No. 18-7471

IN THE SUPREME COURT OF THE UNITED STATES

MARK HENRY, AKA WEIDA ZHENG, AKA SCOTT RUSSEL, AKA BOB WILSON, AKA JOANNA ZHONG, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly instructed the jury on the meaning of the term "willfully" in the Arms Export Control Act, 22 U.S.C. 2778(c), where the court required the jury to find that petitioner knew that his conduct was unlawful and that he had acted with the intent to do something that the law forbids.

2. Whether the Arms Export Control Act's delegation to the President of authority to designate items as "defense articles and defense services" subject to export restrictions, 22 U.S.C. 2278(a)(1), violates the nondelegation doctrine.

3. Whether the district court abused its discretion by requiring the use of a court interpreter after determining that petitioner, whose primary language is Mandarin, would have difficulty understanding certain trial testimony in English.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A35) is reported at 888 F.3d 589.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2018. A petition for rehearing was denied on October 17, 2018 (Pet. App. A36). The petition for a writ of certiorari was filed on January 14, 2019. 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 Eastern District of New York, petitioner was convicted on one count of conspiracy to violate the Arms Export Control Act (AECA or Act), in violation of 22 U.S.C. 2778(b)(2) and (c) and 18 U.S.C. 371; and one count of violating, attempting to violate, and aiding and abetting the violation of the AECA, in violation of 22 U.S.C. 2278(b)(2) and (c) and 18 U.S.C. 2. Pet. App. A3, A7. He was sentenced to 78 months of imprisonment, to be followed by three years of supervised release. Id. at A38-A39. The court of appeals affirmed. Id. at A1-A35.

1. The AECA, 22 U.S.C. 2278, authorizes the President to control the import and export of defense articles and "to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services." 22 U.S.C. 2778(a)(1). The items designated under that provision constitute the United States Munitions List. Ibid. With certain exceptions not relevant here, "no defense articles or defense services * * * may be exported or imported without a license for such export or import." 22 U.S.C. 2778(b)(2); see 22 C.F.R. 121.1 (setting forth 21 categories of weapons whose export is prohibited without a license). The President has delegated to the Secretary of State the authority to compile the United States Munitions List and grant or deny export applications. See 22 C.F.R.

120.2 (2018). The Act specifies criminal penalties for "[a]ny person who willfully violates any provision of [the Act] * * * or any rule or regulation issued under [the Act]." 22 U.S.C. 2778(c).

2. Petitioner "ran an arms export business" called Fortune Tell, Ltd. Pet. App. A4. On at least four occasions between 2009 and 2012, petitioner acquired ablative materials, "a military technology used in rockets and missiles," from an American distributor and sold the materials to a Taiwanese customer who purchased the materials on behalf of the Taiwanese military. Ibid.

The ablative materials that petitioner exported are defense articles listed on the United States Munitions List, and their export accordingly required a license from the State Department's Directorate of Defense Trade Controls. See 22 C.F.R. 121.1 Category XIII(d)(1) (2018). The American company from which petitioner purchased the materials "prominently" displayed information, which petitioner read, about the license requirement in its communications with petitioner. Pet. App. A5; see id. at A8 (petitioner "admitted to reading correspondence in which the manufacturer or distributor highlighted the need for an export license"). Petitioner and his Taiwanese customer also repeatedly discussed the export-license requirement in their email correspondence. Id. at A5. Petitioner nevertheless exported the articles without seeking or obtaining an export license. Ibid.

Petitioner undertook various steps to conceal his conduct. See Pet. App. A5-A6. Petitioner used a freight forwarder as a

shipping address, in order to conceal his company's involvement in the purchase, and then misrepresented the freight forwarder's address as belonging to a fictitious company. Id. at A6. Petitioner also created false documentation and used several different false names when placing orders. Ibid.

In 2012, separate from his export of the ablative materials, petitioner ordered from a different American company two microwave amplifiers, which can serve "military" purposes and therefore cannot be exported without "an additional license from the U.S. Department of Commerce." Pet. App. A6-A7. Petitioner intended to export the amplifiers to mainland China. Id. at A7. When the supplier learned that petitioner was attempting to disguise the intended end user, it notified law enforcement officials. Ibid. Petitioner was arrested after he received the amplifiers but before he could send them to China. Ibid.

3. A grand jury sitting in the Eastern District of New York charged petitioner with one count of conspiracy to violate the AECA, in violation of 22 U.S.C. 2778(b)(2) and (c) and 18 U.S.C. 371; one count of violating, attempting to violate, and aiding and abetting the violation of the AECA, in violation of 22 U.S.C. 2278(b)(2) and (c) and 18 U.S.C. 2; and one count of attempting to violate the International Emergency Economic Powers Act (IEEPA), in violation of 50 U.S.C. 1705. See Pet. App. A7.

Although petitioner, who "principally" writes and speaks Mandarin, had relied on an interpreter in all pretrial proceedings,

petitioner asked the district court to proceed at trial without use of an interpreter. Pet. App. A8. "To assess the need for an interpreter, the District Court inquired about [petitioner's] facility with the English language." Id. at A9. Petitioner admitted that he "always" relied on Google Translate when communicating by email to manufacturers and distributers, id. at A8, and after "extensive discussion" with petitioner and his attorney, the court determined that petitioner should be provided with a court-appointed Mandarin interpreter "because of the technical nature of some of the evidence likely to be presented," id. at A9. The court permitted petitioner to testify in English with the assistance of a standby interpreter, "an option of which he took advantage during his testimony." Ibid.

At trial, petitioner did not dispute that he had exported or attempted to export defense articles listed on the United States Munitions List, that he was required to register and obtain a license for those articles, or that he had failed to do so. See Pet. 8. Instead, he claimed that "he did not know that he was required to obtain a license for any of the materials he exported or sought to export." Pet. App. A7. The district court charged the jury, on the requirement that an AECA offense must be committed "willfully," 22 U.S.C. 2778(c), as follows:

> Willfully means to act with knowledge that one's conduct is unlawful and with the intent to do something that the law forbids. That is to say, with a bad purpose, either to disobey or disregard the law. The defendant's conduct was not willful if it was due to negligence, inadvertence, or

> mistake. However, it is not necessary for the government to prove that the defendant knew the precise terms of the statute or regulatory provision he is charged with violating -- that is, the government is not required to prove that the defendant knew the existence or details of the Arms Export Control Act or the related regulations. All that is required is that the government prove that the defendant acted with the intent to disobey or disregard the law.

Pet. App. A19; See id. at A96.

The jury found petitioner guilty of the two AECA charges, which related to exporting the ablative materials, and acquitted him of the IEEPA count, which related to the microwave amplifiers. Pet. 4. The district court denied petitioner's motion for a new trial and sentenced him to 78 months of imprisonment. Ibid.

4. The court of appeals affirmed. Pet. App. A1-A35. The court first determined, "in agreement with the other circuits that have considered the issue, that the AECA does not unconstitutionally delegate legislative authority to the executive." Id. at A10 (footnote omitted). The court of appeals explained that under this Court's precedent, Congress may delegate authority to the Executive Branch so long as it "lay[s] down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." Id. at A11 (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989)) (brackets omitted). The court of appeals determined that the AECA meets that standard because it "delineates a general policy to guide the actions of the executive," id. at A14 (citing 22 U.S.C. 2778(a)(1)), and because it "establishes

clear boundaries for th[at] authority," ibid.; see ibid. (describing ways in which the AECA "constrains" and "limits the President's discretion").

Next, the court of appeals rejected petitioner's argument "that the District Court erred by failing to instruct the jury that the government had to prove not only that he knew that his conduct was illegal, but also that he knew why it was illegal: that is, because the items he attempted to export were listed on the [United States Munitions List]." Pet. App. A17. The court of appeals explained that petitioner's argument was inconsistent with the definition of willfulness approved by this Court in Bryan v. United States, 524 U.S. 184 (1988). Pet. App. A18. Under that definition, a "person acts willfully if he acts intentionally and purposely with the intent to do something the law forbids, that is, with the bad purpose to disobey or disregard the law." Ibid. (quoting Bryan, 524 U.S. at 190). The court of appeals observed that the district court's jury instructions in this case "correctly and clearly" stated the appropriate definition because they required the jury to find "that the defendant kn[e]w that what he was doing was illegal, and not that he kn[e]w that his conduct was prohibited under a specific AECA provision or related regulation." Id. at A19-A20. The court of appeals found no merit to petitioner's argument that the district court should have applied an even more demanding definition of willfulness, applicable only to "highly technical statutes" that are "so complicated and non-

intuitive that one might violate them without actually understanding that his conduct was illegal." Id. at A20 (internal quotation marks omitted). "Where it is proven beyond a reasonable doubt that a defendant is generally aware of export license requirements for military-grade materials," the court of appeals explained, "there is no risk of criminalizing otherwise innocent conduct." Id. at A20-A21.

Finally, the court of appeals rejected petitioner's argument "that the District Court's requirement that he use a Mandarin interpreter violated his rights under the Sixth Amendment and the Court Interpreters Act, or CIA." Pet. App. A25. The court of appeals explained that although the CIA gives a defendant the right to waive use of a court-appointed interpreter, that right is "not absolute." Id. at A28. The court observed that, among other things, the statute requires that any waiver be "approved by the presiding judicial officer," 28 U.S.C. 1827(f)(1), thereby indicating "that a defendant's waiver request need not be honored when the court finds a compelling reason to deny it," Pet. App. A28. And the court determined that the district court "did not abuse its discretion" in the circumstances of this case in requiring petitioner to use a court-appointed interpreter at trial and to use a standby interpreter while he testified in English. Id. at A32. The court of appeals observed that the district court's ruling was based on its finding, which was "supported by the record," that petitioner would have difficulty understanding

many of the "technical terms" and "complex concepts" that were likely to arise during the trial, and that petitioner's proposed alternatives "would cause unnecessary delay" or "would be impracticable." Id. at A33. The court of appeals determined that no abuse of discretion occurred, because the district court accommodated petitioner's concerns with an "appropriate compromise solution" and gave the jury a cautionary adverse-inference instruction. Id. at A34. "The District Court's handling of this complex question," the court of appeals emphasized, "was careful and thoughtful." Ibid.

ARGUMENT

Petitioner contends (Pet. 13-17) that his conviction should be reversed because the jury instruction defining willfulness did not require the jury to find that his awareness of the unlawfulness of his conduct rested on specific knowledge "that the items at issue constituted defense articles on the United States Munitions list." Pet. App. A47. Petitioner also contends (Pet. 18-25) that the AECA unconstitutionally delegates legislative power to the President by authorizing him to restrict and license the export of defense articles and services. Finally, petitioner argues (Pet. 26-29) that the district court violated his assertedly "absolute" right to proceed at trial without the assistance of an interpreter. The decision below was correct and does not create a conflict with any decision of this Court or of another court of appeals. The petition for a writ of certiorari should be denied.

1. a. In Bryan v. United States, 524 U.S. 184 (1998), this Court stated that the word "'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears." Id. at 191 (quoting Spies v. United States, 317 U.S. 492, 497 (1943)). The Court explained, however, that "[a]s a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose,'" ibid. (citations omitted), and that "to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful,'" id. at 191-192 (quoting Ratzlaf v. United States, 510 U.S. 135, 137 (1994)); cf. Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57 n.9 (2007) (stating that for criminal statutes, the word "willfully" "is characteristically used to require a criminal intent beyond the purpose otherwise required for guilt, or an additional 'bad purpose,' or specific intent to violate a known legal duty created by highly technical statutes") (citations omitted).

The Court in Bryan accordingly affirmed the following jury instruction for a charge of conspiring to violate the federal firearms licensing statute, 18 U.S.C. 922(a)(1):

> A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids.

524 U.S. at 190. Here, as the court of appeals correctly determined, petitioner's jury was properly instructed, in accordance with Bryan, that it could find petitioner guilty of violating the AECA if it found that petitioner knew his actions were unlawful, even if he did not know the specific federal licensing requirement that he was accused of violating. Pet. App. A19-A20.

b. Petitioner nevertheless contends (Pet. 13-17) that the decision below conflicts with this Court's decisions in Cheek v. United States, 498 U.S. 192 (1991), and Ratzlaf v. United States, supra, which reasoned that in certain cases involving complex statutory crimes, the jury must find that the defendant was aware of the specific statutory provision that he is accused of violating. But as the Court's decision in Bryan makes clear, Cheek and Ratzlaf involved distinct statutory schemes that are not analogous to the sort of licensing requirements at issue in Bryan and this case.

The Court in Bryan acknowledged Cheek, noting that "[i]n certain cases involving willful violations of the tax laws, we have concluded that the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating." 524 U.S. at 194 (citing Cheek, 498 U.S. at 201). Similarly, citing Ratzlaf, the Court observed that for the purposes of the federal statute prohibiting structuring of financial transactions -- that is, breaking single transactions into

multiple separate transactions to evade federal financial-reporting obligations, see 31 U.S.C. 5324 -- "the jury had to find that the defendant knew that his structuring of cash transactions to avoid a reporting requirement was unlawful." Bryan, 524 U.S. at 194 (citing Ratzlaf, 510 U.S. at 138, 149).

The Court in Bryan, however, found the tax and banking laws at issue in Cheek and Ratzlaf to be "readily distinguishable" from the federal firearms licensing requirements. 524 U.S. at 194. The Court explained that Cheek and Ratzlaf "involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct." Ibid. But Bryan found the "danger of convicting individuals engaged in apparently innocent activity" was "not present" in that prosecution for unlicensed firearm dealing "because the jury found that [the defendant] knew that his conduct was unlawful." Id. at 195.

As in Bryan, and unlike in Cheek and Ratzlaf, petitioner was not at risk of being ensnared for apparently innocent conduct for unlicensed sale activity. The district court instructed the jury that an action done "willfully" for purposes of the AECA is one in which the defendant "acts intentionally and voluntarily and not because of ignorance, mistake, accident, or carelessness." Pet. App. A19 (citation omitted). The jury was also instructed that it could find petitioner guilty only if it determined that petitioner "act[ed] with knowledge that [his] conduct [wa]s unlawful and with

the intent to do something that the law forbids." Ibid. (citation omitted); see ibid. ("That is to say, with a bad purpose, either to disobey or disregard the law.") (citation omitted). And as the court of appeals recognized, "[w]here it is proven beyond a reasonable doubt that a defendant is generally aware of export license requirements for military-grade materials," as the jury found here, "there is no risk of criminalizing otherwise innocent conduct on a mere technicality." Id. at A20-A21; see id. at A20 ("[N]either the [munitions] list nor the statute is unclear.").

Furthermore, it is readily apparent that ablative materials, a "military technology used in rockets and missiles," Pet. App. A4, would be subject to the export-control laws. Indeed, petitioner was specifically advised by the distributor that he would need to acquire an export license, and he and his Taiwanese customer "repeatedly discussed the export license requirement through email correspondence." Id. at A5. Petitioner also took multiple steps to conceal from his distributor "the fact that he intended to export the ablative materials," as well as steps "to conceal from United States customs authorities the identity of the materials he was exporting." Id. at A6. As in Bryan, the concerns that animated Cheek and Ratzlaf, about the danger of punishing apparently innocent activity, are not present here.

c. Consistent with this Court's decision in Bryan, every court to have squarely considered the issue has rejected the claim

that conviction under the AECA requires the government to prove that the defendant knew an exported item was on the Munitions List.

In United States v. Hsu, 364 F.3d 192 (2004), for example, the Fourth Circuit rejected the defendants' argument that "the [jury] instructions as to 'willfulness' were deficient because the 'jury was not instructed that the government had to show that the defendants knew that the [encryption device] was covered by the Munitions List or that the device was designed for military use.'" Id. at 198 n.2 (brackets, citation, and ellipsis omitted). "Whatever specificity on 'willfulness' is required," the court stated, "it is clear that this extremely particularized definition finds no support in the case law." Ibid..

Similarly, in United States v. Murphy, 852 F.2d 1 (1988), cert. denied, 489 U.S. 1022 (1989), the First Circuit rejected the defendant's argument that "the willfulness requirement of the act mandates proof of his specific knowledge of the licensing requirement and the Munitions List." Id. at 6. The court explained that "it is sufficient that the government prove that [a defendant] knew he had a legal duty not to export the weapons"; evidence that the defendants "knew of the licensing requirement or were aware of the munitions list" was not required for conviction. Id. at 7.

And in United States v. Tsai, 954 F.2d 155, cert. denied, 506 U.S. 830 (1992), the Third Circuit affirmed the district court's instruction that conviction under the AECA did not require the

jury to find that the defendant "knew all of the specifics of the law or was a lawyer or ever read the law or even the U.S. Munitions List." Id. at 160 n.3. The Third Circuit explained that "[i]f the defendant knew that the export was in violation of the law, we are hard pressed to say that it matters what the basis of that knowledge was." Id. at 162. The court acknowledged that "[c]ertainly knowledge of the licensing requirement will likely be the focal point in most cases," but it found that "the [district] court did not err in instructing the jury that it could convict if it found that the defendant knew that the export was illegal." Ibid.

Accordingly, as the court of appeals in this case recognized, "no other court to have considered the AECA's willfulness requirement" has required the government to prove the defendant's knowledge that an item was on the Munitions List. Pet. App. A21. To the contrary, courts have consistently held that the word "willfully" in the AECA merely requires that the defendant was aware that he was violating a legal duty not to export certain items without a license, not that he had knowledge of the specific features of the regulatory regime implementing the Act. See, e.g., United States v. Covarrubias, 94 F.3d 172, 175-176 (5th Cir. 1996) (per curiam) (affirming conviction for violating Section 2778 where "the evidence was sufficient to support the jury's conclusion that [the defendant] knew that either a license or other form of authorization was required before he could transport the weapons

hidden in his gas tank into Mexico"); United States v. Beck, 615 F.2d 441, 451 (7th Cir. 1980) ("The prosecution must only show that the defendant was aware of a legal duty not to export the articles."); United States v. Lizarraga-Lizarraga, 541 F.2d 826, 828-829 (9th Cir. 1976) ("[T]he 'willfully' requirement of [the predecessor statute to Section 2778] indicates that the defendant must know that his conduct in exporting from the United States articles proscribed by the statute is violative of the law."); see also United States v. Bishop, 740 F.3d 927, 932-935 (4th Cir. 2014); United States v. Chi Mak, 683 F.3d 1126, 1138 (9th Cir. 2012); United States v. Roth, 628 F.3d 827, 833-835 (6th Cir.), cert. denied, 565 U.S. 815 (2011).

d. Petitioner contends (Pet. 9-11) that the court of appeals' decision in this case conflicts with decisions from four other circuits. The cases cited by petitioner, however, do not directly conflict with the decision below.

In United States v. Pulungan, 569 F.3d 326 (2009), the Seventh Circuit reversed the defendant's conviction under Section 2778 for attempting to export rifle scopes to Indonesia without a license, finding that the government had failed to provide sufficient evidence that the defendant acted willfully. The court noted that although the government had conceded that the term "'willfully' in [Section] 2778(c) requires it to prove that the defendant knew not only the material facts but also the legal rules," the court was "not decid[ing] whether the concession is correct." Id. at 329.

The court focused instead on the evidence presented at trial and concluded that the evidence did not show that the defendant had acted with the requisite knowledge or intent to violate the Act.

In particular, the evidence showed that the defendant "was not an industry insider" and, although the defendant subjectively believed that exporting rifle scopes to Indonesia was unlawful, the basis for his belief was erroneous. Pulungun, 569 F.3d at 329. The defendant believed that the rifle-scope shipments violated an embargo by the United States on military exports to Indonesia, but the embargo had been lifted before the offense conduct. Under those circumstances, the court of appeals explained, the defendant "evince[d] a belief in a nonexistent rule * * * rather than a belief that an export license was necessary," id. at 330, and his intent to violate a lapsed embargo could not provide the requisite mens rea under the AECA because "the crimes are too different for one intent to suffice for the other," id. at 331. Here, by contrast, petitioner was not under the false impression that his actions violated a nonexistent legal prohibition; to the contrary, he was repeatedly warned that the ablative materials he dealt were subject to the export-control laws, and he discussed export-control restrictions with his foreign customer.

Similarly, in United States v. Dobek, 789 F.3d 698, cert. denied, 136 S. Ct. 272 (2015), the Seventh Circuit approved a willfulness instruction that would have informed the jury that

"the defendant acted willfully if he exported military aircraft parts to Venezuela knowing that the law forbade exporting those parts to that country." Id. at 701. That hypothetical instruction does not materially differ from the one given in this case, aside from the identities of the defense articles and destination country. Nor did Dobek purport to limit or overrule the Seventh Circuit's earlier holding that the government need "only show that the defendant was aware of a legal duty not to export the articles." Beck, 615 F.2d at 450-451.

United States v. Adames, 878 F.2d 1374 (11th Cir. 1989) (per curiam), also does not support petitioner's claim of a circuit conflict. In Adames, the Eleventh Circuit affirmed the district court's decision to grant the defendant's motion for judgment of acquittal based on insufficient evidence that the defendant had acted willfully. The defendant was a vice consul at the Panamanian consulate in Miami who used her official position to assist her brother, who purchased firearms in the United States for his business in Panama. Id. at 1376. The evidence showed that the defendant took receipt of a number of her brother's purchases from a seller in Miami. Ibid. She shipped those purchases to her brother by falsely addressing them to a Panamanian government agency so that the shipper would waive the shipping fees, a fact about which she had been "untruthful" during the investigation. Ibid. The government presented no evidence that the defendant had prior experience exporting munitions. See id. at 1376-1377.

After "stud[ying] the transcription of the testimony elicited at trial," the Eleventh Circuit concluded that in those specific circumstances, "[t]he evidence demonstrates, at most, that [the defendant] was negligent in not investigating the legal prerequisites to the exportation of firearms. It does not prove that she intentionally violated a known legal duty not to export the firearms or purposefully perpetuated her ignorance of the AECA to avoid criminal liability." Adames, 878 F.2d at 1377. The court acknowledged that the defendant's "suspicious conduct" made it reasonable to infer that "she was aware of the generally unlawful nature of her actions," but found that it fell short of particularizing that awareness to the unlawful exportation of unlicensed firearms. Ibid. Similar to Pulungun, the court in Adames reasoned that a defendant's mere awareness of the "generally unlawful nature" of her conduct does not by itself demonstrate willfulness under the AECA where that awareness could have resulted from other wrongful conduct (such as the defendant's misuse of her official position, fraudulent mislabeling of the shipped goods, or lying to investigators). Ibid.; see United States v. Man, 891 F.3d 1253, 1269 (11th Cir. 2018) (rejecting defendant's challenge to the sufficiency of the evidence that she acted willfully, focusing in part on her efforts to avoid detection by disguising the nature and origin of the goods to be exported).

Nor does United States v. Hernandez, 662 F.2d 289 (5th Cir. 1981) (per curiam), hold that the government must prove that a

defendant had specific knowledge of the Munitions List for conviction under Section 2778, as petitioner argues (Pet. 8). In Hernandez, the Fifth Circuit reversed the defendant's Section 2778 conviction for unlawfully exporting firearms and ammunition to Mexico because the district court had failed to "instruct the jury on the effect and relevance of a defendant's ignorance of the law." 662 F.2d at 292. In doing so, the court of appeals stated that Section 2778's willfulness requirement could be satisfied by "a voluntary, intentional violation of a known legal duty." Ibid. (citing United States v. Davis, 583 F.2d 190 (5th Cir. 1978), and Lizarranga-Lizarranga, supra). Here, unlike in Hernandez, the district court expressly instructed the jury on ignorance of the law. The court told the jury that the defendant must have acted "with knowledge that [his] conduct [wa]s unlawful and with the intent to do something that the law forbids," and that it could not find petitioner guilty if he acted "because of ignorance, mistake, accident, or carelessness." Pet. App. A19; see ibid. ("The defendant's conduct was not willful if it was due to negligence, inadvertence, or mistake.").

Indeed, the Fifth Circuit later rejected an argument similar to the one petitioner presses here. In United States v. Covarrubias, supra, the Fifth Circuit rejected the defendant's claim, based on Hernandez, that "the government ha[d] not sufficiently proved that he acted with specific intent because the government's evidence demonstrates only a general awareness of the

illegality of his conduct and falls short of establishing that he was aware of the United States Munitions List or of the duty to obtain a license in order to export the items listed on it." 94 F.3d at 175. The Fifth Circuit explained that the defendant's reliance on Hernandez was "misplaced," and that the trial evidence was sufficient because it showed "that [the defendant] knew that either a license or other form of authorization was required before he could transport the weapons hidden in his gas tank into Mexico." Id. at 175-176.

The Ninth Circuit's decision in United States v. Lizarraga-Lizarraga, supra, also does not hold that conviction under the AECA requires knowledge that exported items were on the Munitions List. In that case, the jury was given a "general intent" instruction, which stated that to prove a violation of the predecessor statute to Section 2778, "it [wa]s not necessary * * * for the Government to prove that the defendant knew that his act was a violation of the law." 541 F.2d at 827 (citation omitted). The court concluded that the defendant was entitled to a specific-intent instruction and that the government must prove that the defendant "voluntarily and intentionally violated a known legal duty not to export the proscribed articles." Id. at 829. But the court did not hold that the defendant had to be aware of the specific features of the regulatory regime at issue, such as the Munitions List. Indeed, in United States v. Chi Mak, supra, the Ninth Circuit upheld instructions in an AECA prosecution in which

the jury was told "that the Government was not required to prove that 'the defendant had read, was aware of, or had consulted the specific regulations governing his activities.'" 683 F.3d at 1138.

Finally, petitioner cites (Pet. 9 n.3) the Eighth Circuit's decision in United States v. Gregg, 829 F.2d 1430 (1987), cert. denied, 486 U.S. 1022 (1988), in which the court of appeals rejected the defendant's argument that the AECA and the regulations promulgated under it were void for vagueness. Id. at 1437. Petitioner, however, does not raise a void-for-vagueness challenge before this Court and did not raise one below. Although the Eighth Circuit in Gregg approved a jury instruction that "directed acquittal if the jury was not satisfied beyond a reasonable doubt that the defendant knew that the items exported were on the Munitions List and required [a] license [to export]," id. at 1437 n.14, the court of appeals did not suggest that it would have rejected the jury instruction if it had omitted a specific reference to the Munitions List. See Murphy, 852 F.2d at 7 n.6 ("We do not read footnote 14 in [Gregg] as requiring proof that the defendant know that the arms are on the United States Munitions List.").

In sum, none of the cases petitioner identifies presents a direct conflict with the court of appeals' decision here, nor has petitioner identified any court of appeals that has held that conviction under Section 2778 requires the jury to find that a defendant knew his conduct violated specific prohibitions

contained in the Munitions List. Accordingly, no conflict exists in the courts of appeals that might warrant this Court's intervention.

2. The court of appeals also correctly determined that the AECA does not violate the nondelegation doctrine, and its determination does not conflict with any decision of this Court or another court of appeals.

Congress may confer discretion on the Executive Branch to implement and enforce federal law so long as "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946). A statement of general policy suffices if there is "an intelligible principle" to direct the use of the delegated authority. Whitman v. American Trucking Ass'ns, 531 U.S. 457, 472 (2001) (citation omitted). Statutory directives that this Court has upheld as sufficiently intelligible include the delegation of authority to regulate broadcast licensing as the "public interest, convenience, or necessity" requires, National Broad. Co. v. United States, 319 U.S. 190, 225-226 (1943); to determine and recover "excessive profits" from military contractors, Lichter v. United States, 334 U.S. 742, 785-786 (1948); and to limit air pollution so as "to protect the public health," Whitman, 531 U.S. at 472.

Judicial deference in favor of a congressional delegation of authority to the Executive Branch is particularly appropriate in

the area of foreign affairs. In light of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations," as well as the need for "discretion and freedom" to effectively undertake those responsibilities, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319-320 (1936), this Court has instructed that "Congress -- in giving the Executive authority over matters of foreign affairs -- must of necessity paint with a brush broader than that [which] it customarily wields in domestic areas," Zemel v. Rusk, 381 U.S. 1, 17 (1965). Accord Haig v. Agee, 453 U.S. 280, 299-300 (1981).

Those principles make clear that the AECA permissibly delegates authority to the President "to designate those items which shall be considered as defense articles and defense services for the purposes of [the Act] and to promulgate regulations for the import and export of such articles and services." 22 U.S.C. 2778(a)(1). The Act identifies a general principle to guide that authority -- the "furtherance of world peace and the security and foreign policy of the United States," ibid. -- that is squarely within the core institutional expertise of the Executive Branch. And the delegated powers fall within a sphere (the designation of militarily sensitive defense articles and services) uniquely appropriate for executive judgment. Indeed, the Act's grant of authority to identify defense articles and services appropriate for export limitations is highly analogous to the power to identify

"arms and munitions of war," for purposes of prohibiting sales, that this Court upheld in Curtiss-Wright. See United States v. Chi Tong Kuok, 671 F.3d 931, 939 (9th Cir. 2012) (explaining that the logic of Curtiss-Wright "applies with equal force" in the AECA context and indicates that the "AECA does not violate the constitutional prohibition on delegation of legislative power") (citation omitted).

The court of appeals thus correctly determined that the AECA "establishes clear boundaries" for the exercise of Executive Branch Authority; that it "limits" and "constrains" such discretion; and that it accordingly "satisf[ies] the intelligible principle standard." Pet. App. A14. That determination is "in agreement with the other circuits that have considered the issue." Id. at A10; see Chi Tong Kuok, 671 F.3d at 938-939; Hsu, 364 F.3d at 205. No further review is warranted.*

3. The court of appeals also correctly determined that the district court "did not abuse its discretion" "by requiring that [petitioner] use a court-appointed interpreter throughout the trial and use a standby interpreter while he testified in English." Pet. App. A32. That fact-specific determination does not conflict with any decision of this Court or any other court.

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* This Court is currently considering a nondelegation challenge in Gundy v. United States, No. 17-6086 (argued October 2, 2018). That case involves an unrelated statute that differs in several respects from the AECA, including that it does not implicate national security. Petitioner does not ask that his petition for a writ of certiorari be held pending the Court's decision in Gundy, nor would it be appropriate to do so.

The Court Interpreters Act "Direct[s]" courts to use a certified interpreter in any federal criminal prosecution if a party "speaks only or primarily a language other than the English language," such that the defendant's lack of English fluency would "inhibit [his] comprehension of the proceedings or communication with counsel or the presiding judicial officer." 28 U.S.C. 1827(d)(1)(A). When certain conditions have been met, a defendant "may waive such interpretation in whole or in part," but "only if [the waiver is] approved by the presiding judicial officer." 28 U.S.C. 1827(f)(1).

In this case, the district court properly exercised its discretion under 28 U.S.C. 1827(f)(1) in declining petitioner's request to proceed at trial without the assistance of an interpreter. After an "extensive colloquy" with petitioner and his counsel, the court found (and petitioner does not here dispute) that petitioner's limited proficiency in English would have inhibited his comprehension of the trial. Pet. App. A32. Petitioner, who used an interpreter during all pretrial proceedings, "had trouble with * * * technical language, requiring [his] lawyer to frequently repeat the more complex phrases for him during trial preparation." Id. at A32-A33. Petitioner's counsel also expressed "concern that his client would not understand some of the concepts elicited at trial," and petitioner acknowledged "that some of the technical terms used at trial might be difficult for him to understand." Id. at A33.

Petitioner initially proposed that he could proceed without an interpreter and could rely on discussions with counsel "to cure any misunderstandings." Pet. App. A69. The district court determined, however, that petitioner's proposal would be insufficient to allow him to comprehend "the technical aspects of the testimony or the technical aspects of the documents given how many will be coming in here [and] how often they will be coming in as evidence." Id. at A75. The court offered petitioner's counsel "another opportunity to address" the court's concerns, but counsel declined, instead making "an alternative" suggestion to have "an interpreter on standby." Id. at A75-A76. The court, however, found it impracticable to rely on a standby interpreter to provide after-the-fact interpretations of testimony or trial developments, particularly because the trial would not stop while the interpreter was translating what had previously been said. Id. at A77-A78 ("The interpreter can't just say, oh, well, the witness just testified essentially X."). The court accordingly appointed an interpreter to translate for petitioner throughout the trial, but it permitted petitioner to testify in English, with a standby interpreter as needed. Petitioner "indeed required the use of an interpreter on several occasions during his testimony." Id. at A34.

Petitioner does not dispute that "the district court's order in this case was proper under the plain terms of the statute." Pet. 27. Instead, invoking constitutional decisions regarding a defendant's right to represent himself at trial, see ibid.

(discussing Faretta v. California, 422 U.S. 806 (1975)), petitioner argues (Pet. 27) that his "personal right to make decisions regarding [his] defense encompasses the right to waive statutory procedural protections like those provided under the CIA." Petitioner's argument, which no court has adopted, lacks merit. As the court of appeals recognized, appointment of an interpreter "does not inhibit the defendant's ability to mount a successful defense," Pet. App. A31, nor does it constrain the defendant's ability to make "decisions of trial strategy," Faretta, 422 U.S. at 820. And just as a defendant's right to self-representation at trial may be limited in circumstances where it conflicts with "the government's interest in ensuring the integrity and efficiency of the trial," Martinez v. Court of Appeal of Cal., 528 U.S. 152, 162 (2000), a defendant does not have an unfettered right to decline reliance on an interpreter if doing so would undermine the public's interests in an efficiently functioning and accurately recorded trial. See McKaskle v. Wiggins, 465 U.S. 168, 187 (1984) (approving appointment of standby counsel, despite the defendant's objection, so long as counsel's participation does not "seriously undermin[e]" the "appearance before the jury" that the defendant is representing himself). Particularly in light of the district court's cautionary jury instruction, which "clearly and properly instructed the jury that they were to draw no adverse inference from the fact that [petitioner] occasionally required the use of an interpreter,"

Pet. App. A34, petitioner has not shown that the appointment of an interpreter under the circumstances of this case violated his constitutional rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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