regulatory scheme and, by incorporation, the criminal enforcement provisions. The Ninth Circuit reversed, holding that the term "asbestos" describes something

different – *and far broader* – in a CAA criminal prosecution than the EPA's long-standing definition of the same term. In so holding, the Ninth Circuit committed two significant errors, each meriting review.

First, the Ninth Circuit's decision all but ensures that corporate defendants or indicted employees will receive substantially harsher treatment than their counterparts in other Circuits for the same offense. In the Ninth Circuit, smart prosecutors will now indict, try, and convict – or, more likely, use newfound leverage to secure pleas from – defendants for actions not proscribed by the plain text of any regulation. Actual ignorance of the regulatory prohibition, however vague, will not be a defense. Neither fair notice requirements nor the rule of lenity will apply. Rather, for defendants generally familiar with the regulated substance, activity, or industry, culpable knowledge of the previously unannounced line between legal and illegal conduct will simply be presumed.

The questions presented in this case reach fundamental tenets of criminal enforcement and civil regulation, including:

- due process demands fair notice of the threshold dividing prohibited from permitted conduct;
- courts construing criminal statutes must resolve ambiguities in favor of defendants (i.e., the rule of lenity);

- common law principles cannot enlarge the scope of criminal liability fixed by statute;
- statutes or regulations must mean what they say and must not change based on the identity or characteristics of particular defendants; and
- all accused persons must be treated equally without stereotype, bias, or regard for the accident of geography.

The Ninth Circuit has broken from these venerable principles, subjecting regulated communities to disparate (and virtually unlimited) risk of criminal liability for public welfare offenses. This will have a staggering impact on American industry.

Specifically, and second, the Ninth Circuit's decision jeopardizes the viability of numerous highly-regulated industries already heavily burdened by federal criminal oversight. By collapsing the bright line between legal and illegal conduct and reducing the quantum of criminal intent the government must prove to secure a conviction, the Ninth Circuit has invited inefficient over-investment in regulatory compliance beyond that which the law actually requires. To avoid harsh criminal penalties for inadvertent transgressions of indeterminate standards – the *mens rea* historically reserved for amelioration in tort – companies will now spend far more on prevention than Congress or the EPA ever

intended, reducing competitiveness, and, ultimately, competition, in the affected industries.

This Court's review is thus necessary to restore the few fundamental protections criminal defendants accused of environmental violations had before the Ninth Circuit ran roughshod over them.

2. The Ninth Circuit's decision merits certiorari review for another reason, as well: it substantially weakens protections against untimely prosecutions for those accused of regulatory crimes – a class of defendants already burdened by the Ninth Circuit's retreat from basic tenets of criminal law.

The Ninth Circuit ignored district court's unambiguous finding that the initial indictment violated the statute of limitations because it "failed to allege an overt act in furtherance of the knowing endangerment object within the limitations period." By holding that 18 U.S.C. § 3288 does not bar the return of a superseding indictment where the original indictment was, as here, "time-barred," the decision misunderstands § 3288 to create a distinction between "time-barred" and "timely-filed," effectively writing the limitation out of the statute for these defendants. As a result, prosecutors in the Ninth Circuit may now bring numerous prophylactic indictments alleging generic elements against anyone under suspicion, effectively extending the statutory period by six months in every case.

ARGUMENT

A. Public Welfare Offenses Subject Regulated Communities In The Ninth Circuit To Boundless Risk Of Disparate Penalties Without Traditional Protections.

1. The public welfare offense doctrine – under which individuals can be found guilty with a reduced *mens rea* requirement for handling "dangerous and deleterious devices" that "will be assumed to alert an individual that he stands in responsible relation to a public danger" – "almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary." *Staples v. United States*, 511 U.S. 600, 612 n.6, 616 (1994); *accord Morissette v. United States*, 342 U.S. 246, 256 (1952) (public welfare offense "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation"). Under environmental statutes like the CAA and the Federal Sentencing Guidelines, however, companies and individuals who transgress an environmental regulation – even unknowingly – may be guilty of a felony punishable by years of imprisonment. For example, a defendant in an earlier Ninth Circuit case received 33 months imprisonment for discharging 6% more sewage than his permit allowed. *United States v. Weitzenhoff*, 35 F.3d 1275, 1282, 1296 (9th Cir. 1993).

Despite the availability of a wide range of civil and administrative enforcement mechanisms, federal regulators are increasingly turning to

criminal prosecution of the environmental laws.[2] *See* Lundin, *Sentencing Trends in Environmental Law: An "Informed" Public Response*, 5 FORDHAM ENVTL. L.J. 43, 48-51 (1993) (describing trend toward increased environmental prosecutions and longer prison sentences). This trend shows no sign of abating – in fact, the government has recently expanded the reach of environmental enforcement into the workplace. *See* Barstow & Bergman, *With Little Fanfare, a New Effort to Prosecute Employers that Flout Safety Laws*, N.Y. TIMES, May 2, 2005, at A17 (DOJ announcing interagency partnership with EPA and OSHA to prosecute workplace safety violations by using environmental laws).

2. These harsh penalties mixed with the government's decreased burden of proving *mens rea*, as detailed *infra* at 15-22, create immense pressure on defendants to accept plea bargains. The easier a case is to try, the more power a prosecutor wields in plea negotiations: "[c]ases that would be risky in litigation if the crime were defined precisely become fairly easy, meaning that charges the defendant would otherwise contest turn into pleas." Stuntz, *Substance, Process, and the*

---

[2] This phenomenon is not limited to environmental laws. Government officials have also stepped up prosecutions for corporate fraud. In 2007, for example, the President's Corporate Fraud Task Force announced its "remarkable results": in five years, it had secured convictions for 1,236 individuals, including 214 CEOs and presidents, 53 CFOs, 23 corporate counsels, and 129 vice-presidents. Fact Sheet: President's Corporate Task Force Marks Five Years of Ensuring Corporate Integrity, U.S. Dep't of Justice (July 17, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/July/07_odag_507.html.

Civil-Criminal Line, 7 J. CONTEMP. LEGAL ISSUES 1, 15 (1996); *see also* Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 724 (2005) (increasing potential punishment allows prosecutors "to wield a bigger stick throughout the criminal process, and often leaves the accused little choice but to accept a plea bargain").[3] The more power a prosecutor has to induce a plea agreement, the more concentrated governmental authority becomes because, as commentators have observed, plea bargaining "*is* the criminal justice system." Scott & Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) (emphasis in original); *see also* Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 90-91 (2005) (about 95% of federal criminal cases are resolved by guilty pleas).

3. Both before and after a defendant is swept into the criminal system for regulatory violations, the deck is stacked against her. The probability is high that she will receive a multi-year prison sentence, even if she did not know her actions violated the law and, after the Ninth Circuit's decision here, even if she could not have known. The Ninth Circuit's decision turns the existing legal labyrinth into something even more one-sided, effectively eliminating long-standing procedural

[3] Studies have shown that *innocent* criminal defendants can be more likely to agree to a plea deal. Huff, *Wrongful Conviction: Causes and Public Policy Issues*, CRIM. JUST., Spring 2003, at 15, 17 (in psychological experiment, "innocent 'defendants' were more likely to accept plea bargains when they faced a number of charges or when the probable severity of punishment was great").

protections for those accused of regulatory infractions.

First, the decision nullifies the principle that due process entitles defendants to fair warning of the conduct that can give rise to criminal liability. Many American industries are already subject to pervasive regulation. The governing regulations are often highly technical, and their requirements can be difficult to ascertain, even for experts. But now, in the Ninth Circuit, the government may prosecute companies and their employees for acts that are not even covered by the text of any regulation but are, at most, somehow merely similar in nature.

Second, the decision impermissibly applies common law principles to enlarge the scope of criminal liability fixed by statutory or regulatory text. The meaning of environmental laws must be determinate, not variable according to the whim of prosecutors or the identity of defendants. Here, even a defendant who manages to penetrate thousands of pages of regulations might still be handed an indictment if the government decides, after the fact, that an otherwise on-point civil regulatory definition does not apply to his conduct – even where, as here, the criminal provision incorporates the civil definition rather than providing one of its own.

Instead, the prosecutor can select his own definition, which, in the present case, was the definition of "asbestos" found in the Chemical Abstract Service (CAS), a private database accessible only to paid subscribers. W.R. Grace Pet.

13. Alternatively, a court can, without citation, offer its own definition, previously unknown and unknowable to the defendant. App. (No. 07-1286), at 16a-17a. There is no refuge, nothing to provide actual or constructive notice, even for the most diligent and innocent-minded defendant who is otherwise engaging in socially productive conduct. This gives prosecutors even more power to bring charges and secure convictions, thus increasing the pressure on defendants to negotiate plea agreements.

In the instant case, the Ninth Circuit held that, because defendants are "an industrial chemical company and seven of its top executives" who "are all familiar with asbestos," they had "actual notice" and "have known of the health risks posed by . . . their products." *Id.* at 17a.[4] While a defendant's professional background might have some bearing on whether he should have known that a particular substance was a pollutant subject to regulation, it is wholly irrelevant to a statute's or regulation's definition of *what* a pollutant is. A defendant's background does not change what it is that Congress and the EPA *intended to – and actually did – regulate*.

"Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Crandon v.*

[4] Because there is no factual record in this case – only an indictment – the Ninth Circuit had no basis for making these assumptions about defendants.

United States, 494 U.S. 152, 160 (1990); *see also United States v. Lanier*, 520 U.S. 259, 266 (1997) ("due 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"). It should be rarer still for a court's own conception of what constitutes a "hazardous air pollutant" to displace, and broaden, the EPA's own published and properly promulgated definition. Nevertheless, the Ninth Circuit has accomplished just that, and in so doing countenanced virtually boundless liability for regulatory crimes.

Third, the Ninth Circuit has abandoned the rule of lenity, the application of which should not hinge on a defendant's subjective characteristics. *See* App. (No. 07-1286), at 17a. When a criminal statute does not, as here, unambiguously cover the accused's conduct, the rule of lenity gives the benefit of the doubt to the defendant. It is a "time-honored interpretive guideline" that "ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985). A statute is either ambiguous or it is not – neither the clarity of Congress' intent nor its words in a criminal statute change from defendant to defendant.

"In our era of multiplying new federal crimes" – and, one might add, ever growing and complex regulations – "there is more reason than ever to

give this ancient canon of construction consistent application." *Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting). This is especially true for environmental crimes: "when the environmental protection requirements upon which . . . violations are based are too obscure or indeterminate[,] the applicable law should be read in a light more favorable to the criminal defendant." Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2526 (1995). Indeed, "the problems intended to be redressed by the rule of lenity are especially pronounced in the environmental law context." *Id.* at 2527. In contrast to the Ninth Circuit, other courts of appeals have properly recognized that "[t]he fact that [a] case involves pollution does not make the rule of lenity inapplicable." *United States v. Borowski*, 977 F.2d 27, 32 n.9 (1st Cir. 1992) (applying rule of lenity to Clean Water Act); *accord United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993).

B. Industries Are Subject To Vast Statutory And Regulatory Schemes, Many Of Which Create Potential Criminal Liability.

The scope of American industry already subject to highly intrusive federal civil regulation and direct criminal enforcement is breathtaking. There are now "several hundred federal agencies, charged with everything from 'assur[ing] so far as possible every working man and woman in the nation safe and healthful working conditions and preserv[ing] our human resources' to creating 'a national policy

which will encourage productive and enjoyable harmony between man and his environment.'" Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1337-38 (2008) (quoting 29 U.S.C. § 651(b) (OSHA) and 42 U.S.C. § 4321 (EPA)). These agencies manage industries comprising a vital share of our domestic economy, including manufacturing, transportation and shipping, finance and banking, energy and mining, health care, pharmaceuticals, agriculture, and more.

The long arm and stubborn complexity of this civil regulatory scheme may be matched only by the rapidly expanding reach of federal criminal laws to new regulatory domains, a mode of enforcement traditionally reserved to the States. No precise count of the number of federal statutory crimes exists. Charged with the task of enumerating them, the American Bar Association's Task Force on the Federalization of Crime essentially gave up, stating that it "may be impossible to determine exactly how many federal crimes could be prosecuted" – "[s]o large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes." AMERICAN BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 2, 9 (1998) (hereinafter "ABA Task Force"). These laws are "scattered in over 50 titles of the United States Code, encompassing roughly 27,000 pages." Rosenzweig, The Heritage Foundation, *The Over-Criminalization of Social and Economic Conduct* (April 17, 2003), *republished in* CHAMPION, Aug. 2003, at *29.

Nevertheless, it is safe to say that thousands of acts (or omissions) are subject to criminal sanction by the federal government – and that number is growing. After an exhaustive analysis, one commentator concluded that "[t]here are *over 4,000 offenses* that carry criminal penalties in the United States Code." Baker, *Measuring the Explosive Growth of Federal Crime Legislation*, THE FEDERALIST SOC'Y FOR LAW & PUBLIC POLICY STUDIES, at 3 (2005) (emphasis added). That number reflects a one-third increase since 1980. *Id.* Environmental crimes accounted for a "substantial number" of the federal criminal statutes enacted from 1998 to 2005. *Id.* Indeed, prior to the 1980s, all but the most egregious environmental violations received administrative or civil sanction. *See* Lundin, *supra*, at 48.

Such figures do not even include administrative regulations. Federal criminal laws impacting economic activity often incorporate regulations promulgated by the agencies charged with implementing the statutes and impose criminal liability for violating the same. The ABA Task Force estimated that as of 1996, the federal government could impose sanctions, many of which would be criminal, for nearly 10,000 regulations – and that is likely a conservative figure. ABA Task Force, *supra*, at 10; *see also* Coffee, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models*, 71 YALE L.J. 1875, 1881 (1992) (early 1990s estimate that "the number of federal regulations currently punishable by criminal penalties [is] over 300,000"). "Whatever the exact number of crimes that comprise today's 'federal criminal law,' it is

clear that the amount of individual citizen behavior now potentially subject to federal criminal control has increased in astonishing proportions in the last few decades." ABA Task Force, *supra*, at 10.

C. A Relaxed *Mens Rea* Requirement Leaves Regulated Communities Vulnerable To Prosecution And Invites Inefficient Over-Investment in Compliance.

The convergence of the federal government's civil regulatory role with its vast expansion into the criminal sphere has already harmed regulated communities. "[The] rise of the modern administrative state [has] erect[ed] a vast legal labyrinth buttressed by criminal penalties in areas ranging from environmental protection and securities regulation to product and workplace safety." Luna, *supra*, at 708-09.

That twin enforcement system captures acts (or omissions) that may not be inherently evil and which, to the contrary, frequently occur in the context of socially and economically beneficial activities. Proof that the defendant knew she was violating the law is rarely required; a mere inadvertence can sometimes result in a felony conviction. Thus, coupled with the sheer volume of regulations – many of which are, at best, incredibly complex – the cost of compliance is high. Yet, the cost has thus far been determinate; what any given law required was usually ascertainable. No longer in the Ninth Circuit. Its decision here allows prosecutors to impute knowledge of illegality to defendants before the illegal subject matter is even

identified, increasing the burden of compliance to the breaking point.

1. Acts giving rise to regulatory criminal liability are unlike traditional, common law crimes. They are wrongful not because of their intrinsic nature – like murder, arson, or rape (*malum in se*) – but rather because the law says they are (*malum prohibitum*). BLACK'S LAW DICTIONARY 978-79 (8th ed. 2004) (*malum prohibitum* is "a[n] act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral"). Thus, "many statutes punish those whose acts are wrongful only by virtue of legislative" – or agency – "determination." Rosenzweig, *supra*, at *30. As a result, individuals are less likely to realize when their actions cross the line from permissible to criminal. This is especially true when the laws are technical and complex.

For example, this Court has observed that the "highly technical" tax code and banking laws "present[] the danger of ensnaring individuals engaged in apparently innocent conduct." *Bryan*, 524 U.S. at 194. Both sets of laws "sometimes criminalize conduct that would not strike an ordinary citizen as immoral or likely unlawful. Thus, both sets of laws may lead to the unfair result of criminally prosecuting individuals who subjectively and honestly believe they have not acted criminally." *United States v. Aversa*, 984 F.2d 493, 502 (1st Cir. 1993) (en banc) (Breyer, J., concurring); *see also Arthur Anderson LLP v. United States*, 544 U.S. 696, 703-04 (2005) ("the act underlying the conviction – 'persuasion' – is by

itself innocuous . . . 'persuading' a person 'with intent to . . . cause' that person to 'withhold' testimony or documents from . . . Government official[s] is not inherently malign") (quoting 18 U.S.C. § 1512(b)); *Ratzlaf v. United States*, 510 U.S. 135, 144 (1994) ("currency structuring is not inevitably nefarious").

These concerns are magnified in the environmental realm, particularly because environmental laws are frequently empirical. Because "[t]here are rarely any clear threshold levels at which environmental pollution becomes unacceptable," the laws "draw[] lines that tend to be based on fairly arbitrary distinctions [and] turn on questions of degree that are, at best, gray at the border." Lazarus, *supra*, at 2431. "It is rarely self-evident[] on which side of the border one lies." *Id.* Moreover, because "[m]any socially beneficial activities cause pollution, either indirectly or directly," environmental laws often do not prohibit the release of substances in their entirety; rather, the laws govern "where, when, and how much" one can discharge – "the difference between being on just one side of the line rather than just on the other side is likely to be negligible," but the legal consequences can be tremendous. *Id.* at 2422, 2431.

Not only are the lines between permissible and illegal not intuitive in environmental law, but they are incredibly complex and technical. Even experts in the field refer to environmental law's "extraordinary complexity" and note that "the quantity of minutely detailed language in modern environmental law beggars description." *Id.* at 2423

(collecting citations). "[A]lthough criminal law requires clear, determinate, and readily accessible legal standards, familiar to the general public, environmental law is replete with obscure . . . and highly technical standards, the meaning of which few can claim genuine mastery." *Id.* at 2445.

2. There are approximately 16,000 pages of regulations for the three major environmental statutes – the Clean Air Act, Clean Water Act (CWA), and Resource Conservation and Recovery Act (RCRA). *See* 40 C.F.R. §§ 50-97 (CAA); 40 C.F.R. §§ 100-149, 400-699 (CWA); 40 C.F.R. §§ 260-282 (RCRA). *See also* Anderson, *The Environmental Revolution at Twenty-Five*, 26 RUTGERS L.J. 395, 413 (1995) (environmental regulations in Code of Federal Regulations measure over thee-and-a-half feet tall).[5]

Individuals need not know that their conduct violates *any* of these regulations to be subject to potential criminal liability. The CAA, CWA, and RCRA criminalize almost all knowing violations of a regulation, including discharging a substance without a permit when one is required, failing to comply with a permit condition, or failing to meet recording and reporting requirements. 42 U.S.C.

[5] The EPA also drafts preambles to its regulatory schemes that do not appear in the Code of Federal Regulations, but provide detailed guidance as to how the agency plans to implement specific laws. These preambles can be lengthier than the rules themselves. For example, the regulations setting forth the definition of "solid waste" were a few pages of the Federal Register; the EPA's preamble explaining those regulations covered 54 pages. Lazarus, *supra*, at 2437 (citing 50 Fed. Reg. 614 (1985)).

§ 7413(c)(1)-(2); 33 U.S.C. § 1319(c)(2); 42 U.S.C. § 6928(d). To determine the scope of criminal liability, one must not only consult the statute, but also decipher the underlying regulations that form the basis for the statute's civil regulatory scheme. "This structure creates [a] broad criminal net, which piggybacks on the full range of environmental regulations." Barker, *Environmental Crimes, Prosecutorial Discretion, and the Civil/Criminal Line*, 88 VA. L. REV. 1387, 1393 (2002); *see also* Rosenzweig, *supra*, at *35 ("Identically phrased statutes are often applicable to the same conduct – one authorizing a civil penalty and the other a criminal sanction.") (citing 33 U.S.C. § 1319(g) (authorizing administrative penalties for CWA violations), § 1319(b),(d) (civil penalties), and § 1319(c) (criminal penalties)).

The requirement that a violation be "knowing" is all that stands between a civil or administrative sanction and a felony conviction. As one commentator has noted, however, that line is a "parchment barrier," Rosenzweig, *supra*, at *33, because courts of appeals have held that a "knowing" *mens rea* does not require that the defendant actually know he is breaking the law. Put another way, the "knowing" *mens rea* standard in environmental statutes "requires not that a defendant know that his conduct was illegal, but only that he know the facts that make his conduct illegal." *United States v. Wilson*, 133 F.3d 251, 262 (4th Cir. 1997) (quotations omitted). The "government need not prove that the defendants understood the legal consequences of those facts or were even aware of the existence of the law

granting them significance." *Id.* at 264.[6] In other words, to secure a felony conviction, the government need only prove that a defendant knew she was discharging a pollutant. A defendant who honestly, but incorrectly, believed that she – or her employer – had a permit to do so has no defense. *E.g.*, *United States v. Weitzenhoff*, 35 F.3d 1275, 1286 (9th Cir. 1993) (defendants could not interpose "lack of knowledge" defense where permitted sewage discharge exceeded allowable levels by 6%; knowledge of discharge alone satisfied *mens rea* standard);[7] *United States v. Hopkins*, 53 F.3d 533, 541 (2d Cir. 1995) (government needed to prove only that defendant "knew the nature of his acts and performed them intentionally, but [not] that he knew that those acts violated the CWA, or any particular provision of that law, or the regulatory permit").

Similarly, by invoking the traditional public welfare offense doctrine, courts of appeals have also held that a defendant who knowingly discharged a pollutant, but did not know he needed a permit to do so, acted "knowingly." *E.g.*, *United States v.*

---

[6] *See also* Lazarus, *supra*, at 2469 ("Without exception, the courts agree that the criminal penalty provisions in [environmental statutes] that require that a person 'knowingly violates' do not require the government to prove that the defendant was actually aware of the applicable environmental standard.").

[7] "The only thing [the defendants] have to know to be guilty is that they were dumping sewage into the ocean, yet that was a lawful activity expressly authorized by their federal permit." *Weitzenhoff*, 35 F.3d at 1294 (Kleinfeld, J., dissenting from denial of rehearing en banc).

Weintraub, 273 F.3d 139, 147 (2d Cir. 2001). For a public welfare offense, a defendant has the requisite *mens rea* if he simply "knows that he is dealing with a dangerous devise of a character that places him in responsible relation to a public danger, [and] should be alerted to the probability of strict regulation." *Staples*, 511 U.S. at 607 (quotations and citation omitted). *See*, *e.g.*, *United States v. Sinskey*, 119 F.3d 712, 715-16 (8th Cir. 1997) (CWA, invoking public offense doctrine); *Hopkins*, 53 F.3d at 537-39 (same); *Weitzenhoff*, 35 F.3d at 1284-86 (same). Thus, the government need not prove that a defendant knew a substance was covered by a regulation – only that the defendant had a general sense that the substance was a pollutant.

Of course, not all pollutants are self-evidently pollutants as defined by statute or regulation: hot water, rock, and sand are "pollutants" under the CWA. 33 U.S.C. § 1362(6); *see also* Lazarus, *supra*, at 2479 ("pollutants subject to the federal environmental statutes are not . . . confined to those that are especially dangerous"). And, to hold that "any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to extensive regulation and that may involve a risk to the community . . . would extend th[e] narrow [public welfare offense] doctrine to virtually any criminal statute applicable to industrial activities." *Hanousek v. United States*, 528 U.S. 1102, 120 S. Ct. 860, 861 (2000) (Thomas, J., dissenting from denial of certiorari).

In short, an individual can act "knowingly" even without any specific intent to do a wrongful act or to violate a legal duty that is set forth amid thousands of pages of dense, highly technical regulations – regulations that even agency officials might not understand.

3. The Ninth Circuit's interpretation of the CAA's knowing endangerment section relaxes prosecutors' burden of proving intent even further. As the law currently stands, "in regulated industries, those who participate in the industry are presumed to know all of the intricate regulatory arcana that govern their conduct. As a consequence, the only requirement imposed by requiring proof that one has acted 'knowingly' is that the government must demonstrate that the defendant has purposefully done the act constituting the offense – and *in the context of regulated economic conduct that showing is trivial*." Rosenzweig, *supra*, at *33-*34 (emphasis added). "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion." *Morissette*, 342 U.S. at 250. Yet, the Ninth Circuit has turned this fundamental tenet of criminal law inside out.

Here, defendants could not have obtained fair warning of the legal status of the conduct now resulting in criminal liability. Until today, industry had recognized that materials containing the six historically regulated fibers of asbestos were the subject of potential civil or criminal enforcement if certain practices were not followed. Critically, however, winchite and richterite fell outside this

definition of "asbestos," as used by every governmental regulatory agency to address the issue for decades, the EPA included.[8] This presents an unworkable dilemma. To avoid the fate of W.R. Grace and its employees, the regulated community in the Ninth Circuit must divert resources from business interests to invest in over-compliance with the law. The uncertainty about the legal rule requires a margin of error to avoid inadvertent criminal liability.

It is therefore vitally important that this Court grant review to restore clear notice of the acts that could subject companies and individuals to criminal sanction, so as not to deter economically and socially beneficial activities. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 441 (1978) ("salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal

[8] This holds for both civil and criminal enforcement. The Ninth Circuit's understanding of the CAA's "hazardous air pollutant" regulation promulgated for asbestos as an instrument of civil enforcement only is erroneous. It belies the federal government's 30 years of use in criminal prosecutions of the same six-fiber definition of asbestos found in the National Emission Standards for Hazardous Air Pollutants (NESHAP) regulations. Under the Ninth Circuit's decision, however, if prosecutors also assert "imminent endangerment," common law principles can lead to a more expansive allegation-specific definition at variance with the NESHAP text. The result will be inconsistent federal criminal definitions of asbestos in the *same* CAA regulation for substantially similar releases depending on an accident of geography.

punishment for even a good-faith error of judgment").

D. The Ninth Circuit's Erroneous Interpretation Of § 3288's Plain Text Destroys Statutory Repose For Criminal Defendants And Merits Certiorari Review.

The Ninth Circuit's erosion of procedural protections for those accused of regulatory crimes is further exacerbated by its move to substantially weaken criminal statutes of limitations. This Court's review is necessary to protect those accused of regulatory crimes – already burdened by the Ninth Circuit's unprecedented retreat from basic tenets of criminal law – from untimely prosecutions.

The Ninth Circuit fundamentally misunderstood the intent of 18 U.S.C. § 3288, the final sentence of which explains that the savings clause does not extend to initial indictments barred by the statute of limitations. Here, the Ninth Circuit held that this provision does not bar the return of the superseding indictment because the original indictment had been obtained before the statute of limitations expired. Such a reading ignores the district court's unambiguous finding that the initial indictment was "time-barred" because it "failed to allege an overt act in furtherance of the knowing endangerment object within the limitations period." App. (No. 07-1287), at 103a.

By creating an artificial distinction between "time-barred" and "timely-filed," the Ninth Circuit effectively wrote the limitation out of the statute

for these defendants. But the district court never found, and the parties never agreed, that the original indictment had been "timely filed." Nor did the superseding indictment simply repair a minor pleading flaw in an otherwise timely-filed indictment. Section 3288 makes no provision for new allegations in a superseding indictment to relate back to the initial filing date.

Rather, the district court dismissed the initial indictment explicitly on statute of limitations grounds, and the plain text of § 3288 clearly directs that statute of limitations violations in the original indictment cannot be revived under the savings clause. The rationale for this is obvious – were it otherwise, the government could rescue a woefully inadequate indictment containing virtually none of the elements of the offense simply by filing a superseding indictment after the statute of limitations had expired. At best, initial indictments would become placeholders, allowing prosecutors to extend their rights as to potential defendants at the close of the limitations period. The savings clause was intended to protect the government from formalism, from minor technical flaws trumping substance. Yet, the Ninth Circuit has transformed this important check into a device for prosecutors to cast wide nets, and avoid the statute, with the hope of sorting it out afterwards. Especially in the context of regulatory crimes, certiorari review is needed to protect an already over-burdened class of defendants from this abuse.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions for certiorari.

Respectfully submitted.

Jeffrey T. Green
Jonathan Rackoff
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Jan S. Amundson
Quentin Riegel
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 Pennsylvania
Avenue, N.W.
Washington, D.C. 20004
(202) 637-3000

Kristina Silja Bennard
Counsel of Record
Matthew D. Clark
DAVIS WRIGHT
TREMAINE LLP
1201 Third Avenue
Suite 2200
Seattle, WA 98101
(206) 622-3150

Leslie A. Hulse
AMERICAN CHEMISTRY
COUNCIL
1300 Wilson Blvd.
Arlington, VA 22209
(703) 741-5165

May 15, 2008