Written Statement of
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on behalf of the
National Association of Criminal Defense Lawyers

before the
House of Representatives Committee on the Judiciary
Subcommittee on Crime and Federal Government Surveillance

Hearing on "Overreach: An Examination of Federal Statutory and Regulatory Crimes"

April 30, 2024

Chairman Biggs, Ranking Member Lee, and distinguished members of this Subcommittee, thank you for holding this hearing on the topic of overcriminalization. As you know, the National Association of Criminal Defense Lawyers has been working on this issue for over a decade; its work was instrumental in inspiring one of the earliest hearings on this issue, held by this Subcommittee in 2010 on a bipartisan basis, as well as the full Judiciary Committee's formation of the bipartisan Over-Criminalization Task Force a few years later in 2013. We are pleased with this Subcommittee's continued interest in this important issue.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, voluntary bar association founded in 1958 that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of a crime or misconduct. NACDL has a nationwide membership, with over 10,000 direct members and up to 40,000 members 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 criminal defense lawyers. In furtherance of NACDL's mission to safeguard fundamental constitutional rights, NACDL often works on issues involving overcriminalization, prosecutorial overreach, and the proper construction of criminal laws.

The problem of overcriminalization is multifaceted, with many aspects that pervade our criminal legal system, including the criminalization of conduct that is not harmful to society or others; criminal statutes that lack adequate *mens rea*, or intent, requirements; ambiguous and vague language in criminal statutes that provide insufficient notice and insufficient limitation on what conduct is criminalized; and the imposition of vicarious liability with insufficient requirement that the charged person was involved in, or even knew about, the underlying conduct.

Overcriminalization also includes the overfederalization of the criminal law, particularly in areas that can be, and historically have been, under the jurisdiction of the states. It also includes the proliferation of duplicative or overlapping criminal offenses. And, finally, it includes the imposition of criminal penalties on largely economic activities that can be, and traditionally have been, effectively enforced using civil remedies and civil enforcement.

To begin, there are thousands of federal crimes. There are so many federal crimes that no one, not even the Supreme Court, the Department of Justice, or anyone in the Halls of Congress knows exactly how many there are. There have even been efforts by academics, advocacy organizations, and members of Congress to attempt to count the number of federal crimes. But still, the true number is unknown.[1] Many of the crimes are situated in Chapter 18 of the U.S. Code, which is focused on criminal offenses. But there are also crimes scattered around many if not most of the other chapters of federal statutory law. Additionally, some criminal offenses are dependent on regulatory definitions and interpretations promulgated by federal administrative agencies. And again, the exact number of these regulatory crimes is unknown.

It is a fundamental principle that a criminal law must have two elements: (1) an *actus reus* in Latin, or what we would call a wrongful act; and (2) a *mens rea*, that is to say, a guilty mind or wrongful intent. In general, overcriminalization is when a statute may punish a person

[1] *See, e.g.*, Patrick McLaughlin & Liya Palagashvili, Counting the Code: How Many Criminal Laws Has Congress Created? (Jan. 17, 2023), https://www.mercatus.org/research/policy-briefs/counting-the-code-congress-criminal-laws (estimating about 5,200 federal crimes); Ronald L. Gainer, Report to the Attorney General on Federal Criminal Code Reform, 1 Crim. L.F. 99, 100 (1989) (report of a 1980s effort by the Department of Justice to manually count federal crimes); *see also* Gary Fields and John R. Emshwiller, Many Failed Efforts to Count Nation's Federal Criminal Laws, Wall. St. J. (July 23, 2011) (describing the difficulty of counting federal crimes and detailing both the Justice Department's and the American Bar Association's separate unsuccessful efforts to do so), https://www.wsj.com/articles/SB10001424052702304319804576389601079728920 (last accessed Apr. 29, 2024).

for either an act that is not wrongful or punish that person when their intent, or mental state, is not wrongful.

There are many crimes that we can all agree punish actions that we know to be wrong and harmful to others and to society. But there are many crimes where the average person would not immediately think of the conduct in question as being wrong. In many cases they are not harmful to society or to any other person. These things are considered crimes essentially only because the law says so. These types of crimes range from drug possession to certain white collar offenses to certain low-level crimes that are generally misdemeanors. Congress should be wary of criminal offenses where the conduct punished is not inherently wrongful or harmful to others or to society.

The other requirement, the *mens rea* or intent requirement, is sometimes even more difficult. It is a basic principle of criminal law that people should only be criminally punished for intentional wrongful actions. We generally don't use the criminal law to punish actions that were accidental or inadvertent. We generally don't want people to face criminal consequences for mistakes. There are only rare exceptions to this rule. The first is a reckless mistake that results in very serious harm, such as the death of a person, for a crime like reckless homicide or manslaughter. The second is that strict liability – that is, liability without a *mens rea* requirement – may be imposed for relatively minor crimes that uphold public health and welfare but where little social stigma is attached.[2]

Strong intent or *mens rea* requirements protect people from being prosecuted and convicted when they didn't intend to do anything wrong. A 2010 study by NACDL and the Heritage Foundation analyzed all of the bills that would have created new non-violent, non-drug-

[2] *See generally Morisette v. United States*, 342 U.S. 246 (1952) (discussing strict liability crimes and their requirements).

related criminal offenses introduced in the 109th (2005-2006) Congress.[3] Of those 446 new offenses, the study found that 57% lacked an adequate *mens rea* requirement. Worryingly, 23 of those were enacted into law. More recently, NACDL and Heritage conducted a new study with very similar methodology looking at bills from the 114th Congress (2015-2016).[4] The study looked at over 1,300 bills and found 226 new criminal offenses that were introduced in Congress.[5] The research concluded that Congress had improved somewhat. Still, roughly 48% of criminal provisions introduced in the Senate and 37% of those introduced in the House lacked a sufficiently strong *mens rea* requirement. We urge Congress to carefully consider the *mens rea* requirements attached to any new criminal provisions and to ensure that those requirements are strong enough to avoid unintended overcriminalization.

Another way that overcriminalization seeps into federal law is through vicarious liability, that is, criminal liability not because of one's own actions, but because of one's relationship with someone else who is engaging in some criminalized conduct. This occurs in many different contexts. It may occur in the context of white collar offenses, where a statute or regulation may make a supervisor vicariously liable for the actions of the people under their supervision if that person "knew or should have known" about the conduct.

But even more common than supervisory liability is vicarious liability through the conspiracy law doctrines. Broadly, a conspiracy is an agreement to commit some unlawful activity. However, no unlawful activity needs to actually take place; the law merely requires the

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[3] Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law* (2010), https://www.nacdl.org/Document/WithoutIntentHowCongressIsErodingCriminalIntentReq.

[4] Zack Smith & Nathan Pysno, *Without Intent Revisited: Assessing the Intent Requirement in Federal Criminal Law 10 Years Later* (2021), https://www.nacdl.org/Document/WithoutIntentRevisitedAssessFedCrimIntentReq10Yrs.

[5] Offenses relating to firearms, possession or trafficking of drugs or pornography, immigration violations, or intentional violence were excluded from this analysis. *See id.*

agreement and, in some but not all statutes, some "overt act" in furtherance of the activity.[6] Conspiracy is therefore what we call an "inchoate" crime, one that is incomplete. The esteemed Judge Learned Hand called conspiracy the "darling of the modern prosecutor's nursery."[7] Judge Frank Coffin, in the First Circuit's landmark *United States v. Spock* case, said, "[T]he absence of clear definitions of the elements of conspiracy creates a serious risk . . . . [Conspiracy] is . . . not well-defined and experience teaches that even its traditional limitations tend to disappear."[8]

Again, conspiracies can be seen in many different contexts, from complex white collar criminal cases to street-level drug trafficking conspiracies. The fact of the matter is, however, that in any type of conspiracy, a person who is a minor participant can be held criminally liable for the actions of the entire conspiracy, including the most culpable participants and the leaders themselves. Minor participants can even be liable for actions they had no idea were occurring, so long as those actions were "foreseeable."[9] This has major impacts on our criminal system, harshly punishing small-time players at the same level as everyone else, and sometimes more harshly than the leaders themselves. Research from the U.S. Sentencing Commission has even shown that the single most common statutory reason for a mandatory minimum sentence to be imposed against a federal defendant is not something that person themselves did, it is conspiracy liability.[10] The widespread use of harsh conspiracy statutes that punish people for the actions of others, not the actions of the person themselves, is another example of overcriminalization in our system.

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[6] National Association of Criminal Defense Lawyers, *Criminal Conspiracy: Position Paper and Proposals for Reform* (2015), https://www.nacdl.org/getattachment/d61805d0-1f2d-4fc3-a394-6467f58973d5/criminal-conspiracy-position-paper-and-proposals-for-reform.pdf
[7] *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925).
[8] 416 F.2d 165, 188 (1st Cir. 1969) (Coffin, J., dissenting).
[9] *See Pinkerton v. United States*, 328 U.S. 640 (1946).
[10] *See* U.S. Sentencing Commission, An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System (July 2017), at 35 tbl. 1.

I want to briefly note and correct a couple of common misconceptions regarding overcriminalization and white collar offenders. First, some have suggested that overcriminalization only affects so-called white collar offenders. The fact of the matter is that overcriminalization can occur in any area of the criminal law. Second, there is a common misconception that white-collar offenders are predominantly white people. In fact, recent research from the U.S. Sentencing Commission analyzing federal economic crimes, which generally are white-collar crimes such as embezzlement, identity theft, and fraud, shows that people of color are disproportionately affected by enforcement of most of these categories of offenses as well.[11]

Any type of overcriminalization—whether it's the unwarranted criminalization of certain conduct, the weakening of *mens rea* requirements, the federalization of crimes that can be handled at the state level, or the imposition of vicarious criminal liability—will worsen the trial penalty. The term "trial penalty" refers to the vast difference in sentences between defendants who plead guilty and those who go to trial. In the federal system, defendants who exercise their constitutional right to trial are, on average, sentenced to prison terms three times longer than those who pleaded guilty to the exact same crimes.[12] For some offense categories, the differential is even greater, 5 times and even up to 8 times longer on average. Unsurprisingly, this has a major impact on trials in the federal system. Last year, less than 3% of people convicted in the federal system went to trial; the remaining 97% pled guilty.[13]

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[11] U.S. Sentencing Commission, What Does Federal Economic Crime Really Look Like? (Jan. 2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190130_Econ-Crime.pdf.

[12] National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct.

[13] U.S. Sentencing Commission, 2023 Sourcebook of Federal Sentencing Statistics tbl. 11 (2023).

This massive differential in sentencing—the "trial penalty"—also has numerous other effects on the system. It enables a wide variety of coercive tactics by prosecutors who can coerce guilty pleas by threatening long sentences if an accused person chooses to exercise their right to trial and is convicted. These include threatening additional charges, threatening more serious charges, threatening conspiracy charges, threatening to impose sentencing enhancements, seeking different charges that contain mandatory minimum sentences, and more. The trial penalty and coercive plea tactics have a major impact on our criminal legal system and on society. They prevent people from exercising their constitutional right to trial. They lead to longer prison sentences and increase total incarceration.[14] Perhaps most worryingly, the trial penalty can even induce innocent people into pleading guilty.[15]

Overcriminalization has the inescapable effect of increasing prosecutorial discretion. And an increase in prosecutorial discretion is an increase in the availability of potentially coercive tactics in the plea bargaining process. When statutes have vague or nebulous requirements or overlap already existing statutes, these new criminal provisions can be used to pile on charges in order to induce guilty pleas, including from people who are innocent.

To make matters worse, the trial penalty itself makes it hard for people to fight back against this overcriminalization. You might think it's easy for a person to challenge a vague or unclear statute or that a jury would never convict a person of some seemingly innocuous crime.

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[14] The bipartisan Right to Trial Act (H.R. 8092, 117th Cong.) was introduced last Congress to ameliorate the trial penalty. This modest but important bill would have allowed judges to take into consideration plea offers when imposing sentences on those who exercised their constitutional right to trial.

[15] Data from the National Registry of Exonerations shows that 18% of exonerees—people who have been found innocent and completely cleared of the crime they were once convicted of—pleaded guilty. See The National Registry of Exonerations, Browse Cases, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7BFAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7D&FilterField1=Group&FilterValue1=P. For individual stories of innocent defendants who were coerced to plead guilty, see https://guiltypleaproblem.org.

But the trial penalty creates tremendous risk for any defendant who exercises their constitutional right to try their case and risk a sentence that is many times greater than what a person who pleads guilty would likely receive. Additionally, people who plead guilty do not waive only their Sixth Amendment right to trial. They also almost always waive numerous other constitutional rights, including the right to challenge unlawfully obtained evidence, the right to appeal their conviction or sentence, and the right to see the evidence against them. The point is: overcriminalization is hard to challenge. New, vague, overlapping criminal provisions put additional powerful cards into a prosecutor's hand—and the deck is already stacked in their favor.

In short, overcriminalization is a threat to due process and liberty. It concentrates more power in the hands of the government and erodes the rule of law, the foundational principle that our criminal legal system stands on. And, it worsens and is made worse by many of the already well-known problems in our system, most notably the trial penalty.

Thank you for holding this hearing on this issue. The National Association of Criminal Defense Lawyers stands ready to assist the Committee as it further examines the causes and potential remedies to overcriminalization.