No. _____

IN THE

Supreme Court of the United States

JUAN PABLO PRICE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 18 U.S.C. § 2244(b), it is a federal crime to "knowingly engage[] in sexual contact with another person without that other person's permission." Petitioner argued in the district court and on appeal that the knowledge requirement applied *both* to the conduct of engaging in sexual contact with another *and* to the lack of consent. The Ninth Circuit panel majority concluded that the term "knowingly" modifies only the verb phrase "engages in sexual contact with another person" and does not modify the adverbial prepositional phrase "without that other person's permission," even though engaging in sexual contact with another person is not itself unlawful. As the judges who disagreed with the panel majority found, the majority's decision violated several canons of statutory construction and was contrary to the holdings of several decisions of this Court—including *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), and *Rehaif v. United States*, 139 S. Ct. 2191 (2019), among others—and of the en banc Eighth Circuit when it reviewed a related, nearly-identical statute. Accordingly, the question presented here is:

> Whether the knowledge requirement in 18 U.S.C. § 2244(b) applies to all elements of the offense, such that the government must prove *both* that the defendant knowing engaged in sexual contact with another person *and* that defendant knew he lacked that other person's permission.

PARTIES AND PROCEEDINGS

All parties to the proceedings are listed in the caption. The petitioner is not a corporation.

This case arises from the following proceedings in the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit: *United States v. Juan Pablo Price*, No. CR 15-00061-GHK (C.D. Cal.), and *United States v. Juan Pablo Price*, Ninth Cir. No. 15-50556 (9th Cir. 2020).

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ON PETITION FOR A WRIT OF CERTIORARI TO
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Juan Pablo Price, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit, along with an opinion by Sixth Circuit Judge Gilman "concur[ring] in the lead opinion's conclusion that [the] conviction should be affirmed" but "disagree[ing] with its holding that the term 'knowingly' in 18 U.S.C. § 2244(b) modifies only the phrase 'engages in sexual contact with another person' and does not extend to the phrase 'without that other person's permission,'" together with an order denying rehearing en banc, and an opinion by Judge Wardlaw joined by Judge Nguyen

concurring in the denial of rehearing en banc, and an opinion by Judge Collins joined by Judges Ikuta and VanDyke as to parts I and II, and Judge Bumatay as to part II(B)(1), dissenting from the denial of rehearing en banc, is reported at 980 F.3d 1211 (9th Cir. 2020). Pet. App. 1a-108a (Copy of slip opinion).

JURISDICTION

The Ninth Circuit filed its amended opinion and judgment, and order denying rehearing en banc, on November 27, 2020. This petition is timely filed pursuant to Sup. Ct. R. 13 and this Court's Order dated March 19, 2020, extending the deadline to file any petition for a writ of certiorari due on or after the date of the order to 150 days from the date of the lower court judgment, in light of the ongoing public health concerns relating to COVID-19. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2244(b) provides:

> Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than two years, or both.

49 U.S.C. § 46506 provides in relevant part:

> An individual on an aircraft in the special aircraft jurisdiction of the United States who commits an act that— (1) if committed in the special maritime and territorial jurisdiction of the United States (as defined in section 7 of title 18) would violate section 113, 114, 661, 662, 1111, 1112, 1113, or 2111 or chapter 109A of title 18, shall be fined under title 18, imprisoned under that section or chapter, or both.

STATEMENT OF THE CASE[1]

This is a classic case of "he-said-she-said." On September 21, 2014, during an overnight American Airlines flight from Tokyo, Japan, to Los Angeles, appellant Juan Pablo Price and "A.M.," an adult, female passenger,[2] were seated next to one another. They shared wine together and talked briefly, though there may have been a slight language barrier. Shortly thereafter, depending on which side's story is believed, A.M. either invited and permitted both physical and sexual contact from Price, *or*, the contact was unwelcome but A.M. never complained or made any effort to reject the advances. Mr. Price was charged by indictment in the Central District of California, and convicted following a jury trial, of abusive sexual contact on an aircraft in violation 18 U.S. C. § 2244(b) and 49 U.S.C. § 46506. (CR 1; ER 69-70).[3]

This petition deals with one issue: the requirements for conviction (and proper jury instruction) under 18 U.S.C. § 2244(b). Price requested a jury instruction that, in addition to requiring that he knowingly engaged in sexual

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[1] A more extensive discussion of the facts is detailed in Judge Collins's dissent from the denial of rehearing en banc because, as he explained, "the underlying factual context is important to understanding the issues (particularly the harmless error issue)." Pet. App. 77a-85a.

[2] Although the alleged victim's name was used throughout the trial, and her real name appears throughout the record, Petitioner will refer to her by her initials, rather than her true name, as was done in the opinions below.

[3] "ER" followed by a number refers to the applicable page in Appellant's Excerpts of Record filed in the Ninth Circuit Court of Appeals. "CR" refers to the Clerk's record in the Central District of California and is followed by the applicable docket control number.

contact with another person—as stated in the Ninth Circuit Model Jury Instruction for 18 U.S.C. § 2244(b)—also required that Price "*knew* the sexual contact was without [the alleged victim's] permission." Pet. App. 124a (emphasis added). He argued that the statute's use of the word "knowingly" applied *both* to the conduct of engaging in sexual contact with another person *and* that that contact was without the other person's permission. The district court rejected this argument, concluding that "I think that it is appropriate not to read into the statute that which it does not say it requires," and that the Ninth Circuit model instruction was appropriate. Pet. App. 122a-123a.

This is what happened:

On September 21, 2014, Juan Pablo Price and the purported victim, A.M., were both passengers on American Airlines flight 170 from Tokyo, Japan, to Los Angeles, California. During the flight, defendant left his assigned seat, which had limited legroom, and asked A.M. if it would be okay if he moved to the vacant seat next to her. (ER 663).[4] She said that was "okay." (ER 663). So he moved to that empty seat. (ER 629-630). At the time, she was drinking red wine mixed with Coca-Cola. (ER 663). Although A.M. claims not to speak English, they started to discuss the drink.[5] (ER 664). Price then ordered some red wine from a flight

[4] These facts are from the testimony of A.M., the purported victim.

[5] In fact, A.M. conceded on cross-examination that she does, in fact, speak some English, had taken six years of English classes, and was required to pass an English test for admission to her university. (ER 721-722).

attendant, which he shared with her, and she drank with him. (ER 664-665). She thought "he might be just a kind person." (ER 665). They engaged in conversation, though Price eventually realized she was not completely understanding him. (ER 665-666). At some point, she says, she fell asleep. (ER 673).

A.M. testified that when she awoke she notice Price was touching the right side of her body; she thought he might be trying to steal her iPhone. (ER 673). Although she claims she did not want him touching her, she did not tell him to stop. (ER 674). She then went back to sleep. (ER 675). She says that when she woke up again, he was touching her breast. (ER 675). Again, she did not tell him to stop. (ER 675). She says she then folded her arms in front of her to prevent him from touching her further. (ER 677). Price then put his blanket on top of hers and started to touch her under the blanket, including under her shirt. (ER 678). Again, she did not tell him to stop. (ER 679).

A.M. says Price then began touching her lower body and put his hands inside her jeans and started to touch her vagina. (ER 679). Again, she did not tell him to stop, but instead moved her body towards her friend who was seated in the seat on her other side. (ER 680-681). Her friend then woke up and asked if she was okay. (ER 681). She did not tell her what had happened, but she knows she "sensed" it. (ER 681). When her friend woke up, Price moved back to his seat and was "sitting normally." (ER 681). She then went to the back of the airplane to ask for help. (ER 682). She eventually spoke to a Japanese-speaking flight attendant who moved

A.M. and her friend to new seats. (ER 683). At no point did she ever tell Price to stop touching her. (ER 685). At no point did she try to push him away. (ER 686).

A.M. admitted that when she got off the plane, she started sending tweets on Twitter, and she and her friends discussed how she might be able to make some money out of this situation—"tons of money." (ER 706-707, 711-714, 719).

Yosri Zidan, the flight purser (lead flight attendant), subsequently spoke with A.M. and with Mr. Price. Price told him his interaction with A.M. was "consensual." (ER 752). He explained that he had moved seats because a box containing electronics was in his way and he was unable to stretch his legs. (ER 752-753). After he moved next to A.M., he went to sleep, and when he awoke, A.M.'s hand was touching his, and they started "getting comfortable with one another," and he started to hold her hand. (ER 753). From there, things got more comfortable, and he started touching her. (ER 753-754). When he tried to kiss her, she got up and walked away. (ER 754). Zidan asked Price to write a statement, which he did. (ER 754).

Price testified in his own defense: He explained that he wanted to move seats because of an electrical box that was in his way. (ER 834). When he got up to use the bathroom, he noticed there was an empty aisle seat, and he asked A.M., who was sitting next to it, if the seat was available; she said it was. (ER 834-836). After about a minute, A.M., who had been drinking wine, offered him some. (ER 837). He thought it was a "nice gesture" from a "nice young woman sitting next to me." (ER 838). He thought "[m]aybe she wants to party with me, she wants to have a

good time." (ER 838). They drank more wine and talked, but her English wasn't very good. (ER 839-840). He bought more wine to share with her. (ER 841-844). She began watching a video, he fell asleep, and later woke up feeling the touch of a hand next to his under his blanket. (ER 845). At first, he thought it was an accident, but then thought it might be "an invitation to something" as she had been very friendly. (ER 845-846). He thought she might find him attractive. (ER 846). They started rubbing hands, and eventually he started rubbing other parts of her body, including her breasts, "but it all happened very softly, very gently, very gradually." (ER 847-848). She started arching her body, he could feel her heartbeat, her breathing was intense, and it appeared to him to be someone enjoying herself, "not someone who is in panic." (ER 849-852). At no point did she ever prevent him from touching her or give any type of negative indication or response. (ER 853).

He started massaging her lower body, and tried to unzip her jeans, but they were too tight to get them down. (ER 855). He continued to "caress her." (ER 855). She got up to use the bathroom, came back, and they resumed things. (ER 856-857). He was "hoping that it would end up in an embrace and a kiss." (ER 857). But she turned to the other side, and when she would not yield to his touch, he knew she was no longer okay with things. (ER 858). He then saw that her friend had woken up and had a "perplexed look on her face." (ER 859). Shortly thereafter, A.M. got up and "just had a different attitude all of a sudden" and moved. (ER 871).

He was a little upset at her actions and felt awkward. (ER 871- 872). He ended up writing a note about her changing her mind all of a sudden. (ER 872).

At some point, purser Zidan summoned him to the back of the plane and told him that a passenger had come forward and said that Price had "violated" her. (ER 872-873). Price couldn't believe it and was visibly upset. (ER 873). Zidan ordered him to sit down and Price was asked to write a statement. (ER 874).

Mr. Price was convicted. In his appeal to the Ninth Circuit, Price argued, *inter alia*, that the jury instruction was erroneous because it failed to require proof that defendant knew he lacked permission to engage in sexual contact. A majority of the original Ninth Circuit panel (Stephen Reinhardt, Kim McLane Wardlaw, Ronald Lee Gilman) apparently had agreed with Mr. Price, but Judge Reinhardt passed away before issuing a decision. Pet. App. 2a, 33a. Indeed, Sixth Circuit Judge Gilman explained in his opinion concurring in the judgment, much of his opinion can be attributed to Judge Reinhardt who had prepared a draft opinion in this case prior to his death in which he had concluded, and Judge Gilman agreed, that the "the 'knowingly' mens rea requirement contained in 18 U.S.C. § 2244(b) should be applied to each element of the offense, including that the sexual contact be without the other person's permission." Pet. App. 33a. After Judge Jacqueline Nguyen replaced Judge Reinhardt on the panel, the majority switched, and in an initial published opinion, *United States v. Price*, 921 F.3d 777 (9th Cir. 2019), the divided Ninth Circuit panel affirmed Price's conviction, concluding that the

knowledge requirement applied only to engaging in sexual contact with another, and not to the remainder of the statute.

Mr. Price filed a petition for rehearing en banc. While his petition for pending, this Court issued its opinion in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), in which the Court held that the knowledge requirement in 18 U.S.C. § 922(g), which makes it a crime for certain individuals to possess firearms (including aliens and felons, among others), as modified by 18 U.S.C. § 924(a), which adds that anyone who "knowingly violates" § 922(g) shall be fined or imprisoned for up to 10 years, applies *both* to the defendant's conduct in possessing a firearm *and* to the defendant's status as a prohibited person.[6] In other words, the government is required not only to prove that the defendant knowingly possessed a firearm—which is not itself unlawful—but also that the defendant *knew* he had the relevant status and was thus prohibited from possessing a firearm when he possessed the firearm.

After full briefing by the parties and supplemental briefing on the impact of *Rehaif* on the case, the original two-judge majority issued an amended opinion

[6] The petitioner in *Rehaif* was convicted of being an illegal alien in possession of a firearm. He had entered the United States on a student visa, but was later dismissed by his university and thus lost his lawful immigration status. He subsequently visited a firing range where he shot two firearms. Over his objection, the trial court concluded that the government was nor required to prove that Rehaif knew his status of being in the country unlawfully. The Eleventh Circuit affirmed the conviction, but the Supreme Court reversed. *Rehaif*, 139 S. Ct. at 2194-95.

concluding that *Rehaif* had no impact on this case, and reiterating its holding that the knowledge requirement in the statute did not apply to whether defendant lacked permission to engage in sexual contact. Pet. App. 5a-32a. The panel majority concluded that "the phrase 'without that other person's permission' describes the nature or extent of the prohibited action 'engag[ing] in sexual contact' but, grammatically, does not tie to the term 'knowingly.'" Pet. App. 13a. It concluded that *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009), in which this Court held "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," "is inapposite." Pet. App. 15a-17a. With respect to *Rehaif*, the majority concluded that "*Rehaif* did not change the governing principles of statutory interpretation set out in prior cases. And *Rehaif* examined a different statute with different text, structure, and legislative history, addressing different conduct." Pet. App. 17a (citations omitted).

Judge Gilman again concluded that the knowledge requirement applied to all elements of the statute and recommended that rehearing en banc be granted. Pet. App. 5a, 32a-54a. He explained, for example, that

> Knowingly engaging in sexual contact is, of course, not illegal. Innocent people do it all the time. The element in § 2244(b) requiring that the sexual contact be "without [the] other person's permission" is the actual linchpin of the offense. Therefore, if § 2244(b) requires a guilty mind, then the mens rea requirement must apply to the lack-of-permission element. The requirement that the defendant knew that he was engaging in sexual contact per se does nothing to separate innocent from criminal behavior.

> Nor does the requirement that the government prove that the sexual contact was *objectively* without the other person's permission obviate the need for a second mens rea requirement. [citing lead op., Pet. App. 14a-15a]. Again, the element requiring that the sexual contact be "without [the] other person's permission" is what makes the sexual contact illegal under the statute. This means that "the presumption in favor of a scienter requirement should apply" to the permission element of § 2244(b) because that is the element "criminaliz[ing] otherwise innocent conduct." *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72–73 (1994) (holding that because "the age of the performers is the crucial element separating legal innocence from wrongful conduct" under a child-pornography statute, the statute requires that the defendant have knowledge of the performer's age).

Pet. App. 37a-38a.

Judge Daniel Collins, joined in parts by Judges Sandra Ikuta, Lawrence VanDyke, and Patrick Bumatay, dissented from the denial of rehearing en banc. Pet. App. 73a-108a.

Judge Collins concluded in his dissent that first, the panel majority erroneously held that the word "knowingly" applies *only* to the immediately following seven words ("engages in sexual contact with another person") and *not* to the remainder of the phrase ("without that other person's permission"). Pet. App. 74a. He explained that Judge Gilman persuasively explained why the majority's statutory analysis is incorrect, but that "if anything, he understates the case against the majority's wholly unwarranted elimination of a scienter element from a criminal statute." *Id.* The majority's reading cannot possibly be correct, he argued, "because it limits the application of 'knowingly' to a phrase ('engages in sexual contact with another person') that *already* imposes a *higher* scienter requirement

than 'knowingly.'" *Id.* (emphases in original) (citation omitted). "By thus reading the word 'knowingly' out of § 2244(b), the panel majority's flawed construction ignores the plain language of the statute and disregards no fewer than three applicable canons of construction—including two that were recently and unambiguously reaffirmed by the Supreme Court in *Rehaif v. United States*, 139 S. Ct. 2191 (2019)." Pet. App. 74a-75a.[7]

Judge Collins also concluded that the panel wrongly determined that "the omission of the scienter element was harmless error." Pet. App. 76a. He explained that "under the applicable standards for evaluating whether the failure to instruct the jury on an essential element of a criminal offense is harmless [under *Neder v. United States*, 527 U.S. 1, 19 (1999)], courts must ask whether there is sufficient evidence in the record to have supported a defense verdict on the element in question," and must "*credit* the defendant's testimony concerning the missing element, no matter how incredible we judges may find it." Pet. App. 76a. Judge Collins concluded that when correctly analyzing the case under *Neder*, the error here was not harmless, and concluding otherwise "is a novel and serious intrusion on the Sixth Amendment right to a jury trial." Pet. App. 76a.

[7] Judge Collins explained that in rejecting the "the textualist reading of § 2244(b) that Judge Gilman and I adopt," and "rewriting" the statute, the panel majority was "heavily influenced by the majority's strongly held policy views about what the Government should and should not be expected to prove in criminalizing the offense conduct at issue here." Pet. App. 75a.

REASONS FOR GRANTING THE WRIT

In just thirteen words, unadorned by punctuation, 18 U.S.C. § 2244(b), makes it a federal crime to "knowingly engage[] in sexual contact with another person without that other person's permission." Mr. Price argued in the district court and on appeal that the mens rea knowledge requirement applied both to the conduct of engaging in sexual contact *and* to whether he lacked permission to engage in the conduct. The Ninth Circuit panel majority concluded that the "most natural grammatical reading" of the phrase is that the "term 'knowingly' modifies only the verb phrase 'engages in sexual contact with another person' and does not modify the adverbial prepositional phrase 'without that other person's permission,'" even though engaging in sexual contact with another person is not itself unlawful. Pet. App. 12a. In so doing, as the judges who disagreed with the panel majority found, it ignored the plain language of the statute, violated several canons of statutory construction, and was contrary to the holdings of several decisions of this Court—including most recently, *Rehaif v. United States*, 139 S. Ct. 2191 (2019)—and of the en banc Eighth Circuit. For multiple reasons, the panel majority's reading of the statute is untenable.

As Judge Collins wrote in dissenting from rehearing en banc, *Rehaif* recently reaffirmed that "a court addressing how the word 'knowingly' applies in a criminal statute must 'start from [the] longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding *each* of the statutory elements that criminalize otherwise innocent

conduct.'" Pet. App. 98a (quoting *Rehaif*, 139 S. Ct. at 2195) (cleaned up). Thus, "[t]he application of this presumption here is straightforward, and it require[d] applying the knowledge requirement to § 2244(b)'s without-permission element." *Id.* Indeed, the Ninth Circuit majority's "reasoning reflects a clear misreading of *Rehaif* and would largely gut the canon of construction that it reaffirms." Pet. App. 99a.

The Ninth Circuit majority concluded that "*Rehaif* did not change the governing principles of statutory interpretation set out in prior cases," which have consistently emphasized the specific grammatical context of each statute. Pet. App. 17a. But the majority's assumption that *Rehaif* changed nothing about Ninth Circuit case law is simply wrong. Pet. App. 101a-102a. Its refusal to follows this Court's precedents in favor of Ninth Circuit cases rejected by this Court demands that review be granted to ensure that the Ninth Circuit correctly interprets this Court's dictates and does not "narrowly confine the canons set forth in *Flores-Figueroa* and *Rehaif* as being 'specific to particular grammatical contexts.'" Pet. App. 102a (quoting Pet. App. 16a).

The petition should be granted because the Ninth Circuit's majority here "disregarded controlling Supreme Court authority in concluding that the term 'knowingly' in § 2244(b) does not apply to the phrase 'that other person's permission.'" Pet. App. 102a.

I. The Ninth Circuit majority, in concluding that conviction for abusive sexual contact in violation of 18 U.S.C. § 2244(b) does not require proof that the defendant knew that the sexual contact was without the alleged victim's permission, disregarded controlling Supreme Court authority and violated multiple canons of statutory construction.

The outcome here should be based on a straightforward application of the rules of statutory construction. As Judge Gilman and the dissenting judges rightly concluded, the panel majority's decision here failed to apply multiple canons of statutory construction and ignored or misconstrued multiple decisions of this Court applying those rules. To start, numerous decisions of this Court make clear 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." *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009) (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 79 (1994) (Stevens, J., concurring)); *see also id.* at 660 (Alito, J., concurring) ("I think it is fair to begin with a general presumption that the specified mens rea applies to all the elements of an offense"); *Liparota v. United States*, 471 U.S. 419, 433 (1985) (interpreting statute that said, "[w]hoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [law]" is subject to imprisonment as applying the word "knowingly" to the phrase "in any manner not authorized by [law]").

It appears, very plainly, that the Court's recent decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), in which the Court reaffirmed the *Flores-Figueroa* analysis, further supports Mr. Price's argument that the "knowingly" mens rea

requirement contained in § 2244(b) should be applied to each element of the offense, including the requirement that the purported sexual contact be without the other person's permission.[8] Such an outcome is required as "a matter of ordinary English grammar." *Rehaif*, 139 F.3d at 2196. This is especially so where the modifier "knowingly" does not introduce a long statutory phrase, as is the case in § 922(g), and as is the case here in § 2244(b). Section 2244(b) is a short, simple, and straightforward statute unburdened even by confusing punctuation: "Whoever . . . knowingly engages in sexual contact with another person without that other person's permission."

As Judge Gilman correctly explained, the statute at issue here, "just like the one in *Flores-Figueroa*, lists all of the elements of the offense in a single phrase that begins with the word 'knowingly.' *Flores-Figueroa* therefore requires us to presume that the word 'knowingly' dictates how the defendant must have 'performed' the action—that is, that he knew that he was engaging in sexual contact *and* that he knew he was doing so without the other person's permission." Pet. App. 34a. Moreover, "[t]his key principle from *Flores-Figueroa* has been recently reiterated by

[8] In *Rehaif*, the Court held, 7-2, that the knowledge requirement in 18 U.S.C. § 922(g), which makes it a crime for certain individuals to possess firearms (including aliens and felons, among others), as modified by 18 U.S.C. § 924(a), which adds that anyone who "knowingly violates" § 922(g) shall be fined or imprisoned for up to 10 years, applies *both* to the defendant's conduct in possessing a firearm *and* to the defendant's status as a prohibited person. In other words, the government is required not only to prove that the defendant possessed a firearm, but also that the defendant *knew* he had the relevant status that prohibited him from possessing a firearm.

the Supreme Court in *Rehaif*." Pet. App. 35a. Yet the Ninth Circuit panel majority simply concluded that *Flores-Figueroa* "is inapposite." Pet. App. 15a. In so concluding, the panel majority "misse[d] *Rehaif*'s central point that, in determining congressional intent, courts start from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct." Pet. App. 35a (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994) (cleaned up)). That presumption is directly applicable to this case.

The Eighth Circuit, sitting *en banc*, also supports Mr. Price's position (and that expressed in the opinions of Judge Gilman (also speaking for the late Judge Reinhardt), and Judge Collins and the judges that joined his dissent). In *United States v. Bruguier*, 735 F.3d 754 (8th Cir. 2013) (en banc), the Eighth Circuit, interpreting a closely-related (and similarly-worded) abusive sexual contact statute, 18 U.S.C. § 2242(2),[9] held that the government must prove *both* that a defendant knowingly engaged in a sexual act with the alleged victim *and* that the defendant knew the alleged victim was "incapable of appraising the nature of the conduct" or "physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act." 735 F.3d at 758, 760-61 (relying on, *inter alia*, *Flores-*

[9] Section 2242(2), like § 2244(b) at issue here, is part of the Sexual Abuse Act of 1986, Pub. L. No. 99-646, § 87(b), 100 Stat. 3592, 3620-23 (codified as amended at 18 U.S.C. §§ 2241–44, 2246).

Figueroa, *Staples v. United States*, 511 U.S. 600, 605-06 (1994); *Rodriguez v. United States*, 480 U.S. 522, 525 (1987)). Pursuant to *Flores-Figueroa*, the Eighth Circuit held that "there is a presumption that 'knowingly' in section 2242(2) applies to the circumstances following the conjunction 'if.'" *Id.* at 758. The Eighth Circuit further explained that in addition to the *Flores-Figueroa*-analysis, other rules of statutory construction—similarly applicable to Price's case—as well as the legislative history of the Sexual Abuse Act of 1986, also would require the same result. *Bruguier*, 735 F.3d at 761-62.[10]

[10] Indeed, contrary to the Ninth Circuit panel majority's reading, the legislative history of the Sexual Abuse Act of 1986 actually supports Price's argument that the knowledge requirement applies to the entirety of § 2244(b). As the Eighth Circuit explained in *Bruguier*, 735 F.3d at 761-62, the House Report made clear that the knowledge requirement of 18 U.S.C. §§ 2241 and 2243 was expressly limited in those statutes when it came to the age of the alleged victim, and that without those express provisions, "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." H.R. Rep. 99-594, at 15 n.59 (1986) (discussing knowledge requirement in section 2241); *see also id.* at 18 n.69 (discussing knowledge requirement in section 2243 and referencing footnote 59).

As the *Bruguier* court explained, "[t]he House Report shows that Congress understood the knowledge requirement in sections 2241 and 2243 to attach, absent a limiting provision, to the circumstance of the victim's age." *Bruguier*, 754 F.3d at 761-62. The same applies with respect to § 2244(b)'s permission requirement. Indeed, "[n]otably, although Congress drafted the statutes 'broadly to cover the widest possible variety of sexual abuse,' [H.R. Rep. 99-594, at 12], Congress did not mention that it intended to make section 2242(2) a strict liability crime, nor did it draft provisions limiting the reach of 'knowingly' in section 2242(2)." *Id.* at 762. Similarly, nothing in the legislative history of the Sexual Abuse Act of 1986 indicates an intention by Congress to make a portion of § 2244(b) a strict liability crime. "In short, the legislative history shows that Congress understood the knowledge requirement in section 2242(2) to attach to the victim's incapacity or

"The case for applying the *Flores-Figueroa* presumption, as reiterated in *Rehaif*, to § 2244(b) is even stronger than it is for applying that presumption to § 2242(2)." Pet. App. 35a-36a. And "[i]f the *Flores-Figueroa* presumption applies to § 2242(2), then it certainly applies to the much simpler and more straightforward phrase defining the offense in § 2244(b)." Pet. App. 36a.

The ordinary presumption in favor of scienter also supported Mr. Price's position and demonstrates how the Ninth Circuit panel majority was wrong in rejecting this Court's precedents. In reaching its decision in *Rehaif*, this Court "start[ed] from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" *Rehaif*, 139 S. Ct. at 2195 (quoting *X-Citement Video*, 513 U.S. at 72, and citing *Morissette v. United States*, 342 U.S. 246, 256–258 (1952)). As the Court explained, "[w]e normally characterize this interpretive maxim as a presumption in favor of 'scienter,' by which we mean a presumption that criminal statutes require the degree of knowledge sufficient to 'mak[e] a person legally responsible for the consequences of his or her act or omission.'" *Id.* (quoting *Black's Law Dictionary* 1547 (10th ed. 2014)).

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inability to consent." *Id.* And the same is true as to the permission element of § 2244(b).

This presumption in favor of scienter must be applied "even when Congress does not specify any scienter in the statutory text." *Id.* (citing *Staples v. United States*, 511 U.S. 600, 606 (1994)). And the presumption applies "with equal or greater force" when—*as we have in our case with § 2244(b)*—Congress includes a general scienter provision in the statute itself. *Id.* (citing ALI, Model Penal Code § 2.02(4), p. 22 (1985) (when a statute "prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears")).

Just as the Court in *Rehaif*, 139 S. Ct. at 2195, could "find no convincing reason to depart from the ordinary presumption in favor of scienter," there is no convincing reason to depart from that ordinary presumption here with respect to § 2244(b) given the very plain and simple statutory text. Indeed, in our case, the "knowingly" provision of § 2244(b) represents a general scienter provision in the statute itself, so the presumption is already strong. But the presumption that Congress intended "knowingly" to apply to the lack of permission clause is all the stronger because Congress already specifically included the higher mens rea of "intentional" for the "sexual contact" clause, rendering application of "knowingly" to that clause surplusage. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) (discussing surplusage canon: "If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an

interpretation that causes it to duplicate another provision or to have no consequence"); *Marx v. General Revenue Corp.*, 568 U.S. 371, 386 (2013) ("the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme").

Sexual contact for purposes of § 2244(b) is defined as "the *intentional touching*" of various body parts "with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2246(3) (emphasis added)). Thus, the only way to avoid reading "knowingly" in § 2244(b) as mere surplusage is to apply it to the consent clause—that's the only way that "knowingly" serves a purpose. As Judge Collins explained in his dissent, "[b]y applying the word 'knowingly' *only* to the portion of § 2244(b) that is expressly defined as 'intentional touching,' the majority's reading of 'knowingly' thus wrongly renders that word 'nonsensical and superfluous,' thereby violating 'one of the most basic interpretive canons,' namely, 'that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" Pet. App. 88a (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009) (simplified)). "The *only* non-superfluous role that the word 'knowingly' can have in § 2244(b) is to modify the *entire* phrase 'knowingly engages in sexual contact with another person without that other person's permission'—including the final adverbial prepositional phrase." *Id.*

The Ninth Circuit majority here also erroneously concluded that failing to apply the mens rea knowledge requirement to the permission element could not

penalize innocent conduct. But that's exactly what it does. "Knowingly engaging in sexual contact is, of course, not illegal. Innocent people do it all the time. The element in [the federal sexual assault statute] requiring that the sexual contact be 'without [the] other person's permission' is the actual linchpin of the offense." Pet. App. 37a. Indeed, "the element requiring that the sexual contact be 'without [the] other person's permission' is what makes the sexual contact illegal under the statute. This means that 'the presumption in favor of a scienter requirement should apply' to the permission element of § 2244(b) because that is the element 'criminaliz[ing] otherwise innocent conduct.'" Pet. App. 38a (quoting *X-Citement Video*, 513 U.S. at 72-73) (holding that because "the age of the performers is the crucial element separating legal innocence from wrongful conduct" under a child-pornography statute, the statute requires that the defendant have knowledge of the performer's age).

Section 2244(b) criminalizes sexual contact *only* where it was "without the other person's permission." Applying the presumption in favor of scienter as the Court did in *Rehaif*, the knowledge requirement *must* apply to the statutory language that makes a person criminally liable for engaging in sexual contact: doing it without the other person's permission. If the defendant lacked knowledge that he did not have the other person's permission—the "crucial element"—he could not be criminally liable. This Court in *Rehaif* relied on the identical caselaw to reach its conclusion with respect to the knowledge requirement in § 922(g). *Rehaif* reaffirms the principle that when engaging in normally innocent behavior—like the

possession of a firearm in *Rehaif* or engaging in sexual contact here—the knowledge requirement must apply to the element in the statute that makes the normally innocent act criminal: the prohibited status in § 922(g) or the lack of permission in § 2244(b).

The analysis must be consistent with the principle that to be convicted of a criminal statute, a "vicious will" must be shown. *Rehaif*, 139 S. Ct. at 2196 (citing 4 W. Blackstone, *Commentaries on the Laws of England* 21 (1769)). Indeed, "the understanding that an injury is criminal only if inflicted knowingly 'is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.'" *Id.* (quoting *Morissette*, 342 U.S. at 250). Moreover, the Court "normally presume[s] that Congress did not intend to impose criminal liability on persons who, due to lack of knowledge, did not have a wrongful mental state." *Id.* at 2198. Indeed, "[w]ithout knowledge of that status, the defendant may well lack the intent needed to make his behavior wrongful. His behavior may instead be an innocent mistake to which criminal sanctions normally do not attach." *Id.* (citing O. Holmes, *The Common Law* 3 (1881) ("even a dog distinguishes between being stumbled over and being kicked")). *Rehaif*'s reasoning is equally applicable to § 2244(b).

Here, Mr. Price believed that he was engaging in a consensual sex act. Like the defendant's status in § 922(g) at issue in *Rehaif*, the "crucial element" separating innocent from wrongful conduct in § 2244(b) is whether defendant lacked the other person's permission to engage in the sexual contact. If, as Mr. Price

maintained, he did not know he lacked A.M.'s consent—and, in fact, believed just the opposite, that he was engaging in a consensual act—then he did not have any "vicious will" and cannot be guilty of a crime. As such, the knowledge requirement in § 2244(b) must apply to the consent element in the statute.

And finally, for the same reasons, the failure to correctly instruct the jury on the requirements of § 2244(b)—and to permit the jury to convict Mr. Price without proof beyond a reasonable doubt that he knew he lacked consent to engage in sexual contact—cannot be harmless error. Certainly the evidence in the record was not so strong that no reasonable juror could have found that Price did not know he lacked consent to engage in sexual contact with A.M.. Sexual signals between consenting adults can sometimes be misinterpreted by the parties involved. *See, e.g.*, Peter Rebhahn, *Mixed Signals: How men and women misjudge sexual signals. And why men overestimate women's interest*, Psychology Today (July 1, 2000), https://www.psychologytoday.com/us/articles/200007/mixed-signals. And there is no affirmative consent requirement in the law—the government had the burden of establishing knowledge of lack of consent.

As Judge Collins cogently explained, "the panel's harmless error analysis impermissibly crosse[d] a line when it *weigh[ed] credibility* in assessing whether a reasonable juror could have found in Price's favor on the missing scienter element. The panel's novel approach to harmless error cannot be reconciled with the constitutional right to a jury trial on all elements of an offense." Pet. App. 103a. A proper analysis applying this Court decision in *Neder v. United States*, 527 U.S. 1

(1999), could only lead to the conclusion that the failure to correctly instruct the jury on the elements of the offense was not harmless. Pet. App. 103a-108a. "Here, the jury could easily have convicted Price based on his *first* touching of A.M. (on her breast) *even if they believed Price's version of that first touch*. That is, even if the jury believed Price's testimony that he *subjectively* thought he had consent to touch A.M.'s breast based on her alleged rubbing of his hand and his massaging her arm, the jury could easily conclude that such innocent gestures did not provide objective evidence of consent to justify grabbing her breast." Pet. App. 106a-107a.

"The panel majority's implicit embrace of appellate weighing of a criminal defendant's credibility is unsupported by precedent and is anathema to the fundamental right to trial by jury in criminal cases—a right that the Framers considered so important that they put in the Constitution twice." Pet. App. 107a-108a (citing U.S. Const. art. III, § 2, cl. 3; *id*. amend. VI).

* * *

The Ninth Circuit panel majority misapplied multiple canons of statutory construction and ignored or misapplied several decisions of this Court. The petition should be granted.

CONCLUSION

For all the foregoing reasons, petitioner submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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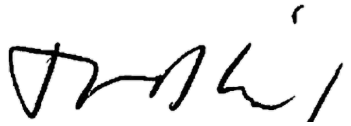

DATED: April 26, 2021

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