No. 99-323

In the

Supreme Court of the United States

EDWARD HANOUSEK, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

*M. REED HOPPER
**Counsel of Record*
ROBIN L. RIVETT
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amicus Curiae
Pacific Legal Foundation

QUESTIONS PRESENTED

1. Is the Clean Water Act a "public welfare" statute (as the Ninth, Eighth, and Second Circuits have ruled, but contrary to the rulings of the Fifth Circuit and arguably the Fourth Circuit) so as to justify criminal conviction and imprisonment, without proof of *mens rea*, for otherwise innocent conduct?

2. Does the Due Process Clause restrict eliminating *mens rea* for offenses punishable by significant terms of imprisonment of one year or more?

3. Does the unmodified word "negligently" in section 1319(c)(1)(A) of the Clean Water Act, a criminal statute that provides for both misdemeanor and felony penalties, mean negligence in an ordinary civil tort sense or negligence in an aggravated criminal sense?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of the Petition for Writ of Certiorari.[1] Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. PLF was founded in 1973 and provides a voice in the courts for mainstream Americans who believe in limited government, individual rights, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast.

In its fight to protect fundamental constitutional rights, PLF becomes involved in cases that raise important public policy considerations that may create significant legal precedents. Amicus participation is approved by a voluntary Board of Trustees where PLF's perspective will assist the court in resolving the underlying legal issues. PLF supports a broad view of the public interest and promotes balance and common sense in the administration of laws and regulations.

There is an alarming trend among federal agencies and the courts to expand the enforcement power of the government, merely for prosecutorial convenience, by adopting statutory interpretations that cannot be squared with the plain meaning of the act, the intent of Congress, or constitutional principles of due process. This case is a singular example of government overreaching.

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

The Ninth Circuit has held wholly unintentional conduct may subject ordinary citizens to substantial fines and even imprisonment. Under this dangerous precedent, ordinary negligence—or a simple mistake—is as much a crime as an intentional and malicious violation of the law. This insidious attack on the liberty of ordinary people is contrary to common sense and Supreme Court precedent. Strict liability offenses undermine the freedoms of all citizens and should be narrowly construed.

PLF has a long history of amicus curiae participation in this Court and believes its public policy perspective will provide a necessary viewpoint on the issues presented in this case.

INTRODUCTION

This case presents an extreme application of the "public welfare offense" doctrine. Under Ninth Circuit jurisprudence, apparently innocent conduct becomes criminal—a backhoe operator inadvertently cracks an oil pipeline causing a spill in a nearby river, and the backhoe operator's supervisor is convicted of a crime and sentenced to six months in jail, six months in a half-way house, six months probation, and fined $5,000. This is contrary to Supreme Court precedent and an assault on common sense. Only in very limited circumstances has this Court inferred from congressional silence that Congress did not intend to require proof of criminal intent to establish a criminal offense. However, some lower courts are regularly making just such an inference.

To be sure, strict criminal liability eases the prosecution's path to conviction but only at the expense of fundamental concepts of fairness and constitutional principles of due process. This case, and others like it, turn our traditional values upside down. Consider the case of *Unser v. United States*, United States Supreme Court No. 98-1600, also on petition to this Court. In that case, Bobby Unser was charged and convicted of a crime for operating a snowmobile in an unmarked wilderness

area where he accidentally wandered while disoriented in a sudden snowstorm. Unser nearly lost his life in the incident but that did not stop overzealous law enforcement officers from citing him for his inadvertent infraction of the law. Nor did it stop the Tenth Circuit from upholding Unser's criminal conviction as a "public welfare offense"—an offense requiring no *mens rea*.

American jurisprudence is founded on the bedrock principle that it is better to let the guilty go free than unfairly punish the innocent. The idea that one can be held criminally liable, even imprisoned, for inadvertent conduct serves no meaningful law enforcement purpose. It neither reforms conduct nor deters wrongdoing.

Strict criminal liability for ordinary acts is reminiscent of those immature systems of law whereby a tribunal is convened only to establish guilt for enemies of the state and not to determine innocence. This type of process is incompatible with a free society and should not be countenanced by this Court or any other. For this reason, this Court should grant the Petition for Writ of Certiorari in this case, as well as in *Unser v. United States*, and place meaningful limits on the expanding scope of the "public welfare offense" doctrine. Virtually all of our laws serve to protect public health and welfare. All of us are capable of apparently innocent acts that put us in conflict with such laws. This Court should not allow federal statutes to be read to dispense with a *mens rea* where doing so would criminalize a broad range of innocent conduct.

STATEMENT OF THE CASE

Edward Hanousek was employed as road master of the White Pass & Yukon Railroad. As road master, Hanousek was responsible to oversee track maintenance and special projects for the railroad. One of the special projects under Hanousek's supervision was the quarrying of rock at a site near the Skagway River in Alaska. The project involved blasting rock out-

croppings and loading the rock onto railroad cars with a backhoe. An oil pipeline runs next to the track at or above ground. To protect the pipeline, a platform was constructed over the pipeline on which the backhoe operated while loading rock. After one loading operation, a backhoe operator noticed rock debris just off the tracks near the pipeline about 150 to 300 feet from the work platform. The backhoe operator drove the backhoe to the debris and, while attempting to "sweep" the rocks away from the tracks, he ruptured the pipeline causing oil to be discharged into the Skagway River in violation of the Clean Water Act.

As Hanousek was responsible for all aspects of the operation, he was charged with a criminal count of negligently discharging a "harmful quantity" of oil into a "navigable water" of the United States. Section 1319(c)(1)(A) of the Clean Water Act provides that any person who "negligently" violates section 1321(b)(3) shall be punishable by fine or imprisonment or both. Section 1321(b)(3), in turn, prohibits the discharge of a "harmful quanitity" of oil into "navigable waters of the United States." Although the term "negligently" is undefined and this provision carries both misdemeanor and felony penalties, at trial the judge told the jurors Hanousek could be held criminally liable for acts of "ordinary" negligence. Hanousek was convicted of the violation and was sentenced to six months in prison, six months in a half-way house, six months of supervised release, and was fined $5,000.

Hanousek appealed his conviction on grounds the Clean Water Act did not allow for criminal liability for acts of "ordinary" as opposed to "gross" negligence. He also argued that to hold him criminally liable for an unintentional act, void of criminal intent, would violate his due process rights. However, the Ninth Circuit Court of Appeals held that Congress intended "ordinary" negligent acts to be subject to criminal penalties. And, purportedly relying on the precedents of this Court, the Ninth Circuit also held that the Clean Water Act

constitutes "public welfare legislation." Under such legislation, the court reasoned, criminal intent or *mens rea*, is not required for criminal prosecution.

SUMMARY OF THE ARGUMENT

The Ninth Circuit has taken the "public welfare offense" doctrine to a ridiculous extreme, finding that wholly inadvertent conduct is a crime warranting a substantial prison sentence. This ruling is important because it draws into question fundamental principles of criminal law. With the complicity of the courts, legislators and prosecutorial agencies are seeking quick convictions based on strict liability offenses. This is most evident in the increasing enforcement trends under federal environmental statutes which are readily characterized as "public welfare" statutes. But when such offenses encompass innocuous acts or wholly inadvertent conduct, they fail to deter crime and defy common sense. Such strict regulation violates the long-held doctrine that an injury can amount to a crime only when inflicted by guilty intention.

This Court has tried to limit "public welfare offenses" rather than expand them as the Ninth Circuit has done in this case. In *Morissette v. United States*, 342 U.S. 246 (1952), this Court affirmed that proof of a guilty mind is requisite to a criminal conviction and warned that a literal interpretation of its so-called "public welfare offense" cases is inconsistent with this Court's philosophy of criminal justice and any ordinary sense of fairness.

More recently, in *Staples v. United States*, 511 U.S. 600 (1994), this Court expressed grave concern over the imposition of prison terms for crimes that do not require a criminal intent. In fact, this Court stated it would not be inclined to find a "public welfare offense" where the penalties include substantial jail terms and declared the very concept of "public welfare offense" may simply be incompatible with a felony. After all, according to this Court, "felony" is as bad a word as you can

give to a man. But the provision under which Hanousek was convicted provides both misdemeanor and felony penalties for the same negligent conduct. Therefore, this Court should grant review and overturn the decision below.

ARGUMENT

I

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO DETERMINE WHETHER THE CLEAN WATER ACT IS "PUBLIC WELFARE LEGISLATION" AUTHORIZING CRIMINAL PENALTIES, INCLUDING SUBSTANTIAL TERMS OF IMPRISONMENT, FOR APPARENTLY INNOCENT CONDUCT

A. Overzealous Application of the "Public Welfare Offense" Doctrine Raises Questions Both Fundamental and Far-Reaching in Federal Criminal Law That Warrant a Response by This Court

The importance of this case cannot be overstated. In addition to the split among the circuits, addressed by Petitioner, this case involves legal issues requiring examination of some of the most fundamental concepts in criminal law and has significance far beyond the parties. *See United States v. Unser*, 165 F.3d 755, 757 (1999).

Indeed, this case is significant because the lower court decision authorizes criminal prosecution for wholly inadvertent conduct. In fact, this case turns fundamental concepts of criminal law on their head. It does away with considerations of intent and infers strict criminal liability from congressional silence. The lower court's lavish extension of the so-called "public welfare offense" exceeds the bounds of reason, good government, and the established precedents of this Court.

Regrettably, overzealous application of the "public welfare offense" seems to be a growing trend. More and more prose-

cutorial agencies rely on the ease of strict liability statutes to get a quick conviction. Nowhere is this more evident than in the enforcement of our federal environmental laws.

In a recent law review article, Kevin Gaynor and Thomas Bartman, *Criminal Enforcement of Environmental Laws*, 10 Colorado Journal of International Environmental Law & Policy 39, Winter, 1999, catalogue the increase in environmental law enforcement over the last 10 or more years. They discuss with some concern the tendency for courts and prosecutors to raise the penalty while lowering the bar on convictions. "Thus, the sanctions for environmental crimes increasingly include significant terms of imprisonment." *Id.* at 40. But,

> [u]nder current case law in most circuits, the standard of intent the government must show for a conviction is less than a general intent standard and does not necessarily require proof that the defendant had knowledge of all the material facts.

Id. at 39.

Statistically, the authors report:

> EPA referrals of criminal cases to the Justice Department have steadily and dramatically increased from 20 in fiscal year 1982 to 107 in 1992 to a record 278 in 1997. Criminal fines in fiscal year 1997 were a record $169.3 million. In fiscal year 1996, 221 defendants were criminally charged with environmental offenses, and individuals were sentenced to 1,116 months in prison.

Id. at 40.

These figures would be something to cheer about if they included only serious offenses occasioned by willful conduct. But to the extent they include minor violations occasioned by innocent conduct, these figures are cause for concern. While

cases such as *Hanousek* and *Unser* give us a warm feeling because they add arithmetically to the appearance of vigorous enforcement of the law, they actually document the eroding rights of the individual—rights the courts should be protecting but are not.

According to Gaynor and Bartman, the latest amendments to each major environmental statute included new criminal penalties and strengthened existing penalties. Some of these amendments expanded the scope of criminal liability by introducing lower or no intent crimes, such as mere "negligent" conduct under the Clean Air Act, *id.* at 40, or, as in this case, the Clean Water Act, 33 U.S.C. § 1319(c)(1) (providing misdemeanor penalty for first time negligent introduction of unpermitted pollutant into waterway and felony penalty of up to $50,000 per day of violation and two years in prison for subsequent violations). Moreover,

> [t]he federal sentencing guidelines governs [*sic*] the sentencing of individuals convicted of environmental offenses and has limited the discretion of judges to mitigate statutory penalties, even in cases that do not involve environmental injury.

Gaynor and Bartman, *Criminal Enforcement of Environmental Laws*, 10 Colo. J. Int'l Envtl. L. & Poly at 41.

Gaynor and Bartman conclude:

> The view of environmental laws as "public welfare" statutes and the corresponding trend toward liberal construction and precedent involving nonenvironmental public welfare statutes have complicated the issue of culpability.

Id. at 59.

This complicated issue of culpability requires clarification by this Court. Clearly, strict criminal liability offenses are

proliferating. As they expand to encompass inadvertent acts such as those at issue in this case, they put ordinary citizens at risk of criminal conviction for apparently innocent conduct. The imposition of criminal penalties in the absence of a criminal intent violates the central theme of criminal law that "wrongdoing must be conscious to be criminal" and is incompatible with a free society. *See Morissette,* 342 U.S at 252.

The observation and admonition of Gaynor and Bartman warrants the attention of this Court:

> EPA Administrator Carol Browner has advocated recent environmental criminal legislation on grounds that environmental criminals should be treated forcefully, like drug dealers. No acknowledgment is made in this connection that drug dealers usually receive a higher intent standard than has been the case in the area of environmental crimes. One of the supporters of the Environmental Crimes and Enforcement Act of 1996, Senator Frank Lautenberg, noted that it was "aimed at bad actors who violate our environmental laws purposely, intentionally, or with knowing disregard for the impact of their actions." Environmental Crimes and Enforcement Act of 1996, S. 2096, 104th Cong. (1996). These are clearly the proper targets of criminal prosecution, rather than the persons potentially and actually reached by the slip-and-fall negligence standard that has generally been followed in this area.

Gaynor and Bartman, *Criminal Enforcement of Environmental Laws*, 10 Colo. J. Int'l Env. L. & Poly. at n.334.

To protect the innocent from criminal conviction, this Court should grant the writ of certiorari and reverse the lower court.

B. Contrary to the Ninth Circuit, This Court Has Tried to Limit, Not Expand, the Doctrine of "Public Welfare Offenses"

The Ninth Circuit claims its determination that the Clean Water Act is "public welfare legislation," and that such legislation allows criminal conviction without proof of criminal intent, is dictated by Supreme Court precedent. But the Ninth Circuit is wrong. This Court's decision in *Morissette v. United States*, 342 U.S. 246, limits rather than expands the "public welfare offense" doctrine and undercuts the lower court opinion here.

In *Morissette,* the petitioner took some old shell casings from an Air Force bombing range that he believed were abandoned scrap. After selling these casings for $84, Morissette was convicted of "knowingly" stealing and converting government property and sentenced to imprisonment for two months or to pay a fine of $200. The lower court ruled the "knowing" offense did not require a criminal intent, basing its ruling on the failure of Congress to express such a requisite and this Court's decisions in *United States v. Behrman*, 258 U.S. 280 (1922), and *United States v. Balint*, 258 U.S. 250 (1922), leading to the so-called "public welfare offenses." *See Morissette,* 342 U.S. at 250.

This Court acknowledged it had, on occasion, construed mere omission of "any mention of criminal intent as dispensing with it," but this Court reversed the lower court in *Morissette* pointing out with great care the dangers of a verbatim reading of its prior cases:

> If they be deemed precedents for principles of construction generally applicable to federal penal statutes, they authorize this conviction. Indeed, such adoption of the literal reasoning announced in those cases would do this and more—it would sweep out of all federal crimes, except when expressly

> preserved, the ancient requirement of a culpable state of mind. We think a resume of their historical background is convincing that an effect has been ascribed to them more comprehensive than was contemplated and one inconsistent with our philosophy of criminal law.

Id. at 250.

The Ninth Circuit has adopted the literal reasoning of this Court's early precedents to interpret the Clean Water Act and has ascribed more to the "public welfare offense" doctrine than was contemplated by this Court. The lower court's holding that an apparently innocent act may subject the actor to severe criminal liability is inconsistent with any fair-minded philosophy of criminal law and sweeps within its arms a whole array of federal statutes—particularly those designed for natural resource protection—that do not expressly preserve a *mens rea* requirement. An historical review of the "public welfare offense" reveals that modern lower courts have both misunderstood and misapplied the doctrine.

In a 1933 law review article, Francis Bowes Sayre elucidates the genesis of this doctrine and its almost immediate subversion. Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 55-88 (1933). Sayre notes that, before the middle of the nineteenth century, there was no thought on the part of American judges of relaxing the general requirement of a *mens rea*, even for violations of so-called regulatory statutes. *Id.* at 62. For example, in *Myers v. State*, 1 Conn. 502 (1816), a defendant was convicted for renting out a carriage on Sunday under a statute making the action a crime "except from necessity or charity." This Court reversed the conviction on grounds the defendant could not be convicted if he believed the rental was for charity and had no criminal intent.

> Unless this construction be adopted, a man may be convicted of a crime, when he had no intent to

> violate the law, and when his object was to perform a deed of charity conformable to the law. This would oppugn the maxim that a criminal intent is essential to constitute a crime.

Sayre, *Public Welfare Offenses*, 33 Colum L. Rev. at 62.

Sayre reports that this was the law in the United States down to the middle of the nineteenth century. *Id.*

By the mid-1840's, however, things began to change—decisions appeared holding under certain statutory regulations *mens rea* need not be proved. In *Barnes v. State*, 19 Conn. 398 (1849), decided by the same Connecticut court that allowed the conviction in *Myers v. State*, the court held (without supporting authority) that a defendant could be convicted for selling liquor to a drunkard even if he didn't know the buyer was a drunkard. Similar decisions ensued during the next decade. Sayre, *Public Welfare Offenses*, 33 Colum L. Rev. at 63.

By the 1860's, the doctrine of "public welfare offenses" became firmly established in Massachusetts relative to liquor and adulterated milk cases. *Id.* at 64. In *Commonwealth v. Boynton*, 2 Allen 160 (Mass. 1861), the defendant was convicted for selling an intoxicating liquor although he didn't know the beverage he sold was intoxicating. Three years later, a Massachusetts court cited *Boynton* for the conviction of a defendant for selling adulterated milk, although the defendant was ignorant of the fact. Based on these decisions, the Massachusetts courts began to extend the doctrine to other types of police regulations. Sayre, *Public Welfare Offenses*, 33 Colum L. Rev. at 65. By 1868, the doctrine was widely recognized in other states. *Id.* at 66.

Sayre points out, however, that such cases involved:

> a social injury so direct and widespread and a penalty so light that in such exceptional cases courts could safely override the interests of innocent individual

> defendants and punish without proof of any guilty intent.

Id. at 68.

Sayre also points out that the decisions permitting convictions of such "light police offenses," generally involving a small fine, without proof of guilty intent came at a time when the demand of an increasingly complex society required administrative regulation "unrelated to questions of personal guilt." *Id.* at 67. This is true for ordinary traffic violations, the shear number of which would bury the courts if the courts were required to ascertain the intent of the individual in each case. *Id.* at 69.

But in recognizing the necessity of "public welfare offenses" for what Sayre calls "petty violations," he delivers a sharp warning: "The group of offenses punishable without proof of any criminal intent must be sharply limited." Sayre believed the sense of justice of the community would not tolerate the imposition of substantial punishment on the innocent. *Id.* at 70. Unfortunately, many of today's courts, like the Ninth Circuit in this case, don't share Sayre's "sense of justice."

Sayre continues with a question that frames the issue quite nicely in the case at bar:

> How then can one determine practically which offenses do and which do not require a *mens rea*, where the statute creating the offense is entirely silent as to requisite knowledge?

Id. at 72.

Sayre suggests the answer is determined by two principles. The first relates to the character of the offense and the second depends on the possible penalty.

According to Sayre, crimes designed to single out wrongdoers for punishment or correction should require a *mens rea*, whereas police offenses of a merely regulatory nature may be enforced without proof of guilty intent. In the present case, Hanousek's offense was inadvertent. To single him out for so severe a punishment or correction, therefore, serves no public purpose—it neither deters wrongdoing nor reforms guilty conduct.

With respect to the second principle, Sayre maintains if the penalty is serious,

> particularly if the offense be punishable by imprisonment, the individual interest of the defendant weighs too heavily to allow conviction without proof of a guilty mind. To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure. Crimes punishable with prison sentences, therefore, ordinarily require proof of a guilty intent.

Id. at 72.

Thus, under the criteria advanced by Sayre, the Clean Water Act, under which Hanousek was—without guilty intent—convicted and sentenced to jail, does not qualify as "public welfare legislation." To the contrary, to so hold would be "revolting to the community sense of justice."

Sayre presented, but did not invent, these two principles for determining when *mens rea* should be required in a criminal case. Rather, he inferred them from his exhaustive study of the actual decisions of the previous half century. Based on this study, Sayre concludes that "public welfare offenses" have mainly been cases of a regulatory nature that involve only light monetary fines rather than imprisonment. *Id.* at 72. This finding

stands in sharp contrast to the substantial fine imposed on Hanousek of $5,000 and his lengthy sentence of six months in jail, six months in a half-way house, and six months probation.

Sayre suggests further that "public welfare offenses" are also characterized by the fact that evidence of the defendant's actual state of mind would be difficult, if not impossible, to obtain or the offenses require enforcement against virtual armies of offenders for whom discerning state of mind would essentially prevent adequate enforcement. *Id.* at 72. In this case, however, Hanousek's state of mind was determined by a jury—he had no criminal intent.

This case is indicative of a growing trend that Sayre observed decades ago. He notes with alarm an increasing tendency in the courts to expand the "public welfare offense" doctrine to impose substantial penalties for innocent conduct, including imprisonment.

> The modern rapid growth of a large body of offenses punishable without proof of a guilty intent is marked with real danger. Courts are familiarized with the pathway to easy convictions by relaxing the orthodox requirement of a *mens rea*. The danger is that in the case of true crimes where the penalty is severe and the need for ordinary criminal law safeguards is strong, courts following the false analogy of the public welfare offenses may now and again similarly relax the *mens rea* requirement, particularly in the case of unpopular crimes, as the easiest way to secure desired convictions.

Id. at 79.

Sayre's warning proved prescient but understates the real danger. As demonstrated by the case at bar and documented by Gaynor and Bartman, above, today's courts are following the false analogy of "public welfare offenses," not merely "now and

again," but regularly. The lower courts, like the Ninth Circuit in this case, are abandoning criminal law safeguards, especially for unpopular "environmental crimes," and sending ordinary people to prison for ordinary acts for the expedient of easy convictions. This is unconscionable.

Even at the writing of his article in 1933, Sayre remarks that "[i]llustrations of this dangerous tendency are all too frequent." *Id.* at 80. One notable example Sayre gives is the Supreme Court case of *United States v. Balint*, *supra*, relied upon in part by the Ninth Circuit in this case. In *Balint*, this Court held no guilty intent need be proven to convict a person for selling narcotics in violation of the Anti-Narcotic Act, which carries a maximum penalty of five years in prison and $2,000 fine or both. Sayre states this decision "goes far" and can be justified only on the ground of the extreme public disapproval of selling narcotics.

Indeed, this Court agreed with Sayre that *Balint* is an exceptional case. In fact, the Court warns that *Balint* has been taken too far by federal officials and does not justify a general expansion of "public welfare offenses." To the contrary, *Balint* is one of the precedents to which this Court referred in *Morissette* when it said:

> We think a resume of their historical background is convincing that an effect has been ascribed to [our "public welfare offense" cases] more comprehensive than was contemplated and one inconsistent with our philosophy of criminal law.

Morissette, 342 U.S. at 250.

This Court's philosophy of criminal law was clearly and eloquently stated this way:

> 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. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "[b]ut I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

Id. at 250-51.

History demonstrates that the "public welfare offense" doctrine is a very limited exception to the intent requirement for criminal cases and does not justify the loose and general rule adopted by the Ninth Circuit in this case. To stop this dangerous trend, this Court should grant review and overturn the decision below.

C. Substantial Jail Terms Are Inconsistent with the "Public Welfare Offense" Doctrine

This Court has expressed grave concerns over the proliferation of "public welfare offenses." In *Staples v. United States*, 511 U.S. 600 (1994), this Court held that government must prove that a defendant charged with illegal possession of a machine gun knew his gun met the statutory definition of a machine gun. The Court concluded that possession of a gun (although a deadly device) is innocent conduct and not a "public welfare offense" authorizing strict criminal liability.

This Court emphasized that "public welfare offenses" have been recognized by the Supreme Court in only limited circumstances and chastised the government for ignoring

> the particular care we have taken to avoid construing a statute to dispense with *mens rea* where doing so

> would 'criminalize a broad range of apparently innocent conduct.'

Id. at 610 (citing *Liparota v. United States*, 471 U.S. 419 (1985)).

This Court also pointed out that "public welfare offenses" are characterized by small penalties that do not gravely damage an offender's reputation and notes:

> [C]ommentators collecting the early cases have argued that offenses punishable by imprisonment cannot be understood to be public welfare offenses, but must require *mens rea*. *See* R. Perkins, Criminal Law 793-798 (2d ed. 1969) (suggesting that the penalty should be the starting point in determining whether a statute describes a public welfare offense); Sayre . . . ("Crimes punishable with prison sentences . . . ordinarily require proof of a guilty intent").

Staples, 511 U.S. at 617.

This Court's unease with sentencing one to prison for acts that do not involve a criminal intent is plain to see from these and other citations. But this Court's misgivings over the expanding doctrine of "public welfare legislation" becomes absolutely acute when the criminal violation amounts to a felony:

> Our characterization of the public welfare offense . . . hardly seems apt, however, for a crime that is a felony . . . . After all, "felony" is . . .'as bad a word as you can give to man or thing.'"

Id. at 618 (quoting 2 F. Pollock & F. Maitland, *History of English Law* 465 (2d ed. 1899)).

To put a point on its concern, this Court stated:

> Close adherence to the early cases . . . might suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense. In this view, absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*.

Staples, 511 U.S. at 618.

Although this Court did not have to adopt such a definitive rule to decide *Staples*, this Court's sentiment could not have been clearer—felony penalties are not compatible with the theory of "public welfare offenses." This conclusion applies squarely to this case.

The Clean Water Act provision under which Hanousek was convicted imposes felony penalties for a second offense. *See* 33 U.S.C. § 1319(c)(1) (providing misdemeanor penalty for first time negligent introduction of unpermitted pollutant into waterway and felony penalty of up to $50,000 per day of violation and two years in prison for subsequent violations). Therefore, under the lower court decision in this case, one can be convicted of a felony for "ordinary" negligence. But under this Court's view expressed in *Staples*, no court should "apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*." *Staples*, 511 U.S. at 618.

It is no argument to suggest that Hanousek was charged "only" with a misdemeanor, because it would not change the interpretation the Ninth Circuit has given the criminal provision under the Clean Water Act. The court cannot read "ordinary negligence" into the same provision one time and then read it out again another time. As this Court explained in *Ratzlaf v.*

United States, 510 U.S. 135 (1994), "[a] term appearing in . . . a statutory text is generally read the same way each time it appears." *Id.* at 143.

Given the apprehension this Court has for an expansive reading of the "public welfare offense" doctrine, this Court should grant the Petition for Writ of Certiorari and address the lower court's overly broad application of that doctrine.

CONCLUSION

Over the past half century, the lower courts have taken this Court's acknowledgment of the "public welfare offense" doctrine in *Morissette* to extremes, finding criminal even the most innocuous conduct. Without the intervention of this Court, the trend will continue at the cost of individual freedom and liberty—a price too high to pay for prosecutorial convenience. This Court should grant review and overturn the lower court decision.

DATED: September, 1999.

Respectfully submitted,

*M. REED HOPPER
**Counsel of Record*
ROBIN L. RIVETT
Pacific Legal Foundation
10360 Old Placerville Road
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amicus Curiae
Pacific Legal Foundation

fil ca
1-1111

DATE: April 30, 1999

TO: Office of the Clerk

FROM: M. Reed Hopper
Pacific Legal Foundation

SUBJECT: *United States of America v. Edward Hanousek, Jr.*
Case No. 97-30185

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United States Court of Appeals
9th Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Headquarters: 10360 Old Placerville Rd., Suite 100, Sacramento, CA 95827 (916) 362-2833 Fax: (916) 362-2932
Alaska: 121 West Fireweed Lane, Suite 250, Anchorage, AK 99503 (907) 278-1731 Fax: (907) 276-3887 • Oregon: (503) 241-8179
Atlantic: P.O. Box 522188, Miami, FL 33152 (305) 499-9807 Fax: (305) 436-9048
Hawaii: P.O. Box 235856, Honolulu, HI 96823-3514 (808) 733-3373 Fax: (808) 733-3374
Washington: 10800 NE 8th Street, Suite 325, Bellevue, WA 98004 (425) 635-0970 Fax: (425) 635-0196
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