No. 20-1594

IN THE
Supreme Court of the United States

MURRAY ROJAS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMERICAN CONSERVATIVE UNION FOUNDATION AND THE CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Ilya Shapiro
Trevor Burrus
Stacy Hanson
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001

David H. Safavian
General Counsel
THE AMERICAN CONSERVATIVE UNION FOUNDATION
1199 N. Fairfax Street,
Suite 500
Alexandria, VA 22314

Thomas M. Johnson, Jr.
Counsel of Record
William K. Lane III
Frank H. Chang
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000
tmjohnson@wiley.law

Counsel for Amici Curiae

June 17, 2021

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INTEREST OF *AMICI CURIAE*[1]

The American Conservative Union Foundation ("ACUF") is a tax-exempt organization dedicated to advancing conservative solutions to issues facing Americans of every race, creed, and ideology. ACUF's Nolan Center for Justice focuses on criminal-justice policies that strengthen public safety, advance human dignity, and improve government accountability. In this context, ACUF opposes the increasing application of federal law to matters that are more appropriately addressed by state and local authorities. Moreover, ACUF firmly believes that the rule of law requires that statutes be strictly construed to ensure due process, particularly for criminal defendants who face the potential forfeiture of their liberty if convicted.

The Cato Institute ("Cato") was established in 1977 as a nonpartisan public-policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the limited constitutional government that is the foundation of liberty.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission. Counsel provided timely notice to all parties of its intent to file this brief, and all parties have given their express written consent.

This case interests *amici* because it epitomizes federal overreach in defiance of constitutional limits, which is particularly galling in the criminal context.

SUMMARY OF ARGUMENT

This case presents a particularly egregious example of an increasingly common and distressing phenomenon—the aggressive federal criminal prosecution of conduct that historically has been left to state and local regulatory enforcement. As the Petition explains, the text of the federal statute at issue here, the Federal Food, Drug and Cosmetic Act ("FDCA"), incorporates a longstanding distinction between the federally regulated "dispensing" of drugs in interstate commerce and the traditional state authority over the purely local "administering" of medicine. Pet'r Br. 1-3. The prosecutors here obliterated that distinction by convicting Petitioner on federal felony charges predicated on purported violations of Pennsylvania state law relating to the administration of medicines. *See id.*

Amici submit this brief to call attention to one particularly troubling aspect of the lower court's reasoning that compounds the unfairness and uncertainty inherent in criminalizing conduct that lacks any basis in the text of federal law. In affirming Petitioner's conviction, the court reasoned that the FDCA must be "liberally construed so as to carry out its beneficent purposes" of "protect[ing] the health and safety of the public." App.9-10. This controversial remedial canon, borrowed from civil cases, works special mischief when applied to regulatory statutes that carry criminal penalties. If adopted as a

universal rule of construction, it would allow federal prosecutors to charge unwritten crimes based on broadly purposive readings of thousands of statutory and regulatory provisions. That would exacerbate the due-process concerns that already in federal criminal law, aided by the explosive growth of the administrative state, invading practically every part of modern life.

The confusion introduced by the Third Circuit's decision requires this Court's attention. The lower court's reasoning conflicts with two lines of this Court's case law—one applying a rule of lenity to resolve any ambiguity in a criminal statute in the defendant's favor, and one requiring a clear Congressional statement to disrupt the traditional federal-state balance. The decision below also deepens an existing circuit split in which some courts of appeals, misreading dicta from this Court's earlier decisions, have applied a remedial canon in criminal FDCA cases while others have properly invoked the rule of lenity. This Court's review is needed to stanch the bleeding and clarify that a liberal construction of statutes has no place where the rights of criminal defendants are at stake.

REASONS FOR GRANTING CERTIORARI

I. This Court's Review Is Warranted To Clarify That Federal Statutes Carrying Criminal Penalties Must Be Interpreted Fairly Or With Lenity, Not Liberally Or Remedially.

Petitioner's brief persuasively shows why the text of the FDCA and controlling Supreme Court

precedent foreclose the Third Circuit's interpretation of the FDCA. *See* Pet'r Br. 3-11, 17-23. This Court's review is warranted for this reason alone. *See id.*

Review is also warranted, however, to clarify that lower courts—like the Third Circuit here—should not apply a rule of "liberal construction" to statutes like the FDCA that carry criminal penalties. App.9-10. This construction conflicts with the judicial duty to exhaust textual and contextual clues in interpreting statutory text. Remedial construction of criminal statutes also contravenes this Court's due-process and rule-of-lenity decisions and deepens an existing circuit split over how expansively to interpret the FDCA in criminal cases. Absent review, more parties like Petitioner will find themselves unwittingly subject to federal criminal liability based on a prosecutor's or court's assessment of what best furthers the "beneficent purposes" of a statute.

A. The Third Circuit Eschewed Its Duty To Fairly Interpret The FDCA By Examining Its Text And Context.

By invoking the remedial canon, the Third Circuit eschewed its duty to fairly interpret and meaningfully analyze the FDCA's text and context, in conflict with decisions of this Court. App.9-10.

As this Court has recently and repeatedly made clear, "[t]he people who come before [the courts]"—including criminal defendants—"are *entitled* . . . to have independent judges *exhaust* '*all* the textual and structural clues' bearing on [the statute's] meaning." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021)

(emphases added) (quoting *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)).

The Court "start[s] where [it] always do[es]: with the text of the statute." *Van Buren v. United States*, 141 S. Ct. 1648, 1654 (2021). And as a starting point, "[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." *United States v. Tate*, —F.3d—, 2021 WL 2177370, at *2 (6th Cir. 2021) (Readler, J.) (quoting Antonin Scalia, *A Matter of Interpretation* 23 (1997)); *cf. Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (adopting a "fair reading" of the FLSA instead of the Ninth Circuit's narrow reading intended to further the FLSA's remedial purpose).

In examining a statute's text, unless Congress has defined a term, "this Court normally seeks to afford the law's terms their ordinary meaning at the time Congress adopted them." *Niz-Chavez*, 141 S. Ct. at 1480; *see also Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) (examining dictionaries from 1970s to interpret the Court Interpreters Act of 1978); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012). To be sure, there may be instances when "the meaning of a word cannot be determined in isolation," *Deal v. United States*, 508 U.S. 129, 132 (1993), or when dictionary definitions alone are "not dispositive," *Yates v. United States*, 574 U.S. 528, 538 (2015) (plurality opinion). If so, the Court looks not only at "the language itself," but also "the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 537 (2015) (plurality opinion)

(alterations in original) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)); *see also* Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 Case W. Res. L. Rev. 855, 859 (2020) ("[T]extualism isn't a mechanical exercise, but rather one involving a sophisticated understanding of language as it's actually used in context.").

The broader context of the statute can be informed by related or predecessor statutes, court decisions interpreting those texts, and the historical context in which Congress enacted them—not to create ambiguity *ex nihilo* but to discern or confirm the text's meaning. *See, e.g.*, *Rapanos v. United States*, 547 U.S. 715, 735 (2006) (plurality opinion) (utilizing predecessor statutes to interpret the Clean Water Act); *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1072 (2020) ("We normally assume that Congress is aware of relevant judicial precedent when it enacts a new statute." (internal quotation marks omitted)). As Justice Kavanaugh recently summarized, when "a reviewing court employs all of the traditional tools of construction, the court will *almost always* reach a conclusion about the best interpretation." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2448 (2019) (Kavanaugh, J., concurring in judgment).

Here, the Third Circuit failed to meaningfully analyze or fairly interpret the FDCA. App.9-10. The court's only attempt at textual analysis was a cursory discussion of a handful of dictionary definitions of the words "administer" and "dispense," dating from decades after the statute was first enacted, which the Third Circuit found "unhelpful" because of "overlapping ordinary meanings." App.9.

Even if the Third Circuit had engaged in the requisite textual analysis and found it not dispositive, the court should not have ended the inquiry there. *See, e.g.*, *Yates*, 574 U.S. at 538 (plurality opinion). Where dictionary definitions are insufficient to elucidate meaning, a court is required to "exhaust" other available textual and contextual clues that "bear[] on [the FDCA's] meaning," *Niz-Chavez*, 141 S. Ct. at 1480, so as to construe the statute "reasonably" and fairly," Scalia, *A Matter of Interpretation* at 23. Instead, as the Petition has shown, the Third Circuit categorically discarded key interpretative aids, such as the meaning of the words "administer" and "dispense" as understood in light of the Harrison Narcotics Act of 1914 (the primary drug-control law that informed the drafting of the FDCA) and *Young v. United States*, 315 U.S. 257 (1942). *See* Pet'r Br. 7-10; 17-22 (discussing the textual and contextual clues); *see also Rapanos*, 547 U.S. at 735 (plurality opinion). Such a wholesale disregard for this Court's decision in *Young*—as a mere "old internal revenue law with no connection to the FDCA," App.10—contravened the judicial duty to consider all available textual and contextual clues to a statute's meaning.

Even worse, the court proceeded by reasoning that remedial statutes should be applied broadly to effectuate their beneficial purposes and thereby extended the FDCA's reach past its textual and contextual limits to encompass the practice of medicine. App.9-10. This "remedial canon" cannot be reconciled with the Court's modern jurisprudence on statutory interpretation, as it amounts to "an open invitation to engage in 'purposive' rather than textual interpretation, and generally to engage in judicial

improvisation." Scalia, *Reading Law* at 365-66; *see also* Pet'r Br. 24. Indeed, this is precisely what happened below. The Third Circuit relied on perceived legislative purpose—unmoored from and in conflict with the text—to liberally construe the FDCA to cover Petitioner's conduct. App.10; *see, e.g.*, *Symons v. Chrysler Corp. Loan Guar. Bd.*, 670 F.2d 238, 241 (D.C. Cir. 1981) ("The fact that legislation has a remedial purpose . . . does not give the judiciary license, in interpreting a provision, to disregard entirely the plain meaning of the words used by Congress."). Such disregard for the Court's established method of interpretation supports certiorari.

B. The Third Circuit's Reliance On The Remedial Canon Vitiated The Rule Of Lenity.

The Third Circuit's hurried invocation of a purposive remedial canon—without doing the necessary work of close textual and contextual statutory analysis—also violates the historic rule of lenity in criminal cases. The lower court's holding conflicts with this Court's rule-of-lenity decisions and deepens existing circuit confusion concerning whether the rule of lenity or the remedial canon should apply to criminal cases involving the FDCA. This Court's review is necessary to resolve the confusion and prevent the mischief that would result from prosecutors charging crimes untethered to clear statutory text.

To be sure, to the extent that the FDCA's text and context unambiguously support Petitioner's reading,

see Pet'r Br. at 3-11, 17-23, the rule of lenity would not need to come into play. *See Van Buren*, 141 S. Ct. at 1661. But what makes the Third Circuit's reasoning particularly pernicious is that it imported perceived statutory purposes, via the remedial canon, to short-circuit the ordinary interpretive process that would reveal whether ambiguity exists in the first place. This method rigs the game at the outset in favor of the government, whereas the purpose of the rule of lenity is to resolve any statutory doubt in favor of the defendant. This consequence further "underscores the implausibility of the Government's interpretation" in this case. *See id.*

In cases of genuine ambiguity, the rule of lenity supplies a background legal principle rooted in common law and constitutional tradition to safeguard individual liberty. As Chief Justice Marshall famously observed, the rule of lenity is "founded on the tenderness of the law for the rights of individuals." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). "This venerable rule . . . vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." *United States v. Santos*, 553 U.S. 507, 514 (2008); *see also McBoyle v. United States*, 283 U.S. 25, 27 (1931) (rule of lenity was meant to give a "fair warning" on what the law prohibited). Vague criminal laws violate due process because they "hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to

their conduct." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019).

Furthermore, the rule of lenity reinforces separation-of-powers principles. *United States v. Nasir*, 982 F.3d 144, 178 (3d Cir. 2020) (Bibas, J., concurring); *see also United States v. Wright*, 607 F.3d 708, 716 (11th Cir. 2010) (Pryor, J., concurring) (same). "[T]he plain principle [is] that the power of punishment is vested in the legislative, not in the judicial department." *Nasir*, 982 F.3d at 178 (Bibas, J., concurring) (quoting *Wiltberger*, 18 U.S. at 95). "If Congress wants to criminalize certain conduct or set certain penalties, it must do so"—not relegate that duty to courts or federal prosecutors. *Id.*; *see also Santos*, 553 U.S. at 514 (noting that the rule "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead").

Invoking the rule of lenity, the Court has repeatedly rejected expansive readings of penal statutes, driven by unwritten intent of the legislature. *See Santos*, 553 U.S. at 515 (rejecting "the Government's invitation to speculate about congressional purpose" in interpreting the word "proceeds" in 18 U.S.C. § 1956(a)(1)); *Bell v. United States*, 349 U.S. 81, 83 (1955) ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."); *Wiltberger*, 18 U.S. at 105 ("[P]robability is not a guide which a court, in construing a penal statute, can safely take."). Furthermore, courts have "even extended [the rule of

lenity] to cases outside the criminal context" where "a civil statute[] imposed such harsh penalties on violators that it warranted a narrow construction." John C. Yoo, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 Yale L.J. 1607, 1625 (1992) (citing *In re Sixty Pipes of Brandy*, 23 U.S. (10 Wheat.) 421 (1825)).

This common-law canon cannot be reconciled with the remedial canon (guided by amorphous legislative purpose) that the Third Circuit embraced in a criminal context. App.9-10.

The remedial canon, which this Court apparently first applied in a debt-collection action in 1851, "appears to be civil in origin." Susan F. Mandiberg, *Fault Lines in the Clean Water Act*, 33 Envt'l L. 173, 177-78 (2003) (collecting early authorities). While some early twentieth-century Supreme Court cases contain language referring to a statute's remedial purposes in the criminal context, this gloss had dissipated by the 1980s, when the "era of favoring 'purpose-oriented' statutory construction canons in general came to an end." *Id.* at 178-79 & n.29. Accordingly, "the broad construction canon is not regularly used in the criminal context today." *Id.* at 179.

Indeed, properly understood, even this Court's earliest FDCA cases recognized that the statute must be read with lenity, because "criminal statutes must be so precise and unambiguous that the ordinary person can know how to avoid unlawful conduct," and thus interpreted according to their "fair meaning." *United States v. Sullivan*, 332 U.S. 689, 693-94

(1948); *see also Kordel v. United States*, 335 U.S. 345, 348-49 (1948) ("A criminal law is not to be read expansively to include what is not plainly embraced within the language of the statute.").

The better-reasoned circuit-court decisions faithfully applying these cases have correctly concluded that "[i]t is well established that criminal statutes should be strictly construed by the courts . . . [and] that where the language of [the FDCA] is unambiguous its words must be given their ordinary meaning." *Penobscot Poultry Co. v. United States*, 244 F.2d 94, 97 (1st Cir. 1957) (citing *Kordel*, 335 U.S. at 345); *see also United States v. Smith*, 740 F.2d 734, 738 (9th Cir. 1984) ("the protective purposes of remedial legislation . . . do[] not vest this court with a license to rewrite the [FDCA]") (applying rule of lenity to narrow 21 U.S.C. § 355(i)); *see also United States v. Geborde*, 278 F.3d 926, 932 (9th Cir. 2002).[2]

But other courts—including the Third Circuit here—continue to apply a remedial canon even in criminal cases. See App.9-10; *United States v. Smith*, 573 F.3d 639, 652-53 (8th Cir. 2009) (noting that the "purpose of misbranding laws is to protect the public from potentially dangerous drugs" and "refus[ing] to construe the statute in a way that would significantly undermine [the FDCA's purpose]"); *De Freese v. United States*, 270 F.2d 730, 734-35 (5th Cir. 1959). These courts have grounded their invocation of the

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[2] *But see United States v. Kaplan*, 836 F.3d 1199, 1209-10 & n.6 (9th Cir. 2016) (concluding that rule of lenity was inapplicable because law was insufficiently ambiguous as applied to the facts).

remedial canon in the Court's early FDCA cases, which they read for the proposition that the statute "as a whole has been liberally construed." *De Freese*, 270 F.2d at 735; *Smith*, 573 F.3d at 652; App.9-10 (citing *De Freese*, 270 F.2d at 735). But as noted above, *Sullivan* observed the importance of strict construction of criminal statutes and merely confirmed that the "literal language" of the Act was "consistent with [its] general aims and purposes." 332 U.S. at 696. Whatever the import of language from New Deal-era cases, the remedial canon cannot be squared with either the Court's earliest lenity decisions (like *Wiltberger*) or its modern due-process and lenity cases (like *Santos* and *Young*). *See also* Pet'r Br. 26-27. This Court's review is thus needed to resolve lower-court confusion and vindicate the application of the rule of lenity in criminal cases.[3]

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[3] Courts have noted the tension between the remedial canon and the rule of lenity in other regulatory contexts as well, further underscoring the need for additional guidance from this Court. *See, e.g.*, *United States v. Anderson*, 626 F.2d 1358, 1369-70 (8th Cir. 1980) (noting it was "unclear" the extent to which RICO's express statutory provision authorizing liberal construction applied in criminal cases, due to "[d]ue process" and "rule of lenity" concerns); *United States v. Plaza Health Lab'ys*, 3 F.3d 643, 648 (2d Cir. 1993) (applying rule of lenity to adopt narrow construction of Clean Water Act in criminal case and distinguishing prior cases as involving "civil-penalty or licensing settings, where greater flexibility of interpretation to further remedial legislative purposes is permitted").

II. This Court's Review Is Warranted To Vindicate The Traditional Balance Of Power Between The Federal Government And States On Matters of Criminal Enforcement.

The Third Circuit's disregard for the ancient rule of lenity, in conflict with decisions of this Court and deepening confusion among sister courts of appeals, is reason enough to grant the Petition. The lower court's liberal construction is equally problematic, however, because it upends the traditional balance between state and federal authority over criminal law. The Third Circuit's application of the atextual remedial canon undermines both the rights of criminal defendants and the interests of states in developing and enforcing their own criminal and regulatory regimes. It cannot stand.

A. This Court Interprets Ambiguous Criminal Statutes In A Manner That Preserves Traditional State Authority.

Recognizing the limited role of the federal government in the constitutional order, this Court has long held that "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States . . . ." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (declining to extend liability under 42 U.S.C. § 1983 to the states). Nowhere else is such a command more important than in the application of criminal law—perhaps the most quintessential state function.

The Constitution vests the federal government with relatively little responsibility for punishing crime. Indeed, it specifies expressly only three infractions that Congress has authority to punish: "counterfeiting the Securities and current Coin of the United States," U.S. Const. art. I, § 8, "Piracies and Felonies committed on the high Seas," *id.*, and "Treason against the United States," *id.* art. III, § 3.

While at the time of the Founding Anti-Federalists had expressed fear that the new Constitution would permit the national government to supplant the states' responsibility over criminal law, proponents of ratification insisted that the role of the federal government in this area was necessarily limited. For instance, Alexander Hamilton in Federalist Number 17 declared that "the ordinary administration of criminal and civil justice" was the "one transcendent advantage belonging to the province of the State governments." Likewise, in response to Patrick Henry's warning that Congress would intrude in responsibilities properly belonging to the states, Delegate George Nicholas of Virginia insisted that Congress lacked the competence to "define or prescribe the punishment of any other crime" not provided for expressly "without violating the Constitution." Thomas B. McAffee et al., *Powers Reserved for the People and the States: A History of the Ninth and Tenth Amendments* 71 (2006) (quoting 4 *The Debates in the Several States on the Adoption of the Federal Constitution* 451 (J. Elliot ed. 1836)). The First Congress included the Tenth Amendment, which reserved those "powers not delegated to the United States by the Constitution" to the states, in the Bill of Rights specifically to assuage fears of the

Anti-Federalists that Congress would usurp state power.

In the years following the Constitution's ratification, the understanding that states would play the primary role in enacting and enforcing criminal law persisted. As St. George Tucker noted in his now-celebrated early commentary, the federal Constitution vests Congress with little "authority to legislate upon the subject of crimes . . . . [Congress is] not entrusted with a general power over these subjects, but a few offences are selected from the great mass of crimes . . . . All felonies and offences committed upon land, in all cases not expressly enumerated, being reserved to the states respectively." St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* App.269 (1803).

To be sure, from the early days of the Republic, Congress has passed laws penalizing conduct beyond the select few crimes specified in the Constitution. *See, e.g.*, "Act for the Punishment of certain Crimes against the United States" (Act of April 30, 1790, ch. 9, 1 Stat. 112). But the federal criminal code nevertheless remained remarkably light throughout much of the nation's history, as Congress left the duty of enacting the vast majority of criminal statutes where it properly belonged: with the states. *See* Am. Bar Ass'n, *The Federalization of Criminal Law* 7-9 (1998) (noting a spike in enactment of federal criminal law since 1930s and through 1996).

Recognizing both the preeminent role state governments play in the administration of criminal law, as well as Congress's traditional "reluctan[ce] to define as a federal crime conduct readily denounced as criminal by the States," this Court has declared that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). This Court, therefore, demands "a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States." *Bond v. United States*, 572 U.S. 844, 860 (2014).

Time and again, this fundamental interpretive command has played a crucial role in preserving the prerogatives of the states from unjustified federal encroachment. For example, the Court has declined to interpret the word "property" broadly when construing the federal mail-fraud statute to avoid "a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Cleveland v. United States*, 531 U.S. 12, 24 (2000). Likewise, in *Scheidler v. National Organization for Women*, the Court rejected an expansive interpretation of the Hobbs Act because "[i]t would federalize much ordinary criminal behavior, ranging from simple assault to murder, behavior that typically is the subject of state, not federal, prosecution." 547 U.S. 9, 20 (2006). And in *Jones v. United States*, this Court refused to construe a statute to allow the federal government to prosecute an individual for the "traditionally local criminal conduct" of setting fire to a private residence. *See* 529

U.S. 848, 849-50 (2000) (quoting *Bass*, 404 U.S. at 350); *see also Fowler v. United States*, 563 U.S. 668, 684-85 (2011) (Scalia, J., concurring in judgment) (characterizing a broad interpretation of an ambiguous federal criminal statute as a "rule of harshness" and "a rule of antifederalism")

Thus, not only does the common-law rule of lenity require interpreting an ambiguous criminal statute in favor of the defendant, but basic tenets of federalism further support and complement such a construction. *See* Note, *The New Rule of Lenity*, 119 Harv. L. Rev. 2420, 2430 (2006) (citing *United States v. Enmons*, 410 U.S. 396, 411 (1973)); *see generally* Julian R. Murphy, *A Tale of Two Canons: Can A Federalism Canon Succeed Where Lenity Has Failed to Limit Federal Criminal Laws?*, 8 Va. J. Crim. L. 60 (2020). Absent an unequivocal command by Congress that it intends to disrupt the traditional balance prescribed by the Constitution, federalism demands that courts construe ambiguous criminal statutes in a manner that does not aggrandize federal power.

B. The Third Circuit's Remedial Canon Cannot Be Reconciled With The Court's Federalism Clear-Statement Rule.

The Third Circuit should have deferred to states' traditional authority over the administration of criminal law. Yet in construing the FDCA expansively, the court abrogated Pennsylvania's prerogative to regulate the administration of drugs within its jurisdiction. This Court's federalism jurisprudence prohibits that outcome.

Regulating the administration of drugs has been a responsibility traditionally left to the states. *See Hillsborough Cnty., Fla. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 719 (1985) ("the regulation of health and safety matters is primarily, and historically, a matter of local concern"); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). The FDCA contains no indication that Congress sought to upset this framework. Indeed, in passing the FDCA, Congress *confirmed* the distinction embraced previously by the Harrison Act between distribution, which is federally regulated, and administration, which historically has been left to the states. *See Hillsborough Cnty.*, 471 U.S. at 719; Pet'r Br. 25. The Third Circuit therefore lacked the necessary "clear statement" from Congress to justify its interpretation of the statute, *Cleveland*, 531 U.S. at 24—an interpretation that would allow federal prosecutors free rein in an area traditionally regulated by Pennsylvania.

Indeed, in many respects the federal government's decision to prosecute in this case is more egregious than in other instances where it has sought to stretch the reach of a criminal statute. *E.g.*, *Jones*, 529 U.S. at 850-51. While the government here predicates its prosecution on a violation of Pennsylvania law, it attaches consequences to that violation that the state would never have countenanced. The government's theory of the case—which prevailed at trial—was that Petitioner violated 21 U.S.C. §§ 331(k), 353(f), and 333(a), specifically because she violated Title 58, § 163.302(a)(2) of the Pennsylvania Code by administering drugs to a horse within twenty-four hours of a race. But Pennsylvania

typically does not seek criminal penalties for such an infraction, as evidenced by the state administrative rulings that the government relied on at trial. *See* App.3-4.[4] In making Petitioner's alleged violation of § 163.302(a)(2) a federal felony, however, the government effectively highjacked Pennsylvania law, repurposing it in a manner never intended by the state's legislature.

Even worse, the manner in which the Third Circuit reviewed Petitioner's conviction was a dramatic departure from how a Pennsylvania court would have approached the application of its own law. Pennsylvania requires that its courts apply the rule of lenity in criminal cases. *See* 1 Pa. Stat. § 1928(b) (mandating that "[p]enal provisions" be "strictly construed"); *Commonwealth v. Edwards*, 229 A.3d 298, 310 (Pa. Super. Ct. 2020) ("penal statutes are always to be construed strictly"), *appeal granted in part*, 237 A.3d 978 (Pa. 2020); *Commonwealth v. Johnson*, 26 A.3d 1078, 1089 (Pa. 2011) ("As this is a penal statute, its words must be strictly construed, and any ambiguity in those words must be interpreted in favor of the Appellant."); *Commonwealth v. Booth*, 766 A.2d 843, 846 (Pa. 2001) ("[A] court may not achieve an acceptable construction of a penal statute by reading into the statute terms that broaden its scope."). Indeed, the Third Circuit has honored this command in the past

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[4] Theoretically, a state prosecutor could pursue a misdemeanor charge under 18 Pa. Const. Stat. § 4109, which penalizes "[r]igging publicly exhibited contest[s]." But such a charge would require different proof, and carry different (and less onerous) penalties, than the federal felony charged in this case.

when construing a Pennsylvania law governing the administration of medical care. *See Aetna Life Ins. Co. v. Huntingdon Valley Surgery Ctr.*, 703 F App'x 126, 131 (3d Cir. 2017). Here, the Third Circuit's rejection of the rule of lenity in favor of a remedial canon would not have been possible had the court left enforcement of Pennsylvania law where it properly belongs—with Pennsylvania.

In short, nothing in the FDCA justified the Third Circuit's decision to extend the statute's reach into an area traditionally regulated by the states. If left uncorrected, federal prosecutors will enjoy a vast new reservoir of power never imagined—let alone authorized—by Congress.

III. The Lower Court's Liberal Construction Will Exacerbate The Problem Of Overly Federalizing Criminal Law.

The Third Circuit's application of a remedial canon in a criminal FDCA case will also lead to harmful public-policy consequences, compounding the problems inherent in expanding the scope of federal criminal law to encompass a host of statutory and regulatory infractions embedded within the modern administrative state. From three enumerated crimes at the Founding, the number of federal crimes today is too high to count, although one report from the early 1990s estimates that "there are over 300,000 federal regulations that may be enforced criminally." John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. Rev. 193, 216 (1991). Having courts apply a remedial

gloss on all these complex and highly reticulated regulations would turn the task of avoiding federal criminal liability for many from challenging to practically impossible. This Court's review is necessary to address this crucial question.

The unnecessary federalization of criminal law leads to multiple adverse consequences. *First*, it causes local criminal-enforcement regimes to atrophy because it reduces the agency of state officials, limiting their ability to craft public policy. As one district court noted, a federal program targeting crime caused "local authorities [to] abdicate[] their responsibility to the federal government . . . lower[ing] citizens' expectations of the Commonwealth's public servants." *United States v. Jones*, 36 F. Supp. 2d 304, 313-14 (E.D. Va. 1999). This Court has observed the same phenomenon while construing federal corruption statutes. As it explained, the expansion of federal criminal law in that context deprives states of their fundamental "prerogative to regulate the permissible scope of interactions between state officials and their constituents." *McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016). Granting federal officials greater prosecutorial authority allows "the Federal Government [to] use the criminal law to enforce [its views] in broad swaths of state and local policymaking." *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020). Simply put, the power to prosecute necessarily entails the power to set policy. A greater federal role in law enforcement diminishes the ability of states to determine their own policies—a direct affront to the "substantial sovereign powers [States retain] under our constitutional scheme, powers with

which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

Second, and relatedly, the over-federalization of criminal law undermines political accountability. Unlike federal officials, "state governments remain responsive to the local electorate's preferences." *New York v. United States*, 505 U.S. 144, 168 (1992); *see Printz v. United States*, 521 U.S. 898, 920 (1997) ("The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens."). With local officials in control, voters know whom to blame when crime increases or when prosecutions are mishandled. *See* Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 Mich. L. Rev. 519, 536 (2011). Local control of the criminal law preserves the ability of voters to hold public officials to task—a prerequisite for democratic governance.

Transferring authority to federal officials, by contrast, prevents voters from holding prosecutors accountable. When that occurs, voters have no state or local official to challenge if prosecutorial policies prove ineffective. Moreover, because federal prosecutors are accountable to national leadership, they tend to focus on national rather than local priorities. As a result, they are less likely to consider the local causes of crime and the costs of their decisions to communities. *See* William Partlett, *Criminal Law and Cooperative Federalism*, 56 Am. Crim. L. Rev. 1663, 1690 (2019). And when federal prosecutors act as they did in this case—incorporating elements of state law into federal charging decisions—lines of political accountability

become particularly blurred, making it challenging for citizens to know what level of the federal system to hold accountable for overreach. *Cf. Printz*, 521 U.S. at 930 (federal policies should not place states "in the position of taking the blame for [a federal program's] burdensomeness and for its defects").

Third, the overcriminalization of federal law is detrimental to individual liberty. In addition to enjoying all of the procedural safeguards afforded by the federal Constitution, state defendants can typically rely on a number of other protections created by state law. *See generally* Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex. L. Rev. 1141 (1985). And state law tends to be more favorable to defendants substantively. *See* Partlett, *supra*, at 1670 ("Generally, federal criminal law is harsher and offers fewer protections to criminal defendants than state law."). Superimposing federal law on top of a state's criminal code subjects citizens to heightened criminal liability never authorized by their state's legislature. Indeed, a defendant may very well be subjected to two separate prosecutions—and two sentences—for the same conduct. *See Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) ("a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute").

The threat to individual liberty in FDCA prosecutions is particularly acute, given that corporate officers can be held both strictly and vicariously liable for their subordinates' offenses. *See United States v. Park*, 421 U.S. 658, 670 (1975). Such

unusually broad liability, when coupled with novel prosecutions premised on state regulatory infractions, places the delicate federal-state balance—and ultimately the liberty of every American—in jeopardy.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

Ilya Shapiro
Trevor Burrus
Stacy Hanson
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001

David H. Safavian
General Counsel
THE AMERICAN CONSERVATIVE UNION FOUNDATION
1199 N. Fairfax Street,
Suite 500
Alexandria, VA 22314

Thomas M. Johnson, Jr.
Counsel of Record
William K. Lane III
Frank H. Chang
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000
tmjohnson@wiley.law

June 17, 2021

Counsel for Amici Curiae