22-1600(L),

22-2063(Con), 23-6819(Con)

United States Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-v.-

Jorge Navarro, Erica Garcia, Marcos Zulueta, Michael Tannuzzo, Gregory Skelton, Ross Cohen, Jordan Fishman, Rick Dane, Jr., Christopher Oakes, Jason Servis, Kristian Rhein, Michael Kegley, Jr., Alexander Chan, Henry Argueta, Nicholas Surick, Rebecca Linke, Christopher Marino,

Defendants,

Seth Fishman, Lisa Giannelli,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

Amicus Brief on behalf of the National Association for Criminal Defense Lawyers for Defendant-Appellant Seth Fishman

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INTEREST OF *AMICUS CURIAE*

Founded in 1958, 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 has a nationwide membership of many thousands of direct members (up to 40,000 with affiliate members), including private criminal defense lawyers, public defenders, law professors, and judges. The only nationwide professional bar association for public defenders and private criminal defense lawyers, NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. It files numerous *amicus curiae* briefs each year in this 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 generally.

NACDL submits this brief in support of Defendant-Appellant Seth Fishman ("Fishman") because of the troubling trend of prosecutorial overreach and overcriminalization, which creates new theories of criminal liability never before seen and for which individuals have no

warning. NACDL has a specific interest in this case because the government has asserted a novel theory that expands the reach of who could be defrauded or misled under the felony provisions of the Food, Drug, and Cosmetic Act ("FDCA") to state horse racing commissions. The government's interpretation of these provisions – which the district court accepted in the jury instructions – substantially extends the breadth of who could be defrauded under the FCDA. If affirmed, the prosecution's theory would expose individuals to potentially unbounded liability when faced with counts in breach of the intent to defraud sections of the FDCA. These efforts implicate areas of great concern to criminal defendants, defense lawyers, and academia throughout the country.

SUMMARY OF ARGUMENT

As noted by Justice Gorsuch in *Percoco v. United States*, 598 U.S. 319 (2023) (Gorsuch, J., concurring), "[t]he Legislature must identify the conduct it wishes to prohibit. And its prohibition must be knowable in advance—not a lesson to be learned by individuals only when the prosecutor comes calling or the judge debuts a novel charging instruction." 598 U.S. at 338–39. This case flies in the face of that wisdom.

Appellant was convicted of introducing a misbranded drug into interstate commerce with the intent to mislead or defraud - a felony under the FDCA. The FDCA has always been a statute aimed at protecting consumers. Its core objective is to ensure that any product regulated by the Food and Drug Administration ("FDA") is "safe" and "effective" for its intended use. Indeed, its predecessor, the 1906 Food and Drugs Act, was the first federal consumer protection law.

Appellant's conviction, however, had nothing to do with protecting consumers. Rather, the government used the felony provision of the FDCA to crack down on cheating in the horseracing industry.

Appellant, a veterinarian, was convicted of creating performance enhancing drugs for racehorses in such a way so as to deceive gaming authorities and allow trainers to cheat at horse racing. In announcing the indictment, the government stressed that the case was brought because of a concern for "[t]he care and respect due to the animals competing, as well as the integrity of racing . . . ."[1] The indictment itself made clear that the intent to deceive element was based, at least in part,

[1] Press Release, Dep't of Justice, Manhattan U.S. Attorney Charges 27 Defendants in Racehorse Doping Rings (Mar. 9, 2020), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-charges-27-defendants-racehorse-doping-rings.

on the allegation that defendant defrauded "various state horse racing regulators . . . and the betting public." Fishman Br., App. at 135. At trial the prosecutors argued to the jury during summation that "the entire point of defendant's business was to pedal adulterated and misbranded drugs . . . designed by him to cheat at horseraces." *Id.* at 46–47.

In accordance with the prosecutor's theory of the case, over Appellant's objection, the jury was instructed: "Intent to defraud or mislead can be demonstrated by evidence of intent to defraud or mislead consumers, **state racing** and drug regulators, the Food and Drug Administration, US Customs and Border Protection or other federal drug enforcement authorities." *Id.* at 182–83, 225 (emphasis added).

Certainly, Congress did not pass the FDCA with that purpose in mind. In contravention of Justice Gorsuch's insight, this extension of the FDCA was only known because "the prosecutor [came] calling" and "the judge debut[ed] a novel charging instruction." *Percoco*, 598 U.S. at 338–39.

While it may be a laudable goal to ensure fairness in gaming, Congress has enacted other statutes to address that harm. The jury instructions failed to provide a correct statement of the law to the jury,

which allowed them to convict Appellant for contributing to unfair gaming practices. The Court should correct the District Court's error.

ARGUMENT

I. THE PURPOSE OF THE FDCA WAS TO PROTECT CONSUMERS, NOT ENSURE FAIR SPORTS GAMING

Congress did not enact the Food, Drug and Cosmetic Act ("FDCA") to protect state racing commissions. The Supreme Court has recognized that the FDCA is to be construed in line with its purpose. Indeed, in looking at the legislative history of the FDCA, the Court has observed that it was passed to "set up effective provisions against abuses of consumer welfare growing out of inadequacies in the Food and Drugs Act of June 30, 1906." *United States v. Dotterweich*, 320 U.S. 277, 282 (1943) (citing H. Rep. No. 2139, 75th Cong., 3d Sess., p. 1.)); *see also United States v. Lexington Mill Co.*, 232 U.S. 399, 409 (1914) (noting that the primary purpose of the misbranding provisions concerning food was consumer protection); *McDermott v. Wisconsin*, 228 U.S. 115, 128 (1913) (observing that the predecessor of the FDCA was passed "to exclude from interstate commerce impure and adulterated food and drugs and to prevent the facilities of such commerce to be used to enable such articles

to be transported throughout the country from their place of manufacture to the people who consume and use them"). Thus, as the Eleventh Circuit observed in U*nited States v. Bradshaw*:

> The general scheme of the Act and its legislative history indicate that the overriding congressional purpose was consumer protection—the protection of the public against any misbranded or adulterated food, drug, device, or cosmetic.

840 F.2d 871, 874 (11th Cir. 1988).

Moreover, the overall statutory scheme of the FDCA underscores this notion, as it was designed to "protect the interstate flow of goods from the moment of introduction into interstate commerce until the moment of delivery to the ultimate consumer." *United States v. Beech-Nut Nutrition Corp.*, 659 F. Supp. 1487, 1494 n.8 (E.D.N.Y. 1987), citing *United States v. Sullivan*, 332 U.S. 689, 696 (1948).

Moreover, the Supreme Court has advised that when interpreting provisions of the FDCA, courts should look to the purpose of that legislation. Thus, as early as *United States v. Sullivan*, in considering a criminal misbranding case, the Supreme Court warned that the FDCA should not be interpreted in such a way as to cause "a distortion of the congressional purpose," but rather should be given "fair meaning in accord with the evident intent of Congress." 332 U.S. at 693–94; *see also*

Mut. Pharm. v. Bartlett, 570 U.S. 472, 517 (2013) (interpreting the FDCA in line with its "core purpose of protecting consumers").

Consistent with this overall purpose, the FDCA has a number of provisions relating to labeling and advertising with the intent to protect purchasers of food and drug products. *See, e.g.*, 21 U.S.C. § 352. The FDA is tasked with enforcing these provisions and requires entities to furnish certain materials and accurate information to ensure compliance with the regulations. *See id.* The FDA reviews such information and develops protocols to prove the product's safety and effectiveness, all to protect the ultimate end-users of these products. *See, e.g.*, 21 U.S.C. §§ 351, 355, 360b. Nowhere in the FDCA are state racing or gaming commissions mentioned as the intended protected parties nor is there anything in the FDCA that suggests allowing for such protections would uphold its purpose.

And, in fact, Congress has enacted other legislation that is meant to protect the horseracing industry. Congress created the Horse Racing Integrity and Safety Authority ("HISA"), which functions under the Federal Trade Commission ("FTC"), and regulates nationwide rules for racing safety, medication control, and even anti-doping. *See* 15 U.S.C. §§

3051-3060. Indeed, Congress's creation of the authority to impose *civil* fines, among other administrative penalties, for doping, demonstrates Congress's intention with such infractions. With the FDCA, which contemplates serious harm to consumers, Congress imposed criminal penalties; with anti-doping measures for sports racing, Congress has imposed civil penalties.

In line with the FDCA's statutory scheme, courts have analyzed felony prosecutions under Section § 331(a)(2) to determine who can be defrauded or misled if a defendant was found to have acted with the requisite intent. Courts have found that a defendant can intend to defraud ultimate consumers, antecedent entities that receive manufactured products in the stream of commerce, the FDA, and even government agencies that oversee drug regulation. *See, e.g.*, *United States v. Milstein*, 401 F.3d 53, 69 (2d Cir. 2005); *United States v. Arlen*, 947 F.2d 139, 144 (5th Cir. 1991); *United States v. Cambra*, 933 F.2d 752, 755 (9th Cir. 1991); *Bradshaw*, 840 F.2d at 874; *United States v. Indus. Laboratories Co.*, 456 F.2d 908, 911 (10th Cir.1972).[2] In each of those

[2] At least one court has questioned, in *dicta*, whether 21 U.S.C. § 331(a)(2) can be violated by defrauding a government agency as opposed to an end consumer. *See United States v. Haga,* 821 F.2d 1036, 1041 (5th Cir. 1987). We do not address that ultimate principle because it is not necessary in this case.

cases the fraudulent acts would pose a danger to consumers, which aligns with the purpose of the FDCA. However, Courts have rejected a reading that the FDCA's "intent to defraud" element was meant to encompass any kind of fraud. For example, in *United States v. Micheltree*, 940 F.2d 1329 (10th Cir. 1991), defendants, as in the instant case, were also charged with introducing misbranded drugs into interstate commerce with the intent to defraud in violation of 21 U.S.C. § 333(a)(2). *See* 940 F.2d at 1332. The Tenth Circuit vacated the conviction of the defendants because while defendants may have misled local police, to sustain a conviction under § 333(a)(2), a defendant must defraud "a government agency involved in consumer protection." *Id.* at 1352. Indeed, if any fraud met the requirements of the "intent to mislead" element of the FDCA, then every misbranding conviction would satisfy that standard. In every criminal case, the criminal intends to mislead law enforcement.

There simply is no statutory or legislative basis to conclude that Congress intended the felony provisions of the FDCA to address cheating in horse races.

II. THIS COURT SHOULD NOT ALLOW SUCH PROSECUTORIAL OVERREACH

The Supreme Court has been vigilant in monitoring prosecutorial overreach – particularly when charging violations involving fraud. It is at least one subject upon which all of the Justices agree.

This year, in a 9-0 decision the Court vacated the conviction of Joseph Percoco, a government aide who was convicted of honest services fraud, based on faulty jury instructions. *Percoco*, 598 U.S. at 332–33. In concurrence, Justice Gorsuch stressed the importance of Congress being the ones who determine the conduct it wishes to prohibit and the dangers of prosecutors and courts developing criminal jurisprudence over time. *Id.* at 337. That same day, in an 8-0 decision, the Court vacated the conviction of Louis Ciminelli, ruling that the "right to control" theory of fraud was not a valid basis for criminal liability. *See Ciminelli v. United States*, 598 U.S. 306, 309 (2023). Justice Thomas, writing for the majority, noted that this theory of fraud was not recognized until 1991, decades after the wire fraud statute and over a century after the mail fraud statute. *Id.* at 314. Justice Thomas noted that this theory was "inconsistent with the structure and history of the federal fraud

statutes." *Id.* at 315.

Two years earlier, in a unanimous opinion, the Court overturned the convictions of Bridget Anne Kelly and William Baroni in the "Bridgegate" scandal who had been convicted of wire fraud under a "right to control" theory. *Kelly v. United States*, 140 S.Ct. 1565, 1574 (2020). The Court acknowledged that the defendants' conduct was an abuse of power, but:

> If U.S. Attorneys could prosecute as property fraud every lie a state or local official tells in making such a decision, the results would be – as *Cleveland* recognized – "a sweeping expansion of federal criminal jurisdiction." . . . In effect, the Federal Government could use the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking. The property fraud statutes do not countenance that outcome.

Id. (citing *United States v. Cleveland*, 531 U.S. 12, 24 (2000)).

These cases are instructive in identifying the dangers of allowing Fishman's conviction to stand. The FDCA has a clear purpose and has been interpreted consistent with that purpose since its enaction eighty-five years ago. The FDCA should be interpreted in accordance with that purpose. However, prosecutors have now adopted it as a tool to combat cheating in horse racing. However laudable a goal that may be, such an extension is "inconsistent with the structure and history" of that statute.

Ciminelli, 598 U.S at 315. And as noted by Justice Kagan in *Kelly*, this Court should not countenance "sweeping expansion[s] of federal criminal jurisdiction[,]" when prosecutors come up with novel theories for criminal statutes in an effort to punish all "wrongdoing." 140 S.Ct. at 1574. "Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (citations omitted).

Moreover, this Court need not "fear that wrongdoing will go unpunished because the government can prosecute defendants under other existing laws . . ." *United States v. Evans*, 844 F.2d 36, 42 (2d. Cir. 1988). In passing the Horseracing Integrity and Safety Act, Congress has made its intent clear as to what laws and regulations it wants to govern anti-doping laws in horse racing. *See* 15 U.S.C. §§ 3051-3060. It set forth definitions of the types of races that it wished to regulate, animals that it would cover, and those who had liability (15 U.S.C. § 3051); created the Horseracing Integrity and Safety Authority to oversee the implementation of the Act and gave the Federal Trade Commission

regulatory oversight (15 U.S.C. §§ 3052–53); set forth anti-doping and provisions to protect the safety of race horses (15 U.S.C. §§ 3055–56); and made clear the penalties it believed should be applied for anyone complicit in providing performance enhancing drugs to race horses (15 U.S.C. § 3057). Veterinarians are specifically covered by the Act (15 U.S.C. § 3051(6)) and provides that violations should be monetary fines and penalties, not imprisonment (15 U.S.C. 3507(d)).

Moreover, New York state also has passed anti-doping laws. In particular, pursuant to NY Penal Law 180.51, it is a crime punishable for up to four years' imprisonment to "affect[] any equine animal involved" in a sports contest "by administering to the animal in any manner whatsoever any controlled substance."

In short, the government's use of the criminal misbranding provisions of the FDCA to punish Fishman is wholly divorced from its purpose and traditional use. The prosecutors cannot coopt the FDCA and use it to punish conduct never contemplated by that statute. *See United States v. Wiltberger*, 5 Wheat. 76, 95 (1820) (Marshall, C. J.) ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment").

CONCLUSION

"Wrongdoing" and criminal liability are separate; but the Court below allowed the two to blend into one concept for the jury. It is not enough that Appellant acted unethically, and we stand on "treacherous grounds . . . when we undertake to translate ethical concepts into legal ones, case by case. We usually end up by condemning all that we personally disapprove and for no better reason than we disapprove it." *Jordan v. DeGeorge*, 341 U.S. 223 (1951).

Criminal law "governs the strongest force that we permit official agencies to bring to bear on individuals[,]" and its "promise as an instrument of safety is matched only by its power to destroy." Wechsler, *The Challenge of A Model Penal Code*, 65 Harv. L. Rev. 1097, 1098 (1952). The government's novel theory of prosecution, which turned the FDCA into a fair gaming statute, cannot stand.

Dated: November 6. 2023
New York, New York

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 2,771 words.

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