No. 16-888

In The Supreme Court of the United States

TODD S. FARHA,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND SEVENTEEN LAW PROFESSORS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a criminal statute requires proof of knowledge, may the defendant be convicted upon a finding of deliberate indifference?

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INTEREST OF AMICI CURIAE[1]

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.

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[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for all parties received notice of NACDL's intention to file this amicus brief ten days before the due date. Letters of consent from both parties to the filing of this brief have been lodged with the Clerk of the Court under Rule 37.2(a).

The amici law professors[2] and their interest are listed below:

Paul G. Cassell is the Ronald N. Boyce Presidential Professor of Criminal Law and University Distinguished Professor of Law at the S.J. Quinney College of Law at the University of Utah. He is a former United States District Judge for the District of Utah, former Associate Deputy Attorney General of the U.S. Department of Justice, and former federal prosecutor.

Lucian E. Dervan is an Associate Professor of Law at Southern Illinois University School of Law, where he focuses on domestic and international criminal law. He is the author of two books and dozens of book chapters and articles. He is also the recipient of numerous national and international awards for his teaching and scholarship.

Jules Epstein is a Professor of Law and Director of Advocacy Programs at Temple University Beasley School of Law. He is a former partner at the highly respected Philadelphia criminal defense and civil rights firm of Kairys, Rudovsky, Messing & Feinberg, LLP, where he remains of counsel. Professor Epstein teaches criminal law and evidence courses.

Brian Gallini is Professor of Law and Associate Dean for Faculty at the University of Arkansas-Fayetteville. His scholarship focuses on law

[2] The law professor amici join this brief in their individual capacity. The brief does not purport to present the institutional views, if any, of the law schools with which they are affiliated.

enforcement discretion issues in the context of interrogation methods, consent searches, and profiling. His work has been recognized nationally by the Southeastern Association of American Law Schools and his expert commentary has also been featured in global media outlets including The Wall Street Journal, Chicago Tribune, and Los Angeles Times.

Lissa Griffin is the James D. Hopkins Professor of Law at the Elisabeth Haub Law School at Pace University, where she teaches Criminal Law, Criminal Procedure, Comparative Criminal Procedure, and Evidence. She is also the Director of the Pace Criminal Justice Institute at the Law School. Professor Griffin has authored two treatises and many law review articles addressing criminal law and procedure issues from both a domestic and comparative perspective.

John Hasnas is Associate Professor of Ethics at Georgetown University's McDonough School of Business, Associate Professor of Law (by courtesy) at the Georgetown University Law Center where he teaches a course in torts, and Executive Director of the Georgetown Institute for the Study of Markets and Ethics. Professor Hasnas conducts research and publishes in the area of corporate criminal liability.

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Richard A. Leo, Ph.D., J.D. is the Hamill Family Professor of Law and Psychology at the University of San Francisco. He is a leading expert on police interrogation, false confessions, and the wrongful conviction of the innocent, and has authored more than one hundred articles and 6 books on these subjects.

Erik Luna is the Amelia D. Lewis Professor of Constitutional & Criminal Law at the Sandra Day O'Connor School of Law at Arizona State University. He has received two Fulbright awards, was visiting scholar with the Max Planck Institute, and was a research fellow with the Alexander von Humboldt Foundation. Professor Luna writes primarily in the areas of criminal law and procedure.

Julie Rose O'Sullivan, Professor of Law at Georgetown University Law Center, is a former federal prosecutor and criminal defense lawyer. She teaches and writes in the area of federal white collar crime and, in particular, mens rea issues in the federal criminal code. Professor O'Sullivan has written the leading casebook on white-collar crime and is a recognized expert on both the federal sentencing guidelines and white collar criminal law.

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Parker formerly served as Deputy Chief Counsel and Consulting Counsel to the United States Sentencing Commission.

Ira P. Robbins is the Barnard T. Welsh Scholar and Professor of Law and Justice at American University, Washington College of Law. He has served as Special Consultant to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States, as well as a reporter for or member of several American Bar Association criminal-justice-related task forces or committees. Professor Robbins has authored many books and articles on criminal law and procedure, including on mens rea issues.

Paul F. Rothstein is a Professor of Law at Georgetown University Law Center. Professor Rothstein is well known for his work in evidence, civil and criminal lawsuits, and the judicial process from this Court on down. He is the author of several books and approximately 100 scholarly articles on those subjects.

Stephen Saltzburg is the Wallace and Beverley Woodbury University Professor of Law at The George Washington University Law School. He was Chair of the Criminal Justice Section of the American Bar Association from 2007-2008 and has previously served as a reporter for, and a member of, the Advisory Committee on the Federal Rules of Criminal Procedure. Professor Saltzburg has authored numerous textbooks and articles on criminal law and procedure.

Stephen F. Smith is a professor of law at the University of Notre Dame Law School. Professor Smith came to Notre Dame Law School in 2009 from the University of Virginia where he was the John V. Ray Research Professor. Professor Smith's area of research is criminal law and procedure. He teaches courses on criminal law, criminal adjudication, and federal criminal law.

Peter Westen is the Frank G. Millard Professor of Law Emeritus at the University of Michigan Law School. Professor Westen's principal scholarly interests are in the fields of criminal law and legal theory. He has authored several books and articles on those subjects.

Gideon Yaffe is Professor of Law & Professor of Philosophy and Psychology at Yale Law School. He is the author of numerous books and articles concerned with the criminal law, focusing on mens rea issues. He is also a member of the MacArthur Foundation's law and neuroscience project and leader of the subgroup investigating criminal mental states.

All amici, except Professors Cassell, Luna, and Westen, appeared as amici below supporting the rehearing petition.

SUMMARY OF ARGUMENT

The court of appeals' decision warrants this Court's review for four reasons. *First*, by substituting "deliberate indifference" for the statutory element of knowledge, the decision contravenes decades of this Court's mens rea jurisprudence, beginning with

Morissette v. United States, 342 U.S. 246 (1952). *Second*, the decision conflicts squarely with *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011), which expressly rejected deliberate indifference as a substitute for knowledge. *Third*, downgrading knowledge to deliberate indifference would confer even greater discretion on federal prosecutors--who already hold enormous power--and violate the separation of powers. *Fourth*, the court of appeals' decision has potentially far-reaching consequences, given the broad array of federal criminal statutes that require proof of the defendant's knowledge.

ARGUMENT

1. This Court has long held that knowledge of the facts constituting criminal conduct is central to criminal responsibility. The "central thought," the Court has declared, is that a person must be "blameworthy in mind" before he can be held accountable for a crime. *Morissette*, 342 U.S. at 252. This principle means "that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (quoting *Staples v. United States*, 511 U.S. 600, 608 n.3 (1994)).

The "blameworthy in mind" principle is so fundamental that even when a criminal statute is silent on mens rea, the Court generally reads in a knowledge element. As the Court has explained, "The fact that the statute does not specify any required mental state . . . does not mean that none exists. We

have repeatedly held that 'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.'" *Elonis*, 135 S. Ct. at 2009 (quoting *Morissette*, 342 U.S. at 250); *see, e.g., Posters 'N' Things v. United States*, 511 U.S. 513, 522 (1994) (reading drug paraphernalia statute to require knowledge); *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978) (reading intent requirement into Sherman Act). In keeping with this approach, the Court in *Morissette* interpreted the federal theft statute (18 U.S.C. § 641) to require proof that the defendant knew the property at issue belonged to the government. 342 U.S. at 275-76. The Court held in *Staples* that the statute prohibiting possession of a machine gun required proof that the defendant knew the firearm had automatic firing capability. *See* 511 U.S. at 619. The Court in *Posters 'N' Things* held that the drug paraphernalia statute required proof that the defendant knew that the items at issue were likely to be used with illegal drugs. *See* 511 U.S. at 524. And in *United States v. X-Citement Video*, 513 U.S. 64 (1994), the Court held that the statute prohibiting certain shipments of visual depictions of minors engaging in sex acts requires proof that the defendant knew that the person depicted was a minor. *See id*. at 78.

The court of appeals did exactly the opposite of what *Morissette* and its progeny require. Those cases honor the "blameworthy in mind" principle by reading knowledge into criminal statutes that do not expressly require it. By contrast, the court of appeals violated that principle by watering an express knowledge element down to "deliberate indifference." Because the court of appeals' decision conflicts with

decades of caselaw by this Court and fundamental principles of criminal responsibility, the Court should grant the petition and reverse.

2. Not only is the court of appeals' decision out of step with decades of this Court's mens rea jurisprudence; it conflicts squarely with *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011). In *Global-Tech*, this Court recognized (over a dissent by Justice Kennedy) that willful blindness can satisfy a statutory knowledge requirement. But the Court took pains to distinguish willful blindness, which can equal knowledge, from "deliberate indifference," which cannot.

Global-Tech defined the elements of willful blindness as follows: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Id.* at 769. The Court emphasized the requirement that the defendant take "deliberate actions" to avoid learning the key fact. It declared: "We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts." *Id.* at 769-70 (emphasis added).

Global-Tech faulted the Federal Circuit for requiring only "deliberate indifference": "[I]n demanding only 'deliberate indifference' to that risk [that the disputed fact existed], the Federal Circuit's

test does not require *active efforts* by an inducer to avoid knowing [the fact]." *Id.* at 770 (emphasis added). Deliberate indifference, in other words, amounts to recklessness, where a person "merely knows of a substantial and unjustified risk of [the fact]." *Id.* at 770; *see Farmer v. Brennan,* 511 U.S. 825, 839-40 (1994) (equating deliberate indifference and recklessness). The court of appeals below crossed the precise line this Court drew in *Global-Tech*: it permitted conviction not only of a defendant with knowledge that the certifications at issue were false, or who willfully blinded himself to their falsity, but also of a defendant who was deliberately indifferent--that is, reckless--as to their falsity.

This analysis demonstrates the irrelevance of the court of appeals' observation that the district court substituted "deliberate indifference" for "reckless indifference." Pet. App. 99a-100a. The court appeared to believe that the phrase "deliberate indifference" was closer to actual knowledge (and thus more favorable to the defense) than "reckless indifference." But as *Global-Tech* and *Farmer* show, the two phrases are virtually identical in meaning--and neither is an adequate substitute for the statutory element of knowledge of falsity.

3. Displacing the requirement of knowledge with a watered-down "deliberate indifference" standard eliminates an essential layer of protection for ordinary Americans while transferring even greater power to federal prosecutors. *See, e.g., Yates v. United States*, 135 S. Ct. 1074, 1100-01 (2015) (Kagan, J., dissenting) (discussing the "overcriminalization and excessive

punishment in the U.S. Code" and noting that the statute at issue, by "giv[ing] prosecutors too much leverage" is "an emblem of a deeper pathology in the criminal code"); Stephen F. Smith, *Overcoming Overcriminalization*,102 J. Crim. L. & Criminology 537, 574 (2012) (discussing importance of strong mens rea requirements in constraining prosecutorial discretion). As Justice Scalia put it, "Only someone who has worked in the field of law enforcement can fully appreciate the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation." *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting). Under the court of appeals' approach, many disputes currently resolved civilly under a recklessness standard would become criminally prosecutable, further augmenting the federal prosecutor's arsenal of potential charges and his concomitant power.

Judicial downgrading of knowledge to deliberate indifference also violates the separation of powers. Congress expressly included the element of knowledge in the health care fraud statute, 18 U.S.C. § 1347. When "the judiciary substitutes a lesser mental state for statutorily prescribed knowledge, then it encroaches on the legislative prerogative of defining criminal conduct." Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. Crim. L. & Criminology 191, 194-95 (1990); *see also United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 93 (1820) ("It is the legislature, not the court, which is to define a crime and ordain its punishment."); Julie R. O'Sullivan, *Federal White Collar Crime*, Sec. D, at 7 (6th ed. 2016) ("If Congress

meant to demand only recklessness, it could have and would have said so. Reading a statute that demands 'knowledge' to be satisfied by 'recklessness,' then, contravenes long-established distinctions in degrees of *mens rea* as well as congressional intent.").

4. The court of appeals' substitution of deliberate indifference for knowledge, if allowed to stand, risks weakening the mens rea element in the broad array of federal criminal statutes requiring proof of knowledge.[3] There is no principled basis for limiting the court's construction of the "knowingly" element of § 1347 to that statute alone. Prosecutors will cite the court of appeals' decision as a basis for reducing the knowledge element of other federal criminal statutes to deliberate indifference, other courts will acquiesce in that view, and the regrettable erosion of the "blameworthy in mind" principle will continue. This Court has intervened repeatedly in the

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[3] *See, e.g.*, 18 U.S.C. § 152 (crimes relating to concealment of assets and false oaths); 18 U.S.C. § 641 (knowingly converting any voucher, money, or thing of value of the United States for personal use); 18 U.S.C. § 1001(a) (knowingly making false statements to an executive, legislative, or judicial branch of the U.S. government); 18 U.S.C. § 1002 (possession of false papers to defraud United States); 18 U.S.C. § 1015(a), (c), (d) (multiple crimes relating to naturalization, citizenship status, or alien registry); 18 U.S.C. § 1029 (fraud and related activity in connection with access devices); 18 U.S.C. § 1031 (major fraud against the United States); 18 U.S.C. § 1425 (knowingly procuring or attempt to procure the naturalization of an alien with unlawful documentary evidence); 18 U.S.C. § 1519 (destruction, alteration, or falsification of records in federal investigations and bankruptcy); 18 U.S.C. § 1542 (knowingly making any false statement on passport application); 18 U.S.C. § 2252(a) (knowingly transporting or receiving child pornography via interstate or foreign commerce); 18 U.S.C. § 2314 (knowingly transporting falsely made, forged or counterfeited securities in interstate commerce).

past to safeguard this "background assumption" of the criminal law, *Liparota v. United States*, 471 U.S. 419, 426 (1985), and it should do so here as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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