No. 17-9560

IN THE SUPREME COURT OF THE UNITED STATES

HAMID MOHAMED AHMED ALI REHAIF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in a prosecution for possession of a firearm and ammunition by an alien who is unlawfully present in the United States, in violation of 18 U.S.C. 922(g)(5), the government must prove that the person who knowingly possessed a firearm also knew that he was unlawfully in the United States.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 888 F.3d 1138.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 2018. The petition for a writ of certiorari was filed on June 21, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on

two counts of possession of a firearm and ammunition by an alien who is unlawfully in the United States, in violation of 18 U.S.C. 922(g)(5) and 924(a)(2). Judgment 1. The district court sentenced petitioner to 18 months of imprisonment and two years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-20a.

1. In July 2013, petitioner, a citizen of the United Arab Emirates, received an F-1 nonimmigrant student visa to study mechanical engineering at the Florida Institute of Technology (FIT). Pet. App. 2a. After three semesters at FIT, petitioner was academically dismissed. Id. at 3a. On January 21, 2015, FIT sent petitioner an email informing him of his dismissal and stating that his "immigration status will be terminated on February 5, 2015" unless he transferred institutions or voluntarily departed the United States before that date. Ibid. Petitioner took no action, and the Department of Homeland Security terminated his status on February 23, 2015. Ibid.

On December 2, 2015, petitioner visited a shooting range in Melbourne, Florida. Pet. App. 3a. While there, he purchased a box of ammunition and fired two guns, one of which he rented for one hour. Ibid. Both of the firearms that petitioner used were manufactured in Austria before importation to the United States through Georgia; the ammunition was manufactured in Idaho. Ibid.

On December 8, 2015, an employee at the Melbourne hotel where petitioner was staying called the police to report that petitioner was acting suspiciously. Pet. App. 3a. An FBI agent followed up on the tip and interviewed petitioner. Ibid. During their conversation, petitioner admitted to the agent that he had fired two firearms at the shooting range and that he was aware that his student visa had expired. Id. at 3a-4a. Petitioner consented to a search of his hotel room, which turned up the remaining ammunition that petitioner had purchased at the shooting range six days earlier. Id. at 4a.

2. A grand jury in the Middle District of Florida indicted petitioner on two counts of possession of a firearm or ammunition by an alien who is unlawfully in the United States, in violation of 18 U.S.C. 922(g)(5) and 924(a)(2). Indictment 1-2. Section 922(g)(5) prohibits "an alien * * * illegally or unlawfully in the United States" from possessing a firearm or ammunition that has traveled in interstate commerce. 18 U.S.C. 922(g)(5)(A). Pursuant to 18 U.S.C. 924(a)(2), "[w]hoever knowingly violates" Section 922(g) "shall be fined as provided in this title, imprisoned not more than 10 years, or both."

At trial, the government asked the district court to instruct the jury that "[t]he United States is not required to prove that the defendant knew he was illegally or unlawfully in the United States." D. Ct. Doc. 53, at 33 (May 3, 2016). Petitioner objected

and asserted that the government bore the burden of proving both that petitioner knowingly possessed the firearms and ammunition and that, at the time of possession, he was aware of his unlawful immigration status. Id. at 33-34; Pet. App. 4a-5a. The district court overruled petitioner's objection. Pet. App. 5a.

The jury found petitioner guilty on both counts. Verdict 1. The district court sentenced petitioner to 18 months of imprisonment, to be followed by two years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1a-20a. The court identified three elements of an 18 U.S.C. 922(g) violation: the status element (whether "the defendant falls within one of the categories listed in the § 922(g) subdivisions"); the possession element (whether "the defendant possessed a firearm or ammunition"); and the jurisdiction element (whether "the possession was 'in or affecting [interstate or foreign] commerce'"). Pet. App. 8a (quoting 18 U.S.C. 922(g)) (brackets in original). The court adhered to its prior decision in Jackson v. United States, 120 F.3d 1226 (1997), which had determined that conviction for a criminal violation of Section 922(g) does not require proof of a defendant's knowledge of his own status (there, as a felon). Pet. App. 11a & n.2. The court indicated that it would recognize a mistake-of-fact defense, but observed that "such defense is not alleged here." Id. at 15a n.5.

The court of appeals reasoned that "[t]extual support, prior precedent, congressional acquiescence, and analogous common law" uniformly counseled against applying a mens rea requirement to the status element of 18 U.S.C. 922(g). Pet. App. 17a. The court noted the "longstanding uniform body of precedent holding that the government does not have to satisfy a mens rea requirement with respect to the status element of § 922," id. at 12a, and observed that, "despite ample opportunity to do so, Congress has never revisited the issue" in light of this prevailing judicial construction, id. at 13a. And it explained that, "even at common law and early American law, the government did not have the burden of proving that the defendant knew a specific fact or detail about himself." Id. at 14a.

ARGUMENT

Petitioner renews his contention (Pet. 5-15) that conviction under 18 U.S.C. 922(g)(5) requires the government to prove both that he knowingly possessed a firearm or ammunition and that he knew he was not authorized to be in the United States at the time of the possession. Like the courts below, every circuit to consider the question has determined that a conviction under Section 922(g) requires proof that the defendant knowingly possessed a firearm, but not proof that he knew his own status. In the absence of a circuit conflict, this Court has repeatedly declined to review that issue. And this case would be a poor

vehicle for considering the question in any event because petitioner acknowledged that he was aware that his visa had expired as of the time he possessed the firearms and ammunition. The petition for a writ of certiorari should be denied.

1. As petitioner acknowledges (Pet. 6), every court of appeals that has addressed the question over the past 30 years has determined that Sections 922(g) and 924(a)(2) require proof that (1) the defendant had a status listed in Section 922(g), (2) the defendant knowingly possessed a firearm, and (3) the firearm traveled in interstate commerce. See United States v. Smith, 940 F.2d 710, 713 (1st Cir. 1991); United States v. Huet, 665 F.3d 588, 596 (3d Cir.), cert. denied, 568 U.S. 941 (2012); United States v. Langley, 62 F.3d 602, 604-608 (4th Cir. 1995) (en banc), cert. denied, 516 U.S. 1083 (1996); United States v. Rose, 587 F.3d 695, 705-706 & n.9 (5th Cir. 2009) (per curiam), cert. denied, 559 U.S. 1019 (2010); United States v. Olender, 338 F.3d 629, 637 (6th Cir. 2003) (per curiam); United States v. Lane, 267 F.3d 715, 720 (7th Cir. 2001); United States v. Kind, 194 F.3d 900, 907 (8th Cir. 1999), cert. denied, 528 U.S. 1180 (2000); United States v. Miller, 105 F.3d 552, 555 (9th Cir.), cert. denied, 522 U.S. 871 (1997), abrogated on other grounds by Caron v. United States, 524 U.S. 308 (1998); United States v. Games-Perez, 667 F.3d 1136, 1142 (10th Cir. 2012), cert. denied, 571 U.S. 830 (2013); Jackson, 120

F.3d at 1229; United States v. Bryant, 523 F.3d 349, 354 (D.C. Cir. 2008).[1]

"[D]espite ample opportunity to do so, Congress has never revisited the issue." Pet. App. 13a. And this Court has repeatedly declined requests to review the question presented and similar questions, including in cases involving arguments that support the position petitioner presses. See Games-Perez, 667 F.3d at 1142; see also, e.g., Swaggerty v. United States, 138 S. Ct. 2649 (2018) (No. 17-7458); Fernandez v. United States, 138 S. Ct. 2642 (2018) (No. 17-8884); Beasley v. United States, 138 S. Ct. 1583 (2018) (No. 17-8195); Huett v. United States, 138 S. Ct. 1452 (2018) (No. 17-7946); Arthurs v. United States, 137 S. Ct. 254 (2016) (No. 16-5630); Potts v. United States, 566 U.S.

[1] As these decisions reflect, the majority of prosecutions under Section 922(g) concern Subsection (1), prohibiting firearm possession by felons. But the courts of appeals have construed the statutes in the same way for defendants whose status bars them from firearm possession under other paragraphs of Section 922(g). See, e.g., United States v. Butler, 637 F.3d 519, 523-525 (5th Cir.) (person discharged from Armed Forces under dishonorable conditions under Section 922(g)(6)), cert. denied, 565 U.S. 1092 (2011); United States v. Hancock, 231 F.3d 557, 562-563 (9th Cir. 2000) (person convicted of misdemeanor crime of domestic violence under Section 922(g)(9)), cert. denied, 532 U.S. 989 (2001); United States v. Hutzell, 217 F.3d 966, 967-968 (8th Cir. 2000) (same), cert. denied, 532 U.S. 944 (2001); United States v. Kafka, 222 F.3d 1129, 1131-1133 (9th Cir. 2000) (person subject to restraining order under Section 922(g)(8)), cert. denied, 532 U.S. 924 (2001); United States v. Montero-Camargo, 177 F.3d 1113, 1120 (9th Cir. 1999) (unlawfully present alien under Section 922(g)(5)), opinion withdrawn, 192 F.3d 946, reinstated in part by en banc opinion, 208 F.3d 1122, 1128 n.8 (2000).

923 (2012) (No. 11-6414); Coney v. United States, 562 U.S. 949 (2010) (No. 09-9714); Brent v. United States, 558 U.S. 829 (2009) (No. 08-9319). The same course is appropriate here.

a. For 80 years, federal law has prohibited certain categories of individuals from receiving or possessing firearms. Enacted in 1938, the Federal Firearms Act, ch. 850, § 2(f), 52 Stat. 1251, made it "unlawful for any person who has been convicted of a crime of violence * * * to receive any firearm" transported in interstate commerce. In 1968, Congress prohibited firearm possession by (1) all felons; (2) individuals dishonorably discharged from the armed forces; (3) individuals adjudged mentally incompetent; (4) individuals who have renounced their citizenship; and (5) aliens unlawfully within the United States. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Tit. VII, § 1202(a), 82 Stat. 236.

In 1986, Congress consolidated various firearm provisions of Title 18, and in the process transferred the prohibitions on firearm possession to their current statutory location in 18 U.S.C. 922(g). See Firearms Owners' Protection Act (FOPA), Pub. L. No. 99-308, § 102(6), 100 Stat. 452. Section 922(g) makes it "unlawful for any person" in one of nine enumerated categories -- including aliens "illegally or unlawfully in the United States" -- "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any

firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. 922(g) and (g)(5)(A). A person who "knowingly violates" Section 922(g) "shall be fined * * * , imprisoned not more than 10 years, or both." 18 U.S.C. 924(a)(2).

b. Determining "the mental state required for commission of a federal crime requires 'construction of the statute and ... inference of the intent of Congress.'" Staples v. United States, 511 U.S. 600, 605 (1994) (citation omitted). Section 922(g), like its statutory predecessors, does not itself expressly require any particular mental state. Nevertheless, consistent with the understanding that a federal criminal defendant must "know the facts that make his conduct illegal," ibid.; see Morissette v. United States, 342 U.S. 246, 250 (1952), federal courts have long interpreted statutes prohibiting felons and other categories of individuals from possessing firearms to require that the defendant knowingly possessed a firearm, see United States v. Dancy, 861 F.2d 77, 81 (5th Cir. 1988) (per curiam). Federal courts have not, however, required proof that a defendant who knowingly possessed a firearm knew of his own status. See ibid. (collecting cases); see also Langley, 62 F.3d at 604 (collecting additional cases).

When Congress transferred the prohibitions on firearm possession to Section 922(g) in 1986, it provided that the

penalties set forth in Section 924(a)(2) apply to those who "knowingly" violate Section 922(g). FOPA § 104(a)(1), 100 Stat. 456. Courts of appeals have reasoned that the 1986 amendments should be read as codifying the uniform prior judicial interpretation that the government must prove only that the defendant in such a prosecution is in one of the covered categories and knowingly possessed a firearm, not that the defendant knew of his own status. See Langley, 62 F.3d at 604-606. As the court of appeals stated, Congress' "addition of a mens rea identical to that already imposed by courts does not suggest a change in meaning." Pet. App. 12a; see Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").

Courts of appeals have similarly read the legislative history of the 1986 amendments as indicating that "Congress intended to incorporate former law when it expressly introduced the knowledge element." Dancy, 861 F.2d at 81; see United States v. Sherbondy, 865 F.2d 996, 1002 (9th Cir. 1988). In particular, courts of appeals have reasoned that if Congress intended to depart from the uniform prior judicial interpretation, Congress "would have made clear its intention to do so." Langley, 62 F.3d at 606.

Courts of appeals interpreting Section 922(g) have also relied on general principles of federal criminal intent. A mens rea requirement need not apply to every element in a federal

criminal statute; courts "read into the statute 'only that mens rea which is necessary to separate wrongful conduct from "otherwise innocent conduct."'" Elonis v. United States, 135 S. Ct. 2001, 2010 (2015) (citation omitted). Courts of appeals have reasoned that this "'presumption of mens rea' for an element of an offense carries far less force when there is little 'opportunity for reasonable mistake' about that element" and "[a] defendant's knowledge of his own status offers little room for 'reasonable mistake.'" Pet. App. 17a (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 68 (1994)); see, e.g., Langley, 62 F.3d at 606; United States v. Capps, 77 F.3d 350, 353 (10th Cir.), cert. denied, 518 U.S. 1027 (1996). Indeed, the courts have observed that this Court's precedents have required that "the government prove mens rea for elements of an offense that concern the characteristics of other people and things," Pet. App. 15a-16a, but that "no precedent" of this Court "requires the government to prove that the defendant knew of his own status," id. at 17a.

Petitioner's case is illustrative of that reasoning. Petitioner entered the country under an F-1 nonimmigrant student visa expressly conditioned on his pursuit of a full course of study, and he signed a Certificate of Eligibility "certifying that he agreed to comply with the terms and conditions of his admission." Pet. App. 2a-3a. Yet at the time he unlawfully possessed the firearms and ammunition in this case, petitioner had

been academically dismissed from the Florida Institute of Technology for nearly a year and had been notified that his immigration status would be terminated unless he enrolled in a different institution. Id. at 3a. Indeed, petitioner admitted to an FBI agent that he knew that his student visa -- his sole basis for lawful presence in the country -- was no longer valid at the time he possessed the firearms and ammunition. Id. at 3a-4a.

2. Not only does the uniform determination of the courts of appeals not warrant this Court's review, but this case is not a suitable vehicle for considering the mens rea required by Sections 922(g) and 924(a)(2) for two further reasons.

First, as noted, the undisputed facts demonstrate that petitioner knew of his restricted status. He does not dispute that, upon receiving his student visa, he certified that he would comply with the visa's condition requiring him to pursue a full course of study. He acknowledges (Pet. 2) that he was advised by email of the termination of his immigration status after he was academically dismissed from FIT, 11 months before he possessed two firearms and purchased ammunition. And the FBI agent who interviewed petitioner shortly thereafter testified that petitioner "admitted * * * that he was aware that his student visa was out of status" at the time he visited the shooting range. Pet. App. 3a-4a. Contrary to petitioner's assertion (Pet. 12), he

has no "viable defense" that he lacked the mens rea he contends should be required under the statute.

Second, the majority of prosecutions under Section 922(g) concern paragraph (1), which prohibits possession of firearms and ammunition by felons, but petitioner was prosecuted under paragraph (5), which prohibits possession by aliens "illegally or unlawfully in the United States." 18 U.S.C. 922(g)(5). In the district court, petitioner himself distinguished between the two provisions. See D. Ct. Doc. 53, at 33 (arguing that the presumption that an individual knows of his own felon status should not apply to aliens illegally present in the United States). Further review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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