Nos. 06-30472, 06-30524
Case Decided Sept. 20, 2007 (Circuit Judges B. Fletcher, Pregerson, Ferguson)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America,

Plaintiff-Appellant,

v.

W.R. Grace & Co., Alan R. Stringer, Henry A. Eschenbach, Jack W. Wolter, William J. McCaig, Robert J. Bettacchi, O. Mario Favorito, and Robert C. Walsh,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Montana (Molloy, C.J.)
Case No. CR 05-07-M-DWM

Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Defendants' Petitions for Rehearing En Banc

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae National Association of Criminal Defense Lawyers is a non-profit corporation. NACDL has no parent corporations, and no publicly held corporation owns ten percent or more of NACDL.

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INTEREST OF THE AMICUS 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. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. 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 on various issues in this Court and other courts throughout the country.[1]

SUMMARY OF ARGUMENT

The Court should rehear this case en banc because it presents two questions of exceptional importance, and the panel's decision will have far-reaching effects on criminal defendants in this Circuit. Either of the two questions, standing alone, merits rehearing.

1. The long-standing rule of lenity required the panel to resolve any ambiguity in the Clean Air Act (CAA) or its implementing regulations in favor of

[1] Pursuant to Fed. R. App. P. 29(a) and Circuit Rule 29-2(a), all parties have consented to the filing of this brief.

the defendants. Only when a statute unambiguously covers the challenged conduct is the rule of lenity inapplicable. Here, NACDL agrees with defendants that the CAA's language and structure provide no basis—let alone an unambiguous basis—for the panel's holding that the pollutants encompassed by the CAA's ban on releasing "hazardous air pollutants" regulated by the Environmental Protection Agency (EPA) are defined *more broadly* in the criminal context than in the civil context. To the contrary, the language and structure of the CAA indicate that Congress intended the same definition of "hazardous air pollutants" to apply to both criminal and civil enforcement. But even if there were some merit to the panel's interpretation of the CAA, its reading is not unambiguously correct. At most, the statute is ambiguous, which is exactly the situation that triggers the rule of lenity.

The panel refused to apply the rule of lenity, however, holding that the CAA unambiguously provides that a defendant can be criminally liable for conduct involving a substance that *undisputedly* would not subject him to civil liability. The panel's decision ignored the very troubling issue of fair notice to the regulated business community (not just these defendants) by rejecting EPA's published regulations defining "hazardous air pollutants"—which do not cover the substances these defendants stand accused of releasing—and instead applying a far broader and previously unstated standard to the more serious matter of criminal liability.

Moreover, the panel's refusal to apply the rule of lenity in this context will have serious consequences for all criminal defendants in this Circuit. Now, so long as a court can conjure any interpretation of a statute that sweeps in a defendant's alleged conduct, the rule of lenity is inapplicable—regardless of whether an administrative agency has excluded such conduct from sanction, and regardless of whether there is a more faithful reading of the statute's text and structure under which the defendant would not be subject to criminal liability. Just like that, a court can erase a common law canon of interpretation that predates the Founding Era.

Similarly troubling, the panel assumed, without *any* evidence having yet been admitted at a trial, that the individual defendants knew they were releasing a hazardous pollutant into the air—even though the panel's unique definition of "asbestos" cannot be found in any statute or other publicly available source and is more expansive than EPA's regulation—because of defendants' *presumed* background with respect to industrial chemicals. In other words, the panel created a subjective test for the rule of lenity's application that varies based on what a court presumes to be a defendant's background. Ambiguity in the text of a statute will no longer be enough to trigger the rule of lenity in this Circuit—now a court must consider a statute's text *and* what it assumes to be the subjective knowledge of each defendant about a statutory term. Not surprisingly, the panel cited no

authority for the proposition that the application of the rule of lenity depends on a defendant's identity.

2. The panel's decision also merits rehearing en banc for a second reason: it greatly expands the government's ability to return indictments after the limitations period has elapsed. Remarkably, the panel held that the government may cure an untimely indictment, dismissed by the district court for failing to allege an overt act in furtherance of a conspiracy committed within the statute of limitations, simply by filing a superseding indictment within six months of the dismissal that alleges *new* overt acts falling within the limitations period, so long as the new acts are based "on approximately the same facts" as the original indictment. In other words, the government will be able to file an untimely indictment without risk because, after a limitations problem arises, the government will always have an additional six months to further investigate a defendant's acts.

The panel's decision, which rests on an interpretation of 18 U.S.C. § 3288 that ignores half of the applicable statutory language, has the potential to affect all criminal defendants facing a federal indictment. Not only does the panel's decision allow the government to be sloppy in its original indictment, the decision also *sub silentio* extends the applicable statute of limitations for any federal crime by six months (plus however long it takes the district court to dismiss the

indictment as untimely). En banc rehearing is necessary to remedy this unwarranted expansion of criminal liability.

ARGUMENT

A. The Panel's Failure To Apply The Rule Of Lenity Was Erroneous And Will Have Far-Reaching Consequences For Criminal Defendants In This Circuit.

The panel's refusal to apply the rule of lenity to the CAA was erroneous and will have far-reaching consequences for criminal defendants in this Circuit.

1. The rule of lenity requires "that 'ambiguity concerning the ambit of criminal statutes should be resolved in the favor of lenity'" to the defendant. *United States v. LeCoe*, 936 F.2d 398, 402 (9th Cir. 1991) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)); *accord Hughey v. United States*, 495 U.S. 411, 422 (1990) ("longstanding principles of lenity . . . demand resolution of ambiguities in criminal statutes in favor of the defendant"); NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 59.03 (5th ed. 1992) ("penal statutes should be strictly construed against the government . . . and in favor of the persons on whom penalties are sought to be imposed").

"The rule of lenity is . . . a well-recognized principle of statutory construction" with an ancient pedigree. *United States v. Rodgers*, 466 U.S. 475, 484 (1984); *Liparota v. United States*, 471 U.S. 419, 427 (1985) (describing rule as "a time-honored interpretative guideline"). Indeed, "[t]he rule that penal laws are

to be construed strictly, is perhaps not much less old than [statutory] construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 95 (1820) (Marshall, C.J.). Or, as Justice Scalia has noted, the rule of lenity is "almost as old as the common law itself." Antonin Scalia, The Tanner Lectures on Human Values at Princeton University, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, at 103 (March 8-9, 1995). Over 100 years after *Wiltberger*, Justice Holmes endorsed the rule of lenity in *McBoyle v. United States*, 283 U.S. 25, 27 (1931), and the Supreme Court has consistently acknowledged the rule's validity in subsequent cases.[2]

The rule of lenity protects bedrock constitutional principles, including (a) providing fair notice to individuals of the conduct that will subject them to criminal sanction and (b) preserving the separation of powers between the legislative and judicial branches, as only the legislature has the power to criminalize conduct. The rule of lenity thus protects individual liberties by ensuring that courts stay out of the business of creating crimes.

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[2] *See, e.g., Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005); *United States v. Lanier*, 520 U.S. 259, 265 (1997); *United States v. Granderson*, 511 U.S. 39, 54 (1994); *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 (1992); *Taylor v. United States*, 495 U.S. 575, 596 (1990); *Liparota*, 471 U.S. at 427; *Dowling v. United States*, 473 U.S. 207, 213-14 (1985); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-85 (1978); *Rewis*, 401 U.S. at 812; *Ladner v. United States*, 358 U.S. 169, 177-78 (1958); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952).

As a unanimous Supreme Court recently observed:

> We have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of *deference to the prerogatives of Congress*, and out of concern that a *fair warning should be given* to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.

Arthur Andersen LLP v. United States, 544 U.S. 696, 703 (2005) (quotation marks and citations omitted) (emphasis added); *accord United States v. Aguilar*, 515 U.S. 593, 600 (1995). The rule of lenity fulfills both these purposes.

First, the "rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal." *Liparota*, 471 U.S. at 427. It is axiomatic that "before a man can be punished as a criminal under the federal law his case must be plainly and unmistakably within the provisions of some statute." *United States v. Gradwell*, 243 U.S. 476, 485 (1917) (quotation marks omitted). The rule of lenity is thus "rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn v. United States*, 442 U.S. 100, 112 (1979); *see also United States v. Lanier*, 520 U.S. 259, 265 (1997) ("The principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.") (quotation marks and alteration omitted); *Wiltberger*, 18 U.S. (5 Wheat) at 95 (rule of lenity reflects "the tenderness of the law for the rights of individuals"). The rule of lenity "ensures fair warning by so

resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *Lanier*, 520 U.S. at 266.

Second, it is the exclusive province of the legislature to determine what conduct gives rise to criminal liability. As Chief Justice Marshall recognized, it is a "plain principle that the power of punishment is vested in the legislative, not in the judicial department," and thus "[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Wiltberger*, 18 U.S. (5 Wheat.) at 95; *accord Liparota*, 471 U.S. at 424 ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."). "This policy embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in BENCHMARKS 196, 209 (1967)). The rule of lenity preserves the division of powers by ensuring that "legislatures and not courts . . . define criminal activity." *Bass*, 404 U.S. at 348; *see also Liparota*, 471 U.S. at 427 (rule of lenity "strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability").

2. The panel here brushed aside the rule of lenity because, in its view, the CAA unambiguously made the release of a particular "hazardous air pollutant"

subject to criminal, but not civil, sanction. Before a court adopts such a novel reading of a statute, which turns the usual relationship between criminal and civil liability upside down, the statute must clearly mandate that result. The petition for rehearing en banc of defendant W.R. Grace ably demonstrates that not only does the statute *not* mandate that result, but, rather, the most faithful reading of the statute's text and structure leads to the opposite conclusion. The criminal provision of the CAA, 42 U.S.C. § 7413(c)(5)(A), cross-references EPA's definition of "hazardous air pollutant" for civil liability, 42 U.S.C. § 7412(b), thus clearly indicating that Congress intended the *same* definition to apply to both the criminal and civil provisions.

But even if the defendants' and the district court's reading of the CAA is not the most obvious, it cannot be that the panel's contrary interpretation of the statute is undoubtedly correct, especially considering the panel's inversion of the traditional rule that civil liability is broader than criminal. "In the criminal context, courts have traditionally required *greater clarity* in draftsmanship than in civil contexts, commensurate with the bedrock principle that in a free country citizens who are potentially subject to criminal sanctions should have clear notice of the behavior that may cause sanctions to be visited upon them." *United States v. McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987) (emphasis added). "That is to say, the law of crimes must be clear." *Id.* Put another way, even if the panel's reading

is plausible, the CAA does not *unambiguously* provide for broader criminal liability than civil liability. At most, the statute is ambiguous, and defendants were entitled to the rule of lenity.

The fact that the panel's reading of the CAA might be plausible does not preclude the rule of lenity. *See Liparota*, 471 U.S. at 427. Rather, "[w]hen there are two rational readings of a criminal statute, one harsher than the other, [courts] are to choose the harsher only when Congress has spoken in clear and definite language." *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) (alteration and quotation marks omitted); *accord United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952). A court "should not derive criminal outlawry from some ambiguous implication." *Universal*, 344 U.S. at 222. But that is exactly what the panel did here.

The panel's conclusion that the CAA unambiguously criminalizes conduct that would not give rise to civil sanction is all the more troubling given that the panel relied in part on a definition set forth only in a *private database that individuals must pay a fee to access*, the Chemical Abstract Service (CAS). Relying on a private, fee-based database for the definition of what chemical materials may form the basis of criminal liability blatantly transgresses the basic principle of due process that a statute must provide fair warning. *See*, *supra*, pp. 7-8; *see also Lanier*, 520 U.S. at 266 ("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").

This was apparently of no concern to the panel, however, because it determined, prior to any trial, that the defendants were "all familiar with asbestos" and had "actual notice" of the risks associated with the materials they purportedly released. Slip op. 12686-87. The panel's holding is extraordinary for two reasons. First, it made this finding despite the fact that neither party has introduced any evidence to that effect—or any evidence at all for that matter. The panel has all but declared defendants guilty of the charged offenses before they had a chance to present their case. Second, the panel injected a subjective component into the rule of lenity, holding that because of the "defendants' knowledge of the industrial chemicals field, the district court erred . . . in invoking the rule of lenity." Slip op. 12687.

Application of the rule of lenity should not depend on a defendant's identity or background. A statute is either ambiguous or it is not—the clarity of Congress' intent in a criminal statute should not change from defendant to defendant. The panel cites no authority for its newly-found subjective rule of lenity, which, if left standing, will cause much mischief in this Circuit. The new rule of lenity requires a court to presume—without any evidence having been admitted at trial—what a defendant might know based on his or her job title. It also raises the specter of

selective prosecution of any criminal defendant the government can argue has experience with an activity, industry, or object relevant to the prosecution.

3. Finally, the purposes served by the rule of lenity are vital to ensure the fair prosecution of individuals in the context of environmental statutes—like the CAA and the Clean Water Act (CWA)—that have "tremendous sweep." *United States v. Weitzenhoff*, 35 F.3d 1275, 1293 (9th Cir. 1993) (Kleinfeld, J., joined by Reinhardt, Kozinski, Trott, and T.G. Nelson, J.J., dissenting from order denying rehearing en banc of decision holding that person is criminally liable under CWA if he knowingly engages in conduct that violates a permit condition, as opposed to knowingly violates a permit condition). "The 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 in CWA case); *see also United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993) (same); *Weitzenhoff*, 35 F.3d at 1295 (Kleinfeld, J., dissenting from order denying rehearing en banc) (same).

Indeed, the rule of lenity guards against special risks present in environmental prosecutions. Many environmental statutes are exceedingly complex, often invoking intersecting regulations from various agencies and involving highly technical matters, such as what materials are hazardous. Many regulatory violations that subject an individual to criminal liability involve

otherwise innocent conduct, such as exceeding permit limits, disposing of materials that may appear innocuous to most people, or altering one's property. *See* Joshua D. Yount, *The Rule of Lenity and Environmental Crime*, 1997 U. CHI. LEGAL F. 607, 619 (1997). As Judge Kleinfeld has noted, "[m]uch more ordinary, innocent, productive activity is regulated by [environmental statutes] than people not versed in environmental law might imagine." *Weitzenhoff*, 35 F.3d at 1293 (Kleinfeld, J., dissenting from order denying rehearing en banc). Moreover, the wide sweep of environmental statutes provides prosecutors with a great deal of discretion to bring charges, which leads to the potential for abuse. *See* Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2487-90 (1995).

The rule of lenity protects against these dangers by requiring Congress to provide unambiguous notice of the conduct subject to criminal sanction. The panel's decision ran roughshod over the rule to the detriment of these defendants, and it paved the way for future prosecutions of criminal defendants in ambiguous circumstances.

B. The Panel's Decision To Grant The Government Six Months To Fix An Already Untimely Indictment Was Erroneous, Creates A Significant Loophole Contrary To Congress' Intent, And Will Encourage Untimely Charges In The Future.

The panel's decision will have far-reaching consequences for another reason, as well: it significantly expands the government's ability to return indictments after the limitations period has elapsed. Now, if the government brings a conspiracy indictment that fails to allege an overt act committed within the statute of limitations—and thereafter the indictment is properly dismissed—the government can simply file a superseding indictment alleging *new* overt acts that fall within the limitations period, so long as the new acts are based "on approximately the same facts" as the original indictment. Slip op. 12682. In other words, the government will always get a six-month do-over period to remedy an indictment that no one disputes was untimely.

This jarring scenario is the result of the panel's erroneous reading of 18 U.S.C § 3288, which provides, "[w]henever an indictment . . . charging a felony is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired," the government may bring a new indictment within six months of the date of the dismissal," *except* "where the reason for the dismissal was the failure to file the indictment . . . within the period prescribed by the applicable statute of limitations." The statute gives the government a six-month grace period to remedy defects in an indictment *only if* the original (flawed)

indictment was timely. The panel's decision rendered the second part of the statute meaningless.

The petition for rehearing en banc of defendant Henry Eschenbach fully explains how the panel misapplied § 3288 and this Court's earlier decision in *United States v. Clawson*, 104 F.3d 250 (9th Cir. 1996). NACDL will not repeat those arguments here.

NACDL is, however, concerned that if the panel's erroneous interpretation of § 3288 is allowed to stand, the government will almost always be able to "cure" a statute of limitations dismissal despite § 3288's clear preclusion of re-indictment if the original indictment was dismissed as untimely. The panel's decision grants the government an additional six months—on top of the statute of limitation periods provided by Congress and the time it takes for the district court to dismiss the indictment as untimely—to investigate alleged criminal activity. It also permits the government to be sloppy in its original indictment, secure in the knowledge that it can fix any flaws, even if the flaw is that the indictment is barred by the statute of limitations.

The panel's decision thus grants the government far more leeway than that provided in § 3288, and it provides additional opportunities for the government to do an end-run around Congress' statutes of limitations, which serve an important role in ensuring the fairness of criminal prosecutions. Statutes of limitations are

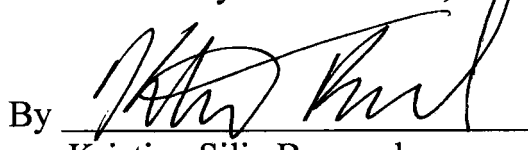
"the primary guarantee against bringing overly stale criminal charges," and they "represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice." *United States v. Marion*, 404 U.S. 307, 322 (1971) (quotation marks omitted); *see also United States v. Lovasco*, 431 U.S. 783, 788-89 (1977). "Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." *Marion*, 404 U.S. at 323 (quotation marks omitted).

Here, Congress has already struck the balance with respect to the general criminal statute of limitations (also applicable to CAA offenses). The panel should not have tacked on an additional six months. *See Smith v. United States*, 508 U.S. 223, 247 n.4 (1993) (Scalia, J., dissenting) ("Stretching language in order to write a more effective statute than Congress devised is not an exercise [courts] should indulge in."). The panel's decision to rewrite Congress' limitations periods will potentially affect all defendants against whom the government returns an untimely indictment.

CONCLUSION

For the reasons given above, this Court should grant defendants' petitions for rehearing en banc.

RESPECTFULLY SUBMITTED this 14th day of November, 2007.

By 

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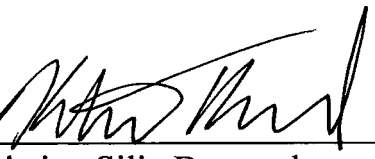
CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the requirements of Circuit Rule 29-2(c)(2). The brief is proportionately spaced in Times New Roman 14-point type. According to the word processing system used to prepare the brief, the word count of the brief is 3,807 words, not including the corporate disclosure statement, table of contents, table of citations, certificate of service, and certificate of compliance.

DATED this 14th day of November, 2007.

By 

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 2007, I caused to be filed the original and 50 copies of the *Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Defendants' Petitions for Rehearing En Banc* by overnight mail to:

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