No. _____

IN THE
Supreme Court of the United States

LUTHER GENE RAY,
Petitioner

v.

UNITED STATES,
Respondent

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

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QUESTION PRESENTED FOR REVIEW

Whether a conviction resulting in a fifteen-year mandatory minimum sentence under 18 U.S.C. § 1591 requires, as the statute says, that force "was used" make someone to have non-consensual sex against her will?

Whether § 1591's requirement that the offense be committed ""knowingly-in or affecting interstate or foreign commerce" means that the defendant must know that that his acts had at least a de minimus effect on interstate commerce as well as having a *knowing* link between the crime's actus reus and its effect on interstate commerce?

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioner, Luther Ray, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit, in an unpublished decision, affirmed Petitioner's conviction for sex trafficking of a minor in violation of 18 U.S.C. § 1591(a).[1] The Ninth Circuit held that the evidence was sufficient to sustain Petitioner's conviction under a force theory, that the admission of a decade-old prior conviction for sex trafficking was permissible other acts evidence, and that the interstate commerce

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[1] *See United States v. Ray*, 734 F. App'x 504 (9th Cir. 2018). A copy of the memorandum decision is attached in Appendix A.

requirement was satisfied without evidence demonstrating that Petitioner had any knowledge of an interstate commerce nexus.[2]

Petitioner sought rehearing en banc. On October 29, 2018, the Ninth Circuit amended its opinion, and then denied the petition for rehearing.[3] The full court also declined to hear the matter en banc.[4]

JURISDICTION

On August 14, 2018, the Ninth Circuit affirmed Petitioner's conviction.[5] On October 29, 2018, it denied his petition for rehearing.[6] The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND OTHER PROVISIONS

Title 18 U.S.C. § 1591 (2014) provides, in relevant part:

> (a) Whoever knowingly—
>
> (1) in or affecting interstate or foreign commerce . . . , recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person
>
> . . .
>
> knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in

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[2] *See id.*

[3] *United States v. Ray*, 741 F. Appx. 452 (9th Cir. 2018). A copy of the amended decision and denial order is attached as Appendix B.

[4] *Id.*

[5] *See* Appendix A.

[6] *See* Appendix B.

subsection (b).

(b) The punishment for an offense under subsection (a) is—

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, . . . by a fine under this title and imprisonment for any term of years not less than 15 or for life

STATEMENT OF THE CASE

When the alleged conduct in this case began around June 2014, Mr. Ray was 30 years old and living with his mom and step dad, having recently been released from federal prison. In fact, he had been in federal and state custody for virtually the entire 10-year period leading up to his release. PSR 20-21. A felon and registered sex offender with very little work history in light of his lengthy periods of incarceration, Mr. Ray had little to no job prospects. PSR 28.

In December 2014, a 16-year-old, Kailynn, who is now an adult with the married name of Shaefer, was serving time on a probation violation at the San Diego County juvenile hall. PSR 4. Kailynn was interviewed by a San Diego police detective and FBI agent, telling them that in July of that same year, she was a runaway who had been introduced to Mr. Ray by a mutual friend. *Id.* Kailynn advised the officers that Mr. Ray believed she was 19 years old. PSR 6. She claimed that she went out with Mr. Ray the same night she met him, met his mom and Mr. Ray's girlfriend, Jasmine Horton, the next day, and began prostituting for Mr. Ray that night up in Orange County. PSR 5. Kailynn and Mr. Ray ultimately were able

to move into their own place in Hemet, California. And Kailynn remained with Mr. Ray until she decided to leave him in September 2014. PSR 7.

In February 2015, a grand jury charged Mr. Ray and his girlfriend, Jasmine Horton, in a three-count indictment. CR 22; ER 11. Mr. Ray was charged in the first two counts with sex trafficking and enhanced penalties for a registered sex offender.

Count One charged Mr. Ray with violating 18 U.S.C. 1951(a). Count One alleged that Mr. Ray "knowingly did recruit, entice, harbor, transport, provide, obtain and maintain" Kailynn, "knowing and in reckless disregard of the fact that: (1) means of force, threats of force, fraud, coercion, and any combination of such means, will be used to cause [Kailynn] to engage in a commercial sex act . . . ." (herein the "Force, Fraud, or Coercion Charge"). CR 22; ER 11-12. If convicted of violating § 1591 under this Force, Fraud, or Coercion Charge, Mr. Ray faced a mandatory-minimum sentence of fifteen years. 18 U.S.C. §1591(b)(1).

Count Two of the indictment alleged that Mr. Ray violated 18 U.S.C. §2260A when committing the above felony allegation in Count One while already required by law to register as a sex offender by virtue of a prior conviction under §1591. CR 22; ER 12. The effect of this allegation was to add an additional, consecutive mandatory 10-year sentence to any sentence received as a result of conviction on Count One. *See* 18 U.S.C. §2260A.

Mr. Ray went to trial in December 2015.[7]

At trial, Kailynn described how she was introduced to Mr. Ray. ER 351. Kailynn described how she began prostituting for Mr. Ray within a day of meeting him and introducing herself to Mr. Ray's mother as Jasmine Horton's cousin. ER 355-59. She then described "certain rules" she was supposed to follow while working for Mr. Ray, specifically that she "couldn't talk to other black men" and to "stay in pocket." ER 363. And when asked specifically what she meant by "in pocket," Kailynn responded: "Don't get out of line, like don't disrespect him in any way in front of anyone or at all." *Id.*

Kailynn then began to describe instances of physical abuse that Mr. Ray inflicted on her and others working for him.[8] Kailynn testified that Mr. Ray originally told her that she was free to leave him, but later wouldn't let her leave, claiming without any details that "he put his hands on us . . . just hit you." ER 365-66. She later testified, however, that when she actually left Mr. Ray, she received a text from one of the other women working for Mr. Ray saying: "He said, you good as long as you don't call the cops on him." ER 43.

As for more specific instances of physical abuse, Kailynn described the first time Mr. Ray hit her, in that case because he thought she wanted to talk to his

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[7] Jasmine Horton, the co-defendant, pled guilty pursuant to a plea agreement on July 28, 2015, CR 55, and ultimately served as a cooperating witness for the government during Mr. Ray's trial. ER 163-235.

[8] Kailynn referred to these other women as "girls," but as the presentence report notes, they were all adult women. PSR 12-13.

brother, another black man, and then quickly apologizing to her. ER 366-68. She described another time when she said "I woke up late at the hotel, and I had an attitude when I woke up." ER 367. When asked to elaborate about why he pushed her, Kailynn responded "I was lazy." *Id.*

Kailynn was asked on direct "What other reasons would [Mr. Ray] hit you?" She responded: "Main thing was just being lazy and not having things done his way." ER 368. When pressed further by the leading question, "When you say *being lazy*, does that mean you didn't want to go work as a prostitute," Kailynn responded: "That or not wanting to iron his clothes." *Id.*

After the close of evidence, the court instructed the jury. ER 238. As to the interstate commerce element, the court instructed

> THE UNITED STATES HAS OFFERED PROOF THAT THE SEX TRAFFICKING CRIMES INVOLVED THE USE OF CELLULAR TELEPHONES AND THE INTERNET AND NATIONAL BRAND HOTELS. IF YOU UNANIMOUSLY AGREE THAT ANY OR ALL OF THOSE FACTS HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT, THEN AS A MATTER OF LAW, THE CRIME HAS AFFECTED INTERSTATE COMMERCE. IT IS NOT NECESSARY FOR THE GOVERNMENT TO PROVE THAT THE DEFENDANT KNEW OR INTENDED THAT HIS ACTIONS WOULD AFFECT INTERSTATE OR FOREIGN COMMERCE.
>
> ER 249-50.

The jury returned a verdict of guilty. CR 100; ER 324. And having found Mr. Ray guilty on Count One, the jury returned to hear testimony and argument on Count Two. ER 81. After retiring to deliberate, the jury convicted Mr. Ray on Count Two as well. CR 109; ER 77; 103-04.

After taking the verdict, the court ruled on the defense's Rule 29 motion from Count One. ER 109-111. In denying the motion, the court opined on the force theory, stating that "what the statute refers to is a course of action which would lead a reasonable person in the victim's position to believe that if, in fact, he or she didn't perform as was being requested of him or her, that physical force would follow." ER 109-10. The case was then set for sentencing. ER 111.

At sentencing, the court imposed a sentence of 360 months on Count One with a mandatory consecutive 120-month sentence on Count Two for a total of 480 months' custody. ER 45.

On appeal, Mr. Ray argued, among other things, that the evidence was insufficient to support a conviction for sex trafficking by force because no rational trier of fact could have concluded that reasonable women in Kailynn's circumstances would have been "compel[led] to continue performing commercial sexual activity" by the prospect of Mr. Ray's unrelated behavior regarding certain "rules." He also argued that the court erred when telling the jury that "as a matter of law" the interstate commerce element was satisfied regardless of whether Mr. Ray knowingly affected interstate commerce in this case. The Ninth Circuit rejected both these arguments and affirmed Mr. Ray's convictions.

REASON FOR GRANTING THE PETITION

Concluding that sex trafficking is "a global matter,"[9] Congress documented a scourge of international sex trafficking across borders.[10] It responded with a powerful criminal statute that carries stiff mandatory minimum penalties, reserving the harshest penalties for crimes involving fraud, force, or coercion. But when bringing down the 15-year mandatory hammer, Congress identified such egregious trafficking as the sort that "includes all the elements of the crime of forcible rape."[11] Despite this understanding, Luther Ray is serving a 40-year federal sentence for what appears to be a pedestrian case of pimping within the state of California.

Rather than proving that Mr. Ray forced someone to have non-consensual sex against her will, i.e. to be forcibly raped by others, the government here proved little more than that Mr. Ray imposed "rules" on how his accomplice conducted herself and that he was willing to enforce these rules with force. In affirming Mr. Ray's conviction, the Ninth Circuit highlighted his accomplice's testimony that Mr. Ray would hit her for "just being lazy and not having things done his way."[12] When the prosecutor pressed the accomplice whether "being lazy" meant "you didn't want to

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[9] *See United States v. Todd*, 627 F.3d 329, 333 (9th Cir. 2010) (*Todd II*).

[10] *See* preamble to PL106-386, 2000 HR 3244, the Victims of Trafficking and Violence Protection Act of 2000.

[11] *Id.* at ¶9.

[12] *United States v. Ray*, 734 Fed. Appx. 504 (9th Cir. 2018) (attached as Appendix A).

go work as a prostitute," she responded: "That or not wanting to iron his clothes." [ER 368] Even the government thought the most it could say about this in closing was: "Perhaps he wanted her to get up so she should would get up and work." [ER 307]. It never went so far as to say that this meant that, even when feeling "lazy," the accomplice was engaging in the equivalent of forcible rape when she prostituted herself; it couldn't. But the Ninth Circuit held this equivocal evidence as sufficient to uphold Mr. Ray's conviction. [13]

The Ninth Circuit cites no caselaw or standard in upholding Mr. Ray's conviction on this ground, a conviction resulting in a 40-year sentence. This would be reason alone to grant the petition. But it is clear from argument and briefing that the problem lies in this Ninth Circuit's multiple attempts in *United States v. Todd* to resolve what the sex trafficking statute "means to describe, and does describe awkwardly," at least in the court's opinion, when articulating the mens rea for the offense.[14] For a statute that requires a defendant to know or recklessly disregard the fact that "force, fraud, or coercion [ ] will be used to cause the person to engage in a commercial sex act,"[15] *Todd* ultimately concludes that "[t]he knowledge required of the defendant is such that if things go as he has planned, force, fraud, or coercion will be employed to cause his victim to engage in a

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[13] *Id.* at 504-05.
[14] *Todd II*, 627 F.3d at 334.
[15] 18 U.S.C. § 1591(a).

commercial sex transaction."[16]

Fair enough. But instead of heeding Judge Milan Smith's warning in concurrence that the required mens rea "does not leave open the possibility that force, fraud, or coercion was not eventually used in committing the offense,"[17] the *Todd* majority hedges. It instead cites Shakespeare and settles on a definition that requires no certainty or even actuality of a future act, claiming: "What the statute requires is that the defendant know in the sense of being aware of an established modus operandi that will in the future cause a person to engage in prostitution."[18] Not only does this formulation maintain the Sixth Amendment problem that the Ninth Circuit identified in *Todd I*,[19] it creates significant criminal liability for the mere possibility of conduct. The Court should grant this petition to resolve the clear conflict between the plain language of the statute of conviction and the Ninth Circuit's faulty reasoning in *Todd*.

The Court should also grant the petition because the Ninth Circuit's analysis of the mens rea for the interstate commerce element of § 1591 not only conflicts with the statute's plain language but also with this Court's precedent in *Flores-Figueroa v. United States*, 129 S.Ct. 1886 (2009). Mr. Ray's conviction on Count One in this regard rested on what essentially was a directed verdict in light of

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[16] *Todd II*, 627 F.3d at 334.
[17] *Id.* at 336 (M. Smith, J., concurring).
[18] *Id.* at 334.
[19] *See United States v. Todd*, 584 F.3d 788, 793-94 (9th Cir. 2009) (*Todd I*).

the district court's instruction on the interstate commerce element. Specifically, it instructed that "as a matter of law," the crime in Count One has sufficiently "has affected interstate commerce" if the government had merely proven that the offense "involved the use of cellular telephones and the internet and national brand hotels," regardless of whether Mr. Ray "knew or intended that his actions would affect interstate or foreign commerce." ER 249-50.

I. The case should be reheard because *Todd* failed to harmonize §1951's plain language, creating an offense predicated on a speculative mens rea.

The Ninth Circuit holds that that the evidence "was sufficient for the jury to find beyond a reasonable doubt that Ray trafficked the victim by force, threats of force, or coercion."[20] With no citations to caselaw or the statute of conviction, the Ninth Circuit leaves it unclear under what standard it believed the evidence was sufficient to prove the offense elements. We know from the verdict form that the jury simply found Mr. Ray "knew or was in reckless disregard that means of force. [threats of force, and coercion] *would* be used to cause MF to engage in a commercial sex act." [ER 116] In other words, the jury only found a mens rea supporting a conditional possibility that such means would be used to make the person have sex against her will, with no further finding that such means were actually used to make her have sex against her will.

When turning to the statute, however, such conditional language doesn't

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[20] *Ray*, 734 Fed. Appx. At 504.

exist. There is no "would." Rather, §1591(a)(2) requires knowledge or reckless disregard of the fact that such means "*will* be used to cause the person to engage in a commercial sex act." And the statute further demonstrates that Congress didn't intend any such guess work about the difference between a conditional, possible "would" and a more certain, actual "will." It only authorizes the heaviest 15-year mandatory minimum punishment if the offense was actually "*effected* by means of force, threats of force, or coercion."[21]

In *Todd I*, the Court failed to appreciate this symmetry. As a consequence, it struggled with the apparent disconnect between proof of what it believed to be a conditional or probable element of force, threats, or coercion versus a sentencing provision that requires those means to actually be used to make a person have sex against their will. The jury in *Todd* was instructed to determine, and did find, that Todd knew such means "would be used to cause [the person] to engage in a commercial sex act."[22] Having no quarrel with the substitution of "would" for "will," the Ninth Circuit settled on a definition of "will be used" that "requires [ ] the defendant know in the sense of being aware of an established modus operandi that will in the future coerce a prostitute to engage in prostitution."[23]

Using this definition, the Court held that even before the offense began, Todd had "such awareness" based on his prior practice of "living off the earnings of a

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[21] 18 U.S.C. §1591(b)(1).
[22] *Todd I*, 584 F.3d at 792.
[23] *Id.*

prostitute, doing so by rules controlling her work and payment of the proceeds to him."[24] No suggestion of threats, force, or coercion, even prior to the office, much less during it.

In *Todd I*, the adoption of this interpretation created a problem with the Ninth Circuit's own plain-language reading of the statute's sentencing provision, a provision that requires that the offense be "effected" by such means before a draconian 15-year mandatory minimum penalty can be imposed. Not any sort of probability of such means being used. Not any sort of conditionality that such means might be used. The sentencing provision requires that those means actually be used to commit the instant offense. Said differently, the offense must be "effected by fraud, force or coercion."[25] Because of this disconnect, and the failure of the jury to find that those means were used, the Ninth Circuit in *Todd I* reversed Todd's convictions on *Apprendi* grounds.[26]

Despite the straight-forward nature of its analysis, the Ninth Circuit reversed course, replacing its opinion with *Todd II*. Interestingly, it didn't reverse course as to its analysis about whether "will be used" also means "would be used" or might be used or conditionality could be used "if things go as [ ] planned."[27] Instead, in upholding the convictions, the Ninth Circuit ignored the plain-meaning import of

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[24] *Id.*
[25] 18 U.S.C. § 1591(b)(1).
[26] *Todd I*, 584 F.3d at 793-94.
[27] *Compare Todd II*, 627 F.3d at 334 *with Todd I*, 584 F.3d at 792-93.

the words "effected by" and concluded in a single paragraph with little to no explanation that this provision in no way informs the language in the first subsection of the statute.[28]

Judge Smith wasn't so sure about this reasoning or lack thereof. In concurrence, Judge Smith read not just the plain meaning of the punishment provision but the plain meaning of "will be used" in the first subsection as "not leav[ing] open the possibility that force, fraud, or coercion was not eventually used in committing the offense."[29] To be clear, he would have held that "[b]y using the phrase 'will be used' as opposed to something more speculative such as 'could be used' or 'might be used,' the statute describes definitive conduct."[30] He could have continued with the difference between "will" and "would." Regardless, Judge Smith focused on actual acts of the defendant in that case to justify his concurrence, specifically the critical fact that at the beginning of the offense, Todd forced his victim to perform oral sex on him against her will, threatening to hit over the head with a bottle.[31] As Judge Smith found, it is this sort of evidence that is essential to sustaining a conviction under the force, threat or coercion prong of § 1591 because it demonstrates that the such action *caused* an unwilling participant to engage in sex.

Judge Smith's is the better reading of the statute. It is one that leave "no

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[28] *Todd II*, 627 F.3d at 334-35.
[29] *Id.* at 336 (M. Smith, J., concurring).
[30] *Id.*
[31] *Id.* at 337.

'hole in the statute,'" specifically one that undermines convictions like Mr. Ray's on *Apprendi* grounds.[32] And because this hole still exists under the majority's reasoning in *Todd II*, this issue should be reviewed by this Court so that it can be harmonized with both the statute's plain language and the Sixth Amendment limitations embraced in by the Court in *Apprendi* and its progeny.

This Court should grant certiorari to resolve this unjust conflict.

II. This Court's precedent and § 1591's plain language require knowledge by a defendant that his acts had at least a de minimus effect on interstate commerce as well as a *knowing* link between the crime's actus reus and interstate commerce.

In light of this Court's decision in *Flores-Figueroa v. United States*,[33] the phrase "knowingly-in or affecting interstate or foreign commerce" in § 1591(a) requires that the defendant "know" the effect of his actions on "interstate or foreign commerce." The rule that penal laws are to be construed strictly, "is perhaps not much less old than construction itself."[34] In *Flores-Figueroa*, the Court reiterated, and inculcated, this tenet of statutory interpretation.

Flores-Figueroa held that Title 18 U.S.C. § 1028A(a)(1), the aggravated identity theft statute which provides an enhanced, 2- year consecutive mandatory penalty for "knowingly transfer[ring], possess[ing], or us[ing],

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[32] *Id.* at 336 (citing *Todd I*, 584 F.3d at 793).
[33] 129 S.Ct. 1886 (2009).
[34] *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

without lawful authority, a means of identification of another person should be construed according to its natural, ordinary, English grammatical reading, namely, that the introductory adverb "knowingly" applied to "all the subsequently listed elements of the crime."[35]

In rejecting the government's contention that the defendant need not know that the means of identification he unlawfully used belonged to "another person," and holding that the government must indeed prove such knowledge to secure the enhanced consecutive penalty, the Court reaffirmed that "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."[36] There was no "special context" or "background circumstances" identified by Congress that might call for anything other than the "ordinary," grammatical reading.[37]

The same is true here. There is no "special context" or "background circumstances" identified by Congress - either when it enacted § 1591 in 2000, or with its subsequent amendments - that might call for anything other than the "ordinary," grammatical reading of the "knowingly in or affecting interstate or foreign commerce" language in § 1591(a).

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[35] 129 S. Ct. at 1891.
[36] *Id.*
[37] See *Id.*

Also, the Court was very clear that the distribution of the word "knowingly" in the law's empire was from now on to be a default used across all of federal criminal law and not just a statute-specific interpretation. "[D]issimilar examples are not easy to find."[38]

> [T]he Government has not provided us with a single example of a sentence that, when used in typical fashion, would lead the hearer to believe that the word 'knowingly' modifies only a transitive verb without the full object, *i.e.*, that it leaves the hearer gravely uncertain about the subject's state of mind in respect to the full object of the transitive verb in the sentence.[39]

In reaching its conclusion, *Flores-Figueroa* instructed: "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 the subject performed the entire action . . . ." This is instruction should be applied to § 1591. The defendant must "knowingly" affect interstate commerce in his actions.

Similarly, the statute requires that the prohibited act have some nexus with interstate commerce. Rooted in the language Congress chose, this is also borne out in the demands of the Court's commerce-clause jurisprudence.

The statute begins with "whoever knowingly—"(1) *in or affecting interstate or foreign commerce*, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, or

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[38] *Id.* at 1890.
[39] *Id.*

maintains by any means a person . . ."[40] The italicized phrase "in or affecting interstate commerce" is a prepositional phrase that modifies the verbs that follow, otherwise known as an adverbial phrase. So parsed out, each of the verbs would be read like this:

- Whoever knowingly, in or affecting interstate or foreign commerce recruits a person

- Whoever knowingly, in or affecting interstate or foreign commerce entices a person

- And so on . . .

That modifying effect of the adverbial phrase is well understood in grammar and statutory construction.[41]

As the Court often reminds litigants, ordinary English and statutory construction are usually consistent: "The manner in which the courts ordinarily interpret criminal statutes is fully consistent with this ordinary English usage."[42] So when courts are confronted with an adverbial phrase at the beginning of a list of terms, whether it's listing elements or means of commission, the adverbial phrase

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[40] 18 U.S.C. § 1591 (emphasis added).

[41] William A. Sabin, *The Gregg Reference Manual*, 475 (7th ed. 1992) ("adverbial phrase" is a "phrase that functions as an adverb (such as . . . a prepositional phrase)."); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147–51 (2012) (thoroughly discussing the Series-Qualifier Cannon).

[42] *Flores-Figueroa*, 556 U.S. at 652.

has the same effect, that phrase modifies each of those terms. The Court couldn't be clearer: "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."[43] That extends beyond the *mens rea* of "knowingly" and has been applied consistently in other statutes.[44] Indeed, in ordinary English, "where a transitive verb has an object, listeners in most contexts assume that an adverb . . . that modifies the transitive verb tells the listener how the subject performed the entire action."[45]

The same rule applies here. The adverb "knowingly" modifies each listed way of facilitating the commercial sex act. That is, a cab driver doesn't violate the statute simply by driving a teenage prostitute across town (transporting), with no clue as to where she was going and why. And just the same, the second adverbial phrase (regarding interstate commerce) likewise modifies each listed way of facilitating the commercial sex act—so you can't violate the statute if the recruitment does not occur in or affecting interstate commerce.

Not surprisingly, other courts have read § 1591 as consistent with this proposition. In *United States v. Phea*, the Fifth Circuit looked at this statute's grammar and noted the obvious:

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[43] *Id.*

[44] *See, e.g..*, *United States v. Hazlewood*, 526 F.3d 862, 865 (5th Cir. 2008) ("forcibly" as used in 18 U.S.C. § 111); *see also United States v. X-citement Video, Inc.*, 513 U.S. 64, 68 (1994).

[45] *Flores-Figueroa*, 556 U.S. at 650.

> It is not the person who must be in or affecting interstate or foreign commerce. Rather, it is the actions described by the transitive verbs that must occur in, or affect, interstate or foreign commerce. *The interstate nexus element is in essence an adverbial phrase modifying the transitive verbs.*[46]

And in *United States v. Garcia-Gonzalez*, that court listed the first two elements this way: (1) "that the defendant knowingly recruited, enticed, harbored, transported, obtained or maintained [the victim];" (2) "that the recruiting, enticing, harboring, transporting, providing, obtaining or maintaining of [the victim] was in or affecting interstate or foreign commerce."[47] And the Fourth Circuit has stated that the statute demands "that the defendant's act was in or affecting interstate commerce."[48]

This point can't be lost: we don't look at all the events surrounding Mr. Ray's disturbing (and allegedly criminal, under state law) acts to see if he ever touched another state.[49] Something always will.[50] Rather, we look at the activity that Congress has targeted, to see if that activity involved interstate commerce. So, in a felon-in-possession case, the question is not whether the *defendant* has traveled in interstate commerce, but the *gun*.[51]

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[46] 755 F.3d 255, 265 (5th Cir. 2014) (emphasis added).

[47] 714 F.3d 306, 312 (5th Cir. 2013).

[48] *United States v. Gray-Sommerville*, 618 F. Appx. 165, 167 (4th Cir. 2015).

[49] *See United States v. Patton*, 451 F.3d 615, 632–34 (10th Cir. 2006).

[50] *See Jones v. United States*, 529 U.S. 848, 856 (2000) (rejecting the proposition that the interstate transport of materials in a building made the arson of that building a federal crime).

[51] *Id.* at 454; *United States v. Travisano*, 724 F.3d 341, 347–48 (2d Cir. 1983); *see also United States v. Vasquez*, 611 F.3d 325, 337 (7th Cir. 2010) (Manion, J.,

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It is axiomatic that "Congress cannot punish felonies generally."[52] So, Congress cannot generally criminalize prostitution; it can only criminalize prostitution that relates to interstate commerce.[53] *Hoke* was a Mann Act case; and building on that, in § 1591, Congress sought to fight human trafficking by focusing on those who would, in or affecting interstate commerce, recruit, entice, harbor, etc. So, the issue isn't whether some aspect of Mr. Ray's behavior affected interstate commerce, or some aspect of his (troubling) relationship with Kailynn affected interstate commerce. The question is whether his recruitment of Kailynn was in or affecting interstate commerce. It was not. Everything that occurred between Mr. Ray and Kailynn was intrastate.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

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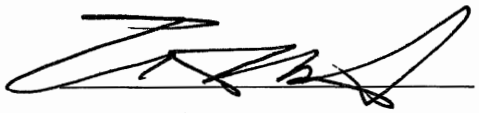
dissenting) (providing a thorough discussion of Congress's Commerce Clause power).

[52] *United States v. Lopez*, 514 U.S. 549, 597 (1995) (Thomas, J. concurring); *see also id.* at 561 n.3 ("Under our federal system, the States possess primary authority for defining and enforcing the criminal law.").

[53] *See Hoke v. United States*, 227 U.S. 308, 322 (1913) (holding that Congress may use its power to take away the facility of interstate transportation from those who are involved with "the enslavement in prostitution and debauchery of women").

Date: January 27, 2019

Respectfully submitted,



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