No. 20-7909

IN THE SUPREME COURT OF THE UNITED STATES

JUAN PABLO PRICE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court committed reversible error by declining to instruct the jury -- in a prosecution for abusive sexual contact on an aircraft, in violation of 18 U.S.C. 2244(b) and 49 U.S.C. 46506 -- that the government is required to prove that the defendant knew that he lacked the victim's permission to engage in sexual contact.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 921 F.3d 777. The order of the court of appeals amending the opinion (Pet. App. 1a-108a) is reported at 980 F.3d 1214.

JURISDICTION

The amended judgment of the court of appeals was entered on November 27, 2020. A petition for rehearing was denied on that date. The petition for a writ of certiorari was filed on April 26, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of abusive sexual contact on an aircraft in the special aircraft jurisdiction of the United States, in violation of 18 U.S.C. 2244(b) and 49 U.S.C. 46506. Judgment 1. He was sentenced to three years of probation. Ibid. The court of appeals affirmed. Pet. App. 1a-108a.

1. In 2014, petitioner took an overnight flight from Tokyo to Los Angeles. Pet. App. 7a. After take-off, petitioner approached A.M., a 21-year-old college student from Japan, and asked if he could sit in the unoccupied seat next to her. Ibid. A.M. agreed. Ibid. Petitioner tried to engage A.M. in conversation, but she told him that she did not speak English well. Ibid. A flight attendant asked petitioner why he had changed seats, and he responded that he wanted more legroom. Ibid. Yet when the flight attendant offered him a seat with three times the legroom -- as well as a working video screen, which his newly chosen screen lacked -- he declined. Ibid. The flight attendant, who had 25 years of experience, had never before seen someone refuse such an offer, became suspicious of petitioner, and slipped A.M.'s friend a note warning them to "watch out" for him. Ibid. A.M. eventually placed her blanket over her legs and fell asleep. Ibid.; Presentence Investigation Report ¶ 6.

A.M. awoke to find petitioner touching her arm, hip, and leg. Pet. App. 8a. Suspecting that petitioner was trying to steal her phone, A.M. moved the phone and fell back asleep. Ibid. She then awoke once more to find petitioner fondling her breast. Ibid. In a panic, she pulled the blanket up to her shoulder and crossed her arms in front of her. Ibid. Petitioner placed his blanket over both of them and continued to touch A.M.'s breast, first above her shirt and then underneath it. Ibid. He slid his hand into her jeans, under her underwear, and touched her vagina. Ibid. A.M. twisted away, but petitioner forcibly pulled her back and tried to remove her jeans. Ibid. Petitioner then saw that A.M.'s friend (seated next to A.M.) was awake, stood up, and returned to his original seat. Ibid.

A.M. found a flight attendant and asked for help. Pet. App. 8a-9a. Petitioner, meanwhile, wrote a note stating, "[i]f a man touches you and you don't want him to always feel free to say No." Id. at 9a. He never delivered the note to A.M. Ibid. He did, however, provide a written statement to a flight attendant in which he stated that his encounter with A.M. was consensual. Ibid.; C.A. E.R. 1036. He did not admit that he had touched A.M.'s breast and vagina. Ibid.; C.A. E.R. 755-756.

Later, during an interview with law enforcement, petitioner stated that he "knew * * * it was wrong" to be "engaging like this with somebody who is totally a stranger" without first having

had a "proper conversation." Gov't C.A. E.R. 30. He further agreed that he should have known it was his "job not to touch" A.M. without her permission. Id. at 45-46. And when asked whether A.M.'s eyes were open when he fondled her breast, he responded that, when he does "something like this" that is "out of limits" and "[]against your consci[ence]," he does not "make eye contact." Id. at 39; C.A. E.R. 795.

2. A federal grand jury in the Central District of California returned an indictment charging petitioner with abusive sexual contact on an aircraft in the special aircraft jurisdiction of the United States, in violation of 18 U.S.C. 2244(b) and 49 U.S.C. 46506. Indictment 1. Section 2244(b) makes it unlawful to "knowingly engage[] in sexual contact with another person without that other person's permission" in the special maritime and territorial jurisdiction of the United States. 18 U.S.C. 2244(b). Section 46506, in turn, applies certain criminal statutes, including Section 2244(b), to "aircraft in the special aircraft jurisdiction of the United States." 49 U.S.C. 46506.

At trial, petitioner testified that he believed that his encounter with A.M. was consensual. Pet. App. 8a. He claimed that he felt A.M. touch his hand, that they had begun rubbing each other's hands, and that he thought A.M. "enjoy[ed] herself" when he touched her breasts. Ibid. (internal quotation marks omitted).

The district court instructed the jury that it could find petitioner guilty only if the government had proved the following beyond a reasonable doubt: "First, [petitioner] knowingly had sexual contact with [A.M.]; second, the sexual contact was without [A.M.'s] permission; and, third, the offense was committed in the special aircraft jurisdiction of the United States." C.A. E.R. 958. The court declined to instruct the jury that the government was also required to prove that petitioner "knew the sexual contact was without A.M.'s permission." Pet. App. 10a; see id. at 122a-123a. But the court granted petitioner's request to instruct the jury that "'permission'" may be "express or implied" and may be "'inferred from words or action[].'" Id. at 10a; see id. at 112a; C.A. E.R. 959.

The jury found petitioner guilty. Pet. App. 6a. The district court sentenced him to three years of probation. Judgment 1.

3. The court of appeals affirmed. 921 F.3d 777. In an amended opinion issued in conjunction with a denial of rehearing following this Court's decision in Rehaif v. United States, 139 S. Ct. 2191 (2019), the court rejected petitioner's argument that the government was required to prove that he knew that he lacked A.M.'s permission and found that, in any event, any error was harmless on the facts here. Pet. App. 1a-54a.

The court of appeals stated that the "most natural grammatical meaning" of Section 2244(b) "is that the government must prove

that the defendant knew he engaged in sexual contact, not that it prove that the defendant subjectively knew he lacked consent." Pet. App. 12a. The court reasoned that "[t]he term 'knowingly'" is most naturally read to "modif[y] only the [adjacent] verb phrase 'engages in sexual contact with another person,'" not to modify "the adverbial prepositional phrase 'without that other person's permission.'" Ibid. And the court noted that "other elements of § 2244(b)" -- which require proof beyond a reasonable doubt "that the defendant engage in sexual contact knowingly" and "that the sexual contact was without the victim's permission" -- already provide an "adequate safeguard" against convictions for innocent conduct. Id. at 14a. The court also drew support from the neighboring provision, Section 2244(a), which likewise requires that the defendant "knowingly" have "sexual contact," plus an additional element, and which "would both be grammatically unnatural and produce absurd results" if the knowledge required applied to the additional element. Id. at 19a-21a.

The court of appeals additionally reasoned that the interpretation of different statutes in Flores-Figueroa v. United States, 556 U.S. 646 (2009), and Rehaif v. United States, 139 S. Ct. 2191 (2019), did not require it to adopt petitioner's construction of Section 2244(b). The court observed that the "grammatical structure" of the identity-theft statute in Flores-Figueroa (in which "knowingly" modified a transitive verb and its

object) differed from the grammatical structure of the statute here ("where the phrase in question -- 'without that other person's permission' -- is not the object of the sentence but an adverbial prepositional phrase"). Pet. App. 16a. The court also noted that the mens rea requirement in Flores-Figueroa was necessary to separate wrongful conduct from otherwise innocent conduct. Ibid. And the court observed that the statute at issue here, unlike the firearm statute in Rehaif, contains "additional prepositional phrases" "'such that questions may reasonably arise about how far into the statute the modifier extends.'" Id. at 17a (quoting Rehaif, 139 S. Ct. at 2196). The court also reiterated that, in this case, it saw no risk of criminalizing innocent conduct in the absence of an additional mens rea requirement, as "[t]he normal default between two people for * * * sexual activity, without any communication or prior understanding, is not to touch." Id. at 18a.

The court of appeals additionally determined, in agreement with the concurrence, that "even if the statute required the government to prove that [petitioner] subjectively knew the sexual contact was without permission, any error in the jury instruction was harmless." Pet. App. 25a n.4. "Given the totality of the circumstances," the court observed, "it was clear beyond a reasonable doubt that [petitioner] subjectively knew that he did not have permission to have sexual contact with A.M." Ibid.

Judge Gilman concurred in the result, explaining that although he disagreed with the court of appeals' construction of Section 2244(b), such an "error was harmless beyond a reasonable doubt because no reasonable juror could have concluded that [petitioner] subjectively believed that he had permission to touch a sleeping stranger's breast." Pet. App. 33a; see id. at 32a-54a. He observed that "[t]he government's evidence, which the jury had to believe in order to find [petitioner] guilty, overwhelmingly demonstrated that [petitioner] knew that he lacked permission to engage in sexual contact with A.M." Id. at 54a; see id. at 51a-54a.

4. The court of appeals denied rehearing en banc. Pet. App. 54a-108a.

Judge Wardlaw (the author of the panel opinion), joined by Judge Nguyen (the other member of the panel majority), concurred in the denial of rehearing to further support the conclusion that, although Section 2244(b) "provides a defense for misunderstandings about consent, when those misunderstandings can be reasonably and objectively inferred from words or actions," it does not provide a defense for a misunderstanding that "exist[s] only in the mind of the defendant." Pet. App. 56a; see id. at 54a-73a. She emphasized, among other things, that reading the statute as petitioner suggests would mean that "[a] misogynist who believed that all women must always want him, no matter their verbal

protestations or body language, could apparently never commit this crime." Id. at 57a.

Judge Collins, joined in part by Judges Ikuta, VanDyke, and Bumatay, dissented from the denial of rehearing en banc. Pet. App. 73a-108a. He would have construed the word "knowingly" in Section 2244(b) to apply to the phrase "without that other person's permission," id. at 85a-93a (citation omitted), and deemed such an error not to be harmless in the circumstances of this case, id. at 103a-108a.

ARGUMENT

Petitioner renews his contention (Pet. 15-24) that the district court committed prejudicial error by declining to instruct the jury that abusive sexual contact, in violation of Section 2244(b), requires proof that the defendant knew that his victim did not consent to his sexual contact. The court of appeals correctly affirmed petitioner's conviction, and its decision does not conflict with any decision of this Court or of another court of appeals. The petition for a writ of certiorari should be denied.

1. The court of appeals determined that, "even if [Section 2244(b)] required the government to prove that [petitioner] subjectively knew the sexual contact was without permission, any error in the jury instruction was harmless." Pet. App. 25a n.4.

That determination was correct and by itself provides a sufficient reason to deny the petition for a writ of certiorari.

The Federal Rules of Criminal Procedure provide that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a). This Court has accordingly held that if a jury instruction "omits an element of the offense," reviewing courts must disregard the error if it is "harmless 'beyond a reasonable doubt.'" Neder v. United States, 527 U.S. 1, 7-8 (1999) (citation omitted). And the court of appeals unanimously found it "clear beyond a reasonable doubt" that the jury would have reached the same verdict even if the district court had provided the instruction petitioner sought. Pet. App. 25a n.4; see id. at 33a (Gilman, J., concurring).

That factbound determination was sound. The "entire theory of [petitioner's] defense," as reflected in his testimony, "was that A.M. gave implicit permission through her physical responses." Pet. App. 73a (Wardlaw, J., concurring in the denial of rehearing en banc). The jury necessarily "found that implicit permission had not been given" and thus "rejected [petitioner's] story to the contrary." Ibid.; see id. at 52a (Gilman, J., concurring) (explaining that the verdict establishes that "[t]he jury * * * believed A.M.'s story of what occurred on the flight over [petitioner's] story."). And as the panel unanimously recognized, the factual findings that underlie the jury's guilty

verdict necessarily establish not only lack of consent, but knowledge of it.

Because petitioner "conceded that A.M. never gave him explicit permission to touch her breasts or vagina," "[t]he only remaining question is whether there is any reasonable possibility that [petitioner] subjectively believed he had A.M.'s implicit permission to engage in sexual contact with her." Pet. App. 52a (Gilman, J., concurring). "A.M. was asleep when [petitioner] began running his hand up and down her side and her leg," and "[a] sleeping person clearly gives no implicit permission to be touched." Ibid. Further, when A.M. awoke to find petitioner fondling her breast, she "put a blanket over her shoulder and crossed her arms in front of her" -- actions that "negate any implicit permission to be touched." Id. at 52a-53a. Petitioner continued to touch A.M.'s breasts and vagina, but "[i]n a state of shock, panic, and fear, and in a final effort to ward off [petitioner], [A.M.] turned her body away from him." Id. at 53a. Despite A.M.'s "negative reaction," petitioner "tried to pull her jeans down." Ibid. A.M. also "never spoke to [petitioner] while he was touching her nor even looked at him during their encounter." Ibid. "Under all of these circumstances, no reasonable juror could have found that [petitioner] subjectively believed that he had permission to touch A.M., especially once A.M. physically turned her back to him." Ibid.

Petitioner's subsequent actions and statements underscore his awareness that he lacked A.M.'s consent. Petitioner wrote A.M. a note stating "[i]f a man touches you and you don't want him to always feel free to say No." Pet. App. 9a. That note -- which petitioner wrote "after A.M. [had] left her seat, but before the flight crew approached him about A.M.'s complaint" -- indicated that petitioner "knew he had not been given permission." Id. at 72a (Wardlaw, J., concurring in the denial of rehearing en banc). Petitioner also failed to mention in a subsequent written statement that he had touched A.M.'s breast and vagina -- an omission suggesting consciousness of guilt. Ibid. And in an interview with law enforcement, petitioner admitted that he "knew * * * it was wrong" to "engag[e] like this with somebody who is totally a stranger" without first having had a "proper conversation"; that he should have known it was his "job not to touch" A.M. without her permission; and that he did not make eye contact with A.M. because he knew he was doing something "out of limits" or "[]against your consci[ence]." Gov't C.A. E.R. 30, 39, 45-46; C.A. E.R. 795.

Petitioner errs in contending that the court of appeals impermissibly "weighed credibility in assessing whether a reasonable juror could have found in [petitioner's] favor on the missing scienter element." Pet. 24 (brackets, citation, and emphasis omitted). The members of the panel majority acknowledged

that petitioner "testified to an escalating chain of events resting on implicit consent for his actions." Pet. App. 71a-72a (Wardlaw, J., concurring in the denial of rehearing en banc); see id. at 72a (discussing petitioner's testimony that A.M. invited sexual contact by rubbing his hand). The court did not, however, discount that testimony simply because it found the testimony incredible. The court's decision instead rested on the understanding that "the jury necessarily rejected [petitioner's] story in finding him guilty." Id. at 72a. The court thus applied the correct legal standard in evaluating harmlessness. See Neder, 527 U.S. at 15 (explaining that the omission of an element is harmless when "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained'") (citation omitted); Pet. App. 25a n.4 (finding harmlessness "beyond a reasonable doubt") (citation omitted). And a "petition for a writ of certiorari is rarely granted" when, as here, "the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10; see United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

2. The court of appeals' unanimous harmless-error determination renders this case an unsuitable vehicle for reviewing the court's construction of Section 2244(b). The court's judgment rests on two alternative grounds: its interpretation of

Section 2244(b) and its finding of harmlessness. See Pet. App. 25a n.4, 32a; see also id. at 74a (Collins, J., dissenting from the denial of rehearing en banc) (acknowledging that "the panel majority rests on two alternative grounds"). Because the harmlessness determination independently supports the judgment below, this Court would have no occasion to review the court of appeals' interpretation of Section 2244(b). See Herb v. Pitcairn, 324 U.S. 117, 126 (1945) ("[O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the [lower] court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."); Stephen M. Shapiro et al., Supreme Court Practice 248 (10th ed. 2013) ("If it appears that upon a grant of certiorari the Supreme Court might be able to decide a case on another ground and thus not reach the point upon which there is conflict, the conflict itself may not be sufficient reason for granting review.").

That issue would not warrant further review in any event. Petitioner errs in contending (Pet. 15-16) that the decision below conflicts with the decisions of this Court and a decision of the Eighth Circuit. None of the cases that petitioner cites involved Section 2244(b). See Rehaif v. United States, 139 S. Ct. 2191 (2019) (interpreting a firearms statute); Flores-Figueroa v.

United States, 556 U.S. 646 (2009) (interpreting an identity-theft statute); Liparota v. United States, 471 U.S. 419 (1985) (interpreting a fraud statute); United States v. Bruguier, 735 F.3d 754 (8th Cir. 2013) (en banc) (interpreting a different sexual-abuse statute, 18 U.S.C. 2242(2)); see also Pet. App. 15a-19a, 23a n.3 (discussing grammatical and substantive differences between the statute at issue here and the statutes at issue in the cases cited by petitioner).

Indeed, before the decision below, no court of appeals "ha[d] addressed whether the knowledge element of Section 2244(b) applies to the victim's lack of permission." United States v. Hawkins, 603 Fed. Appx. 239, 240 (5th Cir. 2015) (per curiam). The only two courts to refer to the issue had not decided it, affirming instead based on trial evidence that established the defendant's knowledge beyond a reasonable doubt. See id. at 241 (finding it "unnecessary to resolve the statutory question because sufficient evidence supported the conviction even assuming a mens rea requirement applied to the 'without that person's permission' element"); United States v. Cohen, No. 07-5561-cr, 2008 WL 5120669, at *2 (2d Cir. Dec. 8, 2008) (summary order) (assuming defendant-favorable interpretation and finding that the district court "had sufficient evidence upon which to conclude beyond a reasonable doubt, as it did, that [the defendant] did not think that he had the permission of the woman sitting next to him to engage in sexual

contact"). Particularly given that the issue has apparently not yet arisen in a case in which it is outcome-determinative, this Court's review would be unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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