NO. _____

In The
Supreme Court of the United States

DERRICK MICHAEL ALLEN, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Kearns Davis
Counsel of Record
Daniel D. Adams
Julia C. Ambrose
BROOKS PIERCE MCLENDON HUMPHREY & LEONARD LLP
230 North Elm Street
2000 Renaissance Plaza
Greensboro, North Carolina 27401
(336) 373-8850
kdavis@brookspierce.com
dadams@brookspierce.com
jambrose@brookspierce.com

Counsel for Petitioner

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THE LEX GROUP^{DC} ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

QUESTION PRESENTED

Whether 18 U.S.C. §§ 922(g) and 924 require the government to prove a criminal defendant's *mens rea* as to each substantive element of the enumerated statutory offenses, including the defendant's knowledge of the fact that renders illegal the otherwise constitutionally protected possession of a firearm.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Derrick Michael Allen, Sr. ("Mr. Allen" or "Petitioner") respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's opinion appears at 734 F. App'x 898 (4th Cir. 2018). Pet. App. 1a-2a. The judgment of the United States District Court for the Middle District of North Carolina is found at *United States v. Allen*, No. 1:17-cr-00157-LCB, ECF No. 34 (M.D.N.C. Dec. 11, 2017). Pet. App. 5a-11a.

JURISDICTION

The Fourth Circuit entered the judgment for which review is sought on August 20, 2018 (Pet. App. 3a) and denied rehearing and rehearing en banc on September 18, 2018 (Pet. App. 4a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The federal statutes at issue in this case are 18 U.S.C. §§ 922 and 924. Section 922(g) provides in relevant part:

> It shall be unlawful for any person . . . who is subject to a court order that—(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury . . . 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)(8). Section 924(a) provides in relevant part: "Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both." 18 U.S.C. § 924(a)(2). The full text of both statutes is set forth in the appendix at Pet. App. 12a-42a.

INTRODUCTION

In this case, Petitioner was sentenced to two years in prison for unlawfully possessing a firearm, even though the jury decided that the government failed to prove he knew the only fact that made his possession illegal. This outcome was made possible by decades of circuit precedent that allow the prosecution of gun possession offenses upon a showing of nothing more than a defendant's knowing possession. That body of law—and outcomes like this one—are irreconcilable with the relevant

statutory language, the United States Constitution, and this Court's *mens rea* jurisprudence.

For years, multiple federal courts of appeals have held that the statutory prohibitions on possession of a firearm articulated in 18 U.S.C. § 922(g) require the government to prove a defendant's *mens rea* only as to the element of possession—and not as to any of the other substantive status or condition elements that render otherwise-lawful gun possession illegal. The Fourth Circuit is among them, having held nearly a quarter-century ago in *United States v. Langley*, 62 F.3d 602 (4th Cir. 1995) (en banc), that the government must prove a defendant's knowing possession but not (in that case) his knowledge that he was a convicted felon. *Id.* at 606. In the decades since *Langley* was decided, numerous other federal courts have followed its reasoning. The Fourth Circuit did so in this case, expressly declaring itself bound by *Langley*.

In those intervening years, however, the invalidity of *Langley*'s reasoning—which was heavily rooted in the legislative history of Section 922(g)(1) but paid scant attention to the relevant statutory language—has become increasingly apparent. Then-Judge Gorsuch recognized as much in 2012, when he expressed the view that the Fourth Circuit's conclusion that the government need not prove a defendant knew he was a felon "simply can't be squared with the text of the relevant statutes," which, taken together, condemn only "knowing" violation of the specific prohibitions on gun possession by persons who occupy any of the enumerated statuses. *United States v. Games-Perez*, 667 F.3d 1136, 1143 (10th Cir. 2012) (Gorsuch, J., concurring in the

judgment), *reh'g denied*, 695 F.3d 1104 (10th Cir. 2012) (criticizing *United States v. Capps*, 77 F.3d 350, 352 (10th Cir. 1996), which relied on *Langley* in reaching the same result). As Judge Gorsuch explained (667 F.3d at 1143), this Court has instructed that statutory language such as Section 924(a)'s "knowingly violates" requirement should be "read as applying to all the subsequently listed elements of the crime." *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009). *Langley* and its progeny have, for more than two decades, failed to meaningfully confront the language of Sections 922 and 924 as *Flores-Figueroa* instructs.

That is not the only flaw in the appellate courts' Section 922(g) decisions that calls for this Court's intervention. Equally troubling is *Langley*'s disregard for settled canons of statutory construction that guide the interpretation of ambiguous criminal statutes, including the rule of lenity and the presumption that a statutory *mens rea* requirement is intended to attach to "each of the statutory elements that criminalize otherwise innocent conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994). First articulated long before *Langley*, this Court's teaching that ambiguous or even absent *mens rea* requirements apply to every element that renders lawful conduct unlawful has gained force in the decades since. *See Morissette v. United States*, 342 U.S. 246, 270-71 (1952); *Torres v. Lynch*, ___ U.S. ___, 136 S. Ct. 1619, 1630-31 (2016); *Elonis v. United States*, ___ U.S. ___, 135 S. Ct. 2001, 2009 (2015).

Notwithstanding the clarity of the relevant statutory language and this Court's substantial and growing body of *mens rea* jurisprudence, in the years since *Langley*, the appellate courts have adhered to circuit precedent permitting prosecution of

firearms possession offenses without proof of a defendant's knowledge of the status or condition that rendered otherwise lawful possession illegal.[1] The Fourth Circuit panel followed that pattern here. This case thus squarely presents the issue that Judge Gorsuch identified in *Games-Perez*. Furthermore, it does so based on a split jury verdict that makes plain that the failure to require proof of *mens rea* as to every substantive element of a Section 922(g) offense subjected Petitioner to punishment despite the government's clear failure to prove knowledge with respect to the one element that turned his otherwise lawful, constitutionally protected conduct into a federal criminal offense.

In this case, the jury found that the government did *not* prove Petitioner knew he was subject to a disqualifying court protective order, under Section 922(g)(8), at the time he examined a rifle in a pawn shop. The jury thus acquitted him of lying on his background check application when he disavowed being subject to such an order, even as it simultaneously convicted him of unlawful possession because the trial court's instructions did not require the government to prove, as to the possession count, knowledge of the fact that made his possession unlawful.

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[1] *See* pp. 14-16, *infra*. *Cf. United States v. Rehaif*, 888 F.3d 1138, 1144 (11th Cir. 2018) ("We [are] bound by this decision '[u]nder our prior precedent rule, [which requires us] to follow a binding precedent in this Circuit unless and until it is overruled by this court en banc or by the Supreme Court.'") (quoting *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017)); *United States v. Rose*, 587 F.3d 695, 706 (5th Cir. 2009) (per curiam) ("Because *Flores-Figueroa* does not [unequivocally] direct [overruling circuit precedent consistent with *Langley*], we are bound to follow the prior panel opinion . . . .") (considering sentence imposed under Section 924(e)(1), which contains no *mens rea* requirement, for violation of Section 922(g)(1)). The jurisprudential developments have not been lost, however, on federal trial courts, at least one of which has recognized the need to reconsider circuit jurisprudence governing burdens of proof in Section 922(g) cases. *See* p. 17, *infra*.

The time has come for this Court to bring the body of federal appellate case law into harmony with the statutory language and this Court's decisions of the last twenty-five years. This Court should grant certiorari, clarify the application of the *mens rea* requirement to every substantive element of the offenses described in Section 922(g), and prevent unconstitutional and unjust verdicts like this one.

STATEMENT OF THE CASE

On February 23, 2017, Derrick Allen sought to purchase a firearm. Pet. App. 63a. He visited a local pawn shop—a federally licensed firearms dealer—and, just as any other citizen would do, considered the guns available for purchase. Pet. App. 47a-50a, 63a-65a. He decided to examine a Colt M4 carbine 5.56 caliber rifle. Pet. App. 49a, 64a. He picked up the gun, put it to his shoulder, sighted down its scope, and inspected the magazine. Pet. App. 53a-55a, 70a. He then placed the rifle back on the counter, indicated to the store clerk his interest in making a purchase, and filled out the form—ATF Form 4473—used to conduct a background check. Pet. App. 51a, 65a, 68a.

The ATF form included a question whether Mr. Allen was "subject to a court order restraining [him] from harassing, stalking, or threatening [his] child or an intimate partner or child of such partner." Pet. App. 51a, 68a-69a. He answered in the negative. Pet. App. 51a. The retailer conducted the background check, which revealed that Mr. Allen was, in fact, subject to an order of protection issued six months earlier, in August 2016, in favor of his child's mother. Pet. App. 56a, 60a. On that ground, Mr. Allen's request to purchase the firearm was denied. Pet. App. 56a.

He left the pawn shop, without the rifle and without incident. *Id.* All told, Mr. Allen held the rifle for no more than a few minutes. Pet. App. 53a-55a.

In April 2017, Mr. Allen was charged in a two-count indictment with (1) knowingly possessing a firearm while subject to a court protective order, in violation of 18 U.S.C. §§ 922(g)(8) and 924(a)(2); and (2) knowingly making a material false statement in connection with the attempted purchase of a firearm, in violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(2). Pet. App. 43a-45a.

The sole issue at trial was Mr. Allen's knowledge of the protective order at the time he attempted to purchase the rifle. On the stand, he admitted that he had briefly held the gun in the pawn shop, and he did not dispute that he was, in fact, subject to a court protective order at that time. Pet. App. 65a, 68a-69a. He testified, though, that he had forgotten about the protective order when he filled out Form 4473 in an attempt to purchase the rifle. Pet. App. 65a-69a. The record evidence was ambiguous as to whether Mr. Allen had learned in August 2016 of the entry of the protective order or its terms. Although he attended the hearing that resulted in the order, evidence suggested that he left the hearing before the final order was issued, was never served with a copy of the order, and did not learn of the duration of the order. *See* Pet. App. 58a-62a.

Consistent with Mr. Allen's testimony, the jury found that the government had failed to prove beyond a reasonable doubt that Mr. Allen knowingly made a false statement on Form 4473 in connection with his attempt to purchase the rifle, and therefore acquitted Petitioner of violating Sections 922(a)(6) and 924. Pet. App. 75a-

76a. The jury found Mr. Allen guilty, however, of knowingly possessing a firearm while subject to a court protective order in violation of Sections 922(g)(8) and 924, because the jury instructions required the government to prove Petitioner's knowledge only as to the possession element—and not as to the existence of a court protective order. *Id.*; *see also* Pet. App. 73a-74a. *Cf.* Pet. App. 71a (reflecting that, regarding the false statement charge of which Petitioner was acquitted, the trial court instructed the jury that "knowingly" required proof Petitioner was aware his answer to Form 4473 question was false). Petitioner was sentenced to two years in prison, where he remains incarcerated. Pet. App. 5a-6a.

On appeal, the Fourth Circuit, declaring itself bound by en banc Circuit precedent in *Langley*, concluded that "the Government was required only to establish that Allen knowingly possessed the firearm, not that he knew of his prohibited status." Pet. App. 2a. On that ground, it affirmed his conviction in a two-paragraph, unpublished, per curiam opinion. *Id.* The Fourth Circuit denied Petitioner's request for rehearing or rehearing en banc on September 18, 2018. Pet. App. 4a.

REASONS FOR GRANTING THE PETITION

In the last quarter-century, decisions of the Fourth Circuit and its sister Circuits have created a body of federal appellate case law declining to require proof of *mens rea* as to the substantive, "status" element of firearm possession offenses described in 18 U.S.C. § 922(g). That body of law, which largely developed from *Langley*'s analysis of the indeterminate legislative history of the felon-in-possession provision rather than careful parsing of the statutory language, is irreconcilable with the statute and this Court's *mens rea* jurisprudence.

In the absence of explicit, specific guidance from this Court as to the application of *mens rea* to the substantive elements of Section 922(g) offenses, however, the lower federal courts have resisted calls to reexamine circuit precedent in light of the plain statutory language. The Fourth Circuit declined to do so here. The time has come for this Court to provide that guidance.

I. THIS COURT MUST CLARIFY THAT THE UNAMBIGUOUS STATUTORY LANGUAGE DEMANDS APPLICATION OF *MENS REA* TO EVERY SUBSTANTIVE ELEMENT OF SECTION 922(g) OFFENSES

A. *Langley's* Reasoning Ignored the Clear Statutory Language in Favor of Admittedly Unclear Legislative History That Has No Application Here.

1. The offense of which Mr. Allen was convicted requires proof of three elements: Section 922(g)(8) makes it unlawful for (1) a person subject to certain specified types of court protective orders (2) to possess a firearm (3) that has moved in interstate commerce. 18 U.S.C. § 922(g)(8). Pet. App. 18a.[2] Section 924(a)(2) authorizes punishment upon proof that Mr. Allen "knowingly violate[d]" Section 922(g)(8). Finding itself bound by *Langley*, the Fourth Circuit ruled that Section 924(a)(2)'s *mens rea* requirement required proof of Mr. Allen's knowledge only as to the possession element of the offense. Pet. App. 2a.

[2] Other subsections of Section 922(g) similarly prohibit possession by persons who occupy any of the specified statuses—felons, fugitives from justice, persons adjudicated mentally defective, illegal aliens, those who were dishonorably discharged from the military, persons who have renounced their citizenship, and more. *See* 18 U.S.C. §§ 922(g)(1), (2), (4), (5), (6), (7). Section 922 does not, by itself, impose criminal penalties for violations of its terms; instead, a separate penalty provision specifies penalties for "knowing[]" violations of Section 922(g) (among others). *See* 18 U.S.C. § 924(a)(2).

2. Twenty-three years ago, when the Fourth Circuit first confronted the meaning of the "knowingly" *mens rea* language as applied to subsection 922(g)(1)—the felon-in-possession provision—the *Langley* majority made little effort to assess the pertinent statutory language, rejecting the defendant's textual argument with a brief note of disagreement. *See* 62 F.3d at 604-05. Instead, the Fourth Circuit, like a number of appellate court decisions in its wake (*see* pp. 14-16, *infra*), turned to the legislative history of the Firearms Owners' Protection Act of 1986 ("FOPA"), Pub. L. 99-308, 100 Stat. 49 (1986), which added the "knowingly violates" language to Section 924(a). *See* 62 F.3d at 605-06. *Even considering the legislative history*, the Fourth Circuit found it "far from clear . . . exactly what Congress intended to modify in each section of 922 with its use of the term 'knowingly.'" *Id.* at 605.[3] (*Langley* did acknowledge, however, that FOPA was intended to "'add[] a set of *mens rea* requirements'" to Section 922(g) offenses and that "'it is highly likely that Congress used section 924(a) simply to avoid having to add 'willful' or 'knowing' into every subsection of section 922.'" *Id.* (quoting *United States v. Sherbondy*, 865 F.2d 996, 1001, 1002 (9th Cir. 1988)).) Finding no anchor in the statutory text or the admittedly ambiguous legislative history, the *Langley* majority rested its holding on a presumption that, had Congress intended for FOPA to displace predecessor statutes' permitted prosecution of felons in possession of firearms without proof of knowledge

[3] In dissent, Judge Phillips agreed that the legislative history provided no clear guidance, although he disagreed with the majority that that lack of clarity weighed against requiring *mens rea* as to the facts creating the defendant's prohibited status. *See* 62 F.3d at 616 (Phillips, J., dissenting) ("The first thing to be said about the relevant legislative history is that it contains no *express* indication by anyone—individual legislator or committee—that the 'knowingly' requirement newly inserted in § 924(a)(2) was *not* intended to apply to a defendant's 'felony' status.") (emphases in original).

of their felon status, it would have spoken more clearly. *See* 62 F.3d at 605-06. The en banc Fourth Circuit thus held in *Langley* that the *mens rea* requirement applies only to the element of possession of a firearm, *not* to the defendant's status as a felon (or to the gun's interstate nexus).[4] *See id*. at 604.

Langley's mistakes were several: The decision focused too narrowly on the specific prohibition at issue there (subsection 922(g)(1), the felon-in-possession statute) and its unique legislative history.[5] In so doing, it failed to engage in a reasoned analysis of the "knowingly" language in 924(a)(2) and its necessary application to other subsections of 922(g). It also overlooked the broader context of FOPA, which was enacted to add *mens rea* requirements to the law to counter prior

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[4] The latter holding is correct: The "knowing" requirement does not apply to the interstate commerce element, which is jurisdictional, not substantive. *See*, *e.g.*, *Torres*, 136 S. Ct. at 1630-31 (explaining that substantive and jurisdictional elements "are not created equal for every purpose"; "the substantive elements of a federal statute describe the evil Congress seeks to prevent; the jurisdictional element connects the law to one of Congress's enumerated powers, thus establishing legislative authority"); *United States v. Yermian*, 468 U.S. 63, 68 (1984); *United States v. Feola*, 420 U.S. 671, 677 n.9 (1975); *Games-Perez*, 667 F.3d at 1144 (Gorsuch, J., concurring in the judgment).

[5] For example, in focusing exclusively on the felon-in-possession provision, the *Langley* majority rested its reasoning on the assumption that a felon necessarily must know the fact that makes his possession of a firearm unlawful—i.e., that he is a felon:

> [A]lthough an individual who possesses a firearm, unaware that it is stolen, may commit an "unintentional misstep[ ]," the same cannot be said for the felon (an individual who has pleaded guilty to, or has been convicted by a jury of, a felony) who knowingly possesses a firearm. Clearly, the act of possessing a firearm by a felon does not fall into the class of "unintentional missteps" envisioned by Congress when it enacted [the Firearm Owners' Protection Act].

Langley, 62 F.3d at 605-06 (internal citations and alteration omitted). From that premise, the *Langley* majority found it "highly unlikely that Congress intended to make it *easier* for felons to avoid prosecution by permitting them to claim that they were unaware of their felony status and/or the firearm's interstate nexus." *Id*. at 606 (emphasis in original). It is not at all clear that the *Langley* majority intended its holding to apply beyond the arguably unique felon-in-possession context; in fact, the *Langley* majority grounded its analysis exclusively in the legislative history of three statutes that were predecessors to subsection 922(g)(1) in particular. *See id*. at 604-06.

judicial decisions that imposed strict liability for "technical" violations of firearms possession offenses.[6]

3. Whatever lack of clarity *Langley* and its progeny perceived in the legislative *history*, the statutory *text* is reasonably susceptible of only one reading, particularly when taking into account this Court's instruction as to how such statutory language should be read. Section 924(a)(2) punishes those who (among other things) "knowingly violate" Section 922(g)(8)'s prohibition on the possession of a firearm by a person "who is subject to a court order that . . . restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person[.]" 18 U.S.C. § 922(g)(8).

In *Flores-Figueroa*, decided fourteen years after *Langley*, this Court applied the rules of "ordinary English grammar" to conclude that, when the "word 'knowingly'" appears in a criminal statute, it should be read "as applying to all the subsequently listed elements of the crime." 556 U.S. at 650. The Court there explained:

> In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how

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[6] *See Langley*, 62 F.3d at 618 (Phillips, J., dissenting) ("[I]t is clear from the legislative history that the primary motivation for adding *any* express *mens rea* requirements to the FOPA provisions at issue here was to increase the safeguards against convictions for inadvertent, or careless conduct. That is to say, the general legislative intent indisputably was to move in the direction of extending rather than retracting or leaving in place existing *mens rea* requirements as judicially interpreted.") (emphasis in original); *see also id.* at 611-12 ("One of the most oft-voiced criticisms of the Gun Control Act of 1968 was that, as interpreted by the courts, it permitted individuals to be subjected to criminal prosecution for minor, technical violations of provisions that were essentially regulatory, rather than penal, in nature."); *id.* at 612 n.11 (quoting a committee report explaining that the revisions "remove[ ] the tendency of statutes permitting conviction for inadvertent violations to 'ease the prosecutor's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries'" (quoting *Morissette*, 342 U.S. at 263)).

> the subject performed the entire action, including the object as set forth in the sentence. [. . .]
>
> The manner in which the courts ordinarily interpret criminal statutes is fully consistent with this ordinary English usage. That is to say courts 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.

Id. at 650, 652 (citing *X-Citement Video*, 513 U.S. at 72 & n.2, and *Liparota v. United States*, 471 U.S. 419, 433 (1985)).

4. Three years later, Judge Gorsuch explained the import of *Flores-Figueroa* for application of the *mens rea* requirement to the prohibitions established by Sections 922(g) and 924(a):

> *Capps*'s holding—that the government doesn't have to prove a defendant knew he was a felon—simply can't be squared with the text of the relevant statutes. Section 922(g)(1) makes unlawful the possession of a gun when three elements are met—(1) the defendant was previously convicted of a felony, (2) the defendant later possessed a firearm, and (3) the possession was in or affecting interstate commerce. But § 922(g) doesn't send anyone to prison for violating its terms. That job is left to § 924(a)(2), which authorizes prison terms for "[w]hoever *knowingly violates*" § 922(g). Despite this, *Capps* reads the word "knowingly" as leapfrogging over the very first § 922(g) element and touching down only at the second. This interpretation defies linguistic sense—and not a little grammatical gravity. Ordinarily, after all, when a "criminal statute . . . introduces the elements of a crime with the word 'knowingly,'" we "apply [ ] that word to *each element*."

667 F.3d at 1143 (Gorsuch, J., concurring in the judgment) (quoting *Flores–Figueroa*, 556 U.S. at 652 (emphasis in *Games-Perez*)). Judge Gorsuch traced *Capps*'s (misplaced) logic to *Langley*, which he characterized as reflecting "an epic battle not on the field of plain language but congressional intent"—itself a logical misstep, as

"whatever Congress's *intent* may have been, any statutory interpretation must take reasonable account of the language Congress *actually adopted*." *Games-Perez*, 667 F.3d at 1144 (emphases in original); *see also id*. ("*Langley* nowhere pauses to explain how it might be possible as a matter of plain language to read 'knowingly' as modifying only the second of § 922(g)'s enumerated elements, skipping the first element altogether.").

As Judge Gorsuch recognized in *Games-Perez*, the most natural grammatical reading of Section 924's requirement that a defendant "knowingly" violate Section 922(g) is that he must know that he is violating every substantive element of the underlying statute—which includes, in the case of Section 922(g)(8), knowing of the existence of the court protective order that renders a defendant's otherwise-lawful possession of a firearm criminal. To the extent that the federal courts of appeals have failed to engage in appropriately careful analysis of the clear language of Sections 922(g) and 924(a)—and particularly where they have failed to do so in reliance upon admittedly uncertain legislative history concerning separate statutory provisions—review upon writ of certiorari in this case is essential.

B. The Courts of Appeals Have Erroneously Followed *Langley*'s Misplaced Reliance on Ambiguous Legislative History Rather Than Clear Statutory Language, But Confusion Remains.

1. As reflected by Judge Gorsuch's criticism of *Capps*, the Fourth Circuit is not alone in its misguided interpretation of Sections 922(g) and 924. Since FOPA added the "knowingly violates" language to Section 924(a) in 1986, federal courts have grappled with what facts a criminal defendant must "know" in order to violate

the prohibitions enumerated in Section 922(g). The Fourth Circuit has adhered to its flawed reasoning since *Langley* (as it did in this case), and other federal courts of appeal have either applied the same reasoning, expressly agreed with *Langley*, or compounded the error by extending *Langley* to other subsections of 922(g) without any further analytical reasoning or consideration of whether the *Langley* analysis of Section 922(g)(1) would support such extension. *See*, *e.g.*, *United States v. Bostic*, 168 F.3d 718, 722 (4th Cir. 1999) ("We agree . . . that this court's decision in *Langley* controls in this case [concerning 18 U.S.C. § 922(g)(8)] . . . ."); *Rehaif*, 888 F.3d at 1144 ("The plain text of the statutes does not require that the defendant 'know' every detail outlined in § 922(g). At most, then-Judge Gorsuch's concurrence serves to illustrate that the language of § 922 and § 924(a)(2) is not 'perfectly clear,' and that other tools of interpretation must be employed to ascertain whether a mens rea requirement attaches to the status element."): *United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997) (per curiam) (relying on *Langley*); *Capps*, 77 F.3d at 352 (observing that "no circuit has extended the knowledge component of § 922(g)(1) beyond the act of possession itself") (citing *Langley* and other cases); *United States v. Dancy*, 861 F.2d 77, 81-82 (5th Cir. 1988) (rejecting challenge to jury charge that required proof of defendant's knowledge as to possession but not as to defendant's felon status to establish violation of § 922(g)(1)). *See also*, *e.g.*, *United States v. Butler*, 637 F.3d 519, 524 (5th Cir. 2011) (per curiam) (following circuit precedent to conclude that § 922(g)(6) does not require proof of a defendant's *mens rea* as to his dishonorable discharge); *United States v. Montero-Camargo*, 177 F.3d 1113, 1120 (9th Cir. 1999),

withdrawn by 192 F.3d 946 (9th Cir. 1999), *reinstated on applicable issue by* 208 F.3d 1122, 1128 n.8 (9th Cir. 2000) (en banc) (considering 18 U.S.C. § 922(g)(5), which prohibits possession of a firearm by an illegal alien, and concluding that *mens rea* "pertains only to the item possessed and not to the status of the possessor").

2. Despite that substantial alignment, there remains confusion and contradiction in the appellate courts regarding application of the *mens rea* requirement to Section 922 offenses. In his dissent in *Langley*, Judge Phillips identified decisions of other federal courts of appeals that have applied Section 924(a)'s "knowingly" requirement "not only to the core conduct proscribed by [other] provisions [of Section 922] but to qualifying facts and circumstances that make the conduct criminal." *Langley*, 62 F.3d at 616 n.16 (Phillips, J., dissenting) (citing *United States v. Hooker*, 997 F.2d 67, 72 (5th Cir. 1993) (holding, in prosecution under § 922(k) for possession or receipt of firearm whose serial number has been removed or altered, that government must prove defendant's knowledge of removal or alteration), and *United States v. Ballentine*, 4 F.3d 504, 506 (7th Cir. 1993) (holding, in prosecution under § 922(g)(2) for possession of firearm by fugitive from justice, that government must prove defendant's knowledge of *facts* that made him a fugitive, though not that those facts rendered him legally a "fugitive")). Even the Fourth Circuit itself has sought to distinguish *Langley* when evaluating other subsections of Section 922. *See United States v. Forbes*, 64 F.3d 928, 932 (4th Cir.

1995) (holding that defendant must know he is under indictment to be convicted of unlawful firearms possession under 18 U.S.C. § 922(n)).[7]

At least one district court, too, has concluded that Section 924(a)'s "knowingly" language demands proof of *mens rea* as to each of the substantive elements of Section 922(g) offenses. *See United States v. Kitsch*, No. 03-594-01, 2008 WL 2971548, at *4, *7 (E.D. Pa. Aug. 1, 2008) (finding *Langley* inconsistent with this Court's jurisprudence and concluding that "the word 'knowingly' in 18 U.S.C. § 924(a)(2), when applied to the offense in 18 U.S.C. § 922(g)(1), modifies both the elements of possession of the firearm and the status as a convicted felon") (footnote omitted).[8]

This Court's guidance is needed to correct the appellate courts' mistaken course and eliminate confusion and uncertainty regarding the *mens rea* requirement imposed on Section 922(g) offenses by Section 924(a).

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[7] This confusion is compounded when the charge is aiding and abetting a felon in possession, where the circuits are split over what the alleged aider and abettor must know about the status of the felon. *Compare United States v. Canon*, 993 F.2d 1439, 1442 (9th Cir. 1993) (ruling accomplice need not know or have reason to believe principal was a convicted felon), *with United States v. Xavier*, 2 F.3d 1281, 1286 (3d Cir. 1993) (accomplice must have "knowledge or . . . cause to believe" possessor's felon status); *United States v. Gardner*, 488 F.3d 700, 715 (6th Cir. 2007) (allowing liability if accomplice "knew or had cause to know" principal's felon status); *United States v. Samuels*, 521 F.3d 804, 812 (7th Cir. 2008) (accomplice must "know or have reason to know" principal's felon status), *and with United States v. Ford*, 821 F.3d 63, 74 (1st Cir. 2016) (concluding government must prove beyond a reasonable doubt that accomplice knew principal had been convicted of a crime punishable by more than a year in prison, but offering four caveats to that holding).

[8] Given the numerous appellate decisions that have followed *Langley* or applied its reasoning—and have declined to reconsider circuit precedent absent explicit direction from this Court—it is unsurprising that few trial or appellate courts have required proof of *mens rea* as to the status element of Section 922(g) offenses, even following *Flores-Figueroa*. *Cf. Kitsch*, 2008 WL 2971548, at *5 ("Because the universe of scenarios is limited in which knowledge of the defendant's status as a felon can plausibly be contested, it is not surprising that Kitsch cannot cite to a case in which a court has applied the scienter requirement he seeks.").

C. Refusal to Apply the *Mens Rea* Requirement to Every Substantive Element of Offenses Described in Section 922(g) Cannot Be Reconciled With Controlling Decisions of This Court.

1. Even assuming that the appellate courts could perceive some ambiguity in Section 924's "knowingly violates" language, resort to admittedly ambiguous legislative history pertaining to only a single subsection of Section 922(g) to resolve that ambiguity reflects significant analytical error. Instead, the appellate courts should have turned to the long-settled *mens rea* interpretive presumptions this Court first articulated more than forty years before *Langley* was decided.

2. It has long been presumed that a nonspecific *mens rea* requirement applies to "each of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video*, 513 U.S. at 72. That settled presumption has its roots in jurisprudence dating back more than a half-century. *See Morissette*, 342 U.S. at 270-71. The Court has applied that interpretive presumption where the statute at issue includes an express *mens rea* provision of uncertain application. *See*, *e.g.*, *X-Citement Video*, 513 U.S. at 72, 79 (violation of statutory prohibition on knowing transport of sexually explicit material involving a minor presumed to require knowledge that the person depicted is a minor); *Liparota*, 471 U.S. at 434 (knowing possession of food stamps in an unauthorized manner requires knowledge that possession is unauthorized); *Morissette*, 342 U.S. at 270-71 (knowing conversion of government property requires knowledge that the property belongs to the government). The presumption applies even where no *mens rea* provision appears in the statute at all. *See Staples v. United States*, 511 U.S. 600, 610-11, 618 (1994)

(despite absence of *mens rea* requirement in 26 U.S.C. § 5861(d), which criminalizes the possession of an unregistered "machine gun," statute is presumed to include general *mens rea* requirement demanding proof that the defendant knew the weapon he possessed was a "machine gun" as defined in the statute, because "dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct"—that is, gun ownership); *see also Posters 'N' Things v. United States*, 511 U.S. 513, 524 (1994) (unlawful sale of drug paraphernalia requires knowledge that paraphernalia in question is primarily intended or designed for use with illegal drugs).

3. *Langley* (and its progeny) disregarded this well-established presumption in favor of a dubious counter-presumption that Congress would have spoken more clearly had it intended for the *mens rea* requirement inserted in Section 924(a) to displace prior decisions permitting prosecution of felons in possession without proof of knowledge of the possessor's felon status. *See Langley*, 62 F.3d at 606. Even assuming, *arguendo*, that rationale were sound when *Langley* was decided in 1995, this Court's decisions in the last three terms have invalidated *Langley's* reasoning and reinforced the rule that *mens rea* is presumed to apply to every element of a statute that criminalizes otherwise-innocent conduct. *See Torres*, 136 S. Ct. at 1630-31 (reiterating that, "[i]n general, courts interpret criminal statutes to require that a defendant possess a *mens rea*, or guilty mind, as to every element of an offense . . . even when the statute by its terms does not contain any demand of that kind," given the "background rule that the defendant must know each fact making

his conduct illegal") (citations and internal quotation marks omitted); *Elonis*, 135 S. Ct. at 2009 ("[T]he 'general rule' is that a guilty mind is 'a necessary element in the indictment and proof of every crime,'" a rule dictated by "the basic principle that 'wrongdoing must be conscious to be criminal.'") (quoting *United States v. Balint*, 258 U.S. 250, 251 (1922), and *Morissette*, 342 U.S. at 250).[9] Appellate courts' continued adherence to *Langley's* faulty analytical approach—despite recent reminders from the Court in *Torres* and *Elonis*—necessitates this Court's intervention.

This Court's guidance is necessary to correct course, bring appellate decisions considering Section 922(g) offenses into line with the Court's pronouncements, and ensure that the government is held to its burden of proving that defendants convicted under that statute have knowledge of the facts that make their (otherwise constitutionally protected) conduct illegal.

II. PROTECTION OF SECOND AMENDMENT RIGHTS REQUIRES THE APPLICATION OF *MENS REA* TO EVERY SUBSTANTIVE ELEMENT OF SECTION 922(g) OFFENSES

1. Every subsection of Section 922(g) penalizes an individual's possession of a firearm—conduct that this Court has held unequivocally to be protected by the Second Amendment to the United States Constitution. *See District of Columbia v. Heller*, 554 U.S. 570, 592, 595 (2008); *see also Staples*, 511 U.S. at 610, 613 ("[T]here is a long tradition of widespread lawful gun ownership by private individuals in this country. . . . Owning a gun is usually licit and blameless conduct."). That

[9] To be clear, this Court's *mens rea* jurisprudence requires a defendant to know the *facts* that make his conduct illegal, not that the conduct violates the law. The longstanding principle that ignorance of the law is no excuse remains fully intact. *See*, *e.g.*, *Staples*, 511 U.S. at 622 n.3 (Ginsburg, J., concurring) (defendant must know the characteristics of weapon that make possession unlawful, not that possessing such a weapon is unlawful).

constitutionally protected conduct becomes illegal under Section 922(g) when, and only when, an individual occupies a certain status—he or she has been "convicted in any court of a crime punishable by imprisonment for a term exceeding one year" (18 U.S.C. § 922(g)(1)), is "a fugitive from justice" (18 U.S.C. § 922(g)(2)), has been "adjudicated as a mental defective" (18 U.S.C. § 922(g)(4)), has been "discharged from the Armed Forces under dishonorable conditions" (18 U.S.C. § 922(g)(6)), has been "convicted in any court of a misdemeanor crime of domestic violence" (18 U.S.C. § 922(g)(9)), or "is subject to [certain] court [protective] order[s]" (18 U.S.C. § 922(g)(8)). The line separating illegal conduct from conduct protected by the Second Amendment turns solely on that status.

The body of law that developed in the lower courts prior to *Heller* permitted the punishment of "knowing" conduct—possession of a firearm—which, standing alone, is perfectly lawful. *Heller* has called that body of law even further into serious question. After all, it is perfectly lawful—and even *protected by the Constitution*—to possess a gun that has moved in interstate commerce. It is perfectly lawful to visit a retail establishment, hold a gun, and contemplate its purchase and ownership. The *sole* fact that renders any of that conduct illegal, under Section 922(g)(8), is that the would-be gun owner happens to be subject to a protective order at the time (or, under the other subsections, happens to occupy one of the other specified statuses).

2. Judge Gorsuch recognized the implications of *Heller* for the proper construction of Section 924(a)'s requirement of "knowing" violation of Section 922(g): "[I]t is hardly crazy to think that in a § 922(g)(1) prosecution Congress might require the government to prove that the defendant had knowledge of the *only fact* (his felony

status) separating criminal behavior from not just permissible, but constitutionally protected, conduct." 667 F.3d at 1145 (emphasis in original).

So too of Mr. Allen's conviction: The Fourth Circuit's reflexive application of *Langley* subjected Mr. Allen to years of imprisonment even though the government was not required to prove (and in fact failed to prove) beyond a reasonable doubt Mr. Allen's knowledge of the single fact—the existence of the August 2016 protective order—that rendered his otherwise constitutionally protected conduct criminal. *Cf. Kitsch*, 2008 WL 2971548, at *7 ("A statute that imposes criminal penalties for the exercise of an enumerated constitutional right despite defendant's reasonable belief in good faith that he has complied with the law must, at the very least, raise constitutional doubts.") (considering Section 922(g)(1) in light of *Heller*).

3. For the same reasons that the federal courts of appeals have adhered to circuit precedent considering the proof of "knowing" violations of Section 922(g) even in the face of *Flores-Figueroa*, the lower courts appear unwilling to reconsider those same decisions in light of *Heller*. This Court's guidance is critical. The Court should grant certiorari to clarify that the government must prove a defendant's knowledge of the crucial, substantive fact that renders otherwise constitutionally protected possession of a gun illegal under Section 922(g). The issue is one of exceptional importance, as "[t]here can be fewer graver injustices in a society governed by the rule of law than imprisoning a man without requiring proof of his guilt under the written laws of the land." *United States v. Games-Perez*, 695 F.3d 1104, 1117 (10th Cir. 2012) (Gorsuch, J., dissenting from denial of reh'g en banc).

III. THIS CASE IS A PROPER VEHICLE FOR CLARIFICATION OF THE *MENS REA* REQUIREMENTS APPLICABLE TO SECTION 922(g) OFFENSES

1. This case presents a uniquely appropriate vehicle for the Court to clarify that, in keeping with the statutory language and this Court's instructions in *Flores-Figueroa*, the applicable *mens rea* requirement set forth in Section 924(a) applies to every substantive element of Section 922(g) offenses, including a defendant's knowledge of the status that renders his possession unlawful. Indeed, this case presents the issue in a particularly stark context, due to the jury's split verdict and its plain indication that the government did not carry its burden of proving that Mr. Allen knew of the protective order at the time he examined the rifle. This is not a case, then, in which an error in failing to instruct the jury on the government's burden to prove a criminal defendant's knowledge can be considered harmless. On the contrary, the record here shows that the *mens rea* issue was outcome determinative.

2. It is no obstacle to review that Mr. Allen did not object to the jury instructions at trial, as the district court's failure to instruct the jury that the government was required to prove Mr. Allen's knowledge of the protective order constituted plain error. The district court's instruction was inconsistent with this Court's *mens rea* jurisprudence, the omitted instruction affected the outcome of the case (as evident in the jury's split verdict), and failure to correct that error resulted in a miscarriage of justice—as Mr. Allen remains imprisoned for a crime he did not commit. *See*, *e.g.*, *United States v. Olano*, 507 U.S. 725, 734 (1993); *see also United States v. Robinson*, 627 F.3d 941, 954 (4th Cir. 2010). In this case, even the exacting "plain error" standard is readily satisfied.

3. This Court's intercession is essential to foreclose the miscarriage of justice that results from every federal court application of *Langley* and its flawed rationale to otherwise-lawful possession of firearms. Mr. Allen stands convicted (and remains incarcerated) for a violation of Section 922(g)—a felony—and he is not alone in having been found guilty under that statute based on proof of knowingly doing nothing more than *possessing a firearm*. *Cf. Games-Perez*, 695 F.3d at 1117 (Gorsuch, J., dissenting) (lamenting that the defendant "might very well be wrongfully imprisoned" where "a state court judge repeatedly (if mistakenly) represented to him that the state court deferred judgment on which his current conviction hinges did *not* constitute a felony conviction") (emphasis in original). Review and clarification by this Court is essential.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KEARNS DAVIS
Counsel of Record
DANIEL ADAMS
JULIA C. AMBROSE
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, LLP
230 North Elm Street
2000 Renaissance Plaza
Greensboro, N.C. 27401
(336) 373-8850
kdavis@brookspierce.com
dadams@brookspierce.com
jambrose@brookspierce.com

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