No. 06-1604

IN THE
Supreme Court of the United States

SAMUEL NESS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether merely hiding funds with no design to create the appearance of legitimate wealth is sufficient to support a money laundering conviction.

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 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

[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.2.

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 criminal justice, including issues involving the Bill of Rights. Consistent with these goals, NACDL has previously criticized illogical and improper judicial expansions of the money laundering statute at issue in this petition for certiorari, 18 U.S.C. § 1956.[2]

The petition in *Ness v. United States* raises substantially similar issues regarding 18 U.S.C. § 1956 as in another petition pending before this court, *Cuellar v. United States*, No. 06-1456. Accordingly, Amicus is filing substantially similar briefs in support of both petitions.

INTRODUCTION

Amicus agrees with Petitioner that a writ of certiorari should be granted in this case. Amicus submits this brief to elaborate on the reasons why, in its view, the conflict among the circuits on the meaning of the "conceal or disguise" clause of the principal federal money laundering statute, 18 U.S.C. § 1956(a), is an important issue that merits resolution by this Court.

The expansive and unwarranted interpretation adopted by the Courts of Appeals for the Second, Third, Fifth, and Eleventh Circuits improperly expands the scope of an already broad statute far beyond its intended reach.

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[2] *See* NACDL Money Laundering Task Force, Proposals to Reform the Federal Money Laundering Statutes (Aug. 1, 2001), *available at* http://www.nacdl.org/public.nsf/legislation/CI_01_018?opendocument (last visited September 10, 2007).

Section 1956 has become a vehicle for increasing potential sentences substantially in excess of what otherwise would be permissible for the underlying conduct, without any showing of the aggravated societal harm that the money laundering statute was designed to redress. If this over-expansive interpretation is allowed to stand, criminal defendants unjustly will face longer sentences and will be forced to weigh the potential for such sentences in considering whether to plead guilty.

These grave concerns regarding the scope of the money laundering statute, coupled with the dangers to the accused that come from the unpredictability and lack of uniformity in the law that a deep circuit split presents, militate strongly in favor of certiorari. Review by this Court is necessary both to clarify the law and to restore the meaning of "conceal" in § 1956 to that which the statutory language supports and which Congress intended.

ARGUMENT

I. THE SECOND CIRCUIT'S INTERPRETATION OF "CONCEAL" EXPANDS 18 U.S.C. § 1956 BEYOND CONGRESS'S INTENT AND CREATES UNJUST RESULTS.

A. The Money Laundering Statute Is Subject to Expansive Interpretations That Invite Prosecutorial Over-Reliance.

The Money Laundering Control Act of 1986 ("MLCA"), *codified at* 18 U.S.C. §§ 1956–1957, was the first federal statute to criminalize money laundering per se. *See* Adam K. Weinstein, Note, *Prosecuting Attorneys for Money Laundering: A New and Questionable Weapon in the War on Crime*, 51 Law & Contemp. Probs. 369, 372–73

(Winter 1988). As enacted, the MLCA was and is a powerful tool for prosecutors. Compared with RICO and various criminal conspiracy statutes, prosecutors can bring cases relatively easily under § 1956, and its long list of predicate offenses facilitates convictions.[3] *See, e.g.*, Norman Abrams & Sara Sun Beal, *Federal Criminal Law & Its Enforcement* 397 (3d ed. 2000).

Although the scope of the MLCA was broad when enacted, many courts since have interpreted the statute to capture conduct substantially beyond traditional money laundering. *See* Scott J. Golde & Winston E. Clavert, *A Practioner's Guide to the Federal Money Laundering Statutes*, 62 J. Mo. B. 312, 312 (2006) ("The federal statutes not only cover the classic money laundering scenario where an individual takes steps to make illegally earned assets appear legitimate, they also affect a far broader range of conduct that many would not consider 'laundering' money."); Sally Baghdasarian, Note, *Gatekeepers: How the Broad Application of Anti-Money Laundering Statutes and Strategies May Open an Attorney's Gates to Prosecution*, 32 Sw. U. L. Rev. 721, 723 (2003) ("The scope of the MLCA can be rather broad. In fact, the statute can reach so far as to impose liability on individuals, such as attorneys, who were not originally involved in any illegal activity, but later became involved in post-illegal activity.").

Prosecutors accordingly may seek to "tack on" money laundering charges where the alleged "laundering" conduct is incidental to or virtually indistinguishable from the underlying offense. More broadly, they may seek to use the money laundering statutes to punish conduct well beyond

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[3] Section 1956(c)(7) provides a lengthy list of offenses that qualify as "specified unlawful activity," including the definition of racketeering found in § 1961(1) (which includes, *inter alia*, mail and wire fraud).

those statutes' proper realm. *See* Marino-Florentino Cuellar, *Criminal Law: The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. Crim. L. & Criminology 311, 414 (2003) ("People committing federal offenses that can be predicates for money laundering (such as drug trafficking), for example, can now be charged with money laundering for doing almost anything in the world with money from specified unlawful activity, because of the watered down interpretation of the anti-money laundering statutes."); *see also* Ellen S. Podgor, Book Review, *Money Laundering and Legal Globalization: Where Does the United States Stand on This Issue?*, 5 Wash. U. Global Stud. L. Rev. 151, 152 (2006) ("While being a leader in fighting money laundering activity, the U.S. Department of Justice has used new statutes creatively to expand prosecutorial power beyond its intended purpose."). So broad is the money laundering statutes' potential scope that legitimate conduct may be threatened. *See* Larry D. Thompson & Elizabeth Barry Johnson, *Money Laundering: Business Beware*, 44 Ala. L. Rev. 703, 723 (1993) ("[A]dditional guidelines are needed to prevent overzealous prosecutors from misapplying the statutes and to ensure that corporations are not deterred from entering into legitimate business transactions.").

B. Many Courts Consistently Have Expanded Specific Terms of 18 U.S.C. § 1956, Encouraging Broad, Unintended, and Unfair Applications of the Statute.

As the Petition for Certiorari demonstrates, the principal federal money laundering statute, 18 U.S.C.

§ 1956, and in particular its "conceal" prong,[4] have been interpreted more broadly than Congress intended. *See* Pet. for Cert. 13–14. Many courts—including the Second Circuit in the decision below—have adopted extraordinarily expansive constructions of the word "conceal," interpreting it to encompass the mere hiding of funds. *See, e.g.*, *United States v. Cuellar*, 478 F.3d 282 (5th Cir. 2007) (en banc) (upholding the money laundering conviction of an individual traveling toward Mexico with large sums of cash hidden in his car, without any evidence that transportation was meant to make the money appear legitimate), *petition for cert. filed* May 3, 2007; *United States v. Garcia-Jaimes*, 484 F.3d 1311, 1321–22 (11th Cir. 2007) (upholding the money laundering convictions of individuals hiding drug proceeds in car haulers and using drug proceeds to purchase cars placed on the haulers, without requiring evidence that defendants attempted to make money appear legitimate), *petition for cert. filed sub nom.*, *Leonardo Nunez-Virraizabal v. United States*, No. 06–11863; *see also United States v. Elso*, 422 F.3d 1305 (11th Cir. 2005) (attorney's placement of client's illicitly-obtained cash into personal briefcase, which he attempted to transport by car to his law office, satisfied concealment prong); *United States v. Hurtado*, 38 Fed. Appx. 661 (2d. Cir. 2002) (facts indicating only that money being transported into the United States was hidden in luggage bags, without evidence that the transportation was meant to make the money appear legitimate, sufficed to show violation of § 1956). Some courts also have found the "conceal" element satisfied when the defendant has done no

[4] A defendant may be convicted under § 1956(a)(1) or (a)(2) if it is shown, *inter alia*, that the defendant knew the transaction, (a)(1), or the international transportation, (a)(2), was "designed in whole or in part—to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." *See also* § 1956(a)(3)(B).

more than commingle the proceeds of lawful and unlawful activity in a single bank account. *See United States v. Posters 'N' Things, Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *aff'd on other grounds*, 511 U.S. 513 (1994) (deposit by "head shop" owner of shop proceeds into business account); *United States v. Sutera*, 933 F.2d 641, 648 (8th Cir. 1991) (deposit of gambling proceeds into family business account bearing defendant's name); *see also United States v. Shepard*, 396 F.3d 1116, 1121 (10th Cir.) ("[D]epositing illegal proceeds into the bank account of a legitimate business may support the inference of an intent to conceal."), *cert. denied*, 545 U.S. 1110 (2005).

The breadth with which some courts have construed the term "conceal" is illustrative of a larger trend among the federal courts to interpret provisions in § 1956 in an expansive fashion. For example, to be convicted under § 1956(a)(1), a defendant must have conducted a "financial transaction," which § 1956(c)(4) defines as "a transaction which in any way or degree affects interstate or foreign commerce" involving, *inter alia*, "the movement of funds by wire or other means." Some courts have construed the phrase "or other means" to be virtually unlimited. *See, e.g.*, *United States v. Reed*, 77 F.3d 139, 143 (6th Cir. 1996) (delivery of money to courier "involved the movement of funds by wire or other means"); *United States v. Wydermyer*, 51 F.3d 319, 326–27 (2d Cir. 1995) ("physical transportation of money out of the United States by hand" is a financial transaction by "other means"); *United States v. Dimeck*, 24 F.3d 1239, 1246 (10th Cir. 1994) (noting that physical delivery of cash is "movement of funds by other means"). According to one commentator, such interpretations have "the potential to extend the reach of the money laundering statute to any movement of property and greatly expand its scope." John K. Villa, *Banking Crimes* § 8:10 (2001). Another commentator expressed a similar concern:

> The continuing trend toward widening what is meant by financial transaction gives prosecutors ever more leeway in deciding when to use [section] 1956, because the occurrence of some kind of financial transaction is what triggers liability under the statute. In short, the pattern is that interpretations have become more draconian over time.

Cuellar, 93 J. Crim. L. & Criminology at 348.

Another statutory term that some courts have construed expansively is the "proceeds" element. Section 1956(a)(1) requires, among other things, that a prosecutor prove that the defendant knew the property involved in the financial transaction was the *proceeds* of some form of unlawful activity. Although the statute does not define this term, some courts have interpreted it broadly. *See United States v. Haun*, 90 F.3d 1096, 1101 (6th Cir. 1996) (defining "proceeds" as "'what is produced by or derived from something (as a sale, investment, levy, business) by way of total revenue.'" (citation omitted)). Contrary to the plain language of the statute, "proceeds" has even been held to include worthless items. *See United States v. Akintobi*, 159 F.3d 401, 403–04 (9th Cir. 1998) (holding that, although the term "may refer to something of value," it "has the broader meaning of 'that which is obtained . . . by any transaction,'" and therefore included checks that "ultimately proved worthless because the accounts backing them up were either empty or closed" (citation omitted)); *see also United States v. Estacio*, 64 F.3d 477, 480 (9th Cir. 1995), *as amended on denial of reh'g* (noting that courts "define the term broadly," and holding that "proceeds" included a "fraudulently

obtained line of credit, which results in an artificially inflated bank balance").

Some Circuits also have interpreted "proceeds" to include gross receipts of the specified criminal activity rather than only the net income of that activity; consequently, they construe the statute broadly to prohibit reinvestment of gross receipts as expenses of the criminal enterprise. *See United States v. Iacaboni*, 363 F.3d 1, 4 (1st Cir.), *cert. denied*, 543 U.S. 978 (2004); *United States v. Grasso*, 381 F.3d 160, 169 (3d Cir. 2004), *vacated and rev'd on other grounds*, 544 U.S. 945 (2005), *reinstated in relevant part*, Nos. 03–1441 & 03–1442 (May 20, 2005). *But see Santos v. United States*, 461 F.3d 886, 893–94 (7th Cir. 2006). The Court recently granted certiorari to resolve the circuit split on this issue. *See United States v. Santos*, No. 06–1005 (cert. granted Apr. 23, 2007).

Through such expansive interpretations of terms that otherwise would appear to limit application of the statute,[5] many courts now punish as "money laundering" conduct that bears virtually no relation to that concept as it is commonly understood. *See United States v. Skinner*, 946 F.2d 176 (2d Cir. 1991) (sale of cocaine sufficient for conviction under the money laundering statute). "[T]he fluidity of the judicial understanding of these concepts means that defenses based on grammar and logic seem doomed to failure." Mary McNamara & Edward W. Swanson, *Money Laundering:*

[5] *See also United States v. Valuck*, 286 F.3d 221, 226 (5th Cir. 2002) (announcing that the Fifth Circuit "subscribes to a broad interpretation of the word 'promote' within the context of section 1956"); *United States v. Leslie*, 103 F.3d 1093, 1100 (2d Cir. 1997) (concluding that *United States v. Lopez*, 514 U.S. 549 (1995), "did not elevate the government's burden under the money laundering statute," and that "[t]he government need only prove that the individual subject transaction has, at least, a de minimis effect on interstate commerce").

How Prosecutors Clean up Under 18 U.S.C. Sections 1956 and 1957, 26 Forum 61 (1999), *available at* http://www.smhlegal.com/articles/money%20laund.pdf (last visited September 10, 2007). These interpretations raise serious concerns that the power of prosecutors to bring a defendant's conduct within the statute has been unfairly and improperly expanded. "Distinctions in the details of 1956 and 1957 should not obscure the prevailing pattern in the way courts parse the statutes' abstruse terms: with just occasional exceptions, over time the statutes' interpretation has tended to favor prosecutors." Cuellar, 93 J. Crim. L. & Criminology at 343.[6]

C. Expansive Interpretations of § 1956 Have Significant Negative Ramifications for the Criminal Justice System.

These concerns are not merely abstract. An overbroad reading of the principal federal money laundering statute has severe consequences for the many criminal defendants accused of violating it, and for the criminal justice system as a whole.[7] Section 1956 comes with harsh

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[6] Compounding the problem, the *United States Attorneys' Manual* imposes limited obligations on prosecutors to notify the Department of Justice before pursuing money laundering charges, "in sharp contrast to even the broadly interpreted and applied RICO statutes which require authorization prior to prosecution under any circumstances." Teresa A. Adams, Note & Comment, *Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?*, 17 Ga. St. U. L. Rev. 531, 569 (citing *U.S. Attorneys' Manual* §§ 9-150.310–.330, 9-110.101).

[7] In the most recent year for which statistics are available, nearly one thousand defendants were convicted under § 1956—62% of all defendants convicted of money-laundering related crimes in the federal system. *See 2007 National Money Laundering Strategy* 94 tbl. 16 (App. B), *available at* http://www.treas.gov/press/releases/docs/nmls.pdf (last

penalties: a statutory maximum of up to twenty years' imprisonment and a fine of either $500,000 or twice the value of the property involved in the transaction, whichever is greater. Additionally, although the Sentencing Guidelines were amended in 2001 in an effort to "tie[ ] offense levels for money laundering more closely to the underlying conduct," *U.S. Sentencing Guidelines Manual* app. C, amend. 634, reason for amend. (2006), even today money laundering charges can result in a sentence far greater than that for the predicate offense alone when the predicate offense is not a drug trafficking crime. Villa, § 11:30 (Supp. 2006); *see also* Cuellar, 93 J. Crim L. & Criminology, at 348–49 (2001 Sentencing Guidelines amendments left sentences for money laundering "severe enough that prosecutors and investigators could use money laundering charges as substitutes for underlying predicate offense charges that might be more difficult to prove against particular defendants"). Conviction under § 1956 automatically adds two offense levels to the base level offense applicable to the underlying offense, even if no other sentencing enhancements apply. U.S.S.G. § 2S1.1(b)(2)(B).

In white-collar criminal cases, in particular, the prospect of a higher sentence allows prosecutors to extract plea bargains and forfeitures that might not otherwise be forthcoming and that may well not be in the interest of justice. *See* Eric. J. Gouvin, *Are There Any Checks and Balances on the Government's Power to Check Our Balances? The Fate of Financial Privacy in the War on Terrorism*, 14 Temp. Pol. & Civ. Rts. L. Rev. 517, 534–35 (2005) (noting, in the context of anti-money laundering provisions in the USA PATRIOT Act, that "prosecutors have used money laundering violations as a device to leverage up

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visited September 10, 2007) (citing Dep't of Justice Office of Policy and Legislation, Crim. Div. (2004)).

the criminal consequences for regulated behavior, creating incentives for the accused to plea bargain"). Because an indictment with a § 1956 charge risks a heavier sentence than does an indictment (for the same conduct) without such a charge, prosecutors have a great incentive to use it as a bargaining chip in pretrial conferences. The mere threat of a money laundering charge thus can be a powerful weapon in the prosecutor's negotiating arsenal.

This vast increase in potential punishment is entirely unjustifiable if it is not accompanied by greater culpability on the part of the accused—and, specifically, by the culpability that Congress meant to punish when it enacted the statute in the first place (i.e., "traditional" money laundering). Instead, prosecutors and courts have interpreted § 1956 to embrace conduct—as here, "concealment" in an automobile—that comes nowhere close to presenting the dangers to society that the money laundering statute was designed to address. Defendants should not face enhanced potential sentences for conduct not meaningfully more blameworthy than the underlying predicate offenses.

The continued broad and improper application of § 1956 has real-world consequences for defendants convicted under it, as well as for defendants threatened with money laundering charges. The Second Circuit's further expansion of § 1956 in this case, if left unreviewed, would further increase prosecutorial power at the expense of fairness.

II. MANY DEFENDANTS WHO SUFFER OVERBROAD APPLICATION OF § 1956 WOULD BE SUBJECT TO PROSECUTION UNDER OTHER CRIMINAL STATUTES IN ANY EVENT.

If this Court were to grant certiorari and reverse the Second Circuit's decision, it would not deprive the government of the means to punish money laundering crimes. On the contrary, numerous other money laundering statutes, cash reporting statutes, and anti-smuggling statutes[8] provide prosecutors ample tools with which to charge the appropriate defendants.

The Fifth Circuit case of *United States v. Cuellar* is illustrative. There, as the dissent pointed out, the defendant's conduct is squarely captured by the bulk cash smuggling statute, 31 U.S.C. § 5332, because he intended to transport cash in excess of $10,000 across an international border without reporting it. *See United States v. Cuellar*, 478 F.3d 282, 299–300 (5th Cir. 2007) (en banc) (Smith, C.J., dissenting) (explaining that the legislative history of § 5332 demonstrates that Congress did not intend § 1956 to capture conduct such as petitioner Cuellar's), *petition for cert. filed*, No. 06-1456, May 3, 2007. If charged under § 5332, Cuellar would have faced a statutory maximum of five years in prison. Instead, having been accused and

[8] In addition to §§ 1956 and 1957, these include 18 U.S.C. § 1960 (Prohibition of illegal money transmitting businesses); 18 U.S.C. § 982 (Criminal forfeiture after conviction under, *inter alia*, §§ 1956, 1957, 1960); 31 U.S.C. § 5313 (Reports on domestic coin and currency transactions); 31 U.S.C. § 5316 (Reports on exporting and importing monetary instruments); 31 U.S.C. § 5317 (Search and forfeiture of monetary instruments); 31 U.S.C. § 5324 (Structuring transactions to evade reporting requirement prohibited); 31 U.S.C. § 5332 (Bulk cash smuggling into or out of the United States).

convicted of "money laundering," Cuellar was exposed to a twenty-year statutory maximum sentence under § 1956.

* * *

Amicus does not dispute the need for an anti-money laundering strategy, or for an anti-money laundering statutory scheme. Rather, Amicus contends that the breadth of § 1956, as interpreted by the Second Circuit, does not conform to the language of the statute or to Congress's intent and leads to unintended and unfair results. This Court therefore should grant certiorari to resolve the split among the circuits and to prevent the improper expansion of § 1956.

CONCLUSION

For the foregoing reasons, amicus curiae National Association of Criminal Defense Lawyers supports Petitioner Ness's petition for certiorari, and respectfully requests that the petition be granted.

Respectfully submitted,

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