No. 20- _____

In the Supreme Court of the United States

JOHN ALLISON HUCKABAY, PETITIONER,

v.

STATE OF IDAHO

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

PETITION FOR A WRIT OF CERTIORARI

GENE C. SCHAERR
Counsel of Record
H. CHRISTOPHER BARTOLOMUCCI
HANNAH SMITH
SCOTT D. GOODWIN
RIDDHI DASGUPTA
JOSHUA J. PRINCE
SCHAERR | JAFFE LLP
1717 K Street NW, St. 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Petitioner

QUESTIONS PRESENTED

Without any requirement or proof of scienter, Petitioner was convicted of unlawful possession of a moose carcass out of season, a felony under Idaho law. Yet the state never showed that he knew that the animal, which he had not killed, had been sot out of season or that the person collecting the carcass lacked a tag authorizing possession. Thus the state failed to show that he knew he unlawfully possessed the carcass. He raised and extensively briefed a 14th Amendment due process challenge to the lack of a requirement and proof of scienter before the Idaho Supreme Court, but that court refused to rule on the issue by literally ignoring five pages of his brief and claiming the issue was not sufficiently raised. This wholly inadequate ground for refusing to reach a constitutional issue is itself a due process violation under the 14th Amendment. The questions presented by this petition are:

1. Whether the 14th Amendment's Due Process Clause requires a scienter element for felonies that are not public welfare offenses and carry serious penalties, as at least three federal circuits and many state supreme courts have recognized, or whether requiring the inclusion of scienter is merely a rule of construction, as three federal circuit courts and one state supreme court have held?

2. Whether a criminal defendant is unconstitutionally denied the opportunity to be heard under the 14th Amendment's Due Process Clause when a court refuses to reach an argument he has extensively briefed because the court erroneously concludes he has not fairly raised the argument?

PARTIES TO THE PROCEEDING

Petitioner John Allison Huckabay was Defendant-Appellant in the Supreme Court of Idaho in No. 48109.

Respondent State of Idaho was Plaintiff-Respondent in the Supreme Court of Idaho in No. 48109.

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INTRODUCTION

Petitioner John Huckabay was convicted of the felony of unlawful possession of a moose carcass under an Idaho statute. Given that Petitioner's associate—in whose truck the dead moose was first spotted by witnesses, and in whose meat locker the carcass was later recovered by authorities—claimed to have a valid tag, Petitioner lacked knowledge that he was unlawfully possessing a moose.

Violating the statute is punishable by up to five years in prison and a $50,000 fine. And, of course, a felony conviction often carries with it other serious legal disabilities, such as the denial of the right to vote and, in some circumstances, travel. Despite the serious penalties attached to this felony, the criminal statute under which Petitioner was convicted contained no scienter requirement—in conflict with fundamental principles of criminal law that go back centuries in Anglo-American jurisprudence.

To add injury to injury, when Petitioner raised this due process problem before the Supreme Court of Idaho—devoting more than five precious pages to that point in the limited space of his opening brief—the court refused to reach the issue, erroneously claiming he had merely devoted a single sentence to it. This blatant error thus deprived Huckabay of his right to be heard, a due process right long recognized by this Court under the 14th Amendment.

Unfortunately, Petitioner is not alone. The number of state and federal felony statutes that impose serious penalties without a scienter requirement has exploded in recent years. Yet lower courts are divided on

whether such statutes trigger due process protections or merely a rule of construction to read scienter into the statutory silence. This Court's direction on these two important issues this petition raises is sorely needed for thousands of Americans like Petitioner. And here direct review by this Court is the last line of defense since Petitioner, now a convicted felon with all of the disabilities that status brings, is no longer in state custody after having exhausted state remedies.

The Court should either grant the petition and set this case for full briefing and argument or, at a minimum, grant, vacate and remand (GVR) with directions for the Idaho Supreme Court to address the scienter issue in the first instance.

OPINIONS BELOW

The Idaho Supreme Court issued an opinion on December 3, 2020. Petitioner subsequently filed a Petition for Rehearing. The court denied rehearing but issued a substitute opinion on February 5, 2021. That opinion is reprinted at Pet.App.1a. The opinion of the court of appeals of Idaho was filed on February 7, 2020, and is reprinted at Pet.App.17a.

JURISDICTION

The Supreme Court of Idaho entered final judgment on February 5, 2021. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL & STATUTORY PROVISIONS

Section One of the 14th Amendment of the U.S. Constitution provides in part that no State shall

"deprive any person of life, liberty, or property, without due process of law."

Idaho Code § 36-1401(c) provides in part that "[u]nlawfully killing, possessing, or wasting of any wildlife within a twelve (12) month period having a single or combined reimbursable damage assessment of more than one thousand dollars ($1,000)" is a felony offense.

STATEMENT

A. Legal Framework

A long line of this Court's cases has recognized the due-process problems inherent in statutes neglecting to include a scienter requirement. *Shevlin-Carpenter Co.* v. *State of Minn.*, 218 U.S. 57, 69-70 (1910); *Morissette* v. *United States*, 342 U.S. 246, 252 (1952); *Lambert* v. *California*, 355 U.S. 225, 228 (1957). Indeed, just two terms ago, the Court recognized that a "basic principle" underlying the criminal law is the showing of a "vicious will." *Rehaif* v. *United States*, 139 S. Ct. 2191, 2196 (2019) (quoting 4 W. Blackstone, Commentaries on the Laws of England 21 (1769)). And this Court has recognized that this fundamental principle "is no provincial or transient notion," but instead a "universal and persistent [feature] in mature systems of law" that had "[u]qualified acceptance" in the "common law in the Eighteenth Century" as well as into "the Nineteenth Century." *Morissette*, 342 U.S. at 250-251. Consistent with this principle and the Court's well-documented due-process concerns, the Court has addressed scienter requirements as one important way for courts to "distinguish[] criminal from civil statutes." *Kansas* v.

Hendricks, 521 U.S. 346, 362 (1997) (citing *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168 (1963)).

However, state and federal courts are divided on whether a scienter requirement is a constitutional minimum for such crimes, or whether it is merely a presumption used to fill in a gap, but not otherwise mandated.

As relevant to this case, due process also requires that a defendant be given a full and fair "opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). That right serves as a bulwark against "substantively unfair and simply mistaken deprivations of [liberty and] property interests." *Fuentes* v. *Shevin*, 407 U.S. 67, 81 (1972). And the denial of that opportunity based on overly restrictive state law rules or practices both violates dues process and does not qualify as an adequate and independent ground for refusing to rule on other issues. See, *e.g.*, *Michigan* v. *Long*, 463 U.S. 1032 (1983).

That constitutional promise of the opportunity to be heard, however, is illusory if a reviewing court turns a blind eye to arguments that clearly have been raised. After all, the opportunity to be heard, this Court has held, must be "meaningful." *Tennessee v. Lane*, 541 U.S. 509, 523 (2004).

B. Factual Background

In the fall of 2014, on what was opening day for the bull moose season in portions of the state, Petitioner received a phone call from a neighbor living in the

area.[1] The neighbor informed Petitioner that a pesky moose was back and asked whether Petitioner could do something about it. Petitioner said he could not help that day, but he might know someone who could. So Petitioner called someone who then called a third person, resulting in two individuals traveling to the neighbor's locale and killing the moose. These two individuals then called Petitioner to inform him they needed help getting the moose carcass out of someone's yard, given the moose's weight. With no evidence that at this point Petitioner knew that there was a possibility that killing it that day would have violated seasonal restrictions, Petitioner said he would get help. He thus called an associate—a local butcher—who had a truck with a crane for lifting big game. The butcher came and got Petitioner and they traveled to the site where the moose carcass lay.

A married couple staying in a cabin at Lake Coeur d'Alene had heard the earlier shot and when they went to investigate, found Petitioner, the truck driver, and the moose carcass in the back of the truck. Pet.App.2a. The couple would later testify before the grand jury and at trial that they saw an intact *cow* moose hanging on the truck and that the driver said that he had a tag for the moose.[2] Based on the driver's assurance, Petitioner also stated that they had a tag for the moose. *Ibid.* Not having any knowledge or belief that

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[1] Given that the State felt no need to develop the factual record under its strict liability reading of the statute, not all of these facts are in the record below.

[2] See Confidential Exhibits ("Conf. Exhs."), at 61-63, 70-71, Transcript of Grand Jury Proceedings ("GJ Tr."), at 11-13, 18-20, 48, 50-53; Tr., 193-94, 196, 199, 204-06, 246, 248-52, 264-65.

he had broken any laws, Petitioner readily gave the couple his name and contact information. The driver, however, did not provide that same information to the couple.

As the couple drove away, the wife reported the moose may have been killed out of season, reported the incident to the Idaho Department of Fish and Game. *Ibid.* An officer reached out to Petitioner, and the two soon met at the Coeur d'Alene office. *Id.* at 2a-3a. Petitioner willingly took the officers to the place where the moose was already lying dead "when he arrived on the scene to collect the carcass." *Id.* at 3a. Officers also visited the local butcher who had been driving the truck. *Ibid.* There, they found the cow moose skinned and quartered in his walk-in cooler. *Ibid.* The carcass was still warm, and blood samples later confirmed that this moose was the same moose killed at the kill site. *Ibid.*

C. Procedural History

A grand jury was convened. An Idaho Department of Fish and Game Officer and the prosecutor made multiple, material, erroneous, and improper statements, the grand jury indicted Petitioner for unlawfully killing or possessing the moose by gutting, quartering and/or transporting it without a tag, in violation of state law. Pet.App.3a. However, the district court found that there was insufficient evidence that Petitioner had killed the moose. *Id.* at 4a. So the State amended the indictment to instead accuse Petitioner of just unlawfully possessing a moose. *Ibid.*

The case went to trial, and Petitioner was ultimately convicted of felony unlawful possession of a moose. *Ibid.* The State did not rely on a theory that Petitioner had aided and abetted the local butcher who had the moose in his truck and later in his meat locker. And the State failed to prove that Petitioner *knew* that the moose had been taken or killed out of season or possessed without a valid tag. He was given a $1,500 civil penalty and a $25,000 fine and lost his hunting and fishing licenses for three years. *Ibid.* As a felon, he was also sentenced to a combined (one year fixed, one indeterminate) two years in prison, but that sentence was suspended. *Id.* at 5a. The court placed him on probation and required that he serve 30 days in a local jail. *Ibid.* The statute carried a penalty of up to five years in prison and a $50,000 fine. See Idaho Code § 18-112.[3] And a felony conviction disqualified

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[3] While having a felony conviction always has serious consequences, in Petitioner's case the fallout is especially harmful. Petitioner is a successful philanthropist who travels globally to conduct his philanthropic, business, and educational activities in places like South Africa, Australia, and elsewhere. See David Ashby, *Idaho Man to Serve Month in jail In Moose Poaching Case*, Idaho St. J. (May 18, 2018), https://tinyurl.com/53zbpwmh (reporting that Huckabay's foundation "has committed more than $8 million toward scholarships through the University of Washington for students who want to practice rural medicine in the northwest"); Devin Weeks, *Kindness Wins the Day*, Coeur d'Alene/Post Falls Press (Nov. 4, 2020), https://tinyurl.com/2s9hurdb (reporting that Huckabay had been honored as "Outstanding Adult Philanthropist"). But as a convicted felon, many nations will not allow him entry.

Petitioner from voting, running for office, or possessing firearms.

On appeal, the Idaho Court of Appeals agreed with Petitioner's claim that Idaho law required possession of more than one animal to constitute a felony. Pet.App.18a. Accordingly, it vacated his conviction without reaching Petitioner's other arguments, including the lack of a scienter requirement in the statute. *Ibid.*

But the State petitioned the Idaho Supreme Court for review. *Ibid.* Before that court, Petitioner's brief spent over five pages explaining that the lack of a scienter requirement for the felony of which he was convicted violates federal due process. Pet.App.39a-45a. As relevant here, he explained that the Second Amended Indictment lacked the "allegation of scienter that most felony convictions require." Pet.App.39a. He further explained that criminal offenses without a *mens rea* requirement are "generally disfavored." Pet.App.40a (citing *Liparota* v. *United States*, 471 U.S. 419, 425-426 (1985)). He then provided two pages explaining how the Idaho legislature "[e]mbraced that principle of American justice" by requiring "every crime or public offense" to have a "union, or joint operation, of act and intent, or criminal negligence." *Ibid.* (quoting Idaho Code §18-114). He then concluded that "due process does not allow [him] to be convicted of a felony involving the possession of a moose based on strict liability or ordinary negligence. Mere possession does not connote criminal knowledge or scienter." Pet.App.43a.

Despite more than five pages of briefing arguing that due process required a scienter element, the

Idaho Supreme Court "decline[d] to consider" that point, erroneously finding that it was "merely mentioned in passing." *Id.* at 13a-14a. The Idaho Supreme Court then reversed the Court of Appeals and affirmed Petitioner's conviction. *Id.* at 16a.

REASONS FOR GRANTING THE PETITION

This petition should be granted because the first question squarely falls within the category of conflicts identified in Rule 10(b), and the second question falls well within Rule 10(c)'s category of decisions that "conflict[] with relevant decisions of this Court." Sup. Ct. Rule 10(c). Indeed, the error that is the subject of the second question is so egregious that it warrants, in the alternative, a vacatur and remand to the Idaho Supreme Court to consider Petitioner's core due process argument on the merits.

I. Lower Courts are Hopelessly Divided Over Whether the Due Process Clause Requires a Scienter Element for Felonies with Severe Penalties or Whether the Inclusion of Such an Element is Merely a Rule of Construction.

A. When Reading a Scienter Requirement into Federal Criminal Statutes, this Court has Hinted at But Never Clarified Whether That Reading is Required by Due Process.

Most jurisdictions, in approaching a criminal liability statute without an express *mens rea* or scienter element, derive their legal framework from a line of precedents harking back at least as far as this Court's decision in *Shevlin-Carpenter Co.* v. *State of Minn.*, 218 U.S. 57, 70 (1910). There the Court

observed that a state's police power "may not transcend the prohibition of the Constitution of the United States." *Ibid.* Thus, if "intent is an essential element of crime, or, more restrictively, if intent is essential to the legality of penalties, it must be so, no matter under what power of the state they are prescribed." *Ibid.*

1. The Court addressed the issue more fully in *Morissette* v. *United States*, 342 U.S. 246 (1952). There the court, balking at a federal statute imposing criminal liability without an express "requirement of guilty intent," held that "the mere omission" of an intent element would "not be construed as eliminating that element from the crimes denounced." *Id.* at 263. In so doing, *Morissette* recognized "the ancient requirement of a culpable state of mind." *Id.* at 250. The Court observed that "[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion" is "universal and persistent in mature systems of law." *Ibid.*

Further, in looking at the history, *Morissette* pointed out the "[u]nqualified acceptance of this doctrine by English common law in the Eighteenth Century," and that "[c]ommon-law commentators of the Nineteenth Century early pronounced the same principle." *Id.* at 251. And the idea that crime "generally constituted *only* from concurrence of an evil-meaning mind with an evil-doing hand *** took deep and early root in American soil." *Id.* at 251-252 (emphasis added).

However, the Court noted an exception to this universal rule: crimes that "consist only of forbidden

acts or omissions," such as laws regulating workplace safety, traffic, food and drug safety, and what the Court referred to as "public welfare offenses." *Id.* at 254-255. *Morissette* characterized these as offenses "in the nature of neglect where the law requires care, or inaction where it imposes a duty," and that "violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize." *Id.* at 255-256. And the Court noted that these "public welfare offenses" typically result in "penalties [that] commonly are relatively small, and conviction does no grave damage to an offender's reputation." *Id.* at 256.

Ultimately, the Court concluded that the offense at issue in that case—theft—was one from the common law where "the penalty is high and, when a sufficient amount is involved, the infamy is that of a felony, which, says Maitland, is 'as bad a word as you can give to man or thing.'" *Id.* at 260 (quoting 2 Pollock & Maitland, History of English Law, 465). Accordingly, the Court read a scienter requirement into the statute and reversed the conviction. *Id.* at 276. See also *Staples* v. *United States*, 511 U.S. 600, 618 (1994) (refusing to "apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*").

2. A few years later, the Court in *Lambert* v. *California* noted that, although lawmakers had "wide latitude" to "exclude elements of knowledge" from criminal statutes, "due process places some limits" on the exercise of that power. 355 U.S. 225, 228 (1957). That is because "[e]ngrained in our concept of due

process is the requirement of notice." *Ibid.* And while noting that this due process principle of notice was often enforced as to property interests, the Court observed that "the principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case." *Ibid.* Thus, the court struck down a Los Angeles ordinance imposing criminal penalties for passive and unwitting failure to register, concluding that such liability was "[in]consistent[] with due process." *Id.* at 229-30.

Lambert's holding thus rested on the Due Process Clause: It made no reference to *Morissette*, nor did it apply any of that decision's federal interpretive principles in construing the municipal law.

3. Since *Morissette* and *Lambert*, this Court has clearly endorsed the scienter requirement as a principle for construing federal criminal statutes but has spoken less clearly about the circumstances under which the Due Process Clause imposes constitutional limitations on federal or state statutes creating criminal liability without an express or implied scienter element.

For example, in *United States* v. *Int'l Mins. & Chem. Corp.*, 402 U.S. 558 (1971), the Court addressed the argument that a person must know that she is violating a specific law prohibiting the transportation of dangerous chemicals without showing the chemicals on the shipping papers. *Id.* at 559-560. The court rejected this argument but cautioned that less obviously dangerous items "may be the type of products which might raise substantial due process questions if Congress did not require *** 'mens rea' as

to each ingredient of the offense." *Id.* at 564-565. Additionally, in *United States* v. *U.S. Gypsum Co.*, the Court indicated that "the holding in *Morissette* can be fairly read as establishing, at least with regard to crimes having their origin in the common law, an interpretive presumption that *mens rea* is required." 438 U.S. 422, 437 (1978). At the same time, however, that opinion acknowledged, without elaboration, that strict liability offenses might "offend constitutional requirements." *Id.*

As recently as 2019, this Court has continued to invoke scienter as a clear principle of statutory interpretation while touching only lightly on the due process concerns behind that presumption. In *Rehaif*, the majority opinion invoked the "longstanding presumption" in favor of scienter without any express reference to due process. 139 S. Ct. at 2195. Nevertheless, the dissent acknowledged the due process concerns underlying such principles of construction, noting with respect to the canon of constitutional avoidance that "we have never held that the Due Process Clause requires *mens rea* for all elements of all offenses, and we have upheld the constitutionality of *some* strict-liability offenses in the past." *Id.* at 2212 (Alito, J., dissenting) (emphasis added).

Thus, as the Third Circuit has observed, this Court "has indicated that the due process clause may set some limits on the imposition of strict criminal liability, but it has not set forth definite guidelines as to what those limits might be." *United States* v. *Engler*, 806 F.2d 425, 433–434 (3d Cir. 1986) (citing *Int'l Minerals & Chemical Corp.* and *Lambert*). Given

this lack of clarity, state courts and federal courts of appeals attempting to apply this Court's precedents are divided over the extent to which, with respect to scienter, the Due Process Clause imposes constitutional requirements as opposed to merely interpreting federal criminal statutes to include such requirements.

B. At Least Three Federal Circuits and Many State Supreme Courts Recognize that the Due Process Clauses Mandate Some Form of Scienter Requirement for Crimes with Serious Penalties.

This lack of guidance has led to a split of authority among the federal circuits and state supreme courts. The majority of these courts to address the issue have held, at least in cases not involving public-welfare crimes, that the federal Due Process Clauses mandate some form of scienter requirement for crimes with serious penalties.

1. Those decisions stretch back to at least 1960. For example, applying *Morissette* and other precedents, then-Judge Blackmun articulated a multifactor test for construing federal criminal statutes that omit a scienter element. *Holdridge* v. *United States*, 282 F.2d 302 (8th Cir. 1960). He articulated his *Holdridge* test against the express possibility that, but for application of that interpretive framework, a criminal statute lacking a scienter element might violate the Due Process Clause. *Id.* at 310. This test laid out several factors to consider in concluding that due process was not violated: the criminal statute (1) "seems to involve what is basically a matter of policy"; (2) imposes a standard that "is,

under the circumstances, reasonable and adherence thereto properly expected of a person"; (3) imposes a "penalty [that] is relatively small; (4) imposes a "conviction [that] does not gravely besmirch"; (5) involves a "statutory crime [that] is not one taken over from the common law"; and (6) "where [legislative] purpose is supporting, the statute can be construed as one not requiring criminal intent." *Ibid.* Failing to satisfy these factors, however, would be "violative of the due process clause." *Ibid.*

Relying on then-Judge Blackmun's opinion in *Holdridge* and this Court's decisions in *Morissette* and *Lambert*, the Fourth Circuit has recognized the scienter requirement to separately implicate both interpretive and constitutional requirements: "Although in most cases particular scienter requirements seem to be based simply on statutory construction, there are undoubtedly due process restrictions on the legislature's power to define certain conduct as criminal absent particular scienter requirements." *United States* v. *Foley*, 598 F.2d 1323, 1335 (4th Cir. 1979) (citations omitted).

In this two-pronged model, the interpretive conclusion that a criminal offense lacks a *mens rea* requirement still prompts the secondary question of whether the statute, so construed, violates constitutional due process requirements. Thus, in *Stepniewski* v. *Gagnon*, the Seventh Circuit recognized that, although it was bound to accept the Wisconsin Supreme Court's construal of a state criminal statute as imposing strict liability without proof of criminal intent, it was still obligated to separately consider "whether that construction

violates the due process clause of the United States Constitution." 732 F.2d 567, 569 (7th Cir. 1984); see also *State* v. *Stepniewski*, 314 N.W.2d 98, 98 (Wis. 1982) (noting that *mens rea* issue "involves a statutory construction and constitutional requirements of due process").

2. Some courts, like the Fifth Circuit in *United States* v. *Garrett*, regard the Due Process Clause as providing a constitutional backstop to the interpretation of statutes without an express *mens rea* requirement. In their view, a court resolves the interpretive question of whether criminal liability attaches without *mens rea* against a due process backdrop under which a statute so interpreted would be constitutionally disfavored.[4] 984 F.2d 1402, 1411 (1993) (concluding analysis with caution that "a serious due process violation would be raised by application of this statute, which carries fairly substantial penalties, to someone who did not know *** that he was [in violation]"); see also *State* v. *Giorgetti*, 868 So.2d 512, 518 (Fla. 2004) ("Because

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[4] Assuming that a statute construed to have an implicit *mens rea* element would comport with due process, several jurisdictions have simultaneously acknowledged and avoided due process concerns by reading such an element into the statute. See, *e.g.*, *State* v. *Stone*, 467 N.W.2d 905, 907 (S.D. 1991) ("Because we hold that [a drug offense] requires knowledge, we need not reach the question whether [the statute] would violate due process if it did not require knowledge."); *Pardo* v. *State*, 160 A.3d 1136, 1142 (Del. 2017) (affirming lower court's due process ruling on alternate ground that challenged offense "is not a strict liability statute"); *State* v. *Rice*, 626 P.2d 104, 110 (Alaska 1981) (reading a *mens rea* element into a moose-hunting regulation "to render the regulation constitutional").

scienter is often necessary to comport with due process requirements, we ascribe the Legislature with having intended to include such a requirement.") (citing *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994)).

Taking that analysis one step further, the Sixth Circuit has concluded that, where a criminal statute could not be construed to contain a scienter requirement, it violated the defendant's constitutional rights to due process. *United States* v. *Wulff*, 758 F.2d 1121, 1124-1125 (6th Cir. 1985). In reaching that conclusion, the Sixth Circuit adapted then-Judge Blackmun's opinion in *Holdridge* to create a test under which, nevertheless, "the elimination of the element of criminal intent does not violate the Due Process Clause where (1) the penalty is relatively small, and (2) where conviction does not gravely besmirch." *Id.* at 1125. See also *United States* v. *Williams*, 872 F.2d 773, 777 (6th Cir. 1989) (endorsing *Wulff*'s "due process concerns" and test).[5]

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[5] Some other circuits have rejected the *Holdridge* and *Wulff* due-process tests, while still recognizing the possibility of due process limitations on statutes that lack scienter requirements. See *United States* v. *Engler*, 806 F.2d 425, 433-35 (3d Cir. 1986) (electing not to follow either the *Holdridge* or the *Wulff* tests but recognizing that the due process clause may set some limits on the imposition of strict criminal liability, but it has not set forth definite guidelines as to what those limits might be.") (citing *United States* v. *Int'l Minerals & Chem. Corp.*, 402 U.S. 558 (1971); and *Lambert*, 355 U.S. at 228)). See also *Engler*, 806 F.2d at 435 (interpreting *United States* v. *Freed*, 401 U.S. 601, 608 (1971), as distinguishing between two types of strict liability crimes—those that "may violate due process" and those that

C. At Least Three Circuits and One State Supreme Court Instead Treat the Inclusion of a Scienter Element as a Non-constitutional Rule of Construction Only.

On the other side of the split, several jurisdictions have interpreted the scienter requirement to be merely a principle of construction divested of constitutional due process limitations. Most explicitly, and contrary to the Fourth Circuit's decision in *Foley*, the Nebraska Supreme Court has held that this Court's decision in *Morissette* merely established factors "to consider when construing statutes that arguably do not require proof of mens rea," and "did *not* establish those factors as principles of constitutional law." *State* v. *Perina*, 804 N.W.2d 164, 170 (2011) (emphasis added). Thus read, "*Morissette* provides no basis for striking down a statute—just for construing it." *Id.* at 171.

Several federal courts of appeal have adopted this view—at least insofar as they apply a scienter requirement as an interpretive principle devoid of any

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would not because they are public welfare offenses); *United States* v. *Unser*, 165 F.3d 755, 761-64 (10th Cir. 1999) (crime at issue was a "public welfare offence"); *United States* v. *Stepanets*, 989 F.3d 88, 98 (1st Cir. 2021) (same); See also *Com.* v. *Jackson*, 344 N.E.2d 166, 174 (1976), see also *State* v. *Mountjoy*, 891 P.2d 376, 385 (Kan. 1995) (holding that a public welfare offense without an "element of criminal intent" does not violate due process); *cf. State* v. *McDowell*, 312 N.W.2d 301, 306 (N.D. 1981) (holding that regulatory statute did not offender due process by imposing a fine or imprisonment without a *mens rea* requirement).

constitutional due process limitations. For example, in *United States* v. *Figueroa*, the Second Circuit applied the *Staples mens rea* requirement and the public welfare exception solely as principles of construction, making no mention of any lingering due process limitations. 165 F.3d 111 (1998); see, *e.g.*, *id.* at 116 (referring to the criminal knowledge requirement as both a "presumption" and "principle of construction"); *id.* at 117 (analyzing the "interpretive principles employed in the case of public welfare crimes").

Similarly, in *United States* v. *Nguyen*, the Ninth Circuit noted that "criminal offenses requiring no *mens rea* have a generally disfavored status," but did so in the context of "implying a *mens rea* element" without invoking due process. 73 F.3d 887, 890-891 (1995).

Likewise, the Pennsylvania Supreme Court has demonstrated the same focus on interpretive principles to the exclusion of due process limitations, approaching the absence of an "explicit *mens rea* requirement" in a bribery statute solely as an interpretive question, relying on *Holdridge*, *Staples*, and *Morissette* without any mention of due process. *Com.* v. *Parmar*, 710 A.2d 1083, 1088-1090 (Pa. 1998).

* * * * *

In short, there is a substantial conflict on the first question presented—one that leads to differing outcomes in different jurisdictions. For example, if Petitioner had been prosecuted for a similar crime in a federal court in the Sixth Circuit rather in Idaho state court, he almost certainly would have had the benefit of a scienter requirement—and therefore

would almost certainly have been acquitted. Only this Court can resolve that conflict and thereby bring a measure of fairness to criminal defendants facing prosecution under felony statutes that lack any scienter requirement.

II. The Lower Court's Refusal to Address Petitioner's Argument On the First Question Independently Violated the Due Process Clause and Likewise Warrants Review.

This Court's rules further provide that one of the bases for granting review is that "a state court *** has decided an important federal question in a way that conflicts with relevant decision of this Court." Sup. Ct. R. 10(c). That is true here: For over a century and a half, this Court has consistently recognized that a fundamental aspect of due process as guaranteed by the Constitution is the opportunity to be heard prior to the deprivation of life, liberty, and property. See, *e.g.*, *Baldwin* v. *Hale*, 68 U.S. (1 Wall.) 223, 233 (1863); *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). Yet the Idaho Supreme Court violated this bedrock constitutional right by holding that Petitioner had not raised an argument he plainly had—apparently so that the court did not have to reach his above-mentioned due process-scienter argument.

There can be no doubt that Petitioner preserved this argument by more than sufficiently presenting it to the lower court. In his Opening Brief at the Idaho Supreme Court, Petitioner spent more than five pages fully arguing that the relevant state statute—I.C. § 36-1401(c)(3)—lacked a scienter requirement in violation of the 14th Amendment's Due Process Clause. Pet.App.39a-45a. Petitioner contended that

this deficiency allowed the State to convict him of a felony without having to prove his state of mind at the time that the crime was committed. Yet that court refused to address this argument on the ground that "Huckabay's strict liability argument was merely mentioned in passing." Pet.App.14a. The record refutes the court's assertion. This itself raises a serious due process issue that is independently worthy of this Court's review—or at least a GVR that will give the Idaho Supreme Court the opportunity to address the due process-scienter issue in the first instance.

A. This Court's Precedent Establishes that Persons Deprived of a Right by the State Must be Given the Opportunity to be Heard.

Over a century and a half ago, this Court plainly noted: "Parties whose rights are to be affected are entitled to be heard." *Baldwin*, 68 U.S. at 233. Just over fifty years later, the Court again proclaimed that "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis*, 234 U.S. at 394 (cleaned up). And almost half a century ago, this Court said that "some form of hearing is required before an individual is finally deprived of a property [or liberty] interest." *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976).

1. This right is a "basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions," not to mention his liberty, the Court assured in *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). Whatever else due process, in all its majestic generalities, might mean, it certainly covers the opportunity to be heard—

without which due process' notice requirement would be futile. See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

The opportunity to be heard exists "not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect hi[m]" from the State's "arbitrary encroachment[s]." *Fuentes*, 407 U.S. at 80-81. The right thus exists to prevent "substantively unfair and simply mistaken deprivations of [liberty and] property interests." *Id.* at 81. See also *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 170-171 (1951) (Frankfurter, J., concurring) ("[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. *** [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.").

This Court has had ample occasion and opportunity to backtrack from this core element of due process. But it has resolutely declined to do so—even when the Nation was at war and grave national security interests were involved. See, *e.g.*, *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 537 (2004) (plurality opinion) (insisting on an opportunity to be heard in "a constitutionally adequate factfinding before a neutral decisionmaker." *Hamdi* "reaffirm[ed] *** the fundamental nature of a citizen's right to be free from involuntary confinement *** without due process of law," including a meaningful opportunity to be heard. *Id.* at 531.

2. *Hamdi* lays out a helpful path. Relevant to our inquiry, the *Hamdi* plurality noted that "[a]ny process

in which the [governmental decision-maker's] factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the [defendant] to demonstrate otherwise falls constitutionally short." 542 U.S. at 537. The same doubtless goes for an appellate procedure that refuses to even *hear* the appellant's argument—even when the appellant has complied with all procedural and substantive rules. Consequently, the notice of a hearing and the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). And under that principle, the Idaho Supreme Court's treatment of Petitioner's scienter argument falls well short of due process.

B. A Person's Opportunity to be Heard is Meaningless if the Court Refuses to Consider What He is Saying.

1. Some of the Nation's greatest jurists have championed the opportunity to be heard precisely because no process could be adequate without it. Judge Friendly, for example, enumerated eleven elements of due process in his seminal article on that topic. See Henry Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1279–1295 (1975). Unsurprisingly, several of Judge Friendly's elements directly inform the opportunity to be heard. Those elements, including giving the subject the "opportunity to present reasons why the proposed action should not be taken" against him, would be of no value if the decisionmaker were disinclined to consider those reasons without any apparent justification. *Id.* at 1281 (cleaned up).

Nor would the right "to have [the] decision [be] based only on the evidence presented" make any sense if the decisionmaker could just ignore the assertions the subject of the possible deprivation has advanced. *Id*. at 1282 (cleaned up). Moreover, both "the making of a record and a statement of reasons" would be empty formalities under these circumstances as well. *Id*. at 1291 (cleaned up). And none of this would sit well with the Court's traditional model of assessing due process violations. See, *e.g.*, *Cty. of Sacramento, Calif.* v. *Lewis*, 523 U.S. 833, 846-847 (1998) (reaffirming the due process proscription on governmental conduct that "shocks the conscience").

Moreover, while the Court has adjusted the demands of due process in a fact-specific, case-by-case manner, it has never deviated from ensuring that the person whose property, liberty, marital or parental status, livelihood, economic sustenance, or life itself is at stake is meaningfully heard. See, *e.g.*, *Wilkinson* v. *Austin*, 545 U.S. 209 (2005); *City of Los Angeles, Calif.* v. *David*, 538 U.S. 715 (2003); *Dusenbery* v. *United States*, 534 U.S. 161 (2002); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Boddie* v. *Conn.*, 401 U.S. 371 (1971).

The Court's reliance on the opportunity to be heard has even informed its approach to structural constitutional matters such as federalism. See *Lane*, 541 U.S. at 523 ("The Due Process Clause also requires the States to afford certain civil litigants a meaningful opportunity to be heard by removing obstacles to their full participation in judicial proceedings.") (cleaned up). In short, the opportunity to be heard always has been central to our constitutional tradition and is "part of our national

culture." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000). It must be honored in reality, not just in theory.

2. Here, as a result of the Idaho Supreme Court's error, Petitioner suffered both a deprivation of physical liberty and reputational harm so severe that even now it effectively deprives him of the right to travel abroad. See *supra* note 3.Petitioner has a *per se* right to vacatur and remand—if not outright reversal—because of this error.

This Court has often expressed a *per se* rule favoring automatic reversal when a defendant is denied the opportunity to be heard. Notably, in cases where even a *civil* defendant has been given notice but deprived of an opportunity to respond to assert his lack of liability, this Court has enforced the due process prohibition against subjecting someone to judgment without giving them a meaningful opportunity "to respond and be heard." *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 466-467 (2000). In such cases, the Court has not engaged in a balancing inquiry. See *id.* at 466-68. For example, it was sufficient for the *Nelson* Court that the decision-maker never gave the defendant a chance to say his piece, and that was automatically reversible error. See *id.* at 467-468. After observing that "Nelson was never afforded a proper opportunity to respond to the claim against him," the Court observed that a "[p]rocedure of this style has been questioned even in systems, real and imaginary, less concerned than ours with the right to due process." *Id.* at 468.

3. As with other "structural defects" in criminal procedure, *United States* v. *Gonzalez-Lopez*, 548 U.S.

140, 149 (2006), the Idaho Supreme Court's error was not a one-off mistake "in [court] process[es]," *Arizona* v. *Fulminante*, 499 U.S. 279, 309-310 (1991). Rather, it "def[ied] analysis by 'harmless-error' standards" because it "affected the [very] framework within which the [state courts adjudicated and upheld his culpability]." *Ibid.*

This becomes even clearer with an extreme hypothetical. Imagine that a state court denies a criminal defendant the ability to file a single page of briefing or utter even *one* word in oral argument (either himself or through counsel), before ruling against that defendant. Clearly, the right to be heard has been violated.

Likewise, here, that right is no less violated when the lower court does the functional equivalent of shutting down an argument by refusing to reach one of the arguments Petitioner comprehensively raised—on the specious grounds that he had not actually raised it. The Court should grant certiorari in this case—and at least a GVR—to make this *per se* rule of reversible error explicit.[6]

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[6] Even if a *per se* rule of automatic reversal were inappropriate here, the Court's traditional *Mathews* framework to evaluate whether a person has been deprived of his procedural due process rights easily leads to the same conclusion. 424 U.S. at 335. Under *Mathews*, courts balance the private interest harmed, the government's interest, "the risk of erroneous deprivation," and the "probable value, if any, of additional or substitute safeguards." *Ibid.* Petitioner's interest in having his arguments properly considered to avoid a felony conviction tower over the nonexistent government interest in ignoring arguments

C. Letting the Idaho Supreme Court's Error Stand in this Case would be an Egregious Miscarriage of Justice.

The Idaho Supreme Court committed a blatant factual error in this case. Despite spending more than five pages briefing the due process issue, Petitioner never was heard on this issue by Idaho's highest court. Petitioner's scienter-due process argument went straight into a black hole of the court's own making. He never waived or forfeited this issue, for he raised it as an issue presented in his Opening Brief and argued it well. Pet.App.30a, 39a-45a. The Idaho court's decision to forego addressing this issue is a grievous error for which it, and *only* it, is responsible.

What the Idaho Supreme Court did here is indeed an "extreme case[]." *Caperton* v. *A.T. Massey Coal Co., Inc.,* 556 U.S. 868, 887 (2009). And this Court has never hesitated to reverse such miscarriages of justice. It should not hesitate to do so here either. The fact that a precise conflict in the lower courts on this issue (Question 2) is difficult to spot is attributable to the fact that mistakes of this egregious character and

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properly raised in its courts. See *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992). Further, the "risk of erroneous deprivation" of Petitioner's liberty interest is at its peak here. *Mathews,* 424 U.S. at 335. See also *Jones* v. *United States*, 463 U.S. 354, 361 (1983) ("It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."). Any counter claims by the government of administrative convenience or efficiency make no sense here. And the value of reaching Petitioner's arguments is great.

magnitude do not ordinarily happen. Consequently, the Court should grant certiorari and reverse the judgment of the Idaho Supreme Court—at least in the form of a GVR.

III. The Questions Presented Are of Nationwide and Growing Importance.

The questions presented, moreover, are of nationwide and increasing importance.

1. For example, scienter and *mens rea* elements were once hallmarks of American criminal jurisprudence. Since the 1930s, the advent of vaguely defined public welfare crimes and the codification of criminal common law eroded these elements at both the federal and state levels. Now, significant percentages of state and federal criminal laws retain no or negligible scienter requirements.

Professor Francis Sayre's seminal 1933 *Columbia Law Review* article outlining public welfare offenses arguably sparked the beginning of scienter's decline. See Francis Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 83 (1933). Discussing Sayer's article, Professor John S. Baker, Jr. observed that "[t]he undefined term 'public welfare offense' expanded in the process of justifying other strict-liability statutes." John S. Baker, Jr., *Mens Rea and State Crimes*, The Federalist Society 4 (Sept. 4, 2012), https://tinyurl.com/34akbyeb. Sayer's work, in other words, was used to justify statutes without scienter requirements that were not public welfare statutes in the doctrinal sense. Additionally, for several reasons, codification efforts such as the Model Penal Code,

"actually has had the unintended consequence of eroding the principle of mens rea in state criminal law." *Id.* at 6. The deterioration is evident at the federal and state levels.

Unfortunately, "[i]t's not even clear how many federal criminal statutes are on the books." John Villasenor, *Over-criminalization and Mens Rea Reform: A Primer*, Brookings Institution (Dec. 22, 2015), https://tinyurl.com/mmwtpkz2. As one retired Justice Department official put it, "[y]ou will have died and resurrected three times" before counting the full number of federal criminal laws. Gary Fields and John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, The Wall Street Journal (Jul 23, 2011), https://tinyurl.com/2jbcedpc (quoting Roland Gainer). A study from strange ideological bedfellows—the Heritage Foundation and the National Association of Criminal Defense Lawyers—estimated that there are over 4,450 federal statutory crimes and "an estimated tens of thousands more in federal regulations." Brian W. Walsh and Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, The Heritage Found. & Nat'l Ass'n of Crim. Def. Lawyers ix (2010), https://tinyurl.com/5frb65mz.

The study's snapshot methodology found that, of the 446 proposed statutes during the 109th Congress, 57.1 percent earned a "none" to "weak" *mens rea* grade. *Id.* at 12. And of the statutes that Congress passed, over 60 percent earned the same grade. *Ibid.* Another study of new federal criminal statutes passed in a recent eight-year period showed about one in five "did not specify a mental element." John Baker,

Revisiting the Explosive Growth of Federal Crimes, The Heritage Found. (June 16, 2008), https://tinyurl.com/HeritageCrimeReport.

The story is even worse for states. For example, a study of Michigan's criminal laws found that the state has at least 3,102 crimes on its books. James R. Copeland, Isaac Gorodetski & Michael J. Reitz, *Overcriminalizing the Wolverine State,* Mackinac Ctr. For Pub. Policy and the Manhattan Inst. For Pub. Policy 1 (Oct. 2014), https://tinyurl.com/cdrzxzuc. More than 26 percent of the felonies "do not explicitly require the state to make a showing of intent." *Ibid.* The problem is not isolated to Michigan. According to a 2012 fifty-state survey, ten states have only varying levels of presumptions in favor of a scienter element, and twenty states completely lack a default *mens rea* requirement. Baker, *Mens Rea and State Crimes* at 67, 78; see generally James R. Copeland & Rafael A. Mangual, *Overcriminalizing America*, Manhattan Inst. 8 (Aug. 2018), https://tinyurl.com/4axzj56m ("State lawmakers have often failed to specify any intent requirements in the crimes that have been added to statutory codes in recent years").

2. The number of statutes lacking a scienter requirement has also grown exponentially in recent years. America's first federal criminal law, in 1790, listed less than 20 offenses. Gary Fields and John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, Wall St. J. (Sept. 27, 2011), https://tinyurl.com/2skcreys. Professor Baker explains that, prior to 1970, "federal criminal law played a relatively minor role in the overall picture of criminal law in the United States." Baker, *Mens Rea and State*

Crimes, at 4. Professor Stephen Saltzburg, in his 2016 congressional testimony before the Senate Judiciary Committee, noted of federal criminal law that "[m]ore than 40% of the federal provisions enacted after the Civil War had been enacted since 1970." *The Adequacy of Criminal Intent Standards in Federal Prosecutions Before the S. Comm. on the Judiciary,* 114th Cong. 1 (2016) (statement of Stephen A. Saltzburg, Current Member and Past Chair, Council of the American Bar Association's Criminal Justice Section). Since 1980, Congress has added over 500 new crimes per decade. Walsh & Joslyn, *supra* at 6. The math paints a disquieting picture if pieced together with the *mens rea* grade ratios from the Heritage Foundation's study.

Not to be outdone by Congress, states are prolific themselves. By way of illustration, using a six-year running average, the Manhattan Institute found that South Carolina creates 60 new crimes per year, Oklahoma creates 46, and Michigan creates 45. Copeland & Mangual, *supra* at 7. South Carolina, Oklahoma, Michigan, and—as mentioned previously—seventeen other states do not maintain any default mens rea statutes. Baker, *Mens Rea and State Crimes* at 78-79.

In short, the proliferation of state and federal felony statutes lacking a scienter requirement, yet imposing serious penalties, has exploded in this country to the detriment of the average American who can now violate hundreds, if not thousands, of felony laws without even knowing she is doing so. And that threat to liberty is exacerbated by the practice of some courts—including the Idaho Supreme Court here—of

evading challenges to those kinds of laws through spurious claims of procedural missteps by the challengers.

IV. This Case Presents a Factually Clean Vehicle to Resolve these Important Issues.

Unlike many due process cases that involve messy facts that are filtered through the trial court, this case is factually clean and simple. The only relevant fact for the first due process issue—the lack of scienter requirement in state felony statute that carries significant penalties—is the Idaho Supreme Court's holding that the statute lacked *mens rea*. Because that court's interpretation of Idaho state law may not be disturbed by this Court, see *Jefferson Branch Bank* v. *Skelly*, 66 U.S. 436, 442 (1861), there are no disputed facts on this first issue.

Nor can there be any doubt that a scienter requirement would have saved Petitioner from a felony conviction. While the State's evidence showed that Petitioner's associate (the butcher) had a dead moose on his truck and later in his cold storage locker at his butcher facility, the State never introduced any evidence that Petitioner knew that his associate lacked a tag and that the season was closed on that day. Thus, there was no way to convict Petitioner of *knowingly* possessing a moose carcass unlawfully.

Furthermore, only the Idaho Supreme Court can choose whether to read a scienter requirement into an Idaho statute lacking such. Thus, Petitioner's only chance to prevail on his scienter-due process argument is for this Court to clarify that rather than a rule of construction, the Constitution's 14th

Amendment requires scienter in the felony statute here that imposes a serious penalty and is not a public welfare offense.

What is more, the Idaho Supreme Court's decision does not rest on independent and adequate state grounds. This Court has long held that a state procedural rule does not prevent review in this Court if the state rule or its application "is an obvious subterfuge to evade consideration of a federal issue." *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 129 (1945). Additionally, state procedural rules are inadequate if they deny due process—precisely the situation here. See, *e.g.*, *Reece* v. *Georgia,* 350 U.S. 85 (1955); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673, 681-682 (1930). Neither is a state law deemed adequate when the record lacks a fair and substantial basis for supporting the state court's state law ruling, as is the case here. See, *e.g., War* v. *Bd. of Commissioners of Love Cty., Oklahoma,* 253 U.S. 17, 23 (1920). While the state procedural rule the Idaho Supreme Court applied is a not facially problematic, [t]here are *** exceptional cases in which exorbitant applications of a generally sound rule renders the state ground inadequate." *Lee* v. *Kemna,* 534 U.S. 362, 376 (2002). And the Idaho court's holding that the state felony statute did not have a scienter requirement and thus that Petitioner could be convicted without such a showing cannot stand if this Court adopts Petitioner's due process argument on that issue.

Finally, there are no disputed or messy facts on the second issue. To resolve that issue, the *only* relevant fact is the content of Petitioner's opening brief in the

lower court. And that is a fact this Court can easily and directly assess.

To be sure, this Court ordinarily looks for cases in which the lower court has squarely decided the question presented—which the Idaho Supreme Court obviously didn't do here with respect to the first question presented. But this Court can and should consider the Idaho Supreme Court's refusal to consider Petitioner's scienter argument on spurious grounds as a rejection of that argument on the merits. At a minimum, this Court should GVR, allow the Idaho Supreme Court to address the scienter issue in the first instance, and then grant certiorari again if that Court rejects Petitioner's scienter argument on the merits.

For all these reasons, this case is a good vehicle in which to resolve the questions presented.

CONCLUSION

Petitioner is a convicted felon despite numerous due process violations made by the state courts below—violations that but for this Court's intervention will remain in force for him and those in similar circumstances. Given the proliferation of state and federal felonies with serious penalties that "gravely besmirch" the character of those convicted of such, and given the lower court's confusion over whether such crimes trigger constitutional due process protection, clarity from this Court is badly needed. The Court should grant the petition and hear this case on the merits or, alternatively, GVR.

Respectfully submitted,

GENE C. SCHAERR
Counsel of Record
H. CHRISTOPHER BARTOLOMUCCI
HANNAH SMITH
SCOTT D. GOODWIN
RIDDHI DASGUPTA
JOSHUA J. PRINCE
SCHAERR | JAFFE LLP
1717 K Street NW, St. 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

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