STATEMENT OF THE CASE

On September 14, 1984, the Appellant Rudolph George Stanko ("Stanko") and Cattle King Packing Co. were convicted of violating the Federal Meat Inspection Act (FMIA) and conspiracy to violate the Federal Meat Inspection Act, 21 U.S.C. § 601 et seq. *See United States v. Cattle King*, 793 F.2d 232 (10th Cir. 1986). The accusations against Mr. Stanko and Cattle King Packing were that Stanko's meatpacking business had mislabeled meat products and had circumvented the USDA inspection process on several occasions.

Ten years later, Stanko sought a declaratory ruling that his convictions fell under the business-practices exclusion from the disabilities of the federal Gun Control Act, 18 U.S.C. § 921(a)(20)(A), and that he could freely possess and use firearms. The U.S. Ninth Circuit Court of Appeals held in an unpublished opinion that Stanko lacked standing for declaratory relief because Stanko was not facing any firearm charge. *Stanko v. United States*, 1995 WL 499524 (9th Cir. 1995) (unpublished).

In March 2005, Stanko was indicted in the U.S. District of Nebraska for possessing firearms and ammunition after previously being convicted of a "crime punishable by imprisonment for a term exceeding one year," in

violation of 18 U.S.C. § 922(g). Stanko challenged the indictment in pretrial motions, arguing (again) that he was immune from prosecution under the Gun Control Act, which states explicitly that the term "crime punishable by imprisonment for a term exceeding one year" shall not include:

> **any Federal or State offenses pertaining to antitrust violations, restraints of trade, unfair trade practices, or other similar offenses relating to the regulation of business practices.**

18 U.S.C. § 921(a)(20)(A).

The District Court ruled on April 12, 2006 that "While the conviction in [1984] could relate to a business practice, it is not 'similar' to any of the three categories of crimes listed in the § 921(a)(20)(A) exception." Order p. 4. The exclusion, wrote the District Court, is "directed at illegal restraints of trade, monopolies, and anti-competitive forces in the marketplace." Order p. 3. "Although in some respects the allegations against the defendant in [1984] could be considered unfair trade practices," wrote the Court, "the gravamen of these charges are issues of food safety and fraud, not unfair trade practices." *Id*. at 5.

The District Court also ruled that the jury would not be instructed on the statutory definition above. At trial, the Court instructed the jury that the alleged crime was being a "felon" (a word which appears nowhere in the statute) "in possession of firearms . . . . and ammunition." Doc. 269,

Instructions 11 and 12. In place of Congress's definition in 18 U.S.C. § 921(a)(20)(A), the District Court substituted its own terms and definition: "that is, a crime punishable by imprisonment for a term exceeding one year" *Id.*

Upon these instructions, the jury convicted Stanko of two counts of prohibited firearm and ammunition possession (Counts I and II) and acquitted him of unlawful transportation of a handgun (Count III). On August 3, 2006, the District Court sentenced Stanko to six (6) years in federal prison. Stanko now appeals.

STATEMENT OF THE FACTS

Rudolph George Stanko ("Stanko") is a cattleman from Sheridan County, Nebraska. On March 7, 2005, persons living in a house near Gordon, Nebraska owned by Stanko's ranch employer turned over eight firearms kept in the house to local police. Federal Bureau of Alcohol, Tobacco and Firearms agents searched the residence and seized several boxes of ammunition. The firearms and ammunition were linked to Stanko, and Stanko was subsequently indicted and convicted of two counts of possessing firearms and ammunition by a prohibited person in violation of 18 U.S.C. § 922(g).

SUMMARY OF THE ARGUMENT

This is an appeal of a conviction for possession of firearms and ammunition by a person previously convicted of a "crime punishable by imprisonment for a term exceeding one year" in violation of the Gun Control Act, 18 U.S.C. § 922(g). The words used in this statute are defined in 18 U.S.C. § 921(a), which states in subsection (20)(A) that the designation of a prohibited person shall not attach to anyone whose prior offense was "any Federal or State offense[ ] pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices."

In a pretrial order issued on April 12, 2006, the District Court found that Stanko's 1984 conviction for conspiracy to violate the Federal Meat Inspection Act did not qualify under the 921(a)(20)(A) exclusion because the exclusion is only "directed toward illegal restraints of trade, monopolies, and anti-competitive forces in the marketplace." Order p. 3. "Although in some respects [Stanko's FMIA violations] could be considered unfair trade practices," wrote the District Court, "the gravamen of these charges are issues of food safety and fraud, not unfair trade practices." *Id*. at 5.

Stanko respectfully submits that (1) the District Court's construction of 18 U.S.C. § 921(a)(20)(A) violates long-established rules of statutory interpretation, (2) violating the Federal Meat Inspection Act is an unfair trade practice as a matter of clearly established law, (3) Stanko's 1984 conviction plainly qualifies as an unfair trade practice even under the test the District Court purported to apply, (4) Stanko's 1984 conviction is an "offense relating to the regulation of business practices" even if it is not an unfair trade practice, (5) the concealment of 921(a)(20)(A) from the jury deprived Stanko of his right to trial by jury on all elements of the offense.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF 18 U.S.C. § 921(a)(20)(A) SUPPORTS THE FINDING THAT CONGRESS INTENDED TO EXEMPT A WIDE SCOPE OF BUSINESS-RELATED OFFENSES FROM THE FIREARM DISABILITIES OF 18 U.S.C. § 922(g).

As a preliminary matter, it is undeniable that the drafters of 18 U.S.C. § 921(a)(20)(A) intended the exclusion to apply to business offenses generally, rather than any subset of business crimes. David T. Hardy, who assisted in drafting the legislation that amended the Gun Control Act in 1986, recounted the legislation's history in a 1986 law review article. "*The Firearm Owners' Protection Act: A Historical and Legal Perspective,*" 17 Cumb. L. Rev. 585, 586 (1986). Initial drafts of the legislation enumerated specific disabling offenses, allowing those convicted of all other offenses to

freely possess firearms. *Id*. at 608. As the debates progressed, the "attempt to define specific 'disabling' offenses was dropped, and the Gun Control Act's broad inclusion of nonbusiness felonies was retained." "In exchange, the scope of administrative relief from disability was expanded." *Id*. at 609 (emphasis added).

The 1986 amendments "effectively overrule[d] six decisions of the United States Supreme Court, . . . and negate[d] perhaps one-third of the total caselaw construing the Gun Control Act of 1968." Congress also "reaffirm[ed]" the intent of Congress, expressed at Section 101 of Pub. L. 90-618, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions [on] acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting [etc.]." Pub. L. 99-308, Section 1(b).

II. AS A MATTER OF PLAIN LANGUAGE, THE EXCLUSION FOUND AT 18 U.S.C. § 921(a)(20) CLEARLY EXTENDS BEYOND "ANTI-COMPETITIVE FORCES IN THE MARKETPLACE."

If Congress had intended 921(a)(20)(A) to apply only to offenses aimed at monopolies and "anti-competitive forces in the marketplace" (to use the District Court's language), it could have stated so explicitly. Instead, Congress used broad, open-ended phrases (e.g., "any Federal or State

offenses" "pertaining to," "or other," and "relating to the regulation of"). Section 921(a)(20)(A) does not enunciate any suggestion that the excluded offenses must be directed toward any specific goal, aim, or objective. The phrase "unfair trade practice" alone encompasses a vast array of business-related offenses. Even the term "antitrust" invokes hundreds of separate offenses, including conspiracies to fix prices, monopolize trade, harm competitors, or otherwise restrain markets. See David Kopel, *Antitrust After Microsoft* (1998) (suggesting almost any conspiracy to maximize business profits or market share can qualify as an antitrust violation).

Lawmakers have many choices available when drafting laws, and the meaning of their words can often be determined by considering alternative language that they do not choose. Congress could have ended § 921(a)(20) with the enumeration of three specific areas of law: "antitrust violations, unfair trade practices, [and] restraints of trade." Congress could also have ended § 921(a)(20) with the words "or other similar offenses." But the addition of a defining clause ("relating to the regulation of business practices") serves to emphasize *the way* that Congress viewed the enumerated examples as being similar to each other.

As Justice Scalia wrote in a recent opinion, two seemingly "similar" items may be "as similar as chalk and cheese." *Blakely v. Washington*, 542

U.S. 296, 302 (2004). But when lawmakers attach a descriptive clause to define the way the drafters view examples as similar, the descriptive clause must be given great weight by the courts. See, e.g., *Minizza v. Stone Container Corp.*, 842 F.2d 1456 (3rd Cir. 1988) (finding that bonuses paid to workers as inducements for ratification of a bargaining agreement qualified as "other similar payments to an employee which are not made as compensation for [ ] hours of employment" even though the bonuses were decidedly *dissimilar* to the six given examples); *Stoltz v. Brattleboro Hous. Auth.*, 315 F.3d 80 (2nd Cir. 2002) (holding that a debtor's interest in a "license, permit, charter, franchise, or other similar grant" includes a public housing lease because the word "grant" implies almost any property interest provided by the government); *United States v. Politzer*, 59 F. 273 (N.D.Cal. 1893) (finding that an advertisement for European bonds qualified as a "circular concerning a lottery . . . or other similar enterprise offering prizes dependent upon lot or chance" although the ad bore little similarity to a lottery circular); *C.f. Scott v. State*, 141 N.E. 19, 23 (Oh. 1923) (soliciting sexual favors is "similar" to taking bribes of money and "other valuables" because it tends to show a corrupt purpose in office).

For years, federal courts battled over the meaning of a tax statute that imposed a heavy tax on amounts paid "at any roof garden, cabaret, *or other*

similar place furnishing a public performance for profit." 26 U.S.C. § 4231 (emphasis added). But the circuit courts ultimately came to a consensus that the phrase "or other similar place" had to be interpreted according to the description that followed ("furnishing a public performance for profit") rather than by comparing given places to the two enumerated examples (roof gardens and cabarets). *Roberto v. United States*, 518 F.2d 1109 (2d Cir. 1974); *United States v. Ritchie*, 327 F.2d 732 (5th Cir. 1964) (holding that a bar qualified as a "similar place furnishing a public performance for profit" because it contained a jukebox and floor space for dancing); *Avalon Amusement Corp. v. United States*, 165 F.2d 653 (7th Cir. 1948) (holding that a bar adjoining a dance hall is a "similar place"); *Stevens v. United States*, 302 F.2d 158 (5th Cir. 1962) (affirming a directed verdict in favor of a broad interpretation); *Billen v. United States*, 273 F.2d 667 (10th Cir. 1987) (holding that a nightclub qualified as an "other similar place"); *Birmingham v. Geer*, 185 F.2d 82 (8th Cir. 1950) (holding that the phrase "other similar" implied a broad range of subjects fitting the given description).

This Court of Appeals made it clear that analysis of the phrase "any roof garden, cabaret, or other similar place furnishing a public performance for profit" involved more than simply comparing a given establishment with roof gardens and cabarets. The phrase "or other similar place" "shows

conclusively that Congress always thought there were other similar places which ought to be taxed like cabarets." *Id*. at 87. Dance halls and ballrooms "were consistently lumped together in the most general classification of unnamed 'places' to which admission was charged and taxed merely as such places." *Id.*

> The history negates an inference that because the dance halls were not named in the amendment therefore they were not intended to be taxed thereunder, and it also refutes the argument that because Congress did not call them by name or dwell upon the differences which distinguish them from cabarets therefore Congress did not intend to tax them.

Id. at 87.

It is noteworthy that those subject to the 'cabaret' tax invariably made arguments which were virtually identical to those used by the District Court in Stanko's case. They argued that the phrase "other similar" implied that a facility must be virtually identical to a roof garden or a cabaret to qualify. *See, e.g., Landau, supra*, at 254 ("Appellant insists that" the question "is whether his ballroom was a 'cabaret.'"). The appellate courts overwhelmingly rejected this construction.

"Despite vigorous arguments to the contrary," wrote this Court in *Geer*, "it appears as clear to this court as it did to the court in the Seventh

Circuit [in *Avalon Amusement Corp.*] that" the phrase 'other similar' includes a wide variety of entertainment facilities. A narrower interpretation would "tortur[e] the plain meaning of the phrase to sustain that contention." *Geer* at 85, 86.

The *way* that "antitrust violations, unfair trade practices, and restraints of trade" were viewed as similar by Congress is that all three are "offenses relating to the regulation of business practices." The Supreme Court, in *Greenleaf v. Goodrich*, 101 U.S. 278 (1916), held that where terms are of general knowledge (e.g., "relating to the regulation of business practices"), courts are to apply no trick language known only to courts or the government, such as a hidden purpose or aim of a statute.

The word "similar" in 921(a)(20) also adds an element of vagueness that must be resolved in favor of an inclusive interpretation. The case of *Springfield Armory v. City of Columbus*, 29 F.3d 250 (6th Cir. 1994) is illustrative: The city banned certain named guns as well as "models by the same manufacturer with the same action design that have slight modifications and enhancements." The Sixth Circuit pointed out that guns varied widely in design, function and power, and it was impossible to determine how much of a difference it took to make something not of "the same action design."

Moreover, the District Court's ruling renders the phrase "relating to the regulation of business practices" an inconvenient nullity, thus violating a maxim of statutory construction developed over centuries. "A statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence**,** or word shall be superfluous, void, or insignificant**.**'" *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). "We are not at liberty," said Mr. Justice Strong, "to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. "This rule has been repeated innumerable times." *United States v. Lexington Mill & Elevator Co*., 232 U.S. 399, 410 (1914) (quoting from *Mkt. Co. v. Hoffman*, 101 U.S. 112, 115 (1879)).

III. VIOLATING THE FEDERAL MEAT INSPECTION ACT IS AN UNFAIR TRADE PRACTICE AS A MATTER OF LAW. INDEED, THE ACT EXPRESSLY PREEMPTS PROVISIONS OF MANY STATE STATUTORY SCHEMES WHICH ARE PLAINLY ENTITLED "UNFAIR TRADE PRACTICES" ACTS.

Violating the Federal Meat Inspection Act is an unfair trade practice as a matter of clearly established law. *See, e.g., United Corp. v. FTC*, 110 F2d 473, 475 (4th Cir. 1940) (holding that provisions of the Packers & Stockyards Act "together with provisions of the *Meat Inspection Act* . . .

undoubtedly vests the Secretary of Agriculture with plenary power to . . . *forbid unfair trade practices* in the sale [of meat products]") (emphasis added).

Many state codes contain unfair-trade-practices statutes, and some of them expressly include false meat labeling. *See, e.g.*, Alaska Code 45.50.471(a)(21) and (b) (unfair trade practice to misrepresent meat quality or "selling [or] falsely representing or advertising meat, fish or poultry which has been frozen as fresh"); N.M. Stat. Ann. § 25-3-15(2) (unfair trade practice statute criminalizing deceptive marketing and misrepresentation of meat). All of these state unfair-trade-practices acts relating to meat quality have been preempted by the Federal Meat Inspection Act. See *Jones v. Rath Packing Co*., 430 U.S. 519 (1977); *Animal Legal Defense Fund, Inc. v. Provimi Veal Corp*., 626 F. Supp. 278 (D. Mass. 1986) (holding that the Massachusetts state unfair trade practices statutes regarding meat quality have been preempted by the "comprehensive federal scheme regulating the labeling, packaging and marketing of meat"). At least one state *unfair trade practices* act explicitly invokes the Federal Meat Inspection Act's standards as its own. See 815 Illinois Comp. Stats A. § 505/1 (2006) ("Consumer Fraud and Deceptive Business Practices Act").

It is well-settled, black letter law that mislabeling products is an unfair trade practice.[1] *See, e.g.*, North Carolina G.S. § 75-1.1 (prohibiting unfair trade practices—specifically including misbranding of products). *See also Forum v. Boca Burger, Inc.*, 788 So.2d 1055 (Fla. App. 2001) (involving mislabeling of food products under Florida's Unfair Trade Practices Act); *Commonwealth v. Burns*, 663 A.2d 308 (Pa. 1995) (unfair trade practice where contractor misrepresented quality of work); *Western Star Trucks, Inc. v. Big Iron Equip. Serv.*, 101 P.3d 1047 (Ak. 2004) (unfair trade practice to misrepresent consequences of contracts); *Hale Nursery Co., Inc. v. Forrest*, 381 S.E.2d 906 (S.C. 1989) (unfair trade practice claim involving mislabeled trees).

IV. STANKO'S 1984 CONVICTION QUALIFIES AS AN UNFAIR TRADE PRACTICE EVEN UNDER THE TEST THE DISTRICT COURT PURPORTED TO APPLY.

The District Court suggested that unfair trade practice convictions are limited to those that depend on their "financial effect on the consumer or on competition." Order p. 5. The Appellant submits that under this test, his

[1] Note that product mislabeling can also be a restraint of trade. *Eon Labs Mfg. v. Watson Pharms, Inc.*, 164 F.Supp. 2d 350 (S.D.N.Y. 2001) (suit over mislabeling drugs as restraint of trade); *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137 (5th Cir. 1993) (mislabeling count included in restraint of trade complaint); *Clinkscales v. Chevron, Inc.*, 831 F.2d 1565 (11th Cir. 1987) (mislabeling, willful adulteration, and misbranding claims in a restraint-of-trade action).

1984 conviction plainly qualifies. Indeed, few convictions would more clearly qualify.

The Federal Meat Inspection Act, 21 U.S.C. § 601 et seq., is a complicated scheme of industry regulation taking up more than twenty pages of the U.S. Code. The Act covers the production, preparation, packaging, labeling, inspection and certification of meat products. The statutory scheme begins with a Congressional statement of findings indicating a need to ensure "effective regulation of meat and meat food products in interstate or foreign commerce," "so as to protect markets, livestock products and processing of meat, and consumers." Of particular importance is the statute's stated anathema: "unwholesome, adulterated, mislabeled, or deceptively packaged articles [which] can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally." "It is hereby found," proclaims the Congressional statement, "that all articles and animals which are regulated under this Act are either interstate or foreign commerce or substantially affect such commerce, and that regulation by the Secretary . . . . [is] appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers." 21 U.S.C. § 602 (emphasis added):

§ 602. Congressional statement of findings

> Meat and meat food products are an important source of the Nation's total supply of food. . . . Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, ***destroy markets*** for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and ***result in sundry losses to livestock producers*** and processors of meat and meat food products, as well as injury to consumers. The unwholesome, adulterated, mislabeled, or deceptively packaged articles ***can be sold at lower prices and compete unfairly*** with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of ***consumers*** and the public generally. . . . [R]egulation by the Secretary and cooperation by the States . . . [is] appropriate to ***prevent and eliminate burdens upon such commerce***, to effectively regulate such commerce, and to protect the health and welfare of ***consumers.***

Id. (emphasis added).

The Congressional statement of findings above invokes the goal of halting *anti-competitive forces in the marketplace no* fewer than four (4) times—*more than in the Sherman Antitrust Act*. 15 U.S.C. § 1 (1890).

Stanko's 1984 offenses were not only violations of a statutory scheme expressly aimed at anti-competitive forces in the marketplace. They involved specific conduct which harmed competitors, as the Tenth Circuit Court of Appeals expressly found:

> The principal effect of all the crimes committed was that Cattle King reaped great economic rewards. Selling meat which should have been condemned, misdating boxes so that meat could be stockpiled and thus produced more cheaply, all directly benefited Cattle King economically.

Cattle King at 242 (emphasis added).

A plain reading of the Federal Meat Inspection Act refutes any assertion that someone can violate the Act without having an "effect on the consumer or on competition." The Meat Inspection Act does not apply to food safety or fraud in any noncommercial context. No person not associated with a commercial meat business can be charged or convicted under its provisions. Moreover, the Act *exempts* all personal, household, and employee meat production and processing not intended for commercial sale. 21 U.S.C. § 623(a).

The Act places no duties and imposes no legal obligations upon a person not engaged in the production, retailing or management of a business enterprise. No private remedy or right of action exists under the Meat Inspection Act's civil provisions. *Mario's Butcher Shop & Food Center, Inc. v. Armour & Co.*, 574 F.Supp. 653 (N.D.Ill. 1983).

V. ALL PUBLISHED CASE LAW INTERPRETING THE SCOPE OF 921(a)(20) CLEARLY SUPPORTS STANKO'S CONTENTION THAT AN FMIA CONVICTION FALLS WELL WITHIN THE 921(a)(20) EXCLUSION.

Only three published opinions have ever analyzed the scope of § 921(a)(20): *United States v. Meldish*, 722 F.2d 26, 28 (2nd Cir. 1983); *Dreher v. United States*, 115 F.3d 330 (5th Cir. 1997); and *United States v. McLemore*, 792 F.Supp. 96 (S.D.Al. 1992). *McLemore* overturned a conviction under 18 U.S.C. § 922(g) where the defendant's prior conviction involved rolling back the odometers of used cars to defraud buyers. The Court held that McLemore's offense qualified under the exclusion even though it also constituted fraud or other common law crimes.

Although Dreher and Meldish failed to qualify under the exclusion, the *rule* of both cases qualifies Stanko's prior offense as an exempt conviction for Gun Control Act purposes. In each case, the claimant argued that his conviction stemmed from underlying facts that involved business affairs. Dreher claimed that his mail fraud conviction involved an underlying scheme for rigging a business bidding process; Meldish argued that his conviction for falsifying a customs declaration was related to a jewelry business. In both cases, the courts applied an entirely mechanical test: the 921(a)(20) business exclusion applies to prior convictions where the

elements required for conviction involved a business regulation nexus. This test clearly exonerates Stanko; indeed, few offenses would more obviously qualify under the rules established in *Meldish* and *Dreher*.

VI. THE DISTRICT COURT'S HOLDING THAT STANKO'S 1984 CONVICTION DOES NOT QUALIFY UNDER THE EXCLUSION BECAUSE IT WAS "FRAUD-RELATED" IS UNTENABLE BECAUSE THE 921(a)(20) EXCLUSION PLAINLY INCLUDES FRAUD-RELATED FEDERAL AND STATE OFFENSES PERTAINING TO ANTITRUST VIOLATIONS, UNFAIR TRADE PRACTICES, RESTRAINTS OF TRADE, OR OTHER SIMILAR OFFENSES RELATING TO THE REGULATION OF BUSINESS PRACTICES.

The District Court's holding is essentially the same argument the government made in *United States v. McLemore*, 792 F.Supp. 96 (S.D.Al. 1992). In *McLemore*, the government argued that a defendant's previous conviction for rolling back car odometers "has its origins in common law fraud by deception" and was thus not a business-related offense. The *McLemore* court found that odometer rollback qualified as business-regulation-related even if it also constituted fraud.

Fraud, though a free-standing federal crime, is also a component of many other federal regulatory schemes. Indeed, fraud is a component of federal antitrust law, as well as restraint-of-trade law and unfair-trade-practice law. Many antitrust prosecutions involve fraud allegations. *See*

Pfizer, Inc. v. Gov't of India, 434 U.S. 308 (1978) (price fixing, market division, and fraud upon the Patent Office as an antitrust violation).; *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268 (5th Cir. 1954) (allegation of fraud as restraint of trade); *Atlantic Heel Co. v. Allied Heel Co*., 284 F.2d 879 (1st Cir. 1960) (antitrust violation for, inter alia, fraudulently misrepresenting one's own company as a branch of another to obtain credit). *See also American Tobacco Co. v. People's Tobacco Co.*, 204 F.58 (5th Cir. 1913); *United States v. Lang*, 766 F.Supp. 389 (D.Md. 1991); *Woods Exploration & Production Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971); *Marketing Assistance Plan, Inc. v. Assoc. Milk Producers*, 338 F.Supp. 1019 (S.D.Tex. 1972); *Outboard Marine Corp. v. Pezetel*, 474 F.Supp. 168 (C.D.Del. 1979); *TransKentucky T.R.R. v. Louisville & N.R.*, 581 F.Supp. 759 (E.D.Ky. 1983); *In re Wheat Rail Freight Rate Antitrust Litigation*, 579 F.Supp. 510 (N.D. Ill. 1983) (the last five cases involving fraudulent presentation of data to government agencies or officials). The Supreme Court has expressly pronounced that fraud can constitute an antitrust violation. *Walker Process Equipment v. Food Machinery & Chemical Corp*., 382 U.S. 172, 175-177 (1965); *United States v. Singer Mfg. Co*., 347 U.S. 174 (1963).

Fraud in business practices is an unfair trade practice by definition, and is specifically proscribed by the texts of dozens of state unfair trade practice laws. *See, e.g.*, California Business and Professions Code, at § 17200 (2006) (defining "unfair competition" as **"**any unlawful, unfair or fraudulent business act or practice"). Cal. Food & Agr. Code § 63101 (2006) ("It is the declared policy of the state to eliminate fraud**,** misinformation, deception, and ***other*** *unfair trade practices* that have existed in the processing strawberry industry . . ") (emphasis added). See also Mass. Gen. Laws ch. 93A (fraud an unfair trade practice); New Hampshire Consumer Protection Act, RSA 358-A:1 et seq**;** Code of Alabama *§ 8-12-1(fraud* in trademarks an *unfair trade practice);* Alaska Stat. § 45.50.471(b) (2006) (fraud in sale of goods or services is unlawful as an "unfair or deceptive act or practice in the conduct of trade or commerce"); Ark.C.A. § 4-88-107, 108 (2006) (fraud or misrepresentation proscribed as "Deceptive and unconscionable trade practice"); Colorado Rev. Stat. § 6-1-304(1)(d)-(h) (fraud in telemarketing a violation of the "Fair Trade and Restraint of Trade" act).

The case law is also in agreement on this point. See, e.g., *Lemelson v. Synergistics Research Corp***.,** 504 F. Supp. 1164 (S.D.N.Y. 1981) (allegation of fraud as restraint of trade and unfair trade practice). *See also Continental*

Paper & Bag Corp. v. Jacksonville Paper Co., 165 So. 216 (Ala. 1936) (fraudulent trademark is unfair trade practice under Alabama's unfair trade act); *People ex rel. Mosk v. National Research Co*., 20 Cal.Rptr. 516 (3rd Dist. 1962) ("Rules of unfair competition are based, not only on [property rights], but also on right of public to protection from fraud and deceit"); *Stires v. Carnival Corp*., 243 F.Supp.2d 1313 (M.D.Fla. 2002) (fraud an unfair trade practice, but must be pled with particularity); *Grocery Mfrs. of America, Inc. v. Gerace*, 581 F. Supp. 658, 671 (S.D.N.Y. 1984) (New York's food labeling regulations aimed at promoting "fair competition by preventing fraud and deception," but the labeling provisions "are preempted by federal [labeling] regulations").[2]

VII. LENITY AND VOID-FOR-VAGUENESS PRINCIPLES WHICH MUST BE APPLIED IN THE INTERPRETATION OF CRIMINAL STATUTES REQUIRE THAT ANY QUESTION OF INTERPRETATION BE RESOLVED IN FAVOR OF STANKO.

Admittedly, 921(a)(20) does leave room for rival interpretations. But the law requires that where more than one interpretation of a word or phrase

[2] Conversely, courts have held that in the absence of fraud, no business can be engaged in unfair trade practices in some contexts. *See, e.g*., Olin Mathieson Chem. Corp. v. Francis, 301 P.2d 139 (Colo. 1956) (taking unusually small profits not an unfair trade practice, unless fraud is involved). And in some cases a showing of fraud is required to establish an antitrust claim. Justice Potter Stewart made clear in *California Motor Transport Co. v. Trucking Unlimited***,** 404 U.S. 508 (1971) that absent a suggestion of "perjury, or fraud, or bribery," a business cannot be subjected to antitrust enforcement for advocating license denials for its competitors. *Id.* at 517 (Stewart, J., concurring).

exists, courts must apply the interpretation that favors a criminal defendant. *United States v. Bass*, 404 U.S. 336, 347 (1971), quoting *Lewis v. United States*, 401 U.S. 808, 812 (1971). See also *Bell v. United States*, 349 U.S. 81 (1955). "The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982). When criminal penalties are at stake, the strictest test in favor of lenity is warranted. *Id*. at 499.

Lenity and anti-vagueness principles make a criminal imposition void for vagueness as applied if even one reasonable interpretation exonerates a defendant. *See Shoemaker v. State of Arkansas*, 38 S.W.3d 350 (Ark. 2001). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Criminal or penal statutes must be interpreted according to the rule of lenity. *See Crandon v. United States*, 494 U.S. 152, 158 (1990). In order to survive a vagueness challenge, a penal statute must define an offense with sufficient clarity so that ordinary people can understand what conduct is prohibited and in a manner that does

not encourage arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

Stanko submits also that the District Court's rule—that Section 921(a)(20)(A) exempts only business-related offenses involving laws with a specific direction, goal, or objective—would make the statute void for vagueness because knowledge of the legislative *history and purposes* of a law is something that cannot be expected of a person of common intelligence. *See Springfield Armory v. City of Columbus*, 29 F.3d 250, 253 (6th Cir. 1994). *See also, In Re: Initiative Petition*, 46 P.3d 123 (Ok. 2002) (striking down a proposed law that would require a person of common intelligence to perform exhaustive research to know his legal boundaries). "A vague statute's prohibitions become clear only after 'courts [have] proceeded on a case-by-case basis to separate out constitutional from unconstitutional areas of coverage." *Id*.

VIII. THE EXCLUSION FOUND AT 18 U.S.C. § 921(a)(20) IS PART OF THE STATUTORY DEFINITION OF "CRIME PUNISHABLE BY IMPRISONMENT FOR A TERM EXCEEDING ONE YEAR," AND THUS STANKO WAS WRONGFULLY CONVICTED BY A JURY THAT DID NOT PROPERLY CONSIDER EACH ELEMENT OF THE OFFENSE.

Section 921(a)(20)(A) expressly excludes from the category of crimes punishable by imprisonment for a period exceeding one year "any Federal or State offenses pertaining to antitrust violations, unfair trade practices,

restraints of trade, and other similar offenses relating to the regulation of business practices." Because the exclusion clause is part of the statutory definition of the offense described in 18 U.S.C. § 922(g), it is an element of the crime which must be proved beyond a reasonable doubt.

The District Court's position was that the application of § 921(a)(20)(A) was a 'legal' question,[3] and that the jury's historic role of deciding 'all the elements of a criminal offense,' *e.g.*, *Estelle* v. *McGuire*, 502 U.S. 62, 69 (1991); *Patterson* v. *New York*, 324 U.S. 197, 210 (1977), applies only to factual components of the essential elements. This position was resoundingly rejected by the Supreme Court in *United States v. Gaudin*, 515 U.S. 506 (1995), which found that all elements required for conviction—even those with so-called 'legal' aspects—must go to the jury. To hold otherwise would allow courts to issue directed verdicts of guilt on essential elements, and defy the meaning and purpose of the Fifth Amendment right to due process and the Sixth Amendment right to a jury trial. *Id.*

[3] The Appellant notes that in pretrial orders prior to April 12, 2006, the District Court wrote that the applicability of the business exclusion contained fact elements. In fact, the Court held a full day evidentiary hearing on April 10, 2006, in which fact witnesses provided testimony regarding the Federal Meat Inspection Act, meat processing practices, FMIA regulatory practices, the Appellant's 1983 conduct, and the applicability of the business exclusion to the facts. See documents #47, 246, 247, and 249.

The District Court's jury instruction in this case—that the allegation was "being a felon . . ." and that the word felony was defined as "a crime punishable by imprisonment for a term exceeding one year," Doc. 269, Instructions 11 and 12—essentially crafted a *new federal crime* similar to offenses found in many *state* criminal codes. But Congress was explicit in the definition of terms used in the Gun Control Act. The chosen words were all vetted through a contentious legislative process. *See* Hardy, *supra*.

IX. NOR DID THE GRAND JURY INDICTMENT PROPERLY CHARGE STANKO WITH THE OFFENSE

Finally, the Appellant sought unsuccessfully on numerous occasions to obtain grand jury records indicating whether the grand juries that issued the three indictments in this case (documents 14, 58, and 220) were instructed regarding the business exclusion, and to dismiss the indictments for failure to properly instruct the grand juries and state the offense in the indictment. On two occasions, the Appellant sought interlocutory appeals (documents 48 and 252) to resolve this question, both of which were unsuccessful.

The text of the indictment upon which Stanko was prosecuted is barren of any mention of the full statutory definition provided by Congress

in 18 U.S.C. § 921(a)(20)(A). The Appellant submits that these flaws render the indictment and conviction in this case fundamentally defective.

CONCLUSION

By any known legal standard, Stanko's 22-year-old conviction for conspiracy to violate the Federal Meat Inspection Act is a Federal or State offense pertaining to antitrust violations, restraints of trade, unfair trade practices, or other similar offenses relating to the regulation of business practices under 18 U.S.C. § 921(a)(20)(A) and cannot constitute a predicate offense for a prosecution for unlawful possession of firearms and ammunition under 18 U.S.C. § 922(g). Accordingly, Stanko is entitled to full reversal of his conviction in this case.

Respectfully submitted:

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ADDENDUM

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APPENDIX

Excerpts from David T. Hardy, *"The Firearms Owners' Protection Act: A Historical and Legal Perspective,"* 17 Cumb. L. Rev. 585 (1986) (stating that "The 1986 Amendments to the Gun Control Act were the result of a nearly-unparalleled legislative battle").