No. 18-_____

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

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

A federal criminal statute this Court has not construed, 18 U.S.C. § 1591, prohibits wide-ranging conduct that facilitates, directly or indirectly, the sex trafficking of minors. The statute does not require intent to facilitate such trafficking. It does have, however, a *mens rea* component requiring the defendant to have acted "knowing, or in reckless disregard of the fact," that a trafficked person was under 18. And it sets out an aggravated offense, with a mandatory minimum sentence of 15 years in prison, if the person was under 14.

The question presented is whether the *mens rea* requirement as to the person's being under 18 applies to the person's being under 14 or whether, as the Second Circuit held, that aggravated under-14 offense imposes "strict criminal liability with regard to the age of a victim."

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The opinion of the United States Court of Appeals for the Second Circuit is reported at 896 F.3d 155 and appears at Pet. App. 1a-30a.

## JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231; judgment was entered on August 25, 2016. The Second Circuit had jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291, and affirmed on July 13, 2018. Rehearing was denied on October 17, 2018. Pet. App. 31a. This Court has jurisdiction under 28 U.S.C. § 1254(1), and Justice Ginsburg granted until February 14, 2019, to seek certiorari.

## RELEVANT STATUTORY PROVISION

The version of Section 1591 of Title 18 of the United States Code in effect on the dates relevant to this case provided, in relevant part:

> (a) 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 maintains by any means a person; or
> >
> > (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),
>
> 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 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, or if the person recruited, enticed, harbored, transported, provided, or obtained had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or
>
> (2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, or obtained had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

18 U.S.C. § 1591 (effective December 28, 2008 through May 28, 2015).[1]

## INTRODUCTION

"Strict liability in criminal law is harsh and in serious tension with deeply rooted principles of justice and responsibility. As a result, strict liability is extremely disfavored in the criminal laws of the United States." *United States v. Burwell*, 690 F.3d 500, 530 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting).

Nevertheless, a panel of the Second Circuit held § 1591 – a statute with an express *mens rea* requirement as to a trafficked person's being under 18 – imposes "strict criminal liability" as to the person's being under 14. Pet. App. 24a.

Review is warranted to properly construe § 1591, a far-reaching penal law this Court has never interpreted, and answer an important and divisive question on strict liability that § 1591 presents and Justice Kavanaugh has flagged.

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[1] The current version of § 1591(a)(1) extends to someone who "advertises, . . . patronizes, or solicits" a minor. And it requires the defendant to have acted "knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact," that the minor was under 18.

## STATEMENT OF THE CASE

Petitioner Alvaun Thompson was charged with nine counts relating to the prostitution of two people under 18, "M1" and "M2." Count One charged a violation of § 1591(b) based on M1 having been under 14 for some of the time in question. Thompson moved to dismiss this count for not alleging he knew or recklessly disregarded that M1 was under 14, which § 1591(a) requires as to a minor's being under 18. The judge denied the motion, ruling "there is no [] requirement that the Government prove that the defendant knew that the victim had not attained the age of 14." *United States v. Thompson*, 141 F. Supp. 3d 188, 200 (E.D.N.Y. 2015). At trial, the government acknowledged to the jury that Thompson "says he doesn't know [M1's] real age. We're not disputing that." Trial Tr. 671. The jury found Thompson guilty on all counts. The judge sentenced him to 30 years on Count One, to run concurrently with equal or lesser terms on the other charges.

The Second Circuit affirmed. It noted § 1591 "separates into different subdivisions the *mens rea* requirement Thompson seeks to impose and the increased penalty based on the victim's age." Pet. App. 23a. The court also noted "there is no common law tradition that crimes involving sexual offenses against minors invariably require a specific mental state with respect to the victim's age" in the face of "congressional silence" on that issue. Pet. App. 22a-23a. The court concluded that § 1591's under-14 offense imposes "strict criminal liability with regard to the age of a victim." Pet. App. 24a.

The circuit denied rehearing. Pet. App. 31a.

## REASONS FOR GRANTING THE PETITION

Certiorari is warranted where a circuit court "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c). Both conditions are present here.

### I. The Court Should Determine the Scope of § 1591 and Answer the Divisive Question on Strict Liability it Presents

Given the "broad language of the statute," Pet. App. 9a, § 1591 reaches people who facilitate the sex trade indirectly and unintentionally. Anyone who knowingly "harbors, transports, . . . or maintains by any means" a prostituted minor is guilty, § 1591(a)(1), even if the person opposes the minor's being prostituted. *See United States v. Brooks*, 610 F.3d 1186, 1195 (9th Cir. 2010) ("[W]hile [another law] requires proof that the defendant *intended* that the victim engage in prostitution, such intent need not be proven for § 1591(a). Instead, § 1591(a) requires that the defendant *knew* that the victim would engage in a commercial sex act.") (emphasis in original). Section 1591 thus reaches, among others: journalists who buy lunch for the young sex workers they write about; doctors who provide birth control and STD medication to the teen prostitutes they treat; and shelter operators who give beds to the youths they know will be used, the next day or week, for sex.

Congress likely did not have such people in mind when it wrote § 1591, yet the text of the statute reaches them. And, many might say, that is a good thing: those who knowingly enable a minor's continued involvement in the sex trade – even if indirectly and unintentionally – should be punished. But does the statute's

*enhanced* punishment of at least 15 years in prison apply when the people above help, unbeknownst to them, a minor under 14? Nothing in the text requires that. On the contrary, there is an express *mens rea* requirement as to age: the defendant must have acted "knowing, or in reckless disregard of the fact," § 1591(a), that the prostituted person was under 18.[2]

Congress's writing a *mens rea* requirement as to age into § 1591 is striking: other statutes addressing sex offenses against minors are either silent on that point or say categorically that the defendant need *not* be aware of the minor's age. *Compare, e.g.,* 18 U.S.C. § 2252(a)(1) (prohibiting transport of an image "if (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct") *with* § 2241(d) ("In a prosecution under subsection (c)," which prohibits crossing a state line to have sex with someone under 12, "the Government need not prove that the defendant knew that the other person . . . had not attained the age of 12 years.").

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[2] There is an exception: If "the defendant had a reasonable opportunity to observe the person . . . , the Government need not prove that the defendant knew that the person had not attained the age of 18 years." § 1591(c) (eff. 2008 to 2015). (The current version also excuses the government from proving reckless disregard.) This is a red herring, however, as it is not a rule of strict liability. Permitting conviction if one had a "reasonable opportunity to observe" permits conviction where one may not have – but should have – known or suspected the person was underage. *See, e.g., United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 n.2 (1994) (Where "the perpetrator confronts the underage victim personally[, he] may reasonably be required to ascertain that victim's age."). A rule of strict liability, by contrast, permits conviction without any concern for mental state: what was or should have been known or suspected is irrelevant. Thus, subsection (c) does not reflect any congressional desire to make § 1591 a strict liability offense. If anything, it confirms that awareness of a minor's age – whether actual or reasonably chargeable under the circumstances – is required.

Accordingly, this is neither a case of "congressional silence," Pet App. 22a, nor of Congress saying awareness of age in unnecessary. Rather, § 1591 expressly requires *mens rea* as to a trafficked person's being under 18. Thus the question: does that requirement apply to the person's being under 14?

The right answer is yes. This "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." *Burwell*, 690 F.3d at 537 (Kavanaugh, J., dissenting) (citations omitted). Indeed, "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), including where one element "appear[s] in a different subsection" than another. *Id.* at 653. *See also United States v. Games-Perez*, 667 F.3d 1136, 1143 (10th Cir. 2012) (Gorsuch, J., concurring). Though "there are instances in which context may well rebut that presumption," *Flores-Figueroa*, 556 U.S. at 660 (Alito, J., concurring), this is not such a case: § 1591 is neither silent on whether one must know the minor is underage or explicit that such awareness is unnecessary. The text requires one to act "knowingly" and, specifically, "knowing, or in reckless disregard of the fact," § 1591(a), that a person is underage. This *mens rea* requirement applies to each element, which a minor's being under 14 plainly is: it increases the mandatory minimum from 10 to 15 years, and "any fact that increases the mandatory minimum is an 'element.'" *Alleyne v. United States*, 570 U.S. 99, 103 (2013).

Thus, § 1591's *mens rea* requirement as to the minor's being under 18 should apply to the minor's being under 14.

The Second Circuit disagreed, refusing to apply the *mens rea* requirement to the very element that sets the aggravated offense apart: the minor's being under 14. That element does not set the offense apart from "otherwise innocent conduct," *X-Citement Video*, 513 U.S. at 72, as prostituting a minor – whether under 18 or under 14 – is not innocent conduct. Thompson's case thus differs in this respect from *Rehaif v. United States*, No. 17-9560 (set for argument on April 23, 2019). The Court will there decide whether the requirement that a defendant "knowingly" possess a gun in violation of 18 U.S.C. §§ 924(a)(2) and 922(g) requires him to know the one thing that makes his "otherwise innocent conduct" of possessing a gun unlawful: having a disqualifying legal status such as a felony conviction or being an alien illegally in the United States.

Though that question is not presented here, *Rehaif* involves an issue highly relevant to this case. The Second Circuit ruled against Thompson partly because § 1591 "separates into different subdivisions the *mens rea* requirement Thompson seeks to impose and the increased penalty based on the victim's age." Pet. App. 23a. The gap to bridge in *Rehaif* is even wider, as the *mens rea* requirement Rehaif says applies to his § 922(g) offense appears in an altogether separate statute: § 924(a)(2). Should the Court rule in his favor, that will be good reason for the Second Circuit to reconsider its decision against Thompson.

Rather than hold this case for *Rehaif*, however, review is warranted because

Thompson's case presents an important and divisive question on strict liability that Justice Kavanaugh has flagged but *Rehaif* does not present.

"When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that *mens rea* which is necessary to separate wrongful conduct from "otherwise innocent conduct."'" *Elonis v. United States*, 135 S. Ct. 2001, 2010 (2015) (citations omitted). As shown, however, § 1591 is not "silent on the required mental state." And "[i]n *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.). "Judge Kavanaugh insists this portends a major shift in the Court's jurisprudence. Perhaps." *Id.*

Specifically, then-Judge Kavanaugh argued, "it would be incoherent to limit the presumption of mens rea to only those cases where it's necessary to avoid criminalizing what the defendant thought was innocent conduct." *Id.* at 543 (Kavanaugh, J., dissenting). "As Professor LaFave has explained, rules of mens rea apply both to a defendant who is unaware of the facts that make his conduct criminal and to a defendant who is 'unaware of the magnitude of the wrong he is doing.' The idea that 'the mistake by the defendant may be disregarded because of the fact that he actually intended to do some legal or moral wrong' is – in Professor LaFave's words – 'unsound, and has no place in a rational system of substantive criminal law.'" *Id.* (citation omitted).

Thus, "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. "When the facts as the defendant believed them would have warranted conviction of a lesser offense and called for a lesser punishment, no legitimate purpose of criminal law – whether it be retribution, deterrence, or rehabilitation – is served by convicting him of an aggravated offense and imposing a more severe punishment." *Id.* *See also id.* (A "'degree of inequity exists in . . . punishing with more years of imprisonment a person who, but for the strict liability application to the element, would still have received substantial punishment.'") (citation omitted).

On this view, Thompson should have been convicted under § 1591(b)(2), and faced a mandatory minimum of 10 rather than 15 years, because he was unaware M1 was under 14: the "link between [a minor being under 14] and greater moral depravity does not hold if the defendant actually thought [the minor was older]." *Id*. at 553.

The en banc majority rejected then-Judge Kavanaugh's argument in *Burwell*, just as the Second Circuit did here: there was no "otherwise innocent conduct" for an under-14 mens rea requirement to guard against, as "Thompson engaged in sex trafficking" of people he knew were under 18. Pet. App. 23a. In other words, Thompson "got what he deserved" because, even though he thought M1 was older, what he thought he was doing "is just as depraved and blameworthy" as what he actually did. *Burwell*, 690 F.3d at 553 (Kavanaugh, J., dissenting).

But § 1591 does not say that. And it does not say a defendant need not know a minor is under 14. If being "a 'bad person' who has done 'bad things' does not

justify dispensing with the presumption of mens rea" and, indeed, "no legitimate purpose of criminal law" is served by enhancing punishment based on something the defendant did not know, *id.* at 544, then neither Thompson's conviction nor those like it should stand. "The debate over mens rea is not some philosophical or academic exercise. It has major real-world consequences for criminal defendants." *Id.* at 553.

Only this Court can answer the important and divisive question here.

## II. The Second Circuit's Reading of § 1591 is Wrong

The Second Circuit's reasons for affirming Thompson's conviction do not withstand scrutiny.

The court refused to apply § 1591(a)'s *mens rea* requirement to § 1591(b)'s aggravated offense because § 1591 "separates into different subdivisions the *mens rea* requirement Thompson seeks to impose and the increased penalty based on the victim's age." Pet. App. 23a. But that is immaterial. Under this Court's rulings in *Flores-Figueroa* and *X-Citement Video*, for example, courts "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*, 556 U.S. at 652, even where one element "appear[s] in a different subsection" than another. *Id.* at 653. Indeed, the "the Supreme Court's precedents definitively establish that neither (i) silence on mens rea, nor (ii) the inclusion of a mens rea requirement in another statute, nor (iii) the inclusion of a mens rea requirement in another part of the same statute suffices to defeat the presumption of mens rea." *Burwell*, 690 F.3d at 550

(Kavanaugh, J., dissenting). Because a minor's being under 14 is the key element of § 1591's aggravated offense, it is subject to § 1591's requirement that a defendant know or recklessly disregard it. That the *mens rea* requirement and the under-14 element appear in different subsections is of no moment.

The Second Circuit also noted "there is no common law tradition that crimes involving sexual offenses against minors invariably require a specific mental state with respect to the victim's age" in the face of "congressional silence" on that issue. Pet. App. 22a-23a. This, too, is irrelevant. As shown, § 1591 is not silent. There is thus no need to "read a *mens rea* requirement *into* [§ 1591's] statutory elements" given that "Congress expressly impose[d] just such a *mens rea* requirement." The problem is the Second Circuit "turn[ed] around and read it *out* of the statute." *Games-Perez*, 667 F.3d at 1145 (Gorsuch, J., concurring) (emphasis in original).

To recap, § 1591 has an express *mens rea* requirement as to age that applies to the under-14 element. Congress knows how to remain silent on awareness of age or say plainly that it isn't required. Congress did neither here. Nothing in § 1591's text says one may be sent to prison for at least 15 years without knowing or recklessly disregarding that a minor is under 14. As Thompson briefed, the notable harshness of that penalty is another reason to reject a strict liability reading. The statute's legislative history, he also briefed, is further reason: nothing in that history shows Congress wanted to make the under-14 aggravated offense a strict liability crime. The Second Circuit ignored all these additional points.

Finally, and significantly, the court made no mention of the rule of lenity,

which Thompson also briefed as yet another reason to construe § 1591 in his favor. A court "will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178 (1958). As such, "'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 enhanced penalty of at least 15 years.

Given the lack of textual clarity, the lack of supporting legislative history, and the harshness of the penalty, "'the ambit of [§ 1591] should be resolved in favor of lenity.'" *Id.* (citation omitted). *See also United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (The rule is "rooted in 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'") (citation omitted).

The Second Circuit wrongly held the aggravated offense under § 1591(b)(1) imposes "strict criminal liability with regard to the age of a victim." Pet. App. 24a.

## CONCLUSION

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

Respectfully submitted,

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