No.

In The Supreme Court Of The United States

Brandon Lamar Pruitt,

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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Questions Presented for Review

1. The federal sex trafficking statute requires that the government prove the defendant knew his/her own actions would cause the victim to engage in a commercial sex act. 18 U.S.C. § 1591(a)(1). Here, however, the Ninth Circuit affirmed a jury instruction that allowed conviction if the government proved only that the defendant knew "anyone would cause" the victim to engage in a commercial sex act. The Ninth Circuit's decision on this element conflicts with its own precedent and model instruction and creates a split with other circuit precedent and pattern instructions for sex trafficking.

Should this Court grant review to ensure uniformity under § 1591(a)(1), and avoid erosion of the Fifth Amendment's grand jury and due process protections?

2. In accordance with Congressional intent to impose harsher penalties on those who seek to exploit children specifically through use of a computer, the Sentencing Guidelines allow for an enhancement when the defendant or his/her agent uses a computer to solicit prohibited sexual conduct with a minor. U.S.S.G. § 2G1.3(b)(3). Here, the Ninth Circuit affirmed application of this enhancement when Pruitt neither used nor directed another to use a computer for solicitation. In affirming, the Ninth Circuit split with other circuits that hold the Guideline requires computer use by the defendant or his agent, not a third party.

Should this Court grant review to resolve the circuit split over whether courts may apply the computer use enhancement to a defendant solely based on the conduct of another?

3. After Pruitt was charged, convicted, and sentenced of prohibited person in possession of a firearm, this Court overturned near-unanimous circuit authority by holding the government must prove the defendant knew at the time of alleged possession that he/she belonged to the category of persons barred from possessing a firearm. *Rehaif v. United States*, 139 S. Ct. 2191 (2019). This Court emphasized that this mens rea marked the distinction between innocent and criminal conduct. Yet Pruitt's indictment failed to charge this critical mens rea that is necessary to establish a federal crime.

Should this Court grant review to resolve the circuit split over whether an indictment "defect," such as omission of the element necessary to render conduct criminal, can ever strip federal courts of jurisdiction?

Related Proceedings

Petitioner Brandon Pruitt challenged his convictions and sentence following two jury trials in *United States v. Pruitt*, No. 2:16-cr-00285-APG-NJK-1, Dkt. 216 (D. Nev. March 28, 2019). The first jury returned not guilty verdicts for Count 1 (Sex Trafficking, 18 U.S.C. § 1591(a)(1) and (b)(2)); and Count 2 (Transportation for Prostitution, 18 U.S.C. § 2423(a)), and guilty verdicts for Count 3 (Unlawful possession of firearm, 18 U.S.C. §§ 922(g)(1) and 924(a)(2)) and Count 4 (Tampering with a witness, 18 U.S.C. § 1512(b)). App. G. The second jury returned guilty verdicts for Count 1 and Count 2. App. E. The district court sentenced Pruitt to 300 months: 300 months on Counts 1 and 2; 120 months on Count 3; and 240 months on Count 3, to run concurrently. App. C.

The Ninth Circuit affirmed the convictions and sentence on December 16, 2020, and denied Pruitt's petition for rehearing on June 29, 2021. *United States v. Pruitt*, 839 F. App'x 90 (9th Cir. Dec. 16, 2020), *pet. for rh'g denied*, No. 19-10125, Dkt. 74 (9th Cir. June 29, 2021). *See* App. A, B.

Pruitt remains in federal custody of the Bureau of Prisons, with an estimated release date of November 8, 2037.

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Petition for Certiorari

Petitioner Brandon Lamar Pruitt petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The Ninth Circuit opinion denying appellate relief is not published in the Federal Reporter but is reprinted at: *United States v. Pruitt*, 839 F. App'x 90 (9th Cir. Dec. 16, 2020) (unpublished). App. B. The Ninth Circuit order denying rehearing is unpublished and not reprinted. App. A.

The district court's final judgment, sentencing transcript, jury verdicts, jury instructions, and superseding indictment are unpublished and not reprinted. App. C, D, E, F, G, H, I.

Jurisdiction

The Ninth Circuit entered the final order denying Pruitt's timely petition for rehearing of his direct appeal on June 29, 2021. App. A: 1a. The district court had jurisdiction over the initial criminal indictment under 18 U.S.C. § 3231. The Ninth Circuit had jurisdiction over the final judgment per 28 U.S.C. § 1291 and 18 U.S.C. § 3742. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

This petition is timely per Supreme Court Rule 13.1 and this Court's orders dated March 29, 2020 and July 19, 2021 extending the deadline to file petitions for writ of certiorari to 150 days from the lower court order denying a timely petition for rehearing.

Constitutional and Statutory Provisions Involved

1. U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . nor be deprived of life, liberty, or property, without due process of law . . ..

2. 18 U.S.C. § 922(g)(1)

> (g) It shall be unlawful for any person—
>
> > (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
> > ***
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

3. 18 U.S.C. § 924(a)(2)

> (a)(2) Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

4. 18 U.S.C. § 1591(a)(1)

> (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, advertises, maintains, patronizes, or solicits by any means a person; . . .
> > ***
>
> knowing, or, except where the act constituting the violation of paragraph (1) is advertising, 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).

5. 18 U.S.C. § 3231

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

6. U.S.S.G. § 2G1.3(b)(3) (2018)

(b) Specific Offense Characteristics

(3) If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor, increase by 2 levels.

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Commentary
Application Notes

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4. Application of Subsection (b)(3)(A).--Subsection (b)(3)(A) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3)(A) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

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Statement of the Case

Pruitt was twice tried for charges stemming from his then-minor girlfriend, A.D., being involved in prostitution. The first jury hung as to whether Pruitt committed sex trafficking (Count One) and transportation for prostitution (Count Two), though the jury did convict him of unlawful possession of a firearm (Count Three) and attempted witness tampering. (Count Four). At the second trial, the district court changed the jury instruction for Count One's sex trafficking charge over Pruitt's objection. The second jury convicted Pruitt of Counts One and Two. Pruitt received 25 years in prison, based on an incorrectly calculated guideline range. During pendency of Pruitt's direct appeal, this Court clarified the elements required for unlawful possession of a firearm, which Pruitt's superseding indictment omitted.

A. Jury instruction differences between first and second trial.

For § 1591(a)(1), controlling Ninth Circuit precedent held the government must prove Pruitt knew *his* actions (i.e., his modus operandi), rather than "anyone's" actions, would cause A.D. to engage in a commercial sex act. *United States v. Todd*, 627 F.3d 329 (9th Cir. 2010); Ninth Circuit Manual of Model Criminal Jury Instructions, § 8134A (2018). A.D. testified she decided to seek prostitution customers in Las Vegas by placing ads on backpage.com and walking a known prostitution "track." A.D. testified she chose when, where, and how much to charge for prostitution. Thus, Pruitt's primary defense was that he did not

knowingly act to cause A.D. to engage in prostitution, because she decided on her own to engage in prostitution.

Both the superseding indictment and the first trial's jury instruction correctly followed the model jury instruction for the sex trafficking count, and the jury hung. App. G, H, I. The first trial's jury instruction required the government to prove "the defendant knew or was in reckless disregard of the fact that A.D. would be caused to engage in a commercial sex act." App. A: 28a (emphasis added).

At the second trial, over Pruitt's objection, the court changed the elements, permitting conviction if "the defendant knew or was in reckless disregard of the fact that *anyone* would cause A.D. to engage in a commercial sex act." App. F: 25a (emphasis added). The government seized this error, reiterating in opening statement the term "anyone" in Count One's instruction: "we have to prove that [Pruitt] knew or recklessly disregarded the fact that someone, anyone, would cause her to engage in commercial sex acts." ECF 236, p. 188. In closing, the government "encourage[d]" the jury to "focus on and circle" the term "anyone," telling the jury "you're not here to decide who caused [A.D.] to prostitute." ECF 238, p. 57. The second jury found Pruitt guilty of the sex trafficking count. App. E: 23a.

On direct appeal, the Ninth Circuit affirmed, creating a circuit split as to the elements required for § 1591(a)(1). App. B: 4a.

B. Disputed two-level sentencing enhancement for use of a computer where Pruitt did not use a computer.

Pruitt objected to a two-level enhancement for use of a computer under U.S.S.G. § 2G1.3(b)(3) (2016), as Pruitt never used a computer to solicit prohibited

sexual conduct with A.D. App. D: 17a. The government agreed A.D., not Pruitt, placed prostitution advertisements online using a computer. App. D: 19a-20a. A.D. consistently testified she alone, at her own discretion, posted advertisements on backpage.com, chose when to place them, chose their content, and answered responses. Applying the enhancement, the district court found A.D.'s use of a computer to place ads on backpage.com met the guideline requirements just because Pruitt knew of the ads. App. D: 21a-22a.

Without the enhancement, Pruitt's Guidelines range would have been 292-365 months. But the probation office and the government asked the district court to apply the enhancement, resulting in a range of 360-months to life. The district court adopted the 360-month to life guideline range and imposed a 300-month (25-year) sentence. App. C: 9a.

On direct appeal, the Ninth Circuit affirmed, creating a circuit split as to application of U.S.S.G. § 2G1.3(b)(3). App. B: 5a.

C. After Pruitt's conviction, this Court issued *Rehaif* and Pruitt challenged his insufficient indictment for the unlawful firearm possession count.

After Pruitt's conviction and sentencing, this Court reversed a wall of circuit precedent and held that 18 U.S.C. §§ 922(g) and 924(a) require, as an essential element, that the defendant knew he belonged to the category of persons barred from possessing a firearm at the time of the alleged possession. *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019). This Court made clear the *Rehaif* mens rea requirement was necessary "to make [Pruitt's] behavior wrongful," and therefore

separated innocent from criminal conduct. *Id.* at 2197. Pruitt, however, was charged and convicted under §§ 922(g) and 924(a) with no allegation he knew he was a prohibited person. App. I: 30a-31a; App. C: 7a-15a.

On direct appeal, the Ninth Circuit affirmed, widening the circuit split on whether an indictment "defect" can ever affect jurisdiction. App. B: 5a.

Reasons for Granting the Petition

Pruitt is serving a quarter-century in prison due to three critical errors below. In affirming Pruitt's case on direct appeal, the Ninth Circuit created three circuit splits, requiring resolution by this Court.

I. Affirming an erroneous jury instruction for sex trafficking, the Ninth Circuit violated Pruitt's Fifth Amendment protections and created a circuit split.

The Ninth Circuit's decision conflicts with its own precedent and model jury instruction, and creates a split with other circuit precedent and pattern jury instructions for sex trafficking under 18 U.S.C. § 1591(a)(1). The erroneous jury instruction impermissibly broadens the statute by including a non-statutory element.

A. The erroneous jury instruction diverged from Ninth Circuit precedent and model jury instruction.

Under previous Ninth Circuit law, to convict Pruitt the government must prove Pruitt knew *his* actions (*i.e.,* his modus operandi) would cause A.D. to engage in a commercial sex act. *United States v. Todd*, 627 F.3d 329 (9th Cir. 2010). An actual commercial sex act need not take place, but the defendant must know his

personal actions would cause the victim to engage in a commercial sex act. *Todd*, 627 F.3d at 334. This precedent reflected other circuit holdings.

The superseding indictment mirrored the statute's language, charging that Pruitt "knowingly and in reckless disregard of the fact that. . . [A.D.] would be caused to engage in a commercial sex acts [sic]." App. I: 30a, *see also* 18 U.S.C. § 1591(a). Pruitt's defense was that he did not knowingly act to cause A.D. to engage in prostitution because she decided on her own to engage in prostitution. The final instruction altered the statute's required elements, resulting in a constructive amendment. *United States v. Davis*, 854 F.3d 601, 605 (9th Cir. 2017) (finding jury instructions for attempted sex trafficking constructively amended indictment).

At the first trial, the district court provided the Ninth Circuit's model jury instruction that requires the defendant knew his personal actions would cause the victim to engage in a commercial sex act:

> [T]he government must prove each of the following elements beyond a reasonable doubt: First, the defendant knowingly recruited, enticed, harbored, transported, provided, obtained, or maintained by any means, A.D; Second, **the defendant knew or was in reckless disregard of the fact that A.D.** had not attained the age of 18 years and **would be caused to engage in a commercial sex act**; and Third, the offense was in or affecting interstate commerce.

App. H: 28a (emphasis added); *see also* Ninth Circuit Manual of Model Criminal Jury Instructions, § 8.134A (June 2021). This first jury hung on the sex trafficking count. App. G: 26a.

To avoid another hung jury at the second trial, the court impermissibly altered the elements under § 1591(a)(1), over Pruitt's objection. The new instruction added a non-statutory element allowing conviction for others' conduct:

> [T]he government must prove each of the following elements beyond a reasonable doubt: First, the defendant knowingly recruited, enticed, harbored, transported, provided for, obtained, or maintained A.D. by any means; Second, the defendant knew or was in reckless disregard of the fact that A.D. had not attained the age of 18 years; Third, **the defendant knew or was in reckless disregard of the fact that anyone would cause A.D. to engage in a commercial sex act**; and Fourth, the offense was in or affecting interstate commerce.

App. F: 25a (emphasis added). The government emphasized the non-statutory term "anyone" in its opening and closing statements, asking the jury to "focus on and circle" the term "anyone, and telling the jury "you're not here to decide who caused [A.D.] to prostitute." ECF 238, p. 57; ECF 236, p. 188. The second jury found Pruitt guilty of the sex trafficking count. App. E: 23a.

Neither Ninth Circuit precedent nor its model jury instruction employs the term "anyone." The model instruction for § 1591(a)(1) rests on *Todd*, where the Ninth Circuit specifically analyzed the "would be caused" element. 627 F.3d at 334. In *Todd*, the Ninth Circuit found the government proved a set practice — a modus operandi — of the defendant controlling women to work as prostitutes for him. *Id.* "What the statute requires is that the defendant know in the sense of being aware of an established modus operandi that will in the future cause a person to engage in prostitution." *Id.* at 334. In other words, the government must prove the

defendant's actions will cause the minor to engage in prostitution "if things go *as he planned*." *Id.* (emphasis added).

Other Ninth Circuit published decisions agreed with *Todd*, holding that § 1591(a)(1) requires the government to prove the defendant knew his personal modus operandi would cause the victim to engage in a commercial sex act. *United States v. Backman*, 817 F.3d 662, 666 (9th Cir. 2016) (requiring under § 1591(a) that the defendant knew his modus operandi would cause a sex act: "[w]hat the statute requires is that the defendant know in the sense of being aware of an established modus operandi that will in the future coerce a prostitute to engage in prostitution."); *United States v. Brooks*, 610 F.3d 1186, 1197 & 1197 n.4 (9th Cir. 2010) (finding sufficient evidence defendant "knowingly had an established modus operandi" causing victims to engage in prostitution where defendant bought bus tickets to travel for prostitution, provided provocative clothing, and rented hotel rooms in an area known for prostitution, proving the defendant "had plans for her to be caused to engage in prostitution in the future").

Yet here, the Ninth Circuit held to the contrary without mentioning its controlling precedent *Todd* or its model jury instruction. App. B. Instead, the Ninth Circuit merely cited the standard for constructive amendment claims—a standard not in dispute. App. B, p. 3. Thus, the Ninth Circuit's affirmance below conflicts with its own precedent and model jury instruction, and also conflicts with other circuit holdings, which require the defendant to know *his* actions would cause the minor to engage in a commercial sex act under § 1591(a)(1).

B. The Ninth Circuit's decision erodes long-standing principles of criminal law.

Three stalwart principles of criminal law are threatened by the Ninth Circuit's decision below: the Fifth Amendment's grand jury and due process requirements precluding constructive amendment of an indictment, canons of statutory interpretation maintaining separation of powers, and the rule that any element required for a mandatory minimum sentence must be submitted to the jury and proved beyond a reasonable doubt.

First, the Fifth Amendment's Grand Jury Clause secures the "right to be tried only on charges presented in [the grand jury's] indictment. *Stirone v. United States*, 361 U.S. 212, 217 (1960). In addition, the Fifth Amendment's Due Process Clause prohibits courts from "constru[ing] a criminal statute to penalize conduct it does not clearly proscribe." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). As a result, a judge may not constructively amend an indictment by modifying the essential elements of the offense in a jury instruction. *Davis*, 854 F.3d at 603 (vacating attempted sex trafficking conviction where jury instruction constructively amended indictment).

Second, creation of a non-statutory element to impose criminal liability violates statutory interpretive canons that maintain separation of powers. "Respect for due process and the separation of powers suggests a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe." *Davis*, 139 S. Ct. at 2333. This principle is not new, as Chief Justice Marshall explained:

> Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorise us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

United States v. Wiltberger, 18 U.S. 76, 95-96 (1820); *see also United States v. Lacher*, 134 U.S. 624, 626 (1890) ("[T]here can be no constructive offenses; and, before a man can be punished, his case must be plainly and unmistakably within the statute.").

Courts therefore cannot read new language into the plain text of § 1591(a)(1) to broaden the federal offense. The statute requires the government to prove the defendant acted "knowingly, or in reckless disregard of the fact . . . that the person . . . will be caused to engage in a commercial sex act." 18 U.S.C. § 1591(a)(1). The statute does not permit the government to prove "that anyone would cause [the person] to engage in a commercial sex act" as the Ninth Circuit permitted below. App. B: 4a. "It is a fundamental principle of statutory interpretation that absent provision[s] cannot be supplied by the courts." *Rotkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019) (citing A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts*, at 94 (West Group 1st ed. 2012)); *see also Borden v. United States*, 141 S. Ct. 1817, 1828 (2021) ("The first precondition of any term-of-art reading is that the term be present in the disputed statute."); *Nichols v. United States*, 136 S. Ct.

1113, 1118 (2016) ("We decline the Government's invitation to add an extra clause to the text [of the statute]."). If a criminal statute is ambiguous, the rule of lenity requires interpreting the statute in the defendant's favor. *Yates v. United States*, 574 U.S. 528, 547 (2015).

Third, the punishment for this crime is a mandatory minimum term of 10 years in prison. *See* 18 U.S.C. §1591(b)(2). Thus, the Fifth Amendment's Due Process Clause requires that any fact triggering the mandatory minimum penalty constitutes an element of the offense, must be submitted to the jury, and proved beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 111-16 (2013). By affirming a jury instruction that failed to require an essential element, the Ninth Circuit permitted imposition of a mandatory minimum without holding the government to its burden of proof, violating Pruitt's due process protections.

Because the Ninth Circuit's decision erodes long-standing principles of criminal law, this Court's review is necessary.

C. The Ninth Circuit's affirmance creates a circuit split.

The Ninth Circuit's model instructions for § 1591(a)(1)—used at Pruitt's first trial—align with other circuits' model instruction, none of which insert the term "anyone would cause" into the statute:

- Fifth Circuit Pattern Jury Instructions (Criminal Cases), § 2.68 Sex Trafficking 18 U.S.C. § 1591 (2019): ". . . Second: That the defendant committed such act knowing or in reckless disregard of the fact the person had not attained the age of 18 years and would be caused to engage in a commercial sex act . . .";

- Sixth Circuit Pattern Criminal Jury Instructions, § 16.12 Sex Trafficking (18 U .S.C. § 1591(a)(1)) (March 2021): ". . . Second, that the defendant [knew] [recklessly disregarded] the fact that [insert name of person as identified in the indictment] was under 18 years old and would be caused to engage in a commercial sex act . . .";

- The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit, Statutory Instructions, 18 U.S.C. § 1591 Sex Trafficking of a Minor—Elements (2020 Ed.): ". . . 2. [The defendant [knew; recklessly disregarded the fact]: (b) [the person identified in the indictment] was under eighteen years of age and would be caused to engage in a commercial sex act. . ."

- Eighth Circuit Manual of Model Criminal Jury Instructions, § 6.18.1591 Sex Trafficking of Children or by Force, Fraud, or Coercion (18 U.S.C. § 1591(a)(1)) (2020 Ed.): " . . . Two, the defendant [knew] [recklessly disregarded the fact] (b) [insert person identified in indictment] was under 18 years of age and would be caused to engage in a commercial sex act . . ."

- Eleventh Circuit Pattern Jury Instructions (Criminal Cases), § O63 Sex Trafficking of Children or by Force, Fraud, or Coercion 18 U.S.C. § 1591(a)(1) (August 2021): ". . . (2) that the Defendant did so knowing or in reckless disregard of the fact that the person had not attained the age of 18 years and would be caused to engage in a commercial sex act . . . "

The remaining circuits lack a pattern § 1591(a)(1) jury instruction.

Federal circuits to address the statute generally affirm § 1591(a)(1) convictions when a defendant knew his/her own planned actions would cause a commercial sex act, not when actions by "anyone" would cause a commercial sex act:

- *United States v. Purcell*, 967 F.3d 159, 193-94 (2d Cir. 2020) (finding sufficient evidence defendant knowingly had an "established modus operandi," where "[t]he logical objective of Purcell's intimidating pattern of behavior was to cause Wood to believe that she could not refuse to work as a prostitute for him without incurring harm, and therefore that she had no viable alternative to engaging in commercial sex activity with Purcell's customers.");

- *United States v. Roach*, 896 F.3d 1185 (10th Cir. 2018) (affirming § 1591(a)(1) conviction where defendant managed and arranged victim's commercial sex acts by choosing her rates, selecting her clients, keeping proceeds, and controlling victim's contact with others by keeping her identification and personal cellphone.)

- *United States v. Wearing*, 865 F.3d 553 (7th Cir. 2017) (affirming § 1591(a)(1) conviction were defendant "completed every step necessary to bring about a commercial sex transaction between the victim and the client at the hotel" including posting advertisements and arranging meetings with client.);

- *United States v. Adams*, 789 F.3d 903 (8th Cir. 2015) (affirming § 1591(a)(1) conviction where defendant had spoken with client about commercial sex transaction before bringing victim to client's house).

- *United States v. Roy*, 630 F. App'x 169, 170-71 (4th Cir. 2015) (holding § 1591(a)(1) requires the defendant know in the sense of being aware of an established modus operandi that will in the future cause a person to engage in prostitution, and finding sufficient evidence where defendant "engaged in threatening behavior towards the prostitutes" and "expected these tactics to succeed.");

- *United States v. Tutstone*, 525 F. App'x 298, 304 (6th Cir. 2013) (holding § 1591(a)(1) requires the defendant know "of an established modus operandi that will in the future cause a person to engage in prostitution," and finding sufficient evidence where defendant "knowingly sold [victim] for $300 with full knowledge that [victim] would be caused to engage in commercial sex acts. . .").

This Court has not issued an opinion addressing the sex trafficking statute's elements, other than an opinion footnoting the interstate commerce requirement of 18 U.S.C. § 1591(a)(1). *See Torres v. Lynch*, 578 U.S. 452, 136 S. Ct. 1619, 1627 n.6 (2016). While this Court addressed § 1591(a)(1) in *United States v. Marcus*, 560 U.S. 258 (2010), the opinion addresses an unrelated issue about charged conduct predating the statute's enactment date and the plain-error standard. *Marcus* thus provides no guidance for the issue here. Review by this Court is thus necessary to maintain uniformity of 18 U.S.C. § 1591(a)(1) among the circuits.

D. Ensuring the government prove consistent elements under 18 U.S.C. § 1591(a)(1) is of national importance.

Sex trafficking is a serious federal crime carrying a mandatory minimum 10-year prison sentence and may impose a 15-year mandatory prison term depending on the age of the victim. *See* 18 U.S.C. §1591(b). In fiscal year 2020 alone, over 850 federal defendants were convicted of sexual abuse crimes, with over 99% receiving prison sentences. U.S. Sent. Comm'n, *2020 Annual Report and Sourcebook of Federal Sentencing Statistics*, Table 13: Sentence Type by Type of Crime, p. 62 (2020) ("2020 Sourcebook").[1] The average median sentence for a federal sexual abuse offense is 15 years. *2020 Sourcebook*, Table 15: Sentence Imposed by Type of Crime, p. 64. The number of defendants convicted of a federal sex offense carrying a mandatory minimum sentence has steadily increased over the past decade, with nearly 40% of such convictions carrying a 10-year mandatory minimum. U.S. Sent. Comm'n, *Mandatory Minimum Penalties for Sex Offenses in the Federal Criminal Justice System*, pp. 4, 20 (2019). Thus, the need to ensure uniformity in 18 U.S.C. § 1591(a)(1) convictions by requiring the government to prove consistent elements is an issue of national importance.

Review by this Court is therefore necessary to ensure uniformity of 18 U.S.C. § 1591(a)(1) and to uphold bedrock principles of criminal law.

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[1] The Sentencing Commission provides general sentencing data for "sexual abuse" offenses that includes sex trafficking under 18 U.S.C. § 1591(a)(1). *2020 Sourcebook*, p. 214 (defining "sexual abuse" offenses).

II. This Court should resolve the circuit split about the two-level sentencing enhancement for use of a computer under U.S.S.G. § 2G1.3(b)(3).

As "a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark" for all federal sentencings. *Gall v. United States*, 552 U.S. 38, 49 (2007). The "rule that an incorrect Guidelines calculation is procedural error ensures that they remain the starting point for every sentencing calculation in the federal system." *Peugh v. United States*, 569 U.S. 530, 542 (2013). This Court recognizes that the Sentencing Commission's statistics about guidelines application "demonstrate the real and pervasive effect the Guidelines have on sentencing." *Molina-Martinez v. United States*, 578 U.S. 189, 136 S. Ct. 1338, 1346 (2016). Thus the "Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar." *Id.*

Here, all parties agree that Pruitt did not use a computer to solicit A.D.'s prohibited sexual conduct. App D: 16a-22a. Yet the Ninth Circuit still affirmed the use-of-computer enhancement of U.S.S.G. § 2G1.3(b)(3) (2016), holding A.D.'s use of a computer to place ads on backpage.com, with Pruitt's knowledge, met the guideline. App B: 5a. Because Pruitt neither used a computer to solicit, nor directed use of a computer to solicit, the enhancement does not apply. Without the use-of-computer enhancement, the total offense level is two-levels lower, yielding a reduced Guideline range and requiring resentencing.

A. The Guideline's plain language and legislative history show the enhancement should not apply in Pruitt's case.

Section 2G1.3(b)(3) provides for a two-level offense level increase:

> If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor.

However, the commentary limits this Guideline:

> Subsection (b)(3) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor.

U.S.S.G. § 2G1.3 cmt. n.4 (2016).

The legislative history of § 2G1.3(b)(3) counsels against applying the enhancement in Pruitt's case, as Pruitt neither himself posted, nor asked anyone to post, advertisements on backpage.com. In 2000, before enactment of § 2G1.3(b)(3), the Sentencing Commission promulgated many enhancements "primarily in response to the Protection of Children from Sexual Predators Act of 1998, Pub. L. 105–314, [112 Stat. 2974 (1998)]" U.S.S.G. app. C, amend. 592 (Supp. 2000), "which addressed the problem that cyberspace provides an increasingly common and effective medium by which would-be sexual predators can contact minors, or persons in control of minors, to arrange for sexual encounters." *United States v. Robertson*, 350 F.3d 1109, 1113 (10th Cir. 2003).

Wary of those who would specifically target minors through use of a computer, Congress sought to increase penalties for defendants who used computers. *Robertson*, 350 F.3d at 1113; *see also* 144 Cong. Rec. S10520 (Sept. 17,

1998) (statement of Sen. Hatch) ("[W]e must also be vigilant in seeking to ensure that the Internet is not perverted into a hunting ground for pedophiles and other sexual predators . . . [a]nd those who take the path of predation should know that the consequences of their actions will be severe and unforgiving."); *id.* at S10522 (statement of Sen. Lautenberg) ("Clearly, we must fight back against these cyberspace criminals. One step that we can take is to ensure strong penalties for those who use the Internet for these horrible purposes."). Following Congressional directive, "the Sentencing Commission concluded that the new enhancements were to 'ensure that persons who misrepresent themselves to a minor, or use computers or Internet-access devices to locate and gain access to a minor, are severely punished.'" *Robertson*, 350 F.3d at 1114 (citation and internal quotation marks omitted).

With this backdrop, the Sentencing Commission explicitly built upon the 2000 enhancements when it created § 2G1.3 just four years later "to address more appropriately the issues specific to [coercion, travel, and transportation] offenses." U.S.S.G. app. C, amend. 664 (Supp. 2004). Legislative history of the guidelines thus shows § 2G1.3 applies only to defendants who used a computer to facilitate the conduct, an offense characteristic Congress viewed as more serious and warranting harsher penalties. And if any ambiguity as to § 2G1.3's reach remains, this Court should "choose the construction yielding the shorter sentence by resting on the venerable rule of lenity," a rule "rooted in the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *United*

States v. R. L. C., 503 U.S. 291, 305 (1992) (citations and internal quotation marks omitted).

B. The Ninth Circuit's decision creates a circuit split.

Before Pruitt's case, circuit courts addressing the issue agreed the enhancement under § 2G1.3(b)(3) and its commentary requires computer use by the defendant or his agent. *United States v. Pringler*, 765 F.3d 445, 456 n.4 (5th Cir. 2014) (holding where "neither the defendant nor someone part of the same criminal activity used a computer to solicit patrons," the enhancement is not "applicable"); *United States v. Patterson*, 576 F.3d 431, 434 (7th Cir. 2009) (holding § 2G1.3(b)(3) inapplicable based on defendant's lack of direct communication with minor where third party placed advertisements online, not at defendant's request); *see also United States v. Cramer*, 777 F.3d 597, 606 (2d Cir. 2015) (distinguishing Patterson "on its facts because the defendant in that case was not actually the individual soliciting third parties online"); *United States v. Winbush*, 524 F. App'x 914, 916 (4th Cir. 2013) (unpublished) ("Under § 2G1.3(b)(3)(B), the focus is on the use of a computer by the defendant or his agent to entice persons to engage in prohibited sexual conduct with the minor.").

The Ninth Circuit here, however, summarily concluded to the contrary, finding "[s]ection 2G1.3(b)(3) does not require that the defendant himself use the computer." App. B: 5a. The Ninth Circuit cited *United States v. Jackson*, 697 F.3d 1141, 1146 (9th Cir. 2012), in support; yet, in *Jackson*, the defendant specifically asked others "to take and post photos of [the minor] on an online advertisement on

the website craigslist.com." *Id.* at 1142. The *Jackson* defendant thus did not challenge on appeal whether the enhancement applied to this directed computer use, limiting his argument to whether the commentary narrowed the guideline's breadth. *Id.* at 1145. Moreover, the *Jackson* defendant did not preserve this claim, requiring plain-error review. *Id.* at 1144–45.

Pruitt's claim, in contrast, is that he neither used, nor directed another to use, a computer to solicit prohibited conduct. This claim is preserved and reviewed de novo. The Ninth Circuit's decision—without reasoning or analysis—creates a split, requiring this Court's review to align the circuits as to proper interpretation of the guideline.

C. Ensuring uniform application of the Guidelines enhancement is an issue of national importance.

Resolving the circuits' split decisions about the proper interpretation of the use of a computer enhancement is an issue of national importance to those convicted of sex trafficking. According to the Sentencing Commission's statistics, in 2020 the use of a computer enhancement at § 2G1.3(b)(3) was applied in 42.7 percent of the 424 cases that applied the § 2G1.3 sex trafficking guideline. U.S. Sent. Comm'n, *Use of Guidelines and Specific Offense Characteristics: Guideline Calculation Based, Fiscal Year 2020*, p. 40 (2020).

The Court should grant review of this matter to resolve the Circuit split about the proper interpretation of the use-of-computer enhancement applied in almost half of the sex trafficking cases nationwide.

III. This Court should resolve whether an indictment's failure to charge the essential mens rea element renders federal courts without jurisdiction.

This Court holds that possessing a firearm can be an "entirely innocent" act: if a defendant lacks knowledge of the facts making his possession unlawful, he "lack[s] the intent needed to make his behavior wrongful." *Rehaif v. United States*, 139 S. Ct. 2191, 2197 (2019). Thus, an element of prohibited person in possession of a firearm under 18 U.S.C. §§ 922(g) and 924(a) is that the defendant knew he belonged to the category of persons barred from possessing a firearm at the time of the alleged possession. *Rehaif*, 139 S. Ct. at 2200. This Court's *Rehaif* decision overturned near-unanimous circuit authority that held the knowledge requirement applied only to the possession element.[2]

A. Federal courts are those of limited jurisdiction, and therefore may only preside over criminal matter charging "offenses against the laws of the United States."

In every federal criminal prosecution, subject-matter jurisdiction is conferred by 18 U.S.C. § 3231. Through § 3231, Congress limited federal judicial jurisdiction, promulgating that the "district courts of the United States shall have original

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[2] *United States v. Games-Perez*, 667 F.3d 1136, 1142 (10th Cir. 2012); *United States v. Thomas*, 615 F.3d 895, 899 (8th Cir. 2010); *United States v. Schmidt*, 487 F.3d 253, 254 (5th Cir. 2007); *United States v. Enslin*, 327 F.3d 788, 798 (9th Cir. 2003); *United States v. Lane*, 267 F.3d 715, 720 (7th Cir. 2001); *United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000); *United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997) (per curiam); *United States v. Langley*, 62 F.3d 602, 604-08 (4th Cir. 1995) (en banc); *United States v. Smith*, 940 F.2d 710, 713 (1st Cir. 1991). Other Circuits had not expressly addressed the issue but did not list knowledge of prohibitive status as an element of § 922(g). *See United States v. Gardner*, 488 F.3d 700, 713 (6th Cir. 2007); *United States v. Smith*, 160 F.3d 117, 121 n.2 (2d Cir. 1998).

jurisdiction . . . of all offenses *against the laws of the United States*." 18 U.S.C. § 3231 (emphasis added). Federal courts, then, lack jurisdiction over a criminal proceeding absent an allegation of an offense against the laws of the United States. The indictment here failed to charge this essential mens rea element, which rendered the allegation in the indictment "an innocent mistake to which criminal sanctions normally do not attach"—not a cognizable federal crime. *Rehaif*, 139 S. Ct. at 2197; App. I: 30a.

At issue is much more than an alleged "defect" in an indictment, the analytical framework the Ninth Circuit relied on to deny Pruitt's claim below. App. B: 5a (citing *United States v. Cotton*, 535 U.S. 625, 631 (2002); *United States v. Velasco-Medina*, 305 F.3d 839, 845–46 (9th Cir. 2002)). The district court lacked jurisdiction under 18 U.S.C. § 3231 to convict or sentence Pruitt because there was no federal crime alleged.

B. The Ninth Circuit's decision widens the current circuit split about whether an indictment "defect" can ever leave federal courts without jurisdiction.

Circuits are split about whether an indictment "defect" can ever render the federal courts without jurisdiction. *See United States v. Muresanu*, 951 F.3d 833, 838 (7th Cir. 2020) (recognizing split). Some circuits hold certain defects in an indictment render the courts without jurisdiction, while others hold defects, no matter how severe, do not impact jurisdiction.

This conflict stems from this Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), which addressed a "defective" indictment. In *Cotton*, the

indictment did "not allege any of the threshold levels of drug quantity that lead to enhanced penalties under [21 U.S.C.] § 841(b)." *Id.* at 628. This Court held such "defects in an indictment do not deprive a court of its power to adjudicate a case." *Id.* at 630. Thus, the defect did not deprive the district court of jurisdiction. *Id.* at 632.

Cotton based its jurisdictional holding on *Lamar v. United States*, 240 U.S. 60 (1916). In *Lamar*, the defendant argued the indictment failed to allege a crime against him, leaving the court without jurisdiction. *Id.* at 64. The *Lamar* indictment charged the defendant with "falsely pretend[ing] to be an officer of the Government of the United States, to wit, a member of the House of Representatives . . . ." *Id.* Because a congressperson is not a United States officer, the defendant argued the indictment did not charge a crime and the court therefore did not have jurisdiction. *Id.* The *Lamar* Court rejected the defendant's jurisdictional argument:

> [T]he district court, which has jurisdiction of all crimes cognizable under the authority of the United States, acts equally within its jurisdiction whether it decides a man to be guilty or innocent under the criminal law, and whether its decision is right or wrong. The objection that the indictment does not charge a crime against the United States goes only to the merits of the case.

Id. at 65 (internal citation omitted).

But in rejecting jurisdictional challenges based on the indictment defects present in both *Lamar* and *Cotton*, these cases properly adhere to § 3231's jurisdictional mandate. In *Lamar*, the indictment alleged all essential elements of

"falsely pretend[ing] to be an officer," thus alleging a cognizable crime. 240 U.S. at 64. Though the *Lamar* defendant argued the method for proving one element, "officer," did not meet the statutory requirements, this argument went to his innocence and not whether the indictment alleged a cognizable crime. *Id.*

Similarly, the indictment in *Cotton*—which charged the defendant with conspiracy and possession with intent to distribute cocaine and cocaine base, but failed to "allege any of the threshold levels of drug quantity that lead to enhanced penalties under [21 U.S.C.] § 841(b)"—also alleged a cognizable offense. *Cotton*, 535 U.S. at 628. Because conspiring and possessing with intent to distribute *any* cocaine and cocaine base violates United States law, alleged drug quantity controlled only the statutory sentencing range, not the conviction for a cognizable crime itself. *See* § 841(a) and (b).

Relying on *Cotton*, the First, Second, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits have drawn a hard line, holding that "defects" in an indictment—of whatever kind—do not affect subject matter jurisdiction.[3] *United States v. Lara*, 970 F.3d 68, 85-86 (1st Cir. 2020); *United States v. Balde*, 943 F.3d 73, 91-92 (2d Cir. 2019); *United States v. Scruggs*, 714 F.3d 258, 262-64 (5th Cir. 2013); *United States v. Dowthard*, 948 F.3d 814, 817 (7th Cir. 2020); *United States v. Fogg*, 922 F.3d 389, 391 (8th Cir. 2019); *Velasco-Medina*, 305 F.3d at 845-46; *United States v. De Vaughn*, 694 F.3d 1141, 1147-48 (10th Cir. 2012). The Seventh Circuit holds

[3] The Third Circuit has not squarely addressed the question but has suggested it reads *Cotton* similarly. *United States v. Al Hedaithy*, 392 F.3d 580, 588 (3d Cir. 2004).

without exception that "indictment defects are never jurisdictional." *United States v. Maez*, 960 F.3d 949, 956 (7th Cir. 2020). The other Circuits in this group similarly hold under *Cotton* that an indictment defect can never deprive a court of the power to adjudicate a case and categorically deny the defendants claims challenging jurisdiction based on omission of the *Rehaif* mental element. *United States v. Burghardt*, 939 F.3d 397, 402 (1st Cir. 2019); *Lara*, 970 F.3d at 85-86; *United States v. McEachin*, No. 19-4255, 2021 WL 4060436, at *2 (4th Cir. Sept. 7, 2021) (unpublished disposition); *United States v. Espinoza*, 816 F. App'x 82, 84 (9th Cir. 2020) (unpublished disposition).[4] And when rejecting the argument that an indictment's omission of the *Rehaif* mens rea deprived the court of jurisdiction, the Second Circuit expressed that only "an indictment that utterly fails, on its face, to charge any federal offense may fail to establish the jurisdiction of the federal court." *Balde*, 943 F.3d at 89.

The Eleventh Circuit generally has taken a more nuanced approach, recognizing that "'indictment errors are not all the same' and should not be treated categorically." *United States v. McIntosh*, 704 F.3d 894, 902 (11th Cir. 2013). Some indictments "charge no federal crime at all," such as offenses not set forth in the United States Code. *Id.* But some, such as the *Cotton* indictment, still charge "'a complete federal offense'" even though they omit an allegation necessary for an

[4] The Third Circuit has also summarily rejected this *Rehaif* claim, though based upon its law that an indictment is not defective if its language "echoes the language of the statute." *United States v. Nasir*, 982 F.3d 144, 162 n.15 (3d Cir. 2020).

enhanced sentence. *Id.* And in the *Rehaif* context, the Eleventh Circuit placed the error in the latter category, concluding that "[s]o long as the conduct described in the indictment is a criminal offense, the mere omission of an element does not vitiate jurisdiction." *United States v. Moore*, 954 F.3d 1322, 1336 (11th Cir. 2020). To so hold, the Circuit applied the rule that an indictment is sufficient if it "track[s] the statutory language and stat[es] approximately the time and place of an alleged crime." *Id.* The Circuit did not grapple with the watershed import of *Rehaif*. The Circuit did not address that *Rehaif* eviscerated the Circuit's prior improper reading of the illegal firearm possession statutes, nor that the missing mens rea element marks the distinction between innocent conduct and a federal offense.

The Sixth Circuit has recognized, in the context of a defendant who pled guilty to illegal possession of a firearm, that a defendant successfully challenges jurisdiction if he establishes "that the face of the indictment failed to charge the elements of a federal offense." *United States v. Martin*, 526 F.3d 926, 934 (6th Cir. 2008) (holding that, pre-*Rehaif*, the indictment charged all the elements of § 922(g)(1)); *see also United States v. Howard, 947 F.3d* 936, 942 (6th Cir. 2020) (citing Martin favorably for the proposition "that a defendant challenges the court's jurisdiction when he asserts that the 'indictment failed to charge the elements of a federal offense'"). In the *Rehaif* context, however, the Sixth Circuit relied on *Cotton*'s statement that "defects in an indictment do not deprive a court of its power to adjudicate a case" to hold that an indictment's omission of the *Rehaif* mens rea element did not deprive the court of jurisdiction. *United States v. Hobbs*, 953 F.3d

853, 856 (6th Cir. 2020) (quoting *Cotton*, 535 U.S. at 630). Like the Eleventh Circuit, the Sixth Circuit also failed to address the unique issues posed by omission of the *Rehaif* mens rea element.

C. *Rehaif*'s impact in this context presents an issue of national importance.

Rehaif's implications are widespread and of national importance. Federal prosecutions for unlawful firearm possession under 18 U.S.C. § 922(g) account for just over ten percent of all federal criminal cases. U.S. Sent. Comm'n, *Quick Facts: Felon in Possession of a Firearm* (May 2021). In fiscal year 2020, 6,782 cases involved convictions under § 922(g), *see id.*, representing only a slight decline from fiscal year 2019's significant high over the previous four years, U.S. Sent. Comm'n, *Quick Facts: Felon in Possession of a Firearm* (2020) (reporting 4,984 unlawful possession cases in fiscal year 2015 and progression through fiscal year 2019). Unlawful firearms offenses thus continue to represent a steady and significant portion of federal convictions. And this Court has already addressed the framework through which to review the validity of defendants' pre-*Rehaif* guilty plea and jury trial convictions. *Greer v. United States*, 141 S. Ct. 2090, 2096 (2021).

As outlined here, *Rehaif* presents a unique wrinkle in the debate over when, and whether, a "defect" in an indictment strips the courts of jurisdiction. This Court's pronouncement in *Rehaif* of the previously missing mens rea element demolished the wall of Circuit authority to the contrary and demarcated the difference between "an innocent mistake to which criminal sanctions normally do not attach" and a federal crime. *Rehaif*, 139 S. Ct. at 2197. This Court should

grant certiorari to review how the defective indictment framework applies here, and whether the critical mens rea omission requires dismissal.

Conclusion

Petitioner Pruitt requests that the Court grant his petition for a writ of certiorari.

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Respectfully submitted,

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