No. 16-6370

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES,

Plaintiff- Appellee,

v.

CHRISTINA CARMAN,

Defendant-Appellant

On Appeal from United States District Court for the Eastern District of Kentucky, No. 14-cr-20-DLB

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT, CHRISTINA CARMAN, SEEKING REVERSAL

Steven D. Jaeger, Esq.
The Jaeger Firm, PLLC
23 Erlanger Road
Erlanger, Kentucky 41018
(859) 342-4500

Candace Crouse, Esq.
NACDL Amicus Committee Sixth Circuit Vice-Chair
Pinales, Stachler, Young, Burrell, & Crouse Co. LPA
455 Delta Avenue, Suite 105
Cincinnati, Ohio 45226
(513) 252-2732

Counsel for *Amicus Curiae*, National Association of Criminal Defense Lawyers

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(A) and 26.1, Amicus Curiae, National Association of Criminal Defense Lawyers, makes the following disclosures:

1. Is any said amicus a subsidiary or affiliate of a publicly-owned corporation?

No.

2. Is there a publicly-owned corporation, not an amicus, which has a financial interest in the outcome?

No.

TABLE OF CONTENTS **Page**

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Other Authorities

INTEREST OF AMICI CURIAE[1]

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as *amicus curiae* in support of Appellant seeking reversal.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in this case as NACDL is committed to combatting the potential consequences arising from the

[1] Pursuant to Rule 29(E), counsel for *amicus curiae* further states that no counsel for a party authored any part of the brief, nor did any person or entity, other than *amicus curiae*, its counsel or their members make a monetary contribution to the preparation or submission of this brief.

statutory expansion, overcriminalization and over-federalization represented in the decision below for offenses involving federal mail fraud statutes. NACDL has an interest in protecting against the unwarranted expansion of federal criminal law.

SUMMARY OF ARGUMENT

18 U.S.C. §1341 requires proof of a "scheme or artifice to defraud, or to obtain money or property by false or fraudulent pretenses, representations, or promises." The District Court denied Appellant, Christina Carman's Motion to Dismiss, Rule 29 Motion, and proposed jury instructions regarding the allegation of conspiring to commit mail and wire fraud by failing to file monthly notices allegedly required under the Jenkins Act, 18 U.S.C. §376. The Court also denied her post-trial motion to vacate her conviction. (R. 427: Memorandum Opinion and Order).

A violation of the Jenkins Act constitutes a misdemeanor, punishable by up to a $1,000 fine or imprisonment for up to six months. 15 U.S.C. §377. It also provided for a civil right of action by state officials against violators. 18 U.S.C. §376(a)(1). At the heart of the issue presented in this case is the unconstitutional and unwarranted expansion of the federal mail fraud statute, resulting in Ms. Carman's wrongful conviction and lengthy sentence of sixty months imprisonment. This case provides another example of the overcriminalization epidemic occurring in this country's federal court system.

ARGUMENT

I. Introduction.

Overcriminalization has been classified as "the most pressing problem with criminal law today." [2] The term describes the trend to use the criminal law rather than the civil law to solve every problem, to punish every mistake, and to compel compliance with regulatory objectives.[3] Congress continues to criminalize at an average rate of one new crime for every week of every year.[4] For instance, from 2000 through 2007, Congress enacted 452 new federal criminal offenses.[5] Currently, it is estimated that there are in excess of 300,000 federal regulatory offenses.[6] Regulatory offenses punish conduct that tends to be wrongful only because it is illegal.[7]

Overcriminalization and the over-federalization of criminal offenses often results in ludicrous federal convictions for offenses better resolved with civil penalties that, traditionally, fall outside the constitutionally anticipated federal purview. Overcriminalization can occur by prosecutorial overreach via the executive expansion of criminal provisions in specific laws and regulations not intended to be

---

[2] Douglas Husak, *Overcriminalization: The Limits of the Criminal Law 3* (2007).
[3] The Heritage Foundation, at http://www.heritage.org/issues/legal/overcriminalization
[4] http://www.heritage.org/research/factsheets/2011/04/overcriminalization-an-explosion-of-federal-criminal-law
[5] http://www.heritage.org/research/factsheets/2011/04/overcriminalization-an-explosion-of-federal-criminal-law
[6] http://rightoncrime.com/category/priority-issues/overcriminalization/
[7] *United States v. Dotterweich*, 320 U.S. 277, 284 (1943).

so applied, and which fall beyond the intended legislative predictions and result in an over-criminalized society. When such a view is endorsed by the Court, ambiguous criminal statutes are brought into the federal system that might otherwise belong elsewhere.

Such is squarely demonstrated in the instant appeal, and because of that, this Court should reverse the judgment below.

II. Allowing Ms. Carman's conviction to stand would expand the scope of the Federal mail fraud statute beyond its textual and purposeful limits.

In this case, there are no allegations that Ms. Carman or her company filed false Jenkins Act reports via the mail. Instead, it is only alleged that they did not file the reports at all. A mere regulatory violation has not traditionally served as the basis for a mail fraud charge. *United States v. Dixon*, 536 F.2d 1388, 1400 (2nd Cir.1976) (holding that failure to carry out reporting obligation imposed by §14 of the Securities Exchange act was "hardly a 'scheme or artifice to defraud' in the sense of the mail fraud statute"). Importantly, there are no cases in which a mail fraud prosecution was upheld, or even brought, where the defendant affirmatively and publicly disclosed they were not filing the returns under the Jenkins Act, informed customers they were responsible for taxes, or urged them to contact their state tax regulators for questions.

It has been noted on multiple occasions by federal courts across the country that, "[t]he language of the mail fraud statute is very broad, and concern has repeatedly been expressed that it not be given too vague and encompassing a scope by judicial interpretation." *Emery v. Am. Gen. Fin., Inc.*, 71 F.3d 1343, 1346 (7th Cir.1995), citing to *United States v. Dial*, 757 F.2d 163, 170 (7th Cir.1985); and *United States v. McNeive*, 536 F.2d 1245, 1252 (8th Cir.1976). In addition, scholars have expressed concern with the expansion of the mail fraud statute. *See, e.g.*, John C. Coffee, Jr., *Hush!: The Criminal Status of Confidential Information After* McNally *and* Carpenter *and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121 (1988); Peter Henning, *Maybe It Should Just Be called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 26 B.C. L. REV. 435 (1995); Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137 (1990).

Because of the ongoing expansion of the scope of the statute, it has been classified as every federal prosecutor's "true love." Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*¸18 DUQ. L. REV. 771, 771 (1980). During a U.S. House of Representatives committee meeting, it was testified that:

> Many federal laws are duplicative of other federal laws. For example, given the ubiquitous use of the mail and telecommunications facilities, the federal mail and wire fraud statutes can be used by federal prosecutors to reach almost any fraud scheme one could imagine, including many garden-variety schemes that could easily be handled by state authorities. John Malcom. *Defining the Problem and Scope of Over-criminalization and Over-federalization*, testimony

before the Committee on the Judiciary Over-Criminalization Task Force, U.S. House of Representatives (June 14, 2013).[8]

Similar advances by federal prosecutors and trial courts have already been rejected in other regulatory realms. For example, in *Bond v. United States*, 134 S. Ct. 2077 (2014), the defendant, after learning about her husband's affair with her best friend, spread harmful chemicals on the friend's car door, mailbox, and door knob, causing minor injuries. *Bond v. United States*, 134 S. Ct. 2077, 2085 (2014). On that basis, Bond was convicted of violating a provision of the Chemical Weapons Convention Implementation Act of 1998 that forbids a person to "possess or use ... any chemical weapon." 18 U.S.C. § 229(a)(1). The Supreme Court rejected the government's sweeping interpretation of the statute reasoning that it would "dramatically intrude upon traditional state criminal jurisdiction." *Bond*, 134 S. Ct. at 2088 (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)).

[8] For additional, recent information on overcriminalization, see The Heritage Foundation, *USA vs YOU: The Flood of Criminal Laws Threatening Your Liberty*, co-published with the American Center for Law and Justice, American Civil Liberties Union, American Legislative Exchange Council, Families Against Mandatory Minimums, Justice Fellowship, National Association of Criminal Defense Lawyers, and Right on Crime, 2013; John G. Malcolm, *The Pressing Need for Mens Rea Reform*, Heritage Foundation Legal Memorandum No. 160, September 1, 2015; Michael B. Mukasey and Paul J. Larkin, Jr., *The Perils of Overcriminalization*, Heritage Foundation Legal Memorandum No. 146, February 12, 2015; Paul Rosenzweig, *Ignorance of the Law Is No Excuse, But It Is Reality*, Heritage Foundation Backgrounder No. 2812, June 17, 2013; Stephen F. Smith, *A Judicial Cure for the Disease of Overcriminalization*, Heritage Foundation Legal Memorandum No. 135, August 21, 2014; Brian W. Walsh and Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, co-published by The Heritage Foundation and National Association of Criminal Defense Lawyers, April 2010; Brian W. Walsh and Benjamin P. Keane, *Overcriminalization and the Constitution*, Heritage Foundation Legal Memorandum No. 64, April 13, 2011; see also Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. Crim. L. & Criminology 537 (2013).

More recently, in *Yates v. United States*, 135 S. Ct. 1074 (2015), the defendant was a commercial fisherman who caught undersized red grouper in federal waters in violation of conservation regulations and "ordered a crew member to toss the suspect catch into the sea." *Yates v. United States*, 135 S. Ct. 1074, 1078-79 (2015). Based on that conduct, Yates was convicted of violating 18 U.S.C. § 1519, a provision of the Sarbanes-Oxley Act that makes it a crime to conceal or destroy "any record, document, or tangible object with the intent to impede, obstruct or influence" a federal investigation. But the United States Supreme Court "rejected the Government's unrestrained reading" of the phrase, "tangible object," and declined to include fish as such. *Id.* at 1081. The Court reasoned that "it is highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record-keeping." *Yates*, 135 S. Ct. at 1087.

In addition, Courts have limited the scope of the mail fraud statute. In *United States v. Louderman*, 576 F.2d 1383, 1388 (9th Cir.1978), the Ninth Circuit directed that "(T)he (mail fraud) statute should be carefully and strictly construed to avoid extension beyond the limits intended by Congress." In *United States v. McNeive*, 536 F.2d 1245 (8th Cir.1976), the Government attempted to prosecute "tipping" or payment of gratuities to official of a city agency. However, the Eighth Circuit held that such an extension of the statute would:

> effect a further extension of § 1341 so as to cover all actions which might offend the Government's sense of personal propriety.... The Government here is attempting to criminalize cupidity and we do not believe § 1341 can be extended to that extreme without a showing of additional facts which clearly bring the conduct within § 1341. Section 1341 is a penal statute with limitations as to its scope, which limitations were grossly exceeded in the present case. *United States v. McNeive*, 536 F. 2d 1245, 1252 (8th Cir.1976).

The Fifth Circuit, in *United States v. Edwards*, 458 F.2d 875, 880 (5th Cir.1972), has also held that "A narrow, careful construction is especially appropriate where, as here, the (mail fraud) statute threatens to reach criminal conduct in the field of domestic relations which the state can, and should, effectively and appropriately control."

In the present case at bar, the Government and the trial court have both expanded the reading of the mail fraud statute by making Ms. Carman's regulatory failure to file the required reports under the Jenkins Act, equate to mail fraud. As the Seventh Circuit has acknowledged, "[p]lenty of cases say that "merely failure to disclose" is not, without more, mail fraud," see *Reynolds v. East Dyer Development Co.*, 882 F.2d 1249, 1252 (7th Cir.1989), and whether a failure to disclose is fraudulent depends on context. See *United States v. Biesiadecki*, 933 F.2d 539, 542–43 (7th Cir.1991), as cited in *Emery v. Am. Gen. Fin., Inc.*, 71 F.3d 1343, 1346–47 (7th Cir.1995). That is why courts have "eschewed sweeping interpretations of what constitutes fraudulent conduct under the mail fraud statute." *Id.* at 1351–52 (7th Cir.1995).

In this case, Ms. Carman's conviction under the mail fraud statute is based solely on omissions, *i.e.*, the failure to send reports to state tax authorities as directed by the Jenkins Act. Fraud must ordinarily be based on a material false statement. Omissions may be actionable in some cases, but only where the omissions make some affirmative statements misleading or deceptive, *United States v. Jamieson*, 427 F.3d 394, 415 (6th Cir.2005), *cert. denied*, 547 U.S. 1218 (2006), or where the defendant is in a fiduciary relationship with the victim. *United States v. Frost*, 125 F.3d 346, 361 (6th Cir.1997). In either case, the deception must concern a material matter. *Neder v. United States*, 527 U.S. 1, 16 (1999) (materiality of falsehood is element of federal mail fraud, wire fraud, and bank fraud statutes).

The Supreme Court has questioned attempts, like the government's here, to hitch a mail fraud conviction onto a Jenkins Act reporting violation. In *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010), the Supreme Court rejected a civil Racketeer Influenced and Corrupt Organizations Act ("RICO") claim made by New York City predicated on mail and wire fraud based on the alleged failure of an internet cigarette seller (Hemi Group, LLC) to file Jenkins Act reports. The question of whether or not Hemi's failure to file Jenkins Act reports constituted mail or wire fraud, which was not before the Court, was nonetheless met by the Court's noticeable skepticism. *Id.* at 988. In fact, Justice Ginsberg, in her concurrence, commented: "I resist reading RICO to allow the City to end-run its lack of authority to collect

tobacco taxes from Hemi Group or to reshape the quite limited remedies Congress has provided for violations of the Jenkins Act....” *Id.* at 995 (Ginsberg, J., concurring) (quotation omitted).

Those “limited remedies” are carefully detailed in the Jenkins Act. A violation of the statute gives the federal government, or injured state governments, the right to bring a civil action in federal court to compel compliance. 15 U.S.C. §377. The Jenkins Act can create criminal liability as well, *but only as a misdemeanor*. 15 U.S.C. §377. In Ms. Carman’s case, the Court permitted the bootstrapping of the mail fraud statute to the Jenkins Act violation, thereby resulting in a sentence of sixty months. Despite what occurred in this case, the mail fraud statute cannot be a vehicle to transform misdemeanors into felonies, or to federalize state tax laws or regulations. Doing such is a textbook example of overcriminalization and runs counter to Congress’ direction *not* to make a violation of the Jenkins Act a felony.

While it is recognized that there are a handful of mail fraud prosecutions or civil cases - all from other circuits and most over thirty years old, none of those cases support the conviction of Ms. Carman. In most of those other cases, a false Jenkins Act notice is filed with the states, the defendants created fictitious companies, or engaged in other acts of affirmative deception and fraud. *See United States v. Melvin*, 544 F.2d 767, 778 (5th Cir.1977) (filing false Jenkins Act notices); and *United States*

v. DeFiore, 720 F.2d 757, 760-61 (2d Cir.1983) (using secret compartments in panel trucks to ship their products a sham company with a fictitious address).

The Supreme Court has made clear "that the federal mail fraud statute is 'limited in scope to the protection of property rights.'" *Cleveland v. United States*, 531 U.S. 12, 18 (2000), *quoting McNally v. United States*, 483 U.S. 350, 360 (1987). A Jenkins Act filing is a regulatory requirement, which in *Cleveland*, was held to not be equated with a property interest, and thus, not covered by the mail fraud statutes. *Id.* at 20. Thus, Ms. Carman's conviction is improper, and should be vacated.

III. The conviction in this case would allow for the Rule of Lenity to be violated.

If Ms. Carman's conviction is permitted to stand, then the interpretation of the mail fraud statute as a proxy for the Jenkins Act would violate the Rule of Lenity. *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015). "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Id.* (quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985)). At the very least, what this case makes clear is that any regulatory requirement which remotely involves the mail, is now subject to a mail fraud charge and possible conviction. In addition, the penalty

available for the United States becomes much greater than for the mere regulatory violation itself.

Clearly, such would result in rampant overcriminalization. The regulatory state in which we now live imposes thousands of regulatory obligations upon everyone, many of them having minor importance, and some, even involving the mail. For instance, even the failure to file a tax return could now also be considered mail fraud under the ruling of this case. Such is obviously an overexpansion of the scope of the statute.

Permitting prosecutors to convert a regulatory violation into a felony mail fraud violation gives prosecutors too much discretion and fails to give adequate notice of what type of conduct the statute covers. *See* Kristin Kate Orr, *Fencing in the Frontier: A look into the Limits of Mail Fraud*, 95 Ky. L.J. 789, 793 (2007) ("(P)rosecutors use the mail fraud statute despite the existence of particularized legislation, thus using the statute as a 'bad' gapfiller and undermining congressional intent"). As a result, this Court should reverse Ms. Carman's conviction and revert the scope of the mail fraud statute to a state closer in line with its original Congressional intent.

CONCLUSION

For the reasons set forth above, the Court should reverse Ms. Carman's conviction and sentence.

Respectfully submitted,

/s/ Steven D. Jaeger
Steven D. Jaeger, Esq.
THE JAEGER FIRM, PLLC
23 Erlanger Road
Erlanger, Kentucky 41018
(859) 342-4500 (t)
(859) 342-4501 (f)
sdjaeger@thejaegerfirm.com

-And-

/s/ Candace C. Crouse
Candace C. Crouse, Esq.
NACDL Amicus Committee Sixth Circuit Vice-Chair
Pinales Stachler Young Burrell & Crouse Co., LPA
455 Delta Avenue, Suite 105
Cincinnati, OH 45226
Phone: 513-252-2750
Fax: 513-252-2751
ccrouse@pinalesstachler.com

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 29, which limits the allowable length of an amicus brief to one-half the maximum length authorized for a party's principal brief, counsel hereby certifies that the foregoing brief is within the page limit, and is double-spaced, with one-inch page margins, and written in proportionally spaced, 14-point typeface, pursuant to Federal Rule of Appellate Procedure 32.

/s/ Steven D. Jaeger
Steven D. Jaeger

/s/ Candace C. Crouse
Candace C. Crouse

CERTIFICATE OF SERVICE

It is hereby certified that a true and accurate copy of the foregoing was electronically filed with the Court on this 10th day of January, 2017, which will electronically notify all counsel of record.

/s/ Steven D. Jaeger
Steven D. Jaeger

/s/ Candace C. Crouse
Candace C. Crouse