No. 18-8050

In the
Supreme Court of the United States

Alvaun Thompson,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

In opposing review of this case, the government says the Second Circuit "correctly rejected [Thompson's] contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Moreover, the resolution of the question presented does not appear to have practical significance for petitioner." Brief in Opposition ("BIO") at 9. The government is mistaken.

The plain text of 18 U.S.C. § 1591(a) has a *mens rea* requirement that, pursuant to this Court's rulings, requires the defendant's awareness that a minor is under 14. Nothing in the statute says otherwise, and Congress knows how to dispense with *mens rea* requirements as to age when it wants to. Were there any doubt, the rule of lenity would require a ruling in Thompson's favor. Finally, there are no vehicle problems preventing resolution of this fully preserved legal dispute over a "core element of the rule of law." *United States v. Burwell*, 690 F.3d 500, 552 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting).

ARGUMENT

I. The Second Circuit's Answer to the Important Question Here is Wrong and Conflicts with This Court's Decisions

The text of § 1591(a) says it plainly: one must act "knowing" or "in reckless disregard of the fact" that "means of force, threats of force, fraud, [or] coercion" will be used to engage a person in a commercial sex act or that "the person has not attained the age of 18 years." Section 1591(b)(1) sets out an aggravated offense – with a 15-year minimum – where the person is under 14. Section 1591(b)(1) does

not repeat the *mens rea* requirement stated in § 1591(a). The government says this means a defendant need not know or recklessly disregard that a trafficked person is under 14. *See* BIO at 10 ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally.'") (citation omitted).

"But the Supreme Court has repeatedly rejected that approach to mens rea." *Burwell*, 690 F.3d at 549 (Kavanaugh, J., dissenting). The "Court has applied the presumption of mens rea consistently, forcefully, and broadly" to statutes, like § 1591, "that contain an explicit mens rea requirement for one element but are silent or ambiguous about mens rea for other elements." *Id.* at 537. "For example, the statute in in *Morissette* [*v. United States*, 342 U.S. 246 (1952)] punished '[w]hoever embezzles, steals, purloins, or *knowingly* converts to his use or the use of another' anything owned by the United States. Despite the explicit knowledge requirement for one element, the Court held that 'mere omission' of a mens rea requirement for another element does not eliminate a mens rea requirement for that other element." *Id.* at 549 (citations omitted; emphasis in *Burwell*). "Similarly, in *Carter v. United States*, [530 U.S. 255 (2000),] the Court faced parallel subsections of a bank robbery statute. While subsection (b) required 'a specific "intent to steal or purloin,"' subsection (a) contained 'no explicit *mens rea* requirement of any kind.' But once again, the Court refused to apply strict liability to subsection (a). Instead, relying on 'the presumption in favor of scienter,' the Court 'read subsection (a) as requiring proof' of the defendant's knowledge." *Id.* at 549-50 (citations omitted). "And

in *Posters 'N' Things, Ltd. v. United States*, [511 U.S. 513 (1994),] the Court interpreted a section of a statute – 21 U.S.C. § 857 (1988) – enacted as part of the Anti-Drug Abuse Act of 1986. The adjacent section of the statute, enacted in the same Act, imposed an explicit knowledge requirement. Yet the Court still held that 'the fact that Congress did not include the word "knowingly" in the text of § 857' cannot 'justif[y] the conclusion that Congress intended to dispense entirely with a scienter requirement.'" *Id.* at 550 (citations omitted).

The government's strict-liability reading, which the Second Circuit adopted, is contrary to this Court's precedents. "[S]trict liability is extremely disfavored in the criminal laws of the United States." *Id.* at 530. Though it may apply when a statute is silent on *mens rea*, the statute here is not silent. Section 1591(a) has an express *mens rea* requirement, and "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." *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009). That is so even if an element "appear[s] in a different subsection" than the *mens rea* requirement. *Id.* at 653. As the government does not dispute, a trafficked person's being under 14 is an element under § 1591 because it increases the mandatory minimum. *See Alleyne v. United States*, 570 U.S. 99, 103 (2013). Thus, absent a clear indication otherwise (and, as shown in the Petition and below, there is none), § 1591's *mens rea* requirement applies to the under-14 element.

The government says *Flores-Figueroa* differs factually from this case because the statute there "set forth a knowledge requirement that textually extended to all

elements" in a single sentence, BIO at 12, whereas "the under-14 element [] is not located in the same provision, or sentence, as [§ 1591's] statutory mens rea requirements." BIO at 13. As the government ignores, however, *Flores-Figueroa* itself found such a fact legally irrelevant. In applying the express *mens rea* requirement in the statute there to all the elements, the Court noted it had done the same thing in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), even though the express *mens rea* requirement in that statute "appeared in a different subsection" than the element at issue. *Flores-Figueroa*, 556 U.S. at 653.

Indeed, in *X-Citement Video* the Court held "the term 'knowingly' in subsections (1) and (2) [of 18 U.S.C. § 2252(a)] modifies the phrase 'the use of a minor' in subsections (1)(A) and (2)(A)" even though that is not "[t]he most natural grammatical reading." 513 U.S. at 68. "Ordinarily . . . , when a criminal statute introduces the elements of a crime with the word 'knowingly,' that *mens rea* requirement must be applied 'to *all* the subsequently listed [substantive] elements of the crime.'" *United States v. Games-Perez*, 695 F.3d 1104, 1117 (10th Cir. 2012) (Gorsuch, J., dissenting from the denial of rehearing en banc) (quoting *Flores-Figueroa*, 556 U.S. at 650) (emphasis and alteration in *Games-Perez*).

Thus, it is irrelevant that § 1591's *mens rea* provision and the under-14 element appear in different subsections.[1]

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[1] Thompson's Petition should at least be held for *Rehaif v. United States*, No. 17-9560 (argued April 23, 2019). If the Court there rules that an express *mens rea* provision applies to a different *statute*, then the fact the Second Circuit relied on – that § 1591's *mens rea* provision and the under-14 element are in "different *subdivisions*," Pet. App. 23a (emphasis added) – should not matter.

The government also cites a factual difference between *X-Citement Video* and Thompson's case that is, again, legally irrelevant. In *X-Citement Video*, applying the statute's *mens rea* requirement to the element at issue was "necessary to separate culpable conduct from innocent or constitutionally protected conduct." BIO at 14. That was not necessary in *Flores-Figueroa*, where the "[a]ggravated identity theft" statute required the simultaneous "commission of [] other crimes," 556 U.S. at 647, but this Court applied the statute's *mens rea* requirement to every element anyway. It did not matter that the statute presupposed wrongdoing: "In *Flores-Figueroa*, the Court rejected the government's argument that the absence of innocence should circumscribe the reach of an explicit *mens rea* requirement." *Burwell*, 690 F.3d at 516 (en banc majority op.). The "fact that the defendant is a 'bad person' who has done 'bad things' does not justify dispensing with the presumption of mens rea." *Id.* at 544 (Kavanaugh, J., dissenting).

"To be sure, the Supreme Court has said that the presumption of mens rea is important when the defendant otherwise may have been innocent of any wrongdoing. But the Court has never cabined the presumption of mens rea to those circumstances." *Id.* at 543 (citation omitted). "The presumption applies *both* when necessary to avoid criminalizing apparently innocent conduct . . . *and* when necessary to avoid convicting the defendant of a more serious offense for apparently less serious criminal conduct (that is, when the defendant would receive a less serious criminal sanction if the facts were as the defendant believed)." *Id.* at 529 (emphasis in original).

Likewise, that the "presumption of mens rea does not *generally* apply to . . . the victim's age in a statutory rape case," *id.* at 537 n.10 (emphasis added), does not mean the presumption does not apply here. As shown in the Petition and below, statutes concerning offenses against minors "generally" are not subject to the *mens rea* presumption because they generally are silent as to *mens rea* or say explicitly that awareness of the minor's age is not required. But § 1591(a) falls into neither category: its text requires knowledge or reckless disregard of the minor's age. That differentiates this case from those where, because of statutory features not present here, the presumption of *mens rea* does not apply.

Here, Congress wrote a *mens rea* requirement directly into § 1591's text. That requirement applies to § 1591's under-14 element because this "Court has established and applied a rule of statutory interpretation for federal crimes: A requirement of mens rea applies to each element of the offense unless Congress has plainly indicated otherwise." *Burwell*, 690 F.3d at 537 (Kavanaugh, J., dissenting).

There is no such indication here. "By its terms," the government claims, § 1591(b)(1)'s "enhanced statutory minimum applies so long as the victim had <u>in fact</u> 'not attained the age of 14 years at the time of such offense,' without regard to whether the defendant knew that the victim was less than 14." BIO at 10 (emphasis in original). But the "terms" of § 1591(b)(1) do not say that. The statute does not say the 15-year mandatory minimum applies if, "in fact," the minor was under 14, "without regard to whether the defendant knew that."

Indeed, what most obviously defeats the government's argument is the

text itself. Section 1591 simply does not say what the government wants it to: "A defendant need not know or recklessly disregard that the minor is under 14." Nor does the government identify any legislative history to that effect. Moreover, Congress speaks plainly when it wants to make awareness of a particular age unnecessary. It did not do so with respect to the under-14 offense.

For example, 18 U.S.C. § 2243(a) permits a 15-year prison sentence for someone who "knowingly engages in a sexual act with another person who (1) has attained the age of 12 years but has not attained the age of 16 years; and (2) is at least four years younger than the person so engaging." The "knowingly" suggests the defendant must know the person is between 12 and 15 and at least four years younger. But Congress expressly said otherwise: "In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew (1) the age of the other person engaging in the sexual act; or (2) that the requisite age difference existed between the persons so engaging." § 2243(d).

As especially relevant here, § 2241(c) mandates a 30-year minimum for someone who "knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under [] circumstances [involving force or coercion] with another person who has attained the age of 12 years but has not attained the age of 16 years." The "knowingly" indicates the defendant must know, depending on the offense, that the minor is under 12 or between 12 and 15. *See, e.g., United States v. Bruguier*, 735 F.3d 754, 761 (8th Cir. 2013) (en banc) (Absent a contrary provision, "'the government would

have had to prove that the defendant knew that a victim was less than 12 years old, since the state of mind required for the conduct – knowing – is also required for the circumstance of the victim's age.'") (quoting H.R. Rep. No. 99-594, at 15 n.59 (1986)).

Congress chose to relieve the government of one burden, but only one: "In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person . . . had not attained the age of 12." § 2241(d). Congress did not excuse the government from proving the defendant "knowingly" had sex with someone between 12 and 15.

Likewise, § 1591(c) only relieves the government of one burden: where the defendant had a "reasonable opportunity to observe the person," the government need not prove his awareness "that the person had not attained the age of 18." Congress did not excuse the government from proving the defendant acted "knowing" or "in reckless disregard of the fact" that the person was under 14.

As shown, that § 1591(a)'s *mens rea* provision is not repeated in § 1591(b)(1) is consistent with the rule that a textual *mens rea* requirement applies to each element regardless of whether it is repeated in every subsection. And "'[d]rawing meaning from silence is particularly inappropriate' where," as here, "'Congress has shown that it knows how to direct sentencing practices in express terms.'" *Dean v. United States*, 137 S. Ct. 1170, 1177 (2017) (citation omitted).

Congress has spoken plainly in other laws and § 1591(c) as to when awareness of a particular age is not required. It has nowhere said someone unaware of a trafficked person's being under 14 must be sent to prison for at least 15 years.

Finally, and as the government and Second Circuit tellingly ignore, the rule of lenity puts the nail in their position's coffin. Given § 1591's textual *mens rea* requirement, the rule that such a requirement applies to each element of an offense, and the fact that a person's being under 14 is an element, there is no ambiguity here. Because Count One required proof the government concedes is lacking – proof Thompson was aware M1 was under 14 – his conviction cannot stand. And even "if there were [ambiguity in § 1591,] that would only provide another reason for the same result. After all, the rule of lenity teaches that if, after 'seizing every thing from which aid can be derived' an ambiguity still persists, courts should interpret federal criminal statutes . . . 'to avoid an increase in the penalty prescribed.'" *United States v. Manatau*, 647 F.3d 1048, 1055 (10th Cir. 2011) (Gorsuch, J., for the Court) (citations omitted). Thus, "'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *Jones v. United States*, 529 U.S. 848, 858 (2000) (citation omitted). Section 1591 has no "clear and definite" language saying someone unware of a minor's being under 14 must receive the statute's enhanced penalty of at least 15 years' imprisonment.

The Second Circuit incorrectly held, contrary to this Court's rulings on *mens rea*, that § 1591(b)(1) imposes "strict criminal liability with regard to the age of a victim." Pet. App. 24a.

II. There are No Vehicle Problems

The government says that, because Thompson "would apparently obtain no practical benefit if the Court adopted the interpretation he urges, his case is an unsuitable vehicle for consideration of the question presented." BIO at 16.

Yet the question presented is purely legal, fully preserved, and concerns a dispute over *mens rea*— a "core element of the rule of law." *Burwell*, 690 F.3d at 552 (Kavanaugh, J., dissenting). This case is the opposite of an "unsuitable vehicle."

Moreover, the government does not contest that a ruling in Thompson's favor would result in reversal of his Count One conviction. Though it cites his Count Two and Three convictions, those concern different conduct and dates than Count One. *See United States v. Thompson*, E.D.N.Y. No. 15-cr-80, Docket Entry 65-1 (Operative Indictment) at ¶¶ 1-3. Where, as here, a criminal conviction may be reversed, it cannot accurately be said "no practical benefit" may result.

For one thing, Thompson would be refunded the $100 special assessment. "For better or worse, nothing so shows a continuing stake in a dispute's outcome as a demand for dollars and cents." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, ___ S. Ct. ___ 2019 WL 2166392, at *4 (May 20, 2019).

And with one of Thompson's nine counts vacated – Count One, arguably the count that drove punishment on the others – resentencing would be appropriate. In "sentencing package cases," which "involve multicount indictments and a successful attack by a defendant on some but not all of the counts of conviction," the "Government routinely argues that an appellate court should vacate the entire

sentence so that the district court may increase the sentences for any remaining counts up to the limit set by the original aggregate sentence. And appellate courts routinely agree. . . . [T]he Government's theory in those cases is that the district court may have relied on a now-vacated conviction when imposing sentences for the other counts." *Dean*, 137 S. Ct. at 1176 (citations omitted). By the same token, a defendant who successfully challenges the lead count may argue for resentencing on the theory the lead count drove up the other sentences.

Ultimately, the government's "vehicle" argument has nothing to do with "vehicle" issues: whatever relief Thompson obtains, his case presents a disputed question going to the heart of criminal law. As the D.C. Circuit has said, en banc: "In *Flores-Figueroa,* the Court rejected the government's argument that the absence of innocence should circumscribe the reach of an explicit *mens rea* requirement. Judge Kavanaugh insists this portends a major shift in the Court's jurisprudence. Perhaps." 690 F.3d at 516.

CONCLUSION

The petition for a writ of certiorari should be granted. If not granted, the petition should be held pending the Court's decision in *Rehaif*.

Respectfully submitted,

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May 24, 2019