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,

Respondent.

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

REPLY BRIEF

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INTRODUCTION

The government does not dispute the importance of the questions presented in the instant petition for a writ of *certiorari*. However, with respect to the existing conflict among the federal courts of appeals regarding the definition of a "willful[]" violation of the Arms Export Control Act ("AECA"), 22 U.S.C. § 2778(c), the government erroneously claims that there is in fact no such conflict. The government also argues that the first clause of the AECA under § 2778(a)(1) qualifies as an "intelligible principle" but fails to explain how that clause restricts or guides the Executive Branch's exercise of inherently legislative powers. Opp'n Br., at 23-25. Moreover, the government does not address the critical and unresolved question of whether something more than an "intelligible principle" is required when Congress delegates its authority to enact and amend criminal laws. Finally, the government advances the illogical argument that criminal defendants may be required to listen to all of their trial proceedings through court-appointed interpreters against their will because doing so would somehow advance "the public's interest in an efficiently functioning and accurately recorded trial." Opp'n Br., at 28.

ARGUMENT

I. The government's assertion that there is no conflict among the federal courts of appeals regarding the AECA's *mens rea* element is manifestly false.

Over the petitioner's objection, Pet. App. A46-47 & 87-92, the district court instructed the jury that a "willful" violation of the AECA may be established through proof that "the defendant acted with the intent to disobey or disregard the law," even if he was not specifically aware of his obligation to obtain a license before exporting items that have been designated as "defense articles" under the AECA and its related regulations. Pet. App. A96. In its opinion below, the Court of Appeals for the Second Circuit held that the district court was correct in finding that "willfulness requires only that the defendant know that what he was doing was illegal, and not that he know that his conduct was prohibited under a specific AECA provision or related regulation." Pet. App. A19-20.[1]

The Second Circuit's opinion erroneously states that "no other court to have considered the AECA's willfulness requirement has applied the rule of" *Ratzlaf v. United States*, 510 U.S. 135 (1994) and *Cheek v. United States*, 498 U.S. 192 (1991), wherein this Court applied what the Second Circuit calls a "heightened definition of willfulness," to other statutes. Pet. App. A20-21. But in fact, the Second Circuit's holding that "ignorance of the law is not a valid defense" to an AECA charge, Pet. App. A20, directly conflicts with prior decisions from the Fifth, Seventh, Ninth, and Eleventh Circuits. Indeed, the Court of Appeals for the Sixth Circuit has specifically

[1] The Second Circuit's opinion is reported at *United States v. Henry*, 888 F.3d 589 (2d Cir. 2018).

noted that "[o]ther circuits have interpreted the willfulness element of section 2778(c) and produced different results." *United States v. Roth*, 628 F.3d 827, 834 (6th Cir. 2011). *See also* Christopher T. Robertson, *The Curious Case of Brian Bishop: Interpretation of the Willfulness Requirement in the AECA and ITAR*, 9 Geo. Mason J. Int'l Com. L. 234, 235 (2018).

The government's brief in opposition erroneously states that "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."[2] Opp'n Br., at 13-14. But as described at length in the instant petition for *certiorari*, at least four of the federal circuit courts to have "squarely considered the issue" have found that the AECA *does* require proof that a defendant knew that he or she was required to obtain a license before importing or exporting particular items. Pet., at 9-11. *See, e.g., United States v. Hernandez*, 662 F.2d 289, 292 (5th Cir. 1981) ("particularly where the weapons covered by the statute are spelled out in administrative regulations, specific intent is required. . . . While it is true that [the defendant's] concealment of [] weapons possibly supported a jury finding that he knew his conduct was unlawful . . . such a finding falls short of deciding that he knew he was unlawfully exporting weapons [designated as

[2] At one point, the government specifically argues that, "courts have consistently held" that an AECA conviction does not require proof that a defendant "had knowledge of the specific features of the regulatory regime implementing the Act." Opp'n Br., at 15. But petitioner has never argued that knowledge of "the specific features of the regulatory regime" is required to establish a "willful" AECA violation. Rather, petitioner contends that the government should at least be required to prove that defendants were aware that they were required to obtain a federal license before importing or exporting particular items in order to convict them of "willfully" violating the statute.

defense articles].") (citing *United States v. Davis*, 583 F.2d 190, 194 (5th Cir. 1978)); *United States v. Pulungan*, 569 F.3d 326, 329 (7th Cir. 2009) ("It is not enough for the Leupold Mark 4 CQ/T riflescope to *be* a 'defense article.' [The defendant] cannot be convicted unless he *knew* that it is one, and that licenses are necessary to export them.") (emphasis in the original); *United States v. Dobek*, 789 F.3d 698, 700 (7th Cir. 2015) ("[W]e interpret willfully in [] § 2278 to require knowledge by the defendant . . . that he needed a license to export the munitions that he exported."); *United States v. Lizarraga-Lizarraga*, 541 F.2d 826, 828 (9th Cir. 1976) ("[I]t appears likely that Congress would have wanted to require a voluntary, intentional violation of a known legal duty not to export such items before predicating criminal liability."); *United States v. Adames*, 878 F.2d 1374, 1377 (11th Cir. 1989) (per curiam) ("Though it reasonably could be inferred from [the defendant's] suspicious conduct that she was aware of the generally unlawful nature of her actions, that state of mind is insufficient to sustain a finding of guilt under a statute requiring specific intent.").

The existing conflict among the federal courts of appeals with respect to the AECA's "willfulness" element could not be more clear. Therefore, this Court should grant the instant petition and clarify whether a conviction under the statute requires proof of a defendant's awareness of the applicable licensing obligations (as the Fifth, Seventh, Ninth, and Eleventh Circuits have found), or whether it is sufficient for the government to prove that a defendant believed that his or her

conduct was in violation of *some* law (as the First, Second, Third, Fourth, and Sixth Circuits have found, *see* Pet., at 12-13).

II. The government fails to identify an "intelligible principle" that restricts or guides the AECA's delegation of legislative authority and does not address the question of whether something more than an "intelligible principle" is required when Congress delegates its criminal lawmaking powers.

By its plain terms, the AECA provides the President with unrestricted and unreviewable powers to designate "defense articles and defense services," and any person who does not obtain a federal license before importing or exporting such articles or services is subject to a maximum of 20 years' imprisonment and a maximum fine of $1,000,000. § 2778(a), (c). The President's designation of defense articles and services "shall not be subject to judicial review," § 2778(h), and there are no limits with respect to the quantity or types of articles and services that may designated under the statute. *See* Pet., at 20-21.

While it is true, as the government notes, that the import and export of articles and services touches on issues of international relations and national security, which are "within the core institutional expertise of the Executive Branch," Opp'n Br., at 24, it should not be forgotten that our constitutional structure assigns lawmaking powers to the legislative branch. *See* U.S. Const. Art. 1, § 1; *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989). Therefore, even when Congress delegates its legislative authority with respect to a subject that affects international relations or national security, this Court's precedents require the relevant statute to provide an intelligible principle that "clearly delineates the

general policy, the public agency which is to apply it, and the boundaries of [the] delegated authority." *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

The government does not explain how the AECA's first substantive clause, which states that the President is authorized to designate defense articles and services "[i]n furtherance of world peace and the security and foreign policy of the United States," § 2778(a)(1), could possibly qualify as an "intelligible principle." *See generally J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). Even if there was reason to believe that Congress intended for that clause to serve as an "intelligible principle," it is so vague, and its operative terms are so subjective (in the sense that challengers or defenders of many potential designations under the statute could plausibly argue that they are "in furtherance of" *or not* "in furtherance of" world peace, security, and U.S. foreign policy), that it cannot be relied on as a "general policy" to define the "boundaries of [the] delegated authority." *American Power & Light Co.*, 329 U.S. at 105. *See also Panama Refining Co. v. Ryan*, 293 U.S. 388, 420 (1935) ("The question of whether [] a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good.").

Moreover, the government's opposition brief does not address the question of whether the "intelligible principle" standard that applies to statutes affecting civil and regulatory matters is also applicable to criminal laws like the AECA. *See generally Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 475 (2001) (noting

that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."). As discussed in the instant petition for *certiorari*, this Court has not yet decided whether "something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions." *Touby v. United States*, 500 U.S. 160, 165-66 (1991). *See also United States v. Nichlols*, 784 F.3d 666, 672 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of reh'g en banc) ("It's easy enough to see why a stricter rule would apply in the criminal arena. . . Indeed, the law routinely demands clearer legislative direction in the criminal context than it does in the civil and it would hardly be odd to think it might do the same here."). Therefore, this Court should grant the instant petition and resolve that critical issue of law.[3]

III. The government does not present any relevant arguments to support the conclusion that criminal defendants may be forced to avail themselves of the statutory right to an interpreter.

With respect to the third question presented in the instant petition, the government argues that federal criminal defendants may be required to listen to their trial proceedings through court-appointed interpreters against their express wishes. Opp'n Br., at 25-29. The government does not dispute that defendants with limited English proficiency are entitled to waive their statutory right to an

[3] The government correctly notes that petitioner has not asked this Court to hold his petition for *certiorari* pending the outcome of *Gundy v. United States*, No. 17-6086 (argued Oct. 2, 2018). However, if this Court's opinion in *Gundy* holds that something more than an "intelligible principle" *is* required in the context of Congressional delegations of criminal lawmaking power, then the Second Circuit should be instructed to review petitioner's non-delegation challenge to the AECA in light of that holding.

interpreter under the Court Interpreters Act ("CIA"), 28 U.S.C. § 1827(f). *See generally United States v. Rodriguez*, 758 Fed. App'x 575, 577 (8th Cir. 2019). However, the government notes that the CIA also provides that such waivers must be "approved by the presiding judicial officer." Opp'n Br., at 26 (citing § 1827(f)(1)). The government then recounts the pretrial colloquy during which the district court asked petitioner several questions in English, found that "[h]e obviously can speak and understand English," but nevertheless ordered him to listen to his entire trial (except for his own testimony) through a translation headset. Opp'n Br.26-27; Pet. App. A67-80. But with respect to the specific question presented in the instant petition, which does *not* relate to the district court's exercise of discretion under the CIA but instead focuses on whether the personal "right to defend" encompasses an absolute right to waive the assistance of interpreters, Pet., at 26, the government's analysis is limited to the following observations:

> As the court of appeals recognized, appointment of an interpreter does not inhibit the defendant's ability to mount a successful defense, nor does it constrain the defendant's ability to make decisions of trial strategy. 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, 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.

Opp'n Br., at 28 (quotations and citations omitted). Both of these statements may be true in the abstract, but they are entirely irrelevant to this case.

Whether or not the statutory right to an interpreter "inhibit[s]," advances, or otherwise affects a criminal defendant's ability to present a "successful defense" has

no bearing on the question presented herein. As this Court has repeatedly stated, "the right to defend is personal." *See, e.g., Faretta v. California*, 422 U.S. 806, 834 (1975); *McCoy v. Louisiana*, --- U.S. ----, 138 S.Ct. 1500, 1507 (2018). As such, criminal defendants are entitled to knowingly and voluntarily waive their constitutional right to the assistance of counsel and "conduct [their] own defense ultimately to [their] own detriment" if they wish. *Faretta*, 422 U.S. at 834. *See also McKastle v. Wiggins*, 465 U.S. 168, 176-77 (1984). Criminal defendants are also entitled to knowingly and voluntarily waive their right to attend and be present at trial. *See Diaz v. United States*, 223 U.S. 442, 455 (1912); *Cuoco v. United States*, 208 F.3d 27, 30 (2d Cir. 2000); *Gov't of the Virgin Islands v. George*, 680 F.2d 13, 14 (3d Cir. 1982). The right to counsel and the right to attend trial clearly do not "inhibit [a] defendant's ability to mount a successful defense" or "constrain [a] defendant's ability to make decisions of trial strategy," and the government has not presented *any* argument, let alone a compelling argument, as to why the statutory right to the assistance of an interpreter should be treated any differently. Opp'n. Br., at 28.

The government's invocation of "the public's interests in an efficiently functioning and accurately recorded trial" is also inapposite. Opp'n Br., at 28. It is not as if the petitioner requested permission to testify in Mandarin without the assistance of an interpreter or to do anything else that would have delayed his trial or increased the potential for confusion to anyone but himself. Rather, petitioner merely requested permission to remove his translation headset and listen to his

trial proceedings in English. Pet. App. A67. If granted, this request would have had no effect whatsoever on "an efficiently functioning and accurately recorded trial." Opp'n Br., at 28.

Therefore, because "[f]reedom of choice is not a stranger to the constitutional design of procedural protections for a defendant in a criminal proceeding," *Faretta*, 422 U.S. at 834 n.45, this Court should grant the petition and clarify whether the personal right to defend encompasses an absolute right to intelligently and voluntarily waive the statutory right to an interpreter.

CONCLUSION

This Court should grant the instant petition for a writ of *certiorari* and resolve the important questions of law described therein.

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New York, New York

Respectfully submitted,

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