No. _____

IN THE SUPREME COURT FOR THE UNITED STATES

EDGAR HERNANDEZ LEMUS and
JUNIOR ALMENDAREZ MARTINEZ,

Petitioners,

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 WRIT OF CERTIORARI

Ethan A. Balogh
BALOGH & CO. APC
100 Pine Street, Suite 1250
San Francisco, CA 94111
(415) 391-0440
eab@balcolaw.com

Attorneys for Petitioner
Edgar Hernandez Lemus

M. Anthony Brown
SPERTUS, LANDES & JOSEPHS, LLP
617 W. 7th Street, Suite 200
Los Angeles, CA 90017
(213) 205-6520
tbrown@spertuslaw.com

Attorneys for Petitioner
Junior Almendarez Martinez

QUESTION PRESENTED

"Coyotes" (smugglers) in Mexico duped "pollos" (would-be migrants to the United States) into believing they would be snuck across the border for a negotiated fee to be paid by their families. A few days later, the coyotes told the families the pollos had arrived, and Petitioners picked up the fee from the family. In fact, the pollos remained in Mexico, being held against their will. For their role in the scheme, Petitioners were charged with violating 18 U.S.C. § 880, which makes it unlawful to receive money obtained from the commission any felony offense in Chapter 41, "knowing the same to have been unlawfully obtained." Petitioners were alleged to have received proceeds from a violation of 18 U.S.C. 875(a), which makes it unlawful to transmit in interstate or foreign commerce ransom demands for the release of a kidnapped person. Petitioners argued they did not know the money they received was ransom money. And this Court's precedent requires courts to interpret criminal statutes to require that a defendant possess a *mens rea* as to every element of an offense, especially elements separating lawful from unlawful conduct. But Petitioners' defense was fruitless because the jury was instructed that the government need prove only that they knew the money was "unlawfully obtained" in some way, irrespective of whether they knew the money arose from a demand for ransom, the predicate offense. Does *Morissette v. United States*, 342 U.S. 246 (1952), and its progeny compel correction of serious and manifest error?

STATEMENT OF RELATED CASES

United States v. Edgar Hernandez Lemus, *United States v. Junior Almendarez Martinez*, Central District of California, Case No. 21-CR-296-JFW (Walter, J.). Judgments were entered on February 28, 2022. Docket Entries 116 & 119.

United States v. Edgar Hernandez Lemus, *United States v. Junior Almendarez Martinez*, United States Court of Appeals for the Ninth Circuit, Case Nos. 22-50046 & 22-50051. Published Opinion and Memorandum Disposition issued March 5, 2024. Docket Entries 52, 53. Motion for Rehearing denied June 10, 2024. Docket Entry 60. *See also* Pet. App'x.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PETITION FOR A WRIT OF CERTIORARI

Petitioners Edgar Hernandez Lemus and Junior Almendarez Martinez respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported as *United States v. Edgar Hernandez Lemus and Junior Almendarez Martinez*, 93 F.4th 1255 (9th Cir. 2023). *See also* Pet. App'x, 2–15.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2024. Pet. App'x, 1. A petition for rehearing was denied on July 15, 2024. *Id.* at 16. This petition, filed within 90 days of the denial of rehearing, is timely. SUP. CT. R. 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

[1] "Pet. App'x" refers to Petitioner's Appendix to this petition, containing the panel's slip opinion and order denying Petitioner's petition for rehearing. "ER" refers to Appellants' Excerpts of Record, with the volume number preceding and the page number following (filed at Ninth Circuit Docket Entries 16-1 through 16-6); "CR" refers to the clerk's record of the district court proceedings, followed by the ECF-generated page numbers for the referenced document.

RELEVANT STATUTORY PROVISION

The relevant statute is 18 U.S.C. § 880, which provides:

> A person who receives, possesses, conceals, or disposes of any money or other property which was obtained from the commission of any offense under this chapter that is punishable by imprisonment for more than 1 year, knowing the same to have been unlawfully obtained, shall be imprisoned not more than 3 years, fined under this title, or both.

STATEMENT OF THE CASE

This case centers on a conspiracy to dupe Mexican nationals and their families into believing they were being smuggled into the United States when they were not, but to demand full payment for their transportation, anyway.

The migrants ("pollos") hired smugglers ("coyotes") in Mexicali, Mexico, to take them across the border for a negotiated price, which would be paid by the pollos' California-based family members upon delivery. Pet. App'x. 5. A few days later, members of the smuggling operation would inform the pollos' family members that the pollos had arrived safely in Los Angeles and demand final payment of the negotiated smuggling fee at an arranged location. *Id.* In reality, the migrants were kidnap victims, being held against their will in Mexico by the phony smugglers. *Id.*

The government alleged that Mr. Lemus met the migrants' family members at big box stores in the Los Angeles area to accept payment of the negotiated smuggling fee. CR 24. Mr. Almendarez was not accused of collecting payments from family members. *Id.* Instead, the government alleged that, on one occasion,

after receiving a bag full of cash from one family member, Mr. Lemus gave the bag to Mr. Almendarez, who took it back to Mr. Lemus's apartment in an Uber. *Id.* The government also alleged that Mr. Almendarez wired smuggling fees from the United States to coconspirators in Mexico, though the dates of the alleged wires preceded the dates that the family members allegedly made the payments at issue in this case.

Petitioners were charged with and convicted of substantive violations of 18 U.S.C. § 880 and conspiracy to do the same under 18 U.S.C. § 371. Section 880 makes it unlawful to receive "money … which was obtained from the commission of any offense under [Chapter 41] that is punishable by imprisonment for more than 1 year." The predicate offense charged in the § 880 counts was 18 U.S.C. § 875(a), which provides: "Whoever transmits in interstate or foreign commerce any communication containing any demand or request for a ransom or reward for the release of any kidnapped person, shall be fined under this title or imprisoned not more than twenty years, or both."

On appeal, Petitioners argued that their convictions were based on erroneous jury instructions. The jury instructions stated that, to convict on the § 880 offenses, the jury must find that (1) "the defendant received, possessed, or concealed money;" (2) "the money was obtained from the transmission in interstate or foreign commerce of a communication that contained a demand for ransom for the release of a kidnapped person;" and (3) "the defendant knew the money had been unlawfully

obtained." Petitioners challenged the third element. They argued that, under this Court's precedent, the *mens rea* for a § 880 offense requires knowledge that the money received was proceeds from the predicate offense alleged, in this case a violation of § 875(a). The court of appeal disagreed and affirmed the convictions. Petitioners' sought rehearing, which was denied.

REASONS FOR GRANTING THE PETITION

This Court should reverse the opinion of the court of appeals because it directly conflicts with this Court's precedent requiring a mens rea for each material element of a criminal offense. The Ninth Circuit's disregard of this Court's consistent teachings on statutory interpretation of criminal statutes affects these two defendants and will prejudice countless others in the nine states and two territories subject to this manifestly incorrect published opinion.

ARGUMENT

In *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), this Court considered 18 U.S.C. § 2255, a statute criminalizing the knowing distribution of visual depictions of minors engaged in sexually explicit conduct. The court of appeal had concluded that the statute's plain language did not require a defendant to know the age of the persons depicted in the materials so long as he knowingly distributed the materials. *Id.* at 67. Acknowledging that this was "the most grammatical reading of the statute," this Court nevertheless rejected the lower court's perfunctory plain-

language interpretation of the statute because it failed to consider the presumption, articulated nearly a half-century before in *Morissette v. United States*, 342 U.S. 246 (1952), that criminal statutes require scienter for each element of the conduct they proscribe. *Id.* at 72. With that presumption in mind, this Court reversed, holding that, to violate § 2255, a defendant must know that the persons depicted in the materials he distributes are minors because that is "the crucial element separating legal innocence from wrongful conduct." *Id.* at 73.

Since *X-Citement Video*, this Court has reaffirmed this presumption many times. In *Elonis v. United States*, 575 U.S. 723 (2015), it held that, while the criminal threats statute, 18 U.S.C. § 875(c), contains no explicit *mens rea*, a violation of that statute requires knowledge that the defendant's communications contain a threat because the threatening nature of the communication is "'the crucial element separating legal innocence from wrongful conduct.'" *Id.* at 737 (quoting *X-Citement Video*, 513 U.S. at 73). The next year, in *Torres v. Lynch*, 578 U.S. 452 (2016), this Court reminded the lower courts that they must "interpret criminal statutes to require that a defendant possess a *mens rea*, or guilty mind, as to every element of an offense." Id. at 467 (emphasis added). Three years later, in *Rehaif v. United States*, 588 U.S. 225 (2019), this Court succinctly summarized its case law on the *mens rea* presumption:

> Whether a criminal statute requires the Government to prove that the defendant acted knowingly is a question of congressional intent. In

> determining Congress' intent, we 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." We apply the presumption in favor of scienter even when Congress does not specify any scienter in the statutory text. But the presumption applies with equal or greater force when Congress includes a general scienter provision in the statute itself.

Id. at 228–29. Finally, just two years ago in *Ruan v. United States*, 597 U.S. 450 (2022), a case involving doctors convicted under § 841(a) for making unauthorized prescriptions of controlled substances, this Court reaffirmed that, even when a criminal statute includes a general scienter provision, the presumption that knowledge is required for each element of the offense that separates wrongful from innocent conduct "'applies with equal or greater force.'" *Id.* at 458 (quoting *Rehaif*, 588 U.S. at 229).

Despite this settled authority, the court of appeals in this case ignored the presumption that scienter applies to all material elements of an offense and, instead, took the same perfunctory plain-language approach to interpreting a criminal statute's *mens rea* that this Court had earlier held inadequate in *X-Citement Video*.

Petitioners in this case were charged with violating 18 U.S.C. § 880, titled "Receiving the proceeds of extortion." The statute provides:

> A person who receives, possesses, conceals, or disposes of any money or other property which was obtained from the commission of any offense under this chapter [i.e., Chapter 41] that is punishable by imprisonment for more than 1 year, knowing the same to have been

> unlawfully obtained, shall be imprisoned not more than 3 years, fined under this title, or both.

18 U.S.C. § 880. The statute's scienter requirement is the unusual adverbial phrase "knowing the same to have been unlawfully obtained."

Petitioners argue that the words "the same" in this phrase refer to the entire actus reus described earlier in the statute. In other words, "the same" refers not just to the words "money or property" in isolation but to the words "money or property" as modified by the relative clause that follows: "which was obtained from the commission of any offense under this chapter that is punishable by imprisonment for more than 1 year." Thus, according to Petitioners, a person is guilty of violating § 880 only if he knows that the money he received was obtained from the commission of a Chapter 41 felony offense.

The court of appeals agreed that "'the same' must refer to the object of the actus reus" and that "'unlawfully obtained' applies to the entire object of the actus reus." Pet. App'x, 9. But, it concluded, the "entire object" of the actus reus is just "money and property" in isolation, not money or property that was obtained through commission of a qualifying Chapter 41 felony offense. *Id.* According to this plain-language interpretation of the statute, "[s]pecific knowledge of the money's origin as proceeds of extortion or threats is unnecessary." *Id.* at 10. To Petitioners' argument that this interpretation of the statute conflicts with the longstanding presumption that a *mens rea* extends to each material element of the offense, the

court of appeals responded tautologically that its interpretation "complies with any requirement that 'the defendant must know each fact making his conduct illegal'" because it necessitates that a person know that the money he received was "unlawfully obtained." *Id.* at 11 (quoting *Torres*, 578 U.S. at 467).

The court of appeals was plainly wrong.

A crucial element separating lawful from unlawful conduct under § 880 is the offense that is the source of the proceeds received. Section 880 makes it unlawful to possess money "obtained from the commission of any offense under this chapter that is punishable by imprisonment for more than 1 year." Section 880 is located in Chapter 41, which is titled "Extortion and Threats." Chapter 41 contains nine other offenses. *See* 18 U.S.C. §§ 871–879. Some Chapter 41 offenses, such as extorting money by threats to injure a person's reputation (18 U.S.C. § 875(d)), are felonies punishable by a term of imprisonment longer than one year. But others are not. Blackmail (18 U.S.C. § 873), for example, is a misdemeanor and therefore does not qualify as predicate offenses under § 880. Thus, only certain Chapter 41 offenses qualify as predicate offenses under § 880. In Petitioners' case, the predicate offense alleged was transmitting a communication in interstate commerce containing a demand for ransom in exchange for releasing a kidnapped person, in violation of § 875(a). Because § 875(a) is in Chapter 41 and is punishable by more than one year in prison, a violation of § 875(a) satisfies § 880's predicate offense requirement. If,

however, the "unlawfully obtained" money appellants received came from a crime not listed in Chapter 41 (e.g., alien smuggling), Petitioners would have been innocent of the § 880 offense charged. This would also have been true of any crimes listed in Chapter 41 that are not punishable by more than one year, such as blackmail. Thus, under § 880, a "crucial element separating legal innocence from wrongful conduct," *X-Citement Video*, 513 U.S. at 73, is that the money received was obtained from the commission of a qualifying Chapter 41 offense.

Because the offense that generated the proceeds is a material element of a § 880 offense, this Court's precedent requires that the statute's mental state of "knowing" must apply to that fact. That means that the government should have been required to prove that Petitioners knew the money they received was obtained by the commission of a violation of § 875(a). In other words, that Petitioners knew that the money they received was kidnapping proceeds.

That did not happen here. Instead, Petitioners' convictions were premised solely on their knowledge that the money they received was "unlawfully obtained." The jury was instructed that, to find a violation of § 880, the government had to prove beyond a reasonable doubt the following elements:

> First, the defendant received, possessed, or concealed money;
>
> Second, the money was obtained from the transmission in interstate or foreign commerce of a communication that contained a demand for ransom for the release of a kidnapped person; and
>
> Third, the defendant knew the money had been unlawfully obtained.

1-ER-69; *see also* Pet. App'x, 7. These instructions—now endorsed by the Ninth Circuit in a published opinion—did not require the government to prove that Petitioners knew the money they allegedly received was obtained by the commission of a kidnapping offense under § 875(a). Giving these instructions for the substantive § 880 offenses was error.

The Ninth Circuit's erroneous construction of § 800 comes clearly into view when considering the conspiracy charge, where the jury was instructed that the government must prove Petitioners became members of an "agreement between two or more persons to receive, possess, conceal and dispose of money from a demand for ransom for the release of a kidnapped person." 1-ER-66. But Petitioners plainly could not form an agreement to receive kidnapping proceeds without knowing the money they received was kidnapping proceeds. Nevertheless, the government was permitted to obtain convictions for conspiracy to obtain kidnapping proceeds based on an agreement to receive money that was the proceeds of some crime—any crime—irrespective of the limits imposed by Chapter 41. That decidedly comes nowhere close to agreeing to violate § 875(a), the alleged object of the conspiracy.

The Ninth Circuit's opinion, which permits convictions for receiving proceeds from a qualifying Chapter 41 offense without knowledge of the money's source, converts § 880 into an all-purpose receipt-of-ill-gotten-gains statute. But § 880 is not such a general statute. It is narrowly focused on the receipt of proceeds obtained by the commission of a very few extortion offenses located in Chapter 41.

The instructional error affected Petitioners' substantial rights. Mr. Lemus's defense was that he never agreed to become a member of a kidnapping ring. His counsel argued in closing: "Mr. Lemus, I think his conduct here, he was definitely naive. He was trusting. But he was not a partner in a kidnapping ring. I am asking you to find him not guilty because he did not know he was picking up ransom money." 4-ER-554. The same was true for Mr. Almendarez, whose counsel argued: "Let me begin by talking to you about crimes that depend on the mental element because in this case there's no disputing the conduct of my client. He did what he did, and the question is what did he know and when did he know it?" 4-ER-533. Under the jury instructions given, it was fruitless for Petitioners to argue that they believed the money they received from the migrants' family members was payment of a negotiated smuggling fee—which is, in fact, what the family members themselves believed until after they had handed the fee over. The government underscored that futility by reminding jurors of its extremely low threshold for proof of knowledge under the instructions it had proposed:

> So what is disputed? Only the third element, only that final element. And as the judge will instruct you, that final element requires that the defendant knew the money had been unlawfully obtained. Notice what that requires. Just that it had been unlawfully obtained. It doesn't require even that the defendants knew it was kidnapping money or ransom money, just that it came from an unlawful source.

4-ER-556. Plainly, these circumstances satisfy both the third and fourth prongs of the plain error standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: October 10, 2024

Respectfully submitted,

/s/ E A Balogh
ETHAN A. BALOGH
BALOGH & CO., APC
100 Pine Street, Suite 1250
San Francisco, CA 94111
(415) 391-0440
eab@balcolaw.com

Attorneys for Petitioner
Edgar Hernandez Lemus

/s/ M. Anthony Brown
M. ANTHONY BROWN
SPERTUS, LANDES & JOSEPHS, LLP
617 W. 7th Street, Suite 200
Los Angeles, CA 90017
(213) 205-6520
tbrown@spertuslaw.com

Attorneys for Petitioner
Junior Almendarez Martinez