No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2024

AUSTEN CHRISTOPHER LEE NEWTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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SUBMITTED: December 16, 2024

QUESTIONS PRESENTED

As a matter of statutory interpretation, can courts interpret U.S.S.G. § 2KI2.1(b)(4) to exclude a scienter requirement to apply the stolen firearm guideline enhancement when this Court repeatedly requires mens rea to attach criminal liability?

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Austen Christopher Lee Newton ("Mr. Newton") petitions for a Writ of Certiorari to review, or to grant, vacate, and remand, the judgment of the United States Court of Appeals for the Ninth Circuit.

This case presents the question: as a matter of statutory interpretation, can courts interpret U.S.S.G. § 2KI2.1(b)(4) to exclude a scienter requirement to apply

the stolen firearm enhancement when this Court repeatedly requires mens rea to attach criminal liability?

The Ninth Circuit's unpublished disposition conflicts with this Court's repeated opinions requiring a mens rea for criminal liability.

JURISDICTION

The court of appeals published its opinion affirming the district court's judgment and denying Mr. Newton's request for appellate relief on September 16, 2024. Appendix A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the district court's judgment is reported at *United States v. Newton*, 2024 WL 4200586 (9th Cir. 2024). Appendix A.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution and U.S.S.G. § 2K2.1. Appendices B, C.

STATEMENT OF THE CASE

Mr. Newton appeals his judgment, challenging the application of the stolen firearm enhancement at U.S.S.G. § 2K2.1(b)(4) without proof of scienter.

In defiance of this Court's repeated holdings requiring scienter for criminal

liability, the court of appeals held:

> Newton argues that Guideline enhancement § 2K2.1(b)(4) requires proof of scienter. We agree with the district court that this argument is foreclosed by longstanding circuit precedent. *See United States v. Goodell*, 990 F.2d 497, 498-99 (9th Cir. 1993) (analyzing the text, purpose, and history of § 2K2.1(b)(4) and holding that it does not require scienter); *United States v. Prien-Pinto*, 917 F.3d 1155, 1161 (9th Cir. 2019) (reaffirming *Goodell*).

United States v. Newton, 2024 WL 4200856 at *1.

REASONS FOR GRANTING THE PETITION

That holding defies generations of law from this Court requiring mens rea to establish criminal liability. *See*, *e.g.*, *Ruan v. United States*, 597 U.S. 450 (2022); *Rehaif v. United States*, 588 U.S. 225 (2019); *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994); *Staples v. United States*, 511 U.S. 600 (1994); *Liparota v. United States*, 471 U.S. 419 (1985); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *Morissette v. United States*, 342 U.S. 246 (1952).

A. In commentary to the guideline, the Commission directs the stolen firearm enhancement does not require scienter.

U.S.S.G. § 2K2.1 is the sentencing guideline for nearly all federal firearm offenses. It controls the Guidelines calculation for felon in possession of a firearm convictions under 18 U.S.C. § 922(g)(1). Section 2K2.1(b)(4) imposes enhancements for stolen firearms (or firearms with altered or destroyed serial numbers):

> If any firearm (A) was stolen, increase by 2 levels; or (B) had an altered or obliterated serial number, increase by 4 levels.

U.S.S.G. § 2K2.1(b)(4) (2021).

Although the guideline does not speak to *mens rea*, the commentary to (b)(4) instructs:

> Knowledge or Reason to Believe: Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.

Application Note 8(B) to U.S.S.G. § 2K2.1 (2021).

The Commission adopted that commentary on November 1, 1993. U.S.S.G. Amendment 478. It did not explain the reason for this commentary. *Id*., Reason for Amendment. It only informed:

> In addition, this amendment clarifies that the enhancement in 2K2.1(b)(4) applies whether or not the defendant knew or had reason to believe the firearm was stolen or had an altered or obliterated serial number.

Id. The Commission's commentary underscores that the plain language of the guideline require scienter, otherwise, the commentary would be unnecessary.

As detailed *infra*, scienter generally, and specifically for stolen firearm liability, is well established in criminal law, *Rehaif v. United States*, 588 U.S. 225, 232 (2019), even where the regulation is silent on mens rea.

B. Fundamental American law requires scienter for criminal liability.

Rehaif v. United States, 588 U.S. 225 (2019), concerned the scope of the mens rea for federal firearm offenses, 18 U.S.C. § 922(g), Mr. Newton's statute of conviction. In *Rehaif*, the Supreme Court specifically addressed whether the mens rea of "knowingly" applies to both the defendant's conduct and to the defendant's status as a prohibited person. *Rehaif*, 588 U.S. at 227. The Court held that in order to convict a defendant of 18 U.S.C. § 922(g), the government "must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." *Id*.

The principles set forth in *Rehaif* demonstrate Congress's intent to require scienter for firearm offenses, specifically, and for almost all criminal offenses, generally. *Id*. at 228, *see also id*. at 231 ("We have interpreted statutes to include a scienter requirement even where the statutory text is silent on the question. And we have interpreted statutes to include a scienter requirement even where 'the most grammatical reading of the statute' does not support one."') (internal citations omitted).

Rehaif overturned "every single Court of Appeals." *Id*. at 238-39 (Alito, J., dissenting). The Court explained the presumption of mens rea applies in the vast majority of cases and should be excused only for "regulatory" or "public welfare"

offenses, which "carry only minor penalties." *Id.* at 232 (citing *Staples v. United States*, 511 U.S. 600, 606 (1994)).

More recently, this Court again identified "regulatory or public welfare offense[s] that carr[y] minor penalties" as the "kind that we have held fall outside the scope of ordinary scienter requirements." *Ruan v. United States*, 597 U.S. 450, 459 (2022). Stolen firearm liability is not a regulatory or public welfare offense, and a Guidelines enhancement, increasing a federal imprisonment sentencing range, is not a minor penalty.

The guideline's stolen firearm sentencing enhancement parallels § 922(g): both punish defendants for possession of a firearm, and both lack an explicit scienter requirement in the text. Prior to *Rehaif*, both were understood not to require proof of knowledge of the status element of the offense. But *Rehaif* upended that well-settled understanding. 588 U.S. at 228, 237. As the Seventh Circuit put it, *Rehaif* "upset what was once a seemingly settled question of federal law." *United States v. Williams*, 946 F.3d 968, 970 (7th Cir. 2020). That dramatic change from settled understandings requires reevaluation of closely analogous regulations like § 2K2.1(b)(4)(A). Yet, the court of appeals refused to engage the analysis, and instead affirmed based on its precedent from last century.

1. Canons of statutory construction presume, and require, scienter here.

Rehaif relied on "the ordinary presumption in favor of scienter" in its statutory interpretation in criminal cases, 588 U.S. at 229; that presumption is "typically" overcome only in the case of "statutory provisions that form part of a 'regulatory' or 'public welfare' program and carry only minor penalties." *Id*. at 232. Section 2K2.1(b)(4)(A) is far from such a provision.

Silence as to mens rea "by itself does not necessarily suggest that Congress intended to dispense with a conventional mens rea element", because courts must "construe the statute in light of the background rules of the common law, in which the requirement of some mens rea for a crime is firmly embedded." *Staples*, 511 U.S. at 605 (citing *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436-37 (1978)). "The existence of a mens rea [i.e., mental state or state of mind] is the rule of, rather than the exception to, Anglo-American jurisprudence." *U.S. Gypsum Co.*, 438 U.S. at 436 (citation omitted).

And as Justice Robert Jackson wrote in *Morissette v. United States*, scienter is fundamental to our criminal law.

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

342 U.S. 246, 250 (1952); *see also Ruan*, 597 U.S. at 457 ("as a general matter, our criminal law seeks to punish the "vicious will'") (quoting *Morissette*, 342 U.S. at 251); *Carter v. United States*, 530 U.S. 255, 259 (2000) (the offense of taking of bank property by "force and violence, or intimidation," requires "proof of knowledge" to convict); *Elonis v. United States*, 575 U.S. 723, 734, (2015) ("We have repeatedly held that 'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.'" (quoting *Morissette*, 342 U.S. at 250)); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994) (importing scienter despite that "the most grammatical reading of the statute" did not include scienter); *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 523-24 (1994) (presuming mens rea to be part of a criminal drug paraphernalia statute); *Staples*, 511 U.S. at 605-06, 615, (firearm statute without explicit mens rea presumed to require knowledge); *United States v. Bailey*, 444 U.S. 394, 406 n.6 (1980) (denying that a criminal offense is a "strict liability" offense where it fails to include mens rea); *U.S. Gypsum Co.*, 438 U.S. at 438 ("Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement."); *Morissette*, 342 U.S. at 263 ("We hold that mere omission from § 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced.").

Dispensing of scienter is disfavored. *Staples*, 511 U.S. at 606 ("Relying on the strength of the traditional rule, we have stated that offenses that require no mens rea generally are disfavored."); *U.S. Gypsum Co.*, 438 U.S. at 437-38 ("While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements, the limited circumstances in which Congress has created and this Court has recognized such offenses, attest to their generally disfavored status." (internal citations omitted)). Yet, that is what the court of appeals did here: matter-of-factly dismissed mens rea.

Fundamental law requires knowing culpability. "The understanding that an injury is criminal only if inflicted knowingly 'is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.'" *Rehaif*, 588 U.S. at 231 (quoting *Morissette*, 342 U.S. at 250). "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 481 U.S. 137, 149 (1987).

The Court just reaffirmed these principles in *Ruan*, 597 U.S. at 454, where the Court ruled criminal liability under 21 U.S.C. § 841(a) requires prescribing doctors knew that they were acting in an unauthorized manner. In short, "wrongdoing must be conscious to be criminal." *Id*. at 457 (quoting *Elonis*, 575 U.S. at 734).

2. To be guilty of possessing a stolen firearm, Congress mandates a defendant must know it was stolen.

Congress, the common law, and the Court, emphatically require a mens rea for stolen firearm liability.

Like any legal text, a court adopts "the traditional rules of statutory construction when interpreting the sentencing guidelines." *United States v. Flores*, 729 F.3d 910, 914 n. 2 (9th Cir. 2013). And that guideline's text is subject to plain language interpretation. *United States v. Williams*, 503 U.S. 193, 200 (1992).

To convict a defendant of possession of a stolen firearm, Congress requires the government must prove beyond a reasonable doubt that the defendant knew, or had reasonable cause to believe, that the firearm was stolen. 18 U.S.C. § 922(j). The same *mens rea* applies to defendants charged with transportation or shipment of a stolen firearm. 18 U.S.C. § 922(i); *see*, *e.g.*, Ninth Circuit, *Model Criminal Jury Instructions*, No. 8.67 (2010) ("the government must prove each of the following elements beyond a reasonable doubt . . . [that] the defendant knew or had reasonable cause to believe that the [specify firearm] [specify ammunition] had been stolen").

According to the court of appeals, the Sentencing Commission advises punishment for a stolen firearm where Congress, and the courts, do not. *See United States v. Games-Perez*, 695 F.3d 1104, 1119 (10th Cir. 2012) (Gorsuch, J., dissenting from the denial of rehearing en banc) ("The Supreme Court has long recognized a

'presumption' grounded in our common law tradition that a *mens rea* requirement attaches to 'each of the statutory elements that criminalize otherwise innocent conduct.'" (quoting *X-Citement Video, Inc.*, 513 U.S. at 72; citing *Staples*, 511 US. at 610-12; *United States Gypsum Co.*, 438 U.S. at 437-38; *Morissette*, 342 U.S. at 250-53).

3. Under the plain language canon of statutory construction, the guideline requires mens rea.

The paramountcy of the guideline's text cannot be understated: "The guideline's text 'is not window dressing: It is the 'critical' text." *Borden v. United States*, 593 U.S. 420, 443 (2021).

Congressional intent is decisive here. Congress reviews guidelines promulgated by the Sentencing Commission, before the guidelines become operative. 28 U.S.C. § 994(p). When the Commission promulgated the stolen firearm guideline for Congressional review, before the guideline took effect, Congress reviewed the guideline under settled judicial construction. *Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc.*, 139 S.Ct. 628, 634 (2019). "Whether a criminal statute requires the Government to prove that the defendant acted knowingly is a question of congressional intent." *Rehaif*, 139 S.Ct. at 2195 (citing *Staples*, 511 U.S. at 605).

The rules of construction presume mens rea.

> 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." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994); *see also Morissette v. United States*, 342 U.S. 246, 256–258, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

Id.

This presumption is such a fundamental "interpretive maxim" that it is a rule of constructive onto itself – the "presumption in favor of scienter".

> We normally characterize this interpretive maxim as a presumption in favor of "scienter," by which we mean a presumption that criminal statutes require the degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission." Black's Law Dictionary 1547 (10th ed. 2014).

Id. The Court recently reaffirmed this "longstanding presumption".

> Consequently, when we interpret criminal statutes, we normally "start from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state." *Rehaif v. United States*, 588 U. S. ——, ——, 139 S.Ct. 2191, 2195, 204 L.Ed.2d 594 (2019). We have referred to this culpable mental state as "scienter," which means the degree of knowledge necessary to make a person criminally responsible for his or her acts. *See ibid.*; Black's Law Dictionary 1613 (11th ed. 2019); *Morissette*, 342 U.S. at 250–252, 72 S.Ct. 240.

Ruan, 597 U.S. at 458.

The presumption applies even when Congress does not specify scienter, and it especially applies, as here with § 922(j), where Congress includes a scienter provision in the statute.

> We apply the presumption in favor of scienter even when Congress does not specify any scienter in the statutory text. *See Staples*, 511 U.S. at 606, 114 S.Ct. 1793. But the presumption applies with equal or greater force when Congress includes a general scienter provision in the statute itself. *See* ALI, Model Penal Code § 2.02(4), p. 22 (1985) (when a statute "prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears").

Rehaif, 588 U.S. at 229.

> Again, fundamental criminal law principles require knowledge.
>
> Beyond the text, our reading of § 922(g) and § 924(a)(2) is consistent with a basic principle that underlies the criminal law, namely, the importance of showing what Blackstone called "a vicious will." 4 W. Blackstone, Commentaries on the Laws of England 21 (1769). As this Court has explained, the understanding that an injury is criminal only if inflicted knowingly "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette*, 342 U.S. at 250, 72 S.Ct. 240. Scienter requirements advance this basic principle of criminal law by helping to "separate those who understand the wrongful nature of their act from those who do not." *X-Citement Video*, 513 U.S. at 72–73, n. 3, 115 S.Ct. 464.

Id. at 231.

For this reason, over-and-over-and-over, for generations, the Court requires scienter.

> The cases in which we have emphasized scienter's importance in separating wrongful from innocent acts are legion. *See*, *e.g.*, *id*., at 70, 115 S.Ct. 464; *Staples*, 511 U.S. at 610, 114 S.Ct. 1793; *Liparota v. United States*, 471 U.S. 419, 425, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985); *United States v. Bailey*, 444 U.S. 394, 406, n. 6, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980); *United States v. United States Gypsum Co.*, 438 U.S. 422, 436, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978); *Morissette*, 342 U.S. at 250–251, 72 S.Ct. 240. We have interpreted statutes to include a scienter requirement even where the statutory text is silent on the question. *See Staples*, 511 U.S. at 605, 114 S.Ct. 1793. And we have interpreted statutes to include a scienter requirement even where "the most grammatical reading of the statute" does not support one. *X-Citement Video*, 513 U.S. at 70, 115 S.Ct. 464.

Id. And, again, the Court just reaffirmed this principle.

> [O]ur criminal law seeks to punish the "'vicious will.'" *Morissette v. United States*, 342 U.S. 246, 251, 72 S.Ct. 240, 96 L.Ed. 288 (1952); *see also id.*, at 250, n. 4, 72 S.Ct. 240 (quoting F. Sayre, Cases on Criminal Law, p. xxxvi (R. Pound ed. 1927)). With few exceptions, "'wrongdoing must be conscious to be criminal.'" *Elonis v. United States*, 575 U.S. 723, 734, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015) (quoting *Morissette*, 342 U.S. at 252, 72 S.Ct. 240). Indeed, we have said that consciousness of wrongdoing is a principle "as universal and persistent in mature systems of [criminal] law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Id*., at 250, 72 S.Ct. 240.

Ruan, 597 U.S. at 457.

Rehaif's fundamental principles control here. "Without knowledge of that [stolen firearm] status, the defendant may well lack the intent needed to make his behavior wrongful. His behavior may instead be an innocent mistake to which we criminal sanctions normally do not attach. Cf. O. Holmes, The Common Law 3

(1881) ('even a dog distinguishes between being stumbled over and being kicked')." 588 U.S. at 232. Where there is silence on scienter, the courts read scienter to impose criminal liability.

> Applying the presumption of scienter, we have read into criminal statutes that are "silent on the required mental state" – meaning statutes that contain no mens rea provision whatsoever – "'that mens rea which is necessary to separate wrongful conduct from "otherwise innocent conduct."'" *Elonis*, 575 U.S. at 736, 135 S.Ct. 2001 (quoting *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000); emphasis added). Unsurprisingly, given the meaning of scienter, the mens rea we have read into such statutes is often that of knowledge or intent. *See*, *e.g.*, *Staples v. United States*, 511 U.S. 600, 619, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994); *United States v. United States Gypsum Co.*, 438 U.S. 422, 444-446, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978).

Ruan, 597 U.S. at 458.

The guideline's plain text establishes that the stolen firearm enhancement requires scienter.

4. <u>If the guideline's plain language does not require a "knowing" mens rea, the Rule of Lenity does</u>.

The rule of lenity "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008). The rule of lenity "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate. . . ." *Dunn v. United States*, 442 U.S. 100, 112 (1979). Lenity in this case demands a rejection of the court of appeals

dismissive "no mens rea" interpretation, which does not comport with federal criminal law.

"The rule of lenity is one of the oldest and most traditional tools of statutory interpretation." *Romero v. Sec'y U.S. Dep't of Homeland Security*, 20 F.4th 1374, 1383 (11th Cir. 2021); *see United States v. Wiltberger*, 18 U.S. 76, 95 (1820) ("The rule that penal laws are to be construed strictly[ ] is perhaps not much less old than construction itself."); *see also Kisor v. Wilkie*, 588 U.S. 558, 631 (2019) (Gorsuch, J., concurring in the judgment) (explaining that the traditional tools of construction include "all sorts of tie-breaking rules for resolving ambiguity").

As Chief Justice Marshall explained two centuries ago, lenity "is founded on the tenderness of the law for the rights of individuals," *Wiltberger*, 18 U.S. at 95, and "the right of every person to suffer only those punishments dictated by 'the plain meaning of words.'" *Wooden v. United States*, 595 U.S. 360, 390 (2022) (Gorsuch, J., concurring in the judgment) (quoting *Wiltberger*, 18 U.S. at 95–96). It is a "longstanding safeguard against excessive punishment," *United States v. Nasir (Nasir II)*, 17 F.4th 459, 473 (3d Cir. 2021) (en banc) (Bibas, J., concurring), and requires that penal laws be construed strictly, with any ambiguities resolved in favor of the defendant. *See Yates v. United States*, 574 U.S. 528, 548 (2015); *United States v. Edling*, 895 F.3d 1153, 1158 (9th Cir. 2018) ("holding rule of lenity applicable to

the Sentencing Guidelines") (citation omitted). Thus, "where uncertainty exists, the law gives way to liberty." *Wooden*, 595 U.S. at 390 (Gorsuch, J., concurring in the judgment).

Although the Guidelines are now advisory, they are the "lodestar" of sentencing. *Peugh v. United States*, 569 U.S. 530, 544 (2013); *see Nasir II*, 17 F.4th at 474 (Bibas, J., concurring) ("Even though the Guidelines are advisory, they exert a law-like gravitational pull on sentences."). The district court must start by correctly calculating the Guidelines range, which serves as "the starting point and the initial benchmark." *Gall v. United States*, 552 U.S. 38, 49 (2007). And throughout sentencing, the Guidelines "inform and instruct the district court's determination of an appropriate sentence." *Molina-Martinez v. United States*, 578 U.S. 189, 200 (2016) (explaining that the Guidelines are not only the starting point but also the lodestar of sentencing).

Given the Guidelines' anchoring effect and centrality in sentencing, when confronted with two plausible readings of a guideline, courts should "adopt[ ] the more lenient." *Nasir II*, 17 F. 4th at 474 (Bibas, J., concurring); *see Wooden*, 595 U.S. at 394-395 (Gorsuch, J., concurring in the result) (explaining that lenity should be employed after applying other traditional tools of statutory construction, rather than looking outside the statute's text).

5. The Doctrine of Constitutional Avoidance buttresses applying the Rule of Lenity to enforce the guideline's plain language.

"[The doctrine of constitutional avoidance] is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (citations omitted). In *Skilling v. United States*, the Court invoked the doctrine of constitutional avoidance to limit the honest services fraud statute to its core meaning of bribes and kickbacks. 561 U.S. 358, 405-06 (2010). There, the government argued that Skilling's criminal conduct as chief executive officer of Enron involved "misrepresenting the company's fiscal health," and "'profit[ing] from the fraudulent scheme . . . through the receipt of salary and bonuses, . . . and through the sale of approximately $200 million in Enron stock, which netted him $89 million." *Id*. at 413.

The Court rejected that theory because its breadth "raise[d] the due process concerns underlying the vagueness doctrine." *Id*. at 408. The Court instead determined that the statute "can and should be salvaged by confining its scope" to the "solid core" of honest-services decisions that predated *McNally v. United States*, 483 U.S. 350 (1987) – schemes involving bribery and kickbacks. *Id*. at 405, 408; *see also McDonnell v. United States*, 579 U.S. 550, 576 (2016) (reaching "constrained

interpretation" of federal bribery statute to "avoid[] this vagueness shoal"). Because the government never alleged that Skilling "solicited or accepted side payments from a third party" in exchange for the misrepresentations, the Court concluded that his conviction could not be upheld on an honest-services theory. *Id*. at 414.

Here, constitutional avoidance instructs enforcing the guideline's plain language that "stolen" requires a mens rea of "knowing."

C. Despite decades of this Court's precedents, the court of appeals discarded scienter.

Despite this Court's repeated holdings, again and again requiring scienter to attach criminal liability, the court of appeals harkened back to its own 1993 opinion to dismiss it here.

> Newton argues that Guideline enhancement § 2K2.1(b)(4) requires proof of scienter. We agree with the district court that this argument is foreclosed by longstanding circuit precedent. *See United States v. Goodell*, 990 F.2d 497, 498-99 (9th Cir. 1993) (analyzing the text, purpose, and history of § 2K2.1(b)(4) and holding that it does not require scienter); *United States v. Prien-Pinto*, 917 F.3d 1155, 1161 (9th Cir. 2019) (reaffirming *Goodell*).

United States v. Newton, 2024 WL 4200856 at *1.

It maintains the language of the guideline's stolen firearm enhancement is unambiguous.

> But the text of § 2K2.1(b)(4) is unambiguous, and our interpretation has never been based on deference to the Sentencing Commission's commentary. *See Goodell*, 990 F.2d at 501 ("The language of the

> guideline enhancement is unambiguous[.]"); *Prien- Pinto*, 917 F.3d at 1158 ("Through traditional techniques of construction, we had been reading this enhancement to apply without a mens rea for fourteen years before the Sentencing Commission began directing us to do so. Application Note 8(B) simply serves as confirmation that *Goodell*'s reading has always been the correct one.").

Id.

That holding defies the repeated holding of this Court in *Rehaif v. United States*, 588 U.S. 225 (2019); *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994); *Staples v. United States*, 511 U.S. 600 (1994); *Liparota v. United States*, 471 U.S. 419 (1985); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); and *Morissette v. United States*, 342 U.S. 246 (1952).

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Dated this 16th day of December, 2024.

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