No. 18-6755

IN THE

SUPREME COURT OF THE UNITED STATES

DAEDERICK LACY

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY TO UNITED STATES' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The crime of Transportation with Intent to Engage in Criminal Sexual Activity under 18 U.S.C. 2423(a) reads:

> A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned for not less than 10 years or for life.

Does the statute require proof that the defendant knew the individual transported had not attained the age of 18 years?

Does the statute require proof that the dominant purpose of the trip was to take a minor across state lines to engage in prostitution, or other criminal sexual activity?

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Earlier this week, the Court heard oral argument in *Rehaif v. United States,* 17-9560. The question presented in *Rehaif* was whether the government must prove that the defendant had the requisite scienter, or *mens rea,* regarding his status in a possession of firearm by illegal alien case charged under 18 U.S.C. 922 (g). The statute did not have a scienter requirement in its operative provision; rather, the penalty provision, 924(a), made it a crime for anyone who "knowingly violates" 922(g), as well as several other similarly operative provisions contained in the statute. In this case, 18 U.S.C. 2423(a)'s language is much more direct: "A person who knowingly transports an individual who has not attained the age of 18 years in interstate…commerce, with intent that the individual engage in prostitution…shall be fined under this title and imprisoned for not less than ten years or life." The government presented no evidence Petitioner knew the victim involved, a girl three months shy of her eighteenth birthday, was underage.

The Court at the moment is undoubtedly well-versed in the controlling cases involving how to interpret a criminal statute containing the word "knowingly." "(C)ourts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Flores-Figueroa v. United States,* 556 U.S. 646, 652 (2009). In his opening brief, Petitioner provided the historical list of the most important cases that apply this maxim: *Morissette v. United States,* 342 U.S. 240 (1952); *Liparota v. United States,* 471 U.S. 419 (1985); *Staples v. United States,* 511 U.S. 600 (1994), and *United States v. X-Citement Video, Inc.,* 513 U.S. 64 (1994). There are more, of course. *United States v. United States Gypsum Co.,* 438 U.S. 422, 436 (1978) ("The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence."). The Court continues to recognize this principle by decisions in just the past five years. *Torres v. Lynch,* 576 U.S. ___, 136 S.Ct. 1619, 1630 (2016) ("A defendant (must) possess a *mens rea,* or guilty mind, as to every element of an offense."); *Elonis v. United States,* 575 U.S. ___, 135 S.Ct. 2001, 2011 (2015)

("What (Elonis) thinks does matter."). In every one of these cases, the word "knowingly" appeared in a less grammatically direct way than in Petitioner's case. In most cases, there were structural oddities similar to *Rehaif's* case. In *Staples* or *Elonis,* the word "knowingly" did not even appear at all. The only generally recognized exception to this "elemental rule of interpretation," *United States v. Games-Perez,* 667 F.3d 1136, 1144 (10th Cir. 2012), that "knowingly" apply to each element, is when the element that must be proved is jurisdictional. *United States v. Yermian,* 468 U.S. 63, 68 (1984) (jurisdictional provisions "need not contain the same culpability requirement as other elements of the offense").

One "significant consideration" requiring proof a defendant "knowingly" violated each substantive element of a felony offense is the harshness of the prospective sentence. *Staples,* 511 U.S. at 616 (1994). A defendant convicted of the illegal alien in possession of a firearm statute like *Rehaif* faces up to a 10 year penalty under 18 U.S.C. 924(a), a similar sentence this Court found compelling under the scienter doctrine in *Staples,* 511 U.S. at 616 (up to 10

years in prison) and *X-Citement Video, Inc.,* 513 U.S. at 72 (up to ten years in prison as well as a substantial fine and forfeiture). A defendant convicted under Petitioner's crime under 18 U.S.C. 2423(a) faces a *mandatory* ten year minimum up to *life* in prison sentence.

Should the Court choose to reverse *Rehaif's* 18 U.S.C. 922(g) conviction based on the *mens rea* requirement set forth in *Flores-Figueroa,* and specifically include that defendants charged under 18 U.S.C. 2423(a) similarly must know that the person transported interstate is eighteen, Petitioner believes that a grant of certiorari in his case would be unnecessary. Based on such a ruling, the Court may similarly reverse Petitioner's 18 U.S.C. 2423(a) conviction, and remand the case to the circuit court with instructions to reverse Petitioner's conviction based on the instructions given to the jury.

Should the Court, however, resolve *Rehaif's* case in some other manner, the Court should grant certiorari in this case, as Petitioner's case involves separate issues that require a separate

resolution. Three such potential issues that distinguish this case from *Rehaif's* may prove important.

The Grammatical Structure of the Statute Is Unambiguous

The grammatical structure of 18 U.S.C. 2423(a) is far more direct than the convoluted structure of 18 U.S.C. 922(g) and 924 (a). The elements are straightforward and presented in a single sentence: a defendant must "know" (1) the person transported is eighteen, (2) that the person was transported interstate, and (3) that the purpose of the transportation was to have the person engage in prostitution. "Statutory interpretation, from beginning to end, requires respect for the text." *Ali v. Federal Bureau of Prisons,* 552 U.S. 214, 228 (2009) (Kennedy, J., dissenting). "Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 340 (1997). "When a statute's language is plain, the sole function of the courts…is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank N.A.,* 530 U.S. 1, 6 (2000). "We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable.

Instead, we must give effect to the text Congress enacted." *Ali,* 552 U.S. at 228. "Congress could have written the law differently than it did, and it is always free to rewrite the law when it wishes." *United States v. Games-Perez,* 695 F.3d 1104, 1118 (10th Cir. 2012) (Gorsuch, J., dissent to *en banc* petition).

In contrast to Petitioner's case, the statutory provision in *Rehaif's* case is unusual. Instead of a straightforward application of the "knowingly" language, the criminal provisions are structured in pieces: 922(g) contains no scienter requirement but sets forth the elements of the crime; 924(a) requires scienter for anyone who "knowingly violates" the earlier enumerated provisions such as 922(g), and then establishes a penalty. The Fourth Circuit in *United States v. Langley,* 62 F.3d 602 (4th Cir. 1995), both by its panel decision, 62 F.3d at 604-05, and in its concurring and dissenting opinion written by Judge Phillips, *id.,* at 610-11, declared the statute "ambiguous." The Ninth Circuit in *United States v. Sherbondy,* 865 F.2d 996, 1001 (9th Cir. 1988), found it "somewhat confusing." An ambiguous statute opens the

door for a court to turn to legislative history to aid in interpreting its meaning. *Games-Perez,* 695 F.3d at 1115.

Should the Court hold that *Rehaif's* case turns on this exception, that the statute was ambiguous and legislative history controlled its interpretation, certiorari should be granted in Petitioner's case, because 18 U.S.C. 2423(a) is plain in its terms. "Whatever weight courts may give to judicial interpretations of predecessor statutes when the current statute is ambiguous, those prior interpretations of now defunct statutes carry no weight when the language of the current statute is clear." *Games-Perez,* 695 F.3d at 1118 (Gorsuch, J., dissent to *en banc* petition). "When the current statute is clear, it must be enforced just as Congress wrote it." *Id.*

18 U.S.C. 2324(a) Requires Petitioner's Knowledge about Another Person

The second distinction between Petitioner's case and *Rehaif's* is that the knowledge requirement made it necessary for Petitioner to know the characteristics of another person, namely the age of the person he was allegedly transporting in interstate commerce.

In contrast, 18 U.S.C. 922(g) requires only that a defendant know *his own status,* namely, whether his permitted alien status had terminated. The Brief in Opposition filed by the government in *Rehaif* appears to support Petitioner's contention that knowledge about another person or thing is an important substantive element. "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,' but that 'no precedent' of this Court 'requires the government to prove that the defendant knew of his own status.'" BIO *Rehaif,* p. 11, quoting *United States v. Rehaif,* 868 F.3d 1138, 1146-47 (11th Cir. 2018).

The cases cited in *Rehaif* illustrate this rule: *Staples,* 511 U.S. 600, 602-03 (defendant must "know" the gun he possessed was capable of automatic fire); *X-Citement Video, Inc.,* 513 U.S. at 78 (defendant must "know" the depiction in question was of a minor); *Flores-Figueroa,* 556 U.S. at 647 (defendant must "know" that the identification belonged to another person) and *Posters 'N' Things, Ltd. v. United States,* 511 U.S. 513, 524 (1994) (defendant must

"know" the items at issue were likely to be used with illegal drugs). *Rehaif,* 868 F.3d at 1146. The rule is designed so there is little "opportunity for reasonable mistake" about the element. *Id.,* quoting *X-Citement Video, Inc.,* 513 U.S. at 72, n. 2. In 18 U.S.C. 922, the distinction may apply to a person in possession of a gun that turns out to be stolen, but not to cases involving whether the person in possession of the gun was a felon. *Langley,* 62 F.3d at 615. In Petitioner's case, as any parent, grandparent, aunt or uncle knows who has watched children interact with their friends, a person can make a "reasonable mistake" about whether a teenager is 18 years old, or three months younger.

Petitioner's Knowledge About Facts Contained in the Element Itself Is Not Excepted from the Rule

The third distinction could involve whether Congress, either expressly or impliedly, excused proof of the element itself. As applied by this Court, the interpretative scienter presumption prevails, unless "some indication of congressional intent, express or implied," to the contrary can be found. See *Staples,* 511 U.S. at 606. When the Court has sought such contrary indication, it has not been willing to find it either in congressional silence on the

particular element in issue, *id.,* at 605, or in ambiguity of statutory text or legislative history. See *X-Citement Video, Inc.,* 513 U.S. at 76-78.

In *Rehaif's* case, the element was whether he "knew" he knew his permitted alien status had terminated. In Petitioner's case, the element was whether Petitioner knew the person he was allegedly transporting across state lines was under eighteen. Triable issues often arise with respect to these critical substantive facts. In *Gamez-Perez,* a felon in possession of a firearm case brought under 922(g), the judge told the defendant at his plea the district court was "not entering a judgment of conviction at this time." *Gamez-Perez,* 667 F.3d at 1138. In *Rehaif's* case, the defendant's foreign student status was terminated by nothing more than an e-mail the government did not prove he ever received. In Petitioner's case, the only witness who testified about the age of the person transported, the Petitioner's roommate, stated he did not suspect the girl was a minor.

The law in all circuits is that no knowledge is required for the "prohibited person" element of 18 U.S.C. 922(g). "(T)he reasonable

expectations of felons are wholly distinct from the reasonable expectations of ordinary citizens." *Langley,* 62 F.3d at 607. "(A) person convicted of a felony cannot reasonably expect to be free from regulation when possessing a firearm." *United States v. Capps,* 77 F.3d 350, 353 (10th Cir. 1996). "(T)he government does not have to satisfy a *mens rea* requirement with respect to the status element…that (the) defendant was illegally or unlawfully in the United States." *Rehaif,* 868 F.3d at 913 (11th Cir. 2018).

Similarly, all circuits have held that a defendant need not know the age of the person transported is under eighteen if it is the intent of the defendant to transport the person across state lines for the purpose of prostitution. Many of these circuit courts have reasoned that, since Congress added 18 U.S.C. 2423(a) to a statutory scheme tied to 18 U.S.C. 2421, which prohibits knowingly transporting any individual interstate for the purpose of having that person engage in prostitution, the "evident congressional purpose of specifically prohibiting the same conduct with respect to minors, and attaching a higher sentencing range," was to "provide heightened protection for minors against sexual

exploitation." BIO at 7, citing *United States v. Cox,* 577 F.3d 833, 837 (7th Cir. 2009), *United States v. Taylor,* 239 F.3d 994, 997 (9th Cir. 2001). Such a defendant "who would presumably know he is treading close to the line in transporting a young person to engage in illicit sexual activity – (should) bear the risk that the person transported is underage." *United States v. Daniels,* 653 F.3d 399, 410 (6th Cir. 2011) and *Taylor,* 239 F.3d at 997.

From the start, the grammatical structure of 18 U.S.C. 2423(a) prevents any further inquiry into the statute's legislative history. This Court has not hesitated to give effect to the unambiguous meaning of a congressional command even when all circuits to have addressed the question have failed to abide by the statute's express terms. *Games-Perez,* 695 F.3d at 1125, citing *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 35 (1998); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 177 (1994). While pre-enactment practice "can be relevant to the interpretation of an ambiguous text," it has no force when the text is clear. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank,* 566 U.S. 639, 649 (2012). This is particularly

important in Petitioner's case because *Morissette,* the seminal Supreme Court case involving interpretation of the word "knowingly" in a criminal statute, expressly held that a "vicious will" need not necessarily apply to "sex offenses, such as rape, in which the victim's age was determinative despite defendant's reasonable belief that the girl had reached the age of consent." In *X-Citement Video, Inc.,* the Court noted *Morissette's* "common law presumption of *mens rea*" was expressly excepted in such cases. 513 U.S. at 72, n. 2.

The crime Petitioner is charged with is substantially different from the common law statutory rape cases referenced in *Morissette.* Even if Petitioner had a personal sexual relationship with the person transported, he would not have committed statutory rape in any of the states he allegedly travelled. And "consent" is not involved at all in the sex trafficking statute he was accused of committing. Enacted in 1998, 18 U.S.C. 2423(a) has no common law mandate. Moreover, the statute carries an exceptionally harsh ten-year mandatory minimum to life sentence, which enhanced the need for Congress to create a scienter

requirement. Although some circuit courts have justified exception to the scienter requirement on the basis that a person transporting *any person* across state lines for the purpose of prostitution is not engaged in innocent conduct such that the presumption should apply, see *Taylor,* 239 F.3d at 997, the critical element that separates a defendant from a potential sentence of probation under 18 U.S.C. 2421's zero to ten year statutory range and a life sentence under 18 U.S.C. 2423(a)'s mandatory ten year minimum to life range is the age of the person transported.

Congress was well aware of the importance of the word "knowingly" at the time it wrote 18 U.S.C. 2423(a) in 1998 in addressing sex-related offenses involving minors. This Court had recently ruled in *X-Citement Video, Inc.* in 1994, where the Court found the grammatical structure of the statute, which included the word "knowingly," required the defendant know a person depicted in a sexually explicit image was a minor. Congress, moreover, was well-versed in drafting statutes where minors might be involved in sex offenses. Not long before, in 1977, Congress drafted 18 U.S.C. 2251(a) in such a way to exclude the

production of child pornography from such a scienter requirement that the defendant "know" the victim was a minor. Such contrasting legislation, combined with the unusually harsh sentence imposed, only strengthens the case that Congress deliberately included the knowledge requirement as to the victim's age in 18 U.S.C. 2423(a). *Sosa v. Alvarez-Machain,* 542 U.S. 692, 711 n. 9 (2004) (statute involving contrasting language).

The Court has required that the *mens rea* presumption prevail unless "some indication of congressional intent, express or implied," to the contrary can be found. *Staples,* 511 U.S. at 606. Despite what circuit courts have held, there has been no express or implicit indication by Congress that the "knowingly" requirement was not intended to apply to the "age element" of 18 U.S.C. 2423(a). The legislative history of the statute contains no express indication by anyone – individual legislator or committee – that the "knowingly" requirement was *not* intended to apply to a defendant's knowledge of the minority status of the person transported.

In every respect, Petitioner's case is a more compelling case under this Court's scienter precedents than *Rehaif.* The statute is unambiguous. The knowledge requirement applies to another person. The penalty is harsher. No legislative history exists to contravene the plain language of Congress. If the Court affirms *Rehaif,* and finds it is an exception to the well-established interpretive rule that "knowingly" apply to each element in a statute, the Court should grant certiorari to explain why such factors in Petitioner's case do not matter. Even if the Court reverses *Rehaif,* absent an express indication 18 U.S.C. 2423(a) would similarly apply, the Court should still grant certiorari to prevent the circuit courts' continued exception to the established statutory interpretation rule in 18 U.S.C. 2423(a) cases.

Petitioner's Case Affects Criminal Cases Nationwide

The scienter doctrine initially set out in *Flores-Figueroa,* that when a criminal statute introduces the elements of a crime with the word "knowingly", a court "applies that word to *each element,*" is a simple and important axiom of American jurisprudence. "Federal criminal liability generally does not turn solely on the

results of an act without considering the defendant's mental state." *Elonis,* 135 S.Ct. at 2012. "This is an understanding that 'took deep and early root in American soil.'" *Id.*, quoting *Morissette,* 342 U.S. at 252. Consistency in applying this doctrine to plainly-worded statutes is critical to how courts work throughout this country. See, for example, 47 Okla. Stat. 11-905 (felony offense of "knowingly" driving without a valid license and causing an accident). Any deviation from the rule will almost certainly weaken American criminal jurisprudence and permit a lesser burden of proof to convict. 18 U.S.C. 2423(a) exemplifies how the scienter doctrine should work.

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

William D. Lunn, attorney for Petitioner Daederick Lacy, hereby attests that pursuant to Supreme Court Rule 29, the preceding Reply to United States' Brief in Opposition was served

on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class prepaid and addressed to:

Noel J. Francisco
Solicitor General of the United States
Room 5614
Department of Justice
10th Street and Constitution Avenue, N.W.
Washington, D.C. 20530

and that the envelope was deposited with the United States Postal Service, Tulsa, Oklahoma 74103, on April 29, 2018, and further attests that all parties required to be served have been served.

_/s/_William D. Lunn_
William D. Lunn

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

Subscribed and sworn to before me this 29th day of April, 2019.

_/s/_____

Notary Public

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AFFIDAVIT OF MAILING

WILLIAM D. LUNN, counsel for Daederick Lacy, and a member of the bar of the State of Oklahoma and the United States

Supreme Court bar, attests that he placed the foregoing petition for a writ of certiorari in the United States mail on April 29, 2019.

_/s/_WILLIAM D. LUNN_
William D. Lunn

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

This affidavit of mailing subscribed and sworn to before me this April 29, 2018.

__/s/_____

Notary Public