No. 21-69

IN THE

Supreme Court of the United States

JOHN ALLISON HUCKABAY,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Idaho

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Fourteenth Amendment's Due Process Clause requires a scienter element for felonies that are not public welfare offenses and carry serious penalties.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute 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 works to restore limited constitutional government, which is the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case concerns Cato because it is unfair to impose criminal liability on people who could not have known their conduct was illegal and who did not have *any* degree of intent to commit an illegal act.

INTRODUCTION AND SUMMARY OF ARGUMENT

One of the most basic tenets of our justice system is that no one should be subject to a criminal conviction unless they acted with a criminal intent. A nexus between a guilty mind and the wrongful act provides a moral justification for punishment. *See, e.g.*, Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Liability*, 88 Cal. L. Rev. 931 (2000); John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 Va. L. Rev. 1021 (1999). As Oliver Wendell Holmes famously quipped, "even a dog

[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

distinguishes between being stumbled over and being kicked." Holmes, *The Common Law* 3 (1881).

The notion that a crime must have criminal intent long predates the founding of the United States and was firmly established in the English common law. The Founders knew that a guilty mind was necessary for criminal culpability. Indeed, early cases and commentaries from the Framing era demonstrate the principle that "wrongdoing must be conscious to be criminal." *Morissette v. United States*, 342 U.S. 246, 252 (1952). And this understanding endured through the end of the nineteenth century.

It wasn't until the 20th century that legislatures began to adopt strict liability crimes in large numbers. But even then, this Court only allowed strict liability convictions for public welfare crimes that imposed small criminal penalties. The Court's decisions simply do not resolve the issue of the constitutionality of strict liability for felony offenses. In the mid-20th century, Professor Herbert Packer summarized this Court's uncertain position on *mens rea* by noting that "it is an important requirement, but it is not a constitutional requirement, except sometimes." Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 107 (1962).

In recent years, this Court has begun to return to the original understanding that criminal liability requires a guilty mind. The Court should use this case to affirmatively declare that criminal intent is necessary to sustain a felony conviction.

ARGUMENT

I. A GUILTY MIND WAS A NECESSARY CONDITION FOR CRIMINAL PUNISHMENT DURING THE FRAMING ERA

The origins of modern *mens rea* doctrine can be traced back millennia. Most scholars trace the emergence of *mens rea* to the rediscovery of Roman law and to Canon Law. Francis B. Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 982–83 (1932); Albert Levitt, *Origin of the Doctrine of Mens Rea*, 17 Ill. L. Rev. 117 (1922); Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 St. John's L. Rev. 725, 726 (2004).

Borrowing heavily from Roman law, Bracton wrote *De Legibus Angliae*, which helped shape the English common law in the 13th century. Bracton writes: "We must consider with what mind (animo) or with what intent (voluntate) a thing is done, in fact or in judgment, in order that it may be determined accordingly what action should follow and what punishment." 2 Henry de Bracton, *De Legibus et Consuetudinibus Angliae* 101b (c. 1235) (quoted in Sayre, *Mens Rea*, *supra*, at 985).

By the 17th century, the requirement of a guilty mind for criminal culpability had become a fixture in the common law. Lord Bacon wrote, "[a]ll crimes have their conception in a corrupt intent, and have their consummation and issuing in some particular fact." Francis Bacon, *Collection of Some Principle Rules and Maxims of the Common Law*, Reg. 15 (1630). Fourteen years later, Sir Edward Coke declared, "the act does not make a person guilty unless the mind be also guilty." Edward Coke, *Third Institute* 6 (1644).

Criminal intent became ingrained in the literature of punishment in the following hundred years. Writing in 1682, Hale described "the several incapacities of persons, and their exemption from penalties," arguing that "where there is no will to commit an offense, there can be no transgression." 1 Matthew Hale, *The History of the Pleas of the Crown* 14–15 (1736) (quoted in *Salzman v. Lowery*, 405 F.2d 358, 364 n.1 (D.C. Cir. 1968)). Hawkins similarly wrote that the "guilt of offending against any law whatsoever, necessarily supposing a wilful disobedience, can never justly be imputed to those, who are either uncapable of understanding it, or of conforming themselves to it." 1 William Hawkins, *A Treatise of the Pleas of the Crown* 1 (1716). And Sir Foster noted that "there must be both a will and an act." Michael Foster, *Crown Law* 279 (3d ed. 1809) (quoted in Peter Brett, *An Inquiry into Criminal Guilt* 39 (1963)). These commentaries all point to the necessity of a criminal intent to sustain culpability.

Finally, a decade prior to the American Revolution, William Blackstone commented that "punishments are . . . only inflicted for [the] abuse of . . . free will," and that "an unwarrantable act without a vi[c]ious will is no crime at all." 4 William Blackstone, *Commentaries* 20–21 (1769). Blackstone continued: "to constitute a crime against human laws, there must be, first, a vi[c]ious will." *Id.* at 21.

The Framers relied heavily on the common law as a guide for applying the Constitution in the newly independent United States. *Morissette*, 342 U.S. at 251–52 (explaining how the belief that crime requires "an evil-meaning mind . . . took deep and early root in American soil"). It is no surprise, then, that the

Founders similarly condemned liability without culpability. In Federalist No. 62, James Madison warned:

> It will be of little avail to the people, that laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood . . . [so] that no man, who knows what the law is to-day, can guess what it will be like to-morrow.

Madison thus argued that a crime must involve a guilty mind, rejecting the legitimacy of vague laws and strict liability crimes.

Although the Constitution does not discuss principles of criminal responsibility, scholars have persuasively argued that this silence indicates "consensus about the topic." Ann Hopkins, *Mens Rea and the Right to Trial by Jury*, 76 Cal. L. Rev. 391, 394 (1988). Indeed, it "demonstrate[s] that the 'connection between crime and moral guilt [was] enshrined in the common law.'" *Id.* (alteration in original) (quoting Brett, *supra*, at 38). Relying on Blackstone, later commentators evinced that the acceptance of moral guilt was necessary to sustain criminal liability. Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 Buff. Crim. L. Rev. 691, 726 (2003); *see, e.g.*, William Oldnall Russell, *A Treatise on Crimes and Misdemeanors* (1824); 1 Harry Toulmin & James Blair, *A Review of the Criminal Law of the Commonwealth of Kentucky* (Gaunt ed., 1983) (1804).

Toulmin and Blair viewed "felonious intention" as a "necessary ingredient in every felony." *Id.* at 94. And nowhere did the authors explicitly identify or justify criminal liability where the defendant bore no fault of any sort. Leonard, *supra*, at 722.

Commentators were not the only ones who recognized the necessity of a criminal mind to sustain punishment. When state legislatures passed laws that authorized punishment without culpability, courts did not hesitate to strike those laws down. In *Ely v. Thompson*, Kentucky's high court held that it would be unconstitutional to punish a person for exercising the common-law right of self-defense, even though a criminal statute purported to permit such punishment. 10 Ky. 70, 70–73 (1820). Similarly, in *Jones v. Commonwealth*, Virginia's high court declined to abrogate the common-law rule prohibiting imposition of a joint fine in a criminal case. The court held that imposing a joint fine would be cruel and unusual because it could require some defendants to bear the punishment for others' conduct. 5 Va. 555 (1799). Finally, in an early New York case, the court refused to find a defendant strictly liable for a mistake his agent made. *Sturges v. Maitland*, Ant. N.P. Cas. 153, 154 (N.Y. Sup. Ct. 1813). James Kent, then Chief Justice of the New York Court of Appeals, explained that "all infringements of police laws must be tested by the intention of the party." *Id.*; *see, e.g.*, *United States v. Clarke*, 2 Cranch C.C. 158 (C.C.D.C. 1818) (asking jury whether defendant was "conscious of the moral turpitude of the act").

II. THE LIMITED STRICT LIABILITY CRIMES OF THE 19TH CENTURY DID NOT REFLECT A CHANGE IN CRIMINAL LAW

As described above, proof of the offender's guilty mental state was a prerequisite for conviction for the Constitution's first 80 years. The shift away from this requirement did not begin until the Industrial Revolution. *See* Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 Cornell L. Rev. 401, 419 (1993); Colin Manchester, *The Origins of Strict Criminal Liability*, 6 Anglo-Am. L. Rev. 277, 279–80 (1977); *but see* Richard G. Singer, *The Resurgence of Mens Rea: III-The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. Rev. 337, 339, 340–73 (1989) (arguing that strict liability statutes originated to close a gap in tort law). Urbanization and industrialization posed new dangers to the public that legislatures sought to mitigate through state sanction. Because a guilty mind would be difficult to prove for some of these novel offenses, lawmakers sometimes omitted a *mens rea* requirement on the ground that penalties were small and would not stigmatize offenders. Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 67 (1933).

The early strict liability offenses, called public welfare offenses, imposed duties on individuals connected with certain industries that affected public health and welfare. Examples included the illegal sale of alcoholic beverages, sale of impure or adulterated food, violations of traffic regulations and motor vehicle laws, and sale of misbranded articles. *Id.* at 73, 84 (cited by *Morissette*, 342 U.S. at 262 n.20).

Often labeled as the first American strict liability decision, *Barnes v. State* dealt with the sale of liquor to persons addicted to alcohol. 19 Conn. 398 (1849); *see* Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. Pa. L. Rev. 35 (1939); Sayre, *Public Welfare Offenses*, *supra*, at 63. But Barnes was not the one who personally sold the alcohol. Instead, his employee sold it contrary to Barnes's express directions. Connecticut's high court held that Barnes could not be convicted without at least personal recklessness. *Barnes*, 19 Conn. at 407 ("[T]he master is never liable criminally for acts of his servant, done without his consent, and against his express orders.").

Many of the strict liability statutes dealt with the sale of liquor, as in *Barnes*, or the corruption of minors. Of the cases cited by Sayre, 30 percent decided before 1900 dealt with liquor directly, and at least another 10 percent concerned either the transportation of liquor or corruption of minors. Sayre, *Public Welfare Offenses*, *supra*, at 84–88; *see* Singer, *supra*, at 368. Thus, for the first 50 years that legislatures created strict liability crimes, they did so tentatively.

Moreover, courts did not simply dispense with the common law's *mens rea* requirement. As late as 1877, this Court implied that it was beyond the authority of the government to punish even knowing violations of a crime where such violations were committed in good faith and with no "evil intent." *Felton v. United States*, 96 U.S. 699, 702 (1877). In *Felton*, the defendants knowingly violated a statute regulating liquor production to avoid the complete loss of the liquor being produced. *Id.* at 702. The Court found that their conduct was justified under the doctrine of necessity

and that it would shock a universal "sense of justice" for a court to impose criminal punishment without proof of wicked intent. *Id.* at 703. "All punitive legislation contemplates some relation between guilt and punishment," the Court explained. *Id.* "To inflict the latter where the former does not exist would shock the sense of justice of every one." *Id.*

State courts also repeatedly emphasized that a guilty mind was fundamental to criminal culpability. The New Jersey Supreme Court observed that "[i]n morals it is an evil mind which makes the offence, and this, as a general rule, has been at the root of criminal law." *Cutter v. State*, 36 N.J.L. 125, 126 (1873). And the Utah Supreme Court noted that *mens rea* was an indispensable element of a criminal offense. *State v. Blue*, 17 Utah 175, 181 (1898) ("To prevent the punishment of the innocent, there has been ingrafted into our system of jurisprudence, as presumably in every other, the principle that the wrongful or criminal intent is the essence of crime, without which it cannot exist."); *see also Bradley v. People*, 8 Colo. 599, 602 (1885) ("Crime proceeds only from a criminal mind. The doctrine which requires an evil intent lies at the foundation of public justice.").

Those courts that upheld strict liability statutes did so only in limited circumstances. These cases involved liquor, minors, or the adulteration of milk. *See, e.g.*, *Gourley v. Commonwealth*, 140 Ky. 221 (1910) (alcohol); *Commonwealth v. Emmons*, 98 Mass. 6 (1867) (minors in billiard halls); *People v. Kibler*, 106 N.Y. 321 (1887) (milk). In all these cases, courts stressed that strict liability was necessary because these offenses: 1) made actual knowledge "difficult to prove"; 2) were "necessary for the public good"; and 3)

involved a "small fine," which effectively diluted "the stigmatic effect of conviction." Singer, *supra*, at 367.

Given this limited role for strict liability crimes, it is unsurprising that legal commentators at the time did not recognize a broader shift in the principles underlying criminal law. There was simply "no recognition from Wharton, Bishop, or others that a new trend had been set in the criminal law which might be worth considering." *Id.* at 373. There was no acceptance that a broad swath of crimes could abandon the scienter requirement. Instead, only a few specific crimes or offenses that imposed strict liability for unique reasons were noticed by commentators. *Id.* Summing up the state of criminal law, Joel Prentiss Bishop remarked, "neither in philosophical speculation, nor in religious or moral sentiment, would any people in any age allow, that a man should be deemed guilty unless his mind were so." 1 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 292 (9th ed. 1923).

III. STRICT LIABILITY IS APPROPRIATE ONLY FOR OFFENSES WITH SMALL PENALTIES, NOT THE CASE HERE

A. This Court has allowed only a limited exception to the rule that criminal statutes require a guilty mental state.

The number of strict liability criminal offenses ballooned during the 20th century as legislatures created scores of "public welfare offenses" to protect public health and safety. *Morissette*, 342 U.S. at 253–56. For well-meaning lawmakers, *mens rea* requirements were burdensome obstacles to solving

social problems. This attitude led lawmakers to more frequently eliminate scienter requirements from criminal statutes. *Id.*

Despite this increase in strict liability statutes, this Court has never endorsed a broad principle that would justify all strict liability felonies. In *United States v. Balint*, the defendant was indicted for the sale of drugs, and the indictment did not allege that he knew the items he was selling and possessing were drugs. 258 U.S. 250 (1922). The Court reasoned that the question was one of legislative intent and that Congress had already weighed the possible injustice of punishing an innocent against the evil of exposing the public to the dangers of drugs. *Id.* at 254. "Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes." *Id.* at 252. Subsequent cases allowed institutions to be held vicariously and strictly liable for violations of federal consumer protection laws. *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Park*, 421 U.S. 658 (1975). In *Dotterweich,* Justice Frankfurter noted that under the circumstances of modern industrialism, the government may reasonably step in to protect the "wholly helpless" public. 320 U.S. at 285.

While this Court has "upheld the constitutionality of some strict-liability offenses in the past," these decisions simply do not resolve the issue of the constitutionality of strict liability for felony offenses. *Rehaif v. United States*, 139 S. Ct. 2191, 2212 (2019) (Alito, J., dissenting). Notably, all these cases

concerned public welfare statutes passed to protect the public. Additionally, the punishment for these crimes carried only minor penalties. Thus, these cases merely followed the limited carveout for strict liability crimes set out in the nineteenth century.

But the Court's later decisions show that there must be a limit past which strict liability laws violate the Due Process Clause. In *Morissette*, the Court read a requirement of intent into the federal conversion statute under which the defendant had been prosecuted. The Court said:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

342 U.S. at 250. To determine whether a mental state requirement should be inferred, the Court considered whether the criminal statute was essentially a matter of regulatory policy, imposed a relatively small penalty, or imposed a conviction that did not gravely besmirch the offender's reputation. *Id.* at 255–56.

Morissette reinvigorated the presumption of *mens rea* in criminal law. Subsequently, this Court announced the importance of substantive limits on the imposition of strict liability for criminal convictions. *See Staples v. United States*, 511 U.S. 600, 618 (1994) ("Our characterization of the public welfare offense in *Morissette* hardly seems apt,

however, for a crime that is a felony, as is violation of § 5816(d). . . . After all, 'felony' is, as we noted in distinguishing certain common-law crimes from public welfare offenses, 'as bad a word as you can give to man or thing.'"). In *Lambert v. California*, the Court held that due process requires that an individual may not be convicted of a strict liability felony when the conduct is "wholly passive," and the person is "unaware of any wrongdoing." 355 U.S. 225, 228–29 (1957).

Likewise, in *Staples*, due process required the government to prove both that the defendant knowingly possessed the firearm and that he was aware of the weapon's unlawful characteristic. 511 U.S. at 619; *see also McFadden v. United States*, 576 U.S. 186, 188–89 (2015) (concluding that the government must prove that the defendant "knew he was dealing with a 'controlled substance'"); *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001) ("[C]ore due process concepts of notice, foreseeability, and, in particular, the right to fair warning . . . bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct."); *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 564–65 (1971) ("Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require, as in [*United States v.*] *Murdock*, [290 U.S. 389 (1933),] 'mens rea' as to each ingredient of the offense."). Finally, just two years ago, the Court held that a "basic principle" underlying criminal law is the showing of a "vicious will." *Rehaif*, 139 S. Ct. at 2196 (quoting 4 Blackstone, *supra*, at 21).

B. Some federal and state courts have required *mens rea* for felony offenses.

There has been a movement among the states and lower federal courts toward requiring *mens rea* to sustain a felony conviction. At the federal level, some circuit courts have closely followed the analysis laid out in *Morissette* to determine whether a given strict liability crime is unconstitutional. Key to the analysis are whether the penalty is relatively small and whether the conviction gravely besmirches the reputation of the defendant. In *United States v. Wulff*, the Sixth Circuit found that the Migratory Birds Act violated due process because a felony conviction irreparably damages the defendant's reputation and deprives her of many of her civil rights for life. 758 F.2d 1121, 1124–25 (6th Cir. 1985); *see also United States v. Engler*, 806 F.2d 425 (3d Cir. 1986). Thus, the potential penalty was not "relatively small." *See United States v. Garrett*, 984 F.2d 1402, 1411 (5th Cir. 1993) (finding that the Due Process Clause provides a constitutional backstop to the interpretation of statutes without an express mens rea requirement); *United States v. Foley*, 598 F.2d 1323, 1335 (4th Cir. 1979) ("Although in most cases particular scienter requirements seem to be based simply on statutory construction, there are undoubtedly due process restrictions.") (citation omitted).

State courts have also grappled with how to deal with statutes that impose prison sentences for strict liability crimes. In Alaska, the court of appeals held that a statute prohibiting fishing in restricted waters required *mens rea* before conviction, particularly because the penalty was a possible one-year imprisonment, $5000, or both. *Reynolds v. State*, 655

P.2d 1313 (Alaska Ct. App. 1982); *see also State v. Blake*, 197 Wash. 2d 170, 187 (2021) (striking down Washington's felony strict liability drug possession statute because it criminalized innocent and passive possession). The Delaware Supreme Court held that a state law required *mens rea* because a legislative intent to impose strict liability was not plainly apparent in the text. *Pardo v. State*, 160 A.3d 1136, 1143 (Del. 2017). Finally, Wayne LaFave, citing several state high court decisions, has identified three circumstances in which a "strict-liability criminal statute" would be "unconstitutional." Wayne R. LaFave, 1 *Substantive Criminal Law* § 5.5(b) (2d ed. 2003). These are "if (1) the subject matter of the statute does not place it 'in a narrow class of public welfare offenses,' (2) the statute carries a substantial penalty of imprisonment, or (3) the statute imposes an unreasonable duty in terms of a person's responsibility to ascertain the relevant facts." *Id.*

Here, the Idaho Supreme Court refused to read a mental state requirement in the criminal statute, despite the statute carrying a felony conviction for "wholly passive" conduct. The statute is not designed to protect the public welfare, and a felony is a significant penalty that carries with it serious, collateral consequences. This Court's earlier cases cannot justify the imposition of a felony conviction for a strict liability crime.

CONCLUSION

For the foregoing reasons, and those stated by the petitioner, this Court should grant the petition and reverse the decision of the Idaho Supreme Court.

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