No. _____

In The
Supreme Court of the United States

_____

HAMID MOHAMED AHMED ALI REHAIF,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
Respondent.

_____

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

_____

PETITION FOR WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Under federal law, persons of various statuses are prohibited from "possess[ing] in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g). One such status is being an alien "illegally or unlawfully in the United States." 18 U.S.C. § 922(g)(5)(A).

The penalty for violating § 922(g) is found in 18 U.S.C. § 924, which provides "Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined, . . . imprisoned, . . . or both. 18 U.S.C. § 924(a)(2).

The question presented is:

Whether the "knowingly" provision of § 924(a)(2) applies to both the possession and status elements of a § 922(g) crime, as has been urged by then-Judge, now Justice Gorsuch, or whether it applies only to the possession element, as has been held by the courts.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Hamid Mohamed Ahmed Ali Rehaif, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit's initial opinion was published at *United States v. Rehaif*, 868 F.3d 907 (11th Cir. 2017) (Pet. App. 21a). After a petition for rehearing en banc was filed, the Eleventh Circuit *sua sponte* vacated its published opinion and substituted a revised opinion, also published. *See United States v. Rehaif*, 888 F.3d 1138 (11th Cir. 2018) (Pet. App. 1a). The petition for rehearing was then denied as moot (Pet. App. 38a).

JURISDICTION

The Eleventh Circuit issued its revised opinion on March 26, 2018. *See* Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 922(g)(5) of Title 18 provides, in relevant part:

> It shall be unlawful for any person . . . who, being an alien . . . is illegally or unlawfully in the United States . . . to . . . possess in or affecting commerce, any firearm or ammunition.

Section 924(a)(2) of Title 18 provides:

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

years, or both.

STATEMENT OF THE CASE

1. Mr. Rehaif is a citizen of the United Arab Emirates. Doc. 108 at 175; Doc. 73-5 (Exhibit 3A). In July 2013, Mr. Rehaif applied for and was granted admission to Florida Institute of Technology (FIT) as a student. Doc. 108 at 186-87. He attended school at FIT during the Fall 2013, Spring 2014, and Fall 2014 semesters. Doc. 73-9 (Exhibit 5); Doc. 108 at 219-21. On January 21, 2015, an email was sent from FIT to Mr. Rehaif notifying him that he had been "academically dismissed" from FIT and that his "immigration status will be terminated on February 5, 2015 unless you transfer out before that date, or you notify our office that you have already left the United States." Doc. 73-7 (Exhibit 4A); Doc. 73-8 (Exhibit 4B); Doc. 108 at 218-19. According to the Department of Homeland Security's foreign student database, the termination of Mr. Rehaif's status became official on February 23, 2015. Pet. App. 3a; *see* Doc. 73-10 (Exhibit 6); Doc. 108 at 222-24.

2. On December 2, 2015, Mr. Rehaif went to a shooting range in Melbourne, Florida. Pet. App. 3a; *see* Doc. 109 at 38-43, 45; Doc. 73-14 (Exhibit 10A). He purchased a box of ammunition and rented a firearm for one hour of shooting. Doc. 109 at 50-52; Doc. 73-17 (Exhibit 11). On December 8, 2015, law enforcement responded to a suspicious person report at the hotel where Mr. Rehaif was staying. An FBI agent spoke with Mr. Rehaif, who acknowledged he had been at a shooting

range and had a box of ammunition in his hotel room. Pet. App. 3a-4a; *see* Doc. 109 at 97-100. Based on the above facts, an indictment charged that Mr. Rehaif, an alien illegally and unlawfully in the United States, knowingly possessed, in and affecting interstate and foreign commerce, a firearm on December 2, 2015 (Count One), and ammunition on December 8, 2015 (Count Two), both in violation of 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2). Doc. 13.

3. The case proceeded to trial. In its proposed jury instructions, the government requested an instruction: "The United States is not required to prove that the defendant knew that he was illegally or unlawfully in the United States." Pet. App. 4a; Doc. 53 at 33. Mr. Rehaif opposed the request, arguing that the United States had to prove both that he had knowingly possessed a firearm and that he had known of his prohibited status – that he was illegally or unlawfully in the United States when he had possessed the firearm. The district court overruled Mr. Rehaif's objection. Pet. App. 4a-5a; *see* Doc. 53 at 33-34; Doc. 100 at 19.

The district court instructed the jury on the elements of the offense as follows:

> For you to find the Defendant guilty, the government must prove each of the following beyond a reasonable doubt:
>
> • the Defendant knowingly possessed a firearm (Count One) and/or ammunition (Count Two) in or affecting interstate or foreign commerce; and
>
> • before possessing the firearm and/or ammunition, the Defendant was an alien illegally or unlawfully in the United States.

Doc. 69 at 11. The court further instructed: "The United States is not required to prove that the Defendant knew that he was illegally or unlawfully in the United States. *Id*. at 16. The jury found Mr. Rehaif guilty on both charges. Doc. 71. He was sentenced to imprisonment for a term of 18 months on each account, to run concurrent. Doc. 85. After serving his sentence, Mr. Rehaif was deported back to his homeland.

4. On appeal, Mr. Rehaif argued that the phrase "knowingly violates," in 18 U.S.C. § 924(a)(2), modifies § 922(g) to require proof that the defendant knew at the time that he possessed the firearm that he was in the United States illegally or unlawfully. Pet. App. 6a. The district court's contrary jury instruction thus misstated the law and eviscerated Mr. Rehaif's planned defense, which was that he did not know he was in the United States illegally or unlawfully. Pet. App. 6a. Mr. Rehaif relied primarily on the partially concurring opinion by Judge Phillips in *United States v. Langley*, 62 F.3d 602, 608 (4th Cir. 1995), *see* Initial Brief of Appellant at 12-16 (filed December 27, 2016), and the concurrence by then-Judge, now Justice Gorsuch in *United States v. Games–Perez*, 667 F.3d 1136, 1142 (10th Cir. 2012) (Gorsuch, J., concurring in judgment), *see* Reply Brief of Appellant at 4-10 (filed February 23, 2017); *see also United States v. Games-Perez*, 695 F.3d 1104, 1116 (10th Cir. 2012) (Gorsuch, J., dissenting from denial of rehearing en banc).

5. The Eleventh Circuit rejected Judge Gorsuch's opinion that the plain

terms of § 922(g) and § 924(a)(2) constituted "a perfectly clear law as it is written, plain in its terms, straightforward in its application." Pet. App. 10a (quoting *Games-Perez*, 667 F.3d at 1145 (Gorsuch, J., concurring in judgment)). The court also found its prior precedent rule bound it to conclude that "the government need not prove that the defendant knew of his prohibited status." Pet. App. 11a-12a (citing *United States v. Jackson*, 120 F.3d 1226 (11th Cir. 1997)). The court discussed legislative history to buttress its conclusions. Pet. App. 12a-14a. The court also explained why it thought this case constituted an exception to the general rule that the government must prove *mens rea* for each substantive element of the crime, reasoning that "the government did not have the burden of proving that the defendant knew a specific fact or detail about himself." Pet. App. 14a-17a.

REASONS FOR GRANTING THE WRIT

I. This Court should grant review to determine whether § 924(a)(2)'s "knowingly violates" provision applies equally to the possession and status elements of a § 922(g) violation, an issue that affects thousands of defendants each year.

Section 922(g) of Title 18, United States Code, prohibits certain categories of persons from possessing a firearm or ammunition in interstate commerce. The most common prohibited status is that of a convicted felon. *See* 18 U.S.C. § 922(g)(1). Other prohibited statuses include fugitives from justice, unlawful users of any controlled substance, persons committed to a mental institution, persons convicted of a misdemeanor crime of domestic, and, as relevant here, "an alien"

"illegally or unlawfully in the United States." §§ 922(g)(2)-(5), (9). Section 924(a)(2), in turn, delineates the penalty for anyone who "knowingly violates" § 922(g). 18 U.S.C. § 924(a)(2).

By its terms, the "knowingly violates" provision in § 924(a)(2) is not limited to just knowledge of possession of the firearm or ammunition. A plain reading of the statutes shows that the "knowingly violates" provision should apply equally to the possession and status elements of a § 922(g) crime.[1]

Petitioner acknowledges that, thus far, "no circuit has required proof of the defendant's knowledge of his prohibited status under any subsection of § 922(g)." Pet. App. 13a. The better view, however, advocated by some judges, is that the government should have to prove a defendant knew about his prohibited status for a § 922(g) offense. *See United States v. Games-Perez*, 667 F.3d 1136 (10th Cir. 2012) (Gorsuch, J., concurring in judgment); *United States v. Games-Perez*, 695 F.3d 1104 (10th Cir. 2012) (Mem) (Gorsuch, J., dissenting from denial of rehearing en banc); *United States v. Ford*, 821 F.3d 63, 71 (1st Cir. 2016) ("a good

[1] The knowledge requirement does not apply to the third element of a section 922(g) violation – the "interstate or foreign commerce" element – since knowledge of jurisdictional facts is not generally an element of the required intent under federal statutes. *See Torres v. Lynch*, 136 S. Ct. 1319, 1331 (2016) ("courts have routinely held that a criminal defendant need not know of a federal crime's interstate commerce connection to be found guilty" because "Congress viewed the commerce element as distinct from, and subject to a different rule than, the elements describing the substantive offense.").

argument can be made that the government actually does need to prove, in a case against the principal under section 922(g)(1), the principal's knowledge of his prior conviction"); *United States v. Langley*, 62 F.3d 602 (4th Cir. 1995) (Phillips, J., joined by three other judges, concurring in part and dissenting in part). The issue has never been addressed by this Court. Review should be granted to consider this important issue, which affects thousands of defendants each year.[2]

The starting point when construing a statute is the language of the statute. "As in all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (citations and internal quotation marks omitted). The Court has instructed "time and again," that courts presume Congress "says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citing cases). Courts "are not at liberty to rewrite the statute to reflect a meaning we deem more desirable." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008). Courts must instead "give effect to the text Congress enacted." *Id*. "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not

[2] There were 8,064 firearms cases in fiscal year 2017. U.S.S.C. *Overview of Federal Criminal Cases – Fiscal Year 2017* at 3. More than half of firearms cases (57.1%) involved the illegal possession of a firearm by a prohibited person, usually a convicted felon. *Id*. at 10.

absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citation and internal quotation marks omitted).

The text of the statutes at issue here is unambiguously clear and so should require that the "knowingly violates" language of section 924(a)(2) be applied to both substantive elements of a 922(g) violation: (1)the possession of a firearm **and** (2) the status that makes a person's possession illegal (here that Mr. Rehaif was "illegally or unlawfully in the United States"). In *Games-Perez*, Judge Gorsuch concurred because of binding prior 10th Circuit precedent holding that proof of a prohibited status was not an element of a § 922(g) offense.[3] He explained why this result is wrong.

Judge Gorsuch identified the three elements of a section 922(g)(1) violation, the statute at issue there, as: (1) the defendant was previously convicted of a felony, (2) the defendant later possessed a firearm, and (3) the possession was in or affecting interstate commerce. 667 F.3d at 1143 (Gorsuch, J., concurring in judgment). He criticized *Capps* for reading the word "knowingly" as "leapfrogging over the very first § 922(g) element and touching down only at the second" because that interpretation "defies linguistic sense—and not a little grammatical gravity." *Id*. "Ordinarily," Judge Gorsuch explained, when a criminal statute

[3] 667 F.3d at 1142-43 (citing *United States v. Capps*, 77 F.3d 350 (10th Cir. 1996)).

introduces the elements of a crime with the word "knowingly," that word is applied to each element of the crime. *Id*. (citing *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009)).

Judge Gorsuch acknowledged that statutory *mens rea* requirements do not always apply to "jurisdictional" elements like the final, interstate commerce element in § 922(g) [*see* note 1, *supra*], but explained that:

> Congress gave us three elements in a particular order. And it makes no sense to read the word "knowingly" as so modest that it might blush in the face of the very first element only to regain its composure and reappear at the second.

667 F.3d at 1144.

Judge Gorsuch opined that following the statutory text "would simply require the government to prove that the defendant knew of his prior felony conviction. And there's nothing particularly strange about that." *Id*. at 1145. He thought it "hardly crazy to think that in a § 922(g)(1) prosecution Congress might require the government to prove that the defendant had knowledge of the only fact (his felony status) separating criminal behavior from not just permissible, but constitutionally protected, conduct." *Id*. "In fact," Judge Gorsuch continued, "this result isn't just plausible, it is presumptive. The Supreme Court has long held that courts should 'presum[e]' a *mens rea* requirement attaches to 'each of the statutory elements that criminalize otherwise innocent conduct.'" *Id*. (quoting *United States v. X-Citement Video, Inc*., 513 U.S. 64, 72 (1994)). He wondered: "How can it be

that courts elsewhere read a *mens rea* requirement *into* statutory elements criminalizing otherwise lawful conduct, yet when Congress expressly imposes just such a *mens rea* requirement in §§ 922(g) and 924(a) we turn around and read it *out* of the statute?" *Id*. Judge Gorsuch could find "no good explanation" for this "topsy turvy result." *Id*. Judge Gorsuch concluded his concurrence:

> I recognize that precedent compels me to join the court's judgment. But candor also compels me to suggest that we might be better off applying the law Congress wrote than the one *Capps* hypothesized. It is a perfectly clear law as it is written, plain in its terms, straightforward in its application. Of course, if Congress wishes to revise the plain terms of § 922(g) and § 924(a), it is free to do so anytime. But there is simply no right or reason for this court to be in that business.

Id. at 1145-46.

A petition for rehearing en banc in *Games-Perez* was denied by a 6 to 4 vote. *United States v. Games-Perez*, 695 F.3d 1104, 1104-05, 1116-17 (10th Cir. 2012). Judge Gorsuch dissented, writing that "reading Congress's *mens rea* requirement as leapfrogging over the first statutorily specified element and touching down only at the second listed element—defies grammatical gravity and linguistic logic." *Id*. at 1117 (Gorsuch, J., dissenting from denial of rehearing en banc). He reiterated that, ordinarily, introducing the elements of a crime with the word "knowingly" means that *mens rea* requirement must apply to all of the ensuing substantive elements of the crime. *Id*. (citing *Flores–Figueroa*, 556 U.S. at 650).

Judge Gorsuch's conclusion: "[T]he *law* before us that survived the gauntlet of bicameralism and presentment couldn't be plainer. By their express terms, §§ 922(g) and 924(a)(2) do not authorize the government to imprison [persons] unless and until the government can show they *knew* of their felon status at the time of the alleged offense." 695 F.3d at 1118.

Even if there was somehow an ambiguity in the "plain statutory text," Judge Gorsuch identified "another intractable problem" – this Court's presumption that a *mens rea* requirement attaches to each of the statutory elements that criminalize otherwise innocent conduct. *Id*. at 1119 (citing, among other cases, *X-Citement Video* and *Morisette v. United State*s, 342 U.S. 246 (1952)). Judge Gorsuch concluded on the merits of imposing a *mens rea* requirement:

> Together §§ 922(g) and 924(a)(2) operate to criminalize the possession of any kind of gun. But gun possession is often lawful and sometimes even protected as a matter of constitutional right. The *only* statutory element separating innocent (even constitutionally protected) gun possession from criminal conduct in §§ 922(g) and 924(a) is a prior felony conviction. So the presumption that the government must prove *mens rea* here applies with full force.

Id.

Everything Judge Gorsuch said in his *Games-Perez* opinions applies equally here, the only difference being that the statutory element separating innocent gun possession from criminal conduct is Mr. Rehaif's status of being illegally or unlawfully present in the United States rather than his status as a convicted felon.

Review is warranted.

II. This case is an excellent vehicle for considering this important issue.

Whether § 924(a)(2)'s "knowingly violates" provision applies to the prohibited status element of a § 922(g) offense was fully litigated in the district court and on appeal to the 11th Circuit, which addressed the issue on the merits.

Moreover, properly instructing the jury may have made a difference in the outcome of the case as Mr. Rehaif had a viable defense that he did not know of his prohibited status. While an email was sent from FIT to Mr. Rehaif notifying him that he had been "academically dismissed" from FIT and that his "immigration status will be terminated," there was no attempt by FIT to confirm that Mr. Rehaif had received the emails. Doc. 108 at 233. Nor was there any attempt to talk with Mr. Rehaif on the telephone, or to set up a meeting with him. *Id*. at 233-34. Mr. Rehaif did not respond to either email. *Id*. at 218-19.

Further, while an FBI agent testified that he interviewed Mr. Rehaif and that Mr. Rehaif admitted he knew he was out of status for his immigration because he was not in school, the interview was not recorded and the other two law enforcement agents present for the interview did not testify. Doc. 109 at 99-101.

With a jury properly instructed that the government had to prove Mr. Rehaif knew he was in the United States unlawfully or illegally, then, Mr. Rehaif could have plausibly argued that he did not know of his prohibited status because (1) he

did not receive the emails from FIT, and (2) the FBI agent who testified was not credible. Petitioner respectfully seeks this Court's review.

III. The decision below is wrong.

The Eleventh Circuit attempted to downplay Judge Gorsuch's opinion in *Games-Perez* by pointing out that he acknowledged the "knowingly" requirement of § 924(a)(2) does not apply to the "interstate commerce" element of § 922(g). Pet. App. 10. Thus, the court reasoned, "[t]he plain text of the statutes does not require that the defendant 'know' every detail outlined in § 922(g)," and so Judge Gorsuch's concurrence only showed that the statutory language was not "perfectly clear" and resort to other tools of statutory construction was necessary. Pet. App. 10a-11a.

The Eleventh Circuit was wrong. The power and logic of Judge Gorsuch's textual reading is not at all diminished by the fact that courts uniformly do not require proof of knowledge of an interstate commerce nexus. Courts have long distinguished between substantive and jurisdictional elements of federal crimes. "[T]he substantive elements of a federal statute describe the evil Congress seeks to prevent; the jurisdictional element connects the law to one of Congress's enumerated powers, thus establishing legislative authority." *Torres*, 136 S. Ct. at 1630.

While both kinds of elements must be proven to a jury beyond a reasonable

doubt, "they are not created equal for every purpose." *Id*. Courts generally "interpret criminal statutes to require that a defendant possess a *mens rea*, or guilty mind, as to every [substantive] element of an offense," but the same is not true of jurisdictional elements. *Id*. ("[T]he existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute.") (quoting *United States v. Feola*, 420 U.S. 671, 677, n.9 (1975)).

Here, unlike the requirement that the gun at issue have moved in interstate commerce, the requirement that Mr. Rehaif be an alien "illegally or unlawfully in the United States" when he possessed the firearm and ammunition is undoubtedly substantive. In fact, it is the only element that makes his conduct illegal. It is lawful to possess a gun that has moved in interstate commerce. It is lawful to go to a shooting range and rent a gun to shoot there, and to purchase ammunition. The only thing that makes such conduct illegal, under § 922(g)(5)(A), is if the person happens to be illegally or unlawfully in the United States at the time.

Because the plain language of the statute is clear, the Eleventh Circuit's ensuing discussion of legislative history is unnecessary. Pet. App. 12a-14a.

The court's comparison to the strict liability common law crimes of statutory rape and bigamy, Pet. App. 14a-15a, is inapt because Congress, by enacting § 924(a)(2), specifically requires a person to "knowingly" violate § 922(g) before

punishment can be imposed for that violation.

Finally, the court below points to cases from this Court where proof of defendant's knowledge of *his own status* was not required. Pet. App. 15a-17a (emphasis in original). The obvious reason for those cases not requiring proof of the defendant's own status is that the defendant's status in those cases was not an element of the crime. The opposite is true here. The plain language of § 924(a)(2) requires a defendant to "knowingly" violate § 922(g), and one of the elements of a § 922(g) case is that the defendant, as charged here, be "an alien . . . illegally or unlawfully in the United States," or, as is more often charged, that the defendant be a convicted felon, or that he comes within any of the several other statuses that prohibit possession of a firearm or ammunition. *See* § 922(g).[4]

[4] The Eleventh Circuit's assertion that "defendant's knowledge of his own status offers little room for 'reasonable mistake,'" Pet. App. 17a, is belied by the facts of this case. As discussed above, the planned defense was that Mr. Rehaif did not know he was an alien "illegally or unlawfully in the United States" and thus legally unable to possess firearms or ammunition, and that defense was viable given the facts of the case.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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Appendix

Decision Below
(Revised Opinion filed March 26, 2018)

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-15860

D. C. Docket No. 6:16-cr-00003-JA-DAB-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HAMID MOHAMED AHMED ALI REHAIF,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(March 26, 2018)

Before ED CARNES, Chief Judge, WILLIAM PRYOR, and DUBINA, Circuit Judges.

DUBINA, Circuit Judge:

We *sua sponte* vacate our prior published opinion, *United States v. Rehaif*, 868 F.3d 907 (11th Cir. 2017), and substitute this revised opinion in lieu thereof.

Hamid Mohamed Ahmed Ali Rehaif ("Rehaif"), a citizen of the United Arab Emirates, appeals his convictions for possessing a firearm and ammunition while being illegally or unlawfully in the United States, in violation of 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2). Rehaif argues that the district court erred by instructing the jury that the government did not have to prove that he knew he was in the United States unlawfully. Rehaif further argues that the district court abused its discretion by failing to instruct the jury that an alien is not unlawfully in the United States until the U.S. Citizenship and Immigration Services ("USCIS") or an immigration judge has declared him unlawfully present. After reviewing the record, reading the parties' briefs, and having the benefit of oral argument, we affirm the convictions.

I. BACKGROUND

The United States issued Rehaif an F-1 nonimmigrant student visa to study mechanical engineering at the Florida Institute of Technology ("FIT") on the condition that he pursue a full course of study—except as otherwise authorized by a "Designated School Official" —or engage in training following graduation. When applying for his F-1 student visa, Rehaif signed a Certificate of Eligibility for Nonimmigrant Student Status, certifying that he agreed to comply with the

terms and conditions of his admission and that he sought "to enter or remain in the United States temporarily, and solely for the purpose of pursuing a full course of study."

After three semesters at FIT, Rehaif was academically dismissed on December 17, 2014. One month later, on January 21, 2015, FIT sent Rehaif an email stating that he had been academically dismissed and that his "immigration status will be terminated on February 5, 2015, unless you transfer out before that date, or you notify our office that you have already left the United States." Rehaif did not take any action. As such, according to the Department of Homeland Security's foreign student database, Rehaif's status was officially terminated on February 23, 2015.

On December 2, 2015, Rehaif went to a shooting range. He purchased a box of ammunition and rented a firearm for one hour. Videos from the shooting range show Rehaif firing two different firearms. The firearms were manufactured in Austria and then imported into the United States through Georgia. The ammunition was manufactured in Idaho.

Six days later, an employee at the Hilton Rialto Hotel in Melbourne, Florida, called the police to report that a guest at the hotel—Rehaif—had been acting suspiciously. Special Agent Tom Slone with the Federal Bureau of Investigation went to the hotel to speak with Rehaif. Rehaif admitted, in an unrecorded

interview, that he had fired two firearms at the shooting range and that he was aware that his student visa was out of status because he was no longer enrolled in school. Rehaif consented to a search of his hotel room, where the agents found the remaining ammunition that he had purchased at the shooting range.

A federal grand jury charged Rehaif with two counts of violating § 922(g)(5)(A). That statute provides that:

> (g) It shall be unlawful for any person —
> . . .
> (5) who, being an alien —
> (A) is illegally or unlawfully in the United States . . .
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition. . . .

18 U.S.C. § 922(g)(5)(A). Section 922(g) does not itself provide for any punishment. That gap is filled by § 18 U.S.C. § 924(a)(2), which states that:

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

18 U.S.C. § 924(a)(2).

Before trial, both parties submitted proposed jury instructions to the district court. During the charge conference, the government requested an instruction stating that "[t]he United States is not required to prove that the defendant knew that he was illegally or unlawfully in the United States." Rehaif disagreed, arguing that the United States had to prove both that he had knowingly possessed a firearm and that he had known of his prohibited status–that he was illegally or unlawfully

in the United States when he had possessed the firearm. The district court overruled Rehaif's objection.

The government also requested an instruction stating that "[t]he alien's presence becomes unlawful upon the date of the status violation." Rehaif, on the other hand, proposed an instruction stating that "[a] person admitted to the United States on a student visa does not become unlawfully present until an Immigration Officer or an Immigration Judge determines that [he] ha[s] violated [his] student status." The district court gave an instruction closer to the government's request, telling the jury that "[a]n alien illegally or unlawfully in the United States is an alien whose presence within the United States is forbidden or not authorized by law." Rehaif then perfected this appeal, challenging the district court's jury instructions with respect to the "knowingly" requirement and the "illegal or unlawful" requirement, as well as the constitutionality of §922.[1]

II. STANDARD OF REVIEW

This court will review the district court's jury instructions "*de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the objecting party." *United States v. James*, 642 F.3d 1333, 1337 (11th Cir. 2011) (quotation omitted).

[1] Rehaif argues that 18 U.S.C. § 922(g) is unconstitutional, both facially and as applied, because it has too attenuated a connection to interstate commerce. This argument is foreclosed by circuit precedent. *See United States v. Wright*, 607 F.3d 708, 715-16 (11th Cir. 2010); *United States v. Scott*, 263 F.3d 1270, 1271-74 (11th Cir. 2001).

III. ANALYSIS

On appeal, Rehaif challenges the district court's jury instructions regarding the "knowingly" requirement and the "illegal or unlawful" requirement.

With respect to the "knowingly" requirement, Rehaif argues that the district court erred by instructing the jury that the government need not prove that he knew he was in the United States illegally or unlawfully, because the phrase "knowingly violates," in 18 U.S.C. § 924(a)(2), modifies § 922(g) to require proof that the defendant knew at the time that he possessed the firearm that he was in the United States illegally or unlawfully. Rehaif further argues that, although several courts have ruled that knowledge of one's status as a convicted felon is not necessary for a conviction under § 922(g)(1), the question of whether knowledge is necessary for a conviction under § 922(g)(5)(A) is not settled. As such, Rehaif argues, the district court's jury instruction misstated the law and eviscerated his planned defense that he did not know he was in the United States illegally or unlawfully.

The government argues that a violation of § 922(g) only requires that the defendant knowingly possessed a firearm, not that the defendant had knowledge of his status, and that nothing in the statute indicates that § 922(g)(5)(A) has a different mens rea requirement. For support, the government points to the fact that no circuit has required proof of the defendant's knowledge of his prohibited status under any subsection of § 922(g). The government also argues that § 922(g)

consolidates previously separate sections that did not contain mens rea provisions but that had been interpreted to require knowledge of the firearm possession, and that Congress did not intend to expand the mens rea requirement when it consolidated the statutes.

With respect to the "illegal or unlawful" requirement, Rehaif argues that federal immigration law defines "unlawful presence" as presence in the United States after the expiration of the period of stay authorized by the Attorney General. This definition, he argues, supports his position that a person is not unlawfully in the United States until a USCIS official or an immigration judge declares him to be so. Additionally, Rehaif argues that both his position and the government's position have a basis in case law or statute and that the ambiguity in the statute requires the application of the rule of lenity.

The government responds that, although this court has not addressed this issue, five other circuits have held that an alien who is permitted to remain in the United States only for the duration of his status becomes illegally or unlawfully in the United States under § 922(g)(5)(A) upon the violation of his status. Therefore, Rehaif became unlawfully in the United States the moment he failed to comply with the conditions of his F-1 visa. The government also argues that the case Rehaif cites to support his position does not state that an alien only becomes illegally or unlawfully present when a USCIS officer or immigration judge

determines that he has violated his status. Moreover, the government argues that because the statute is not grievously ambiguous, the rule of lenity does not apply.

In short, we are left with two questions: (1) what does "knowingly" modify; and (2) what does "illegally or unlawfully" mean? Each argument will be addressed in turn.

A. "Knowingly"

Under 18 U.S.C. § 922(g), persons falling within particular categories are prohibited from possessing any firearm or ammunition that has been transported in interstate commerce. To successfully prosecute a defendant under § 922(g), the government must prove three elements: (1) the defendant falls within one of the categories listed in the § 922(g) subdivisions ("the status element"); (2) the defendant possessed a firearm or ammunition ("the possession element"); and (3) the possession was "in or affecting [interstate or foreign] commerce." *See* 18 U.S.C. § 922(g). By its own terms, § 922(g) does not have a mens rea requirement; instead, the applicable mens rea is set out by § 924(a)(2), which provides that "[w]hoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both." 18 U.S.C. § 924(a)(2). It is undisputed that the mens rea requirement applies to the possession element—that Rehaif "knowingly possessed" the firearm. *See United States v. Winchester*, 916 F.2d 601, 604 (11th Cir. 1990). At issue is whether the

"knowingly" requirement also applies to the status element—that Rehaif knows he is an alien "illegally or unlawfully in the United States." 18 U.S.C. § 922(g)(5)(A).

As Rehaif points out, the strongest argument in favor of requiring proof of mens rea with respect to the status element is laid out in then-Judge, now Justice Gorsuch's concurrence in *United States v. Games-Perez*. 667 F.3d 1136, 1142 (10th Cir. 2012) (Gorsuch, J., concurring in judgment). Acknowledging that prior precedent dictated that the mens rea requirement does not apply to the status element, then-Judge Gorsuch concluded that the plain language of the statute compelled the opposite conclusion. *Id.* ("[Prior precedent] reads the word "knowingly" as leapfrogging over the very first § 922(g) element and touching down only at the second. This interpretation defies linguistic sense—and not a little grammatical gravity."). In drawing such a conclusion, then-Judge Gorsuch noted that, "Congress gave us three elements in a particular order. And it makes no sense to read the word 'knowingly' as so modest that it might blush in the face of the very first element only to regain its composure and reappear at the second." *Id.* at 1144. He also pointed out that "[t]he Supreme Court has long held that courts should presum[e] a mens rea requirement attaches to each of the statutory elements that criminalize otherwise innocent conduct." *Id.* at 1145 (quotations omitted) (alteration in original).

While then-Judge Gorsuch opined that § 922(g) "is a perfectly clear law as it is written, plain in its terms, straightforward in its application," *id.*, there is evidence to suggest otherwise. The fact that § 924(a)(2) only punishes defendants who "knowingly violate" § 922(g) begs the question "what does it mean to knowingly violate the statute?" Does the statute proscribe merely conduct, or both conduct and the surrounding circumstances that make the conduct a federal crime? *See United States v. Langley*, 62 F.3d 602, 613 (4th Cir. 1995) (en banc) (Phillips, J., concurring in part and dissenting in part) *cert. denied*, 516 U.S. 1083, 116 S. Ct. 797 (1996). Indeed, then-Judge Gorsuch acknowledged that the term "knowingly" in § 924(a)(2) does not apply to *every* provision of § 922(g), *Games-Perez*, 667 F.3d at 1144, for § 922(g) requires the "firearm or ammunition [to have] been shipped or transported in interstate or foreign commerce," and the Supreme Court has repeatedly explained that "the existence of [a] fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act." *Torres v. Lynch*, 136 S. Ct. 1619, 1631 (2016) (quoting *United States v. Feola*, 420 U.S. 671, 676 n.9, 95 S. Ct. 1255, 1260 n. 9 (1975)). The plain text of the statutes does not require that the defendant "know" every detail outlined in § 922(g). At most, then-Judge Gorsuch's concurrence serves to illustrate that the language of § 922 and § 924(a)(2) is not "perfectly clear," and that other tools of

interpretation must be employed to ascertain whether a mens rea requirement attaches to the status element.

In *United States v. Jackson*, we resolved the issue of whether "knowingly" applies to the status element of § 922(g).[2] 120 F.3d 1226 (11th Cir. 1997). *Jackson* involved § 922(g)(1), which is identical to § 922(g)(5)(A), except that it proscribes gun possession by felons, as opposed to possession by those illegally or unlawfully in this country. *Compare* 18 U.S.C. § 922(g)(1), *with* § 922(g)(5)(A). Much like Rehaif, the defendant in *Jackson* argued that "the district court erroneously instructed the jury that it was not necessary for [him] to know that he had been convicted of a felony" to find him guilty of violating § 922(g)(1). *Jackson*, 120 F.3d at 1229. Relying on cases from the Fourth and Fifth Circuits, this court held that the government need not prove that the defendant knew of his prohibited status. *See id.* (citing *Langley*, 62 F.3d at 604–06 (majority opinion); *United States v. Dancy*, 861 F.2d 77, 81 (5th Cir.1988)). We our bound by this decision "[u]nder our prior precedent rule, [which requires us] to follow a binding precedent in this Circuit unless and until it is overruled by this court en banc or by

[2] This court has not specifically addressed the illegal-alien prohibited status of § 922(g)(5)(A), but we have recognized that "each subdivision of subsection (g) differs only in its requirement that the offender have a certain "status under the law." *Winchester*, 916 F.2d at 605 (quotations omitted). Not only would it be bizarre for two § 922(g) subdivisions to have different mens rea requirements, but also, there is nothing in the text or history of § 922 to support such deviation.

the Supreme Court." *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017) (internal quotation and citation omitted).

Additionally, there is a longstanding uniform body of precedent holding that the government does not have to satisfy a mens rea requirement with respect to the status element of § 922. "The predecessor statutes to § 922(g)[]" that forbade felons to transport, receive, or possess firearms "contained no mens rea requirement," leading courts "interpreting these processor statutes [to] require[] . . . proof that the defendant knowingly received, transported, or possessed a firearm." *Langley*, 62 F.3d at 604 (internal quotation and citation omitted). "[B]ut, at the same time, [these decisions] recognized that the defendant's knowledge of the weapon's interstate nexus or of his felon status was irrelevant." *Id.* (internal quotation and citation omitted). True, in 1986, Congress amended § 924(a) to require "knowing" violations of § 922(g). *Id.*; *see also* Pub. L. No. 99–308, § 104(a), 100 Stat. 449, 456 (1986). But this codification did not compel a new interpretation. Although "a *significant change* in [statutory] language" ordinarily "is presumed to entail a change in meaning," ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 256 (2012) (emphasis added), the addition of a mens rea *identical* to that already imposed by courts does not suggest a change in meaning. Although defendants pointed to this change as evidence that the government must prove "that the defendant knew not only that he

possessed a firearm but that it had an interstate nexus and that he was a felon," *Dancy*, 861 F.2d at 81, courts routinely rejected these arguments, *See, e.g.*, *id.* at 81–82; *Langley*, 62 F.3d 604–06; *Jackson*, 120 F.3d 1226. And no court of appeals has required proof of the defendant's knowledge of his prohibited status under any subsection of § 922(g).[3]

Moreover, despite ample opportunity to do so, Congress has never revisited the issue.[4] "The long time failure of Congress to alter [the law] after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488, 60 S. Ct. 982, 989 (1940); *see also Kimble v. Marvel*

[3] *See United States v. Smith*, 940 F.2d 710, 713-14 (1st Cir. 1991) (felony conviction, § 922(g)(1)); *United States v. Huet*, 665 F.3d 588, 596 (3d Cir. 2012) (same); *Langley*, 62 F.3d at 606 (same); *United States v. Butler*, 637 F.3d 519, 524-25 (5th Cir. 2011) (dishonorable discharge, § 922(g)(6)); *United States v. Olender*, 338 F.3d 629, 637 (6th Cir. 2003) (felony conviction, § 922(g)(1)); *United States v. Stein*, 712 F.3d 1038, 1041 (7th Cir. 2013) (misdemeanor domestic violence conviction, § 922(g)(9)); *United States v. Kind*, 194 F.3d 900, 907 (8th Cir. 1999) (felony conviction, § 922(g)(1)); *United States v. Kafka*, 222 F.3d 1129, 1131 (9th Cir. 2000) (domestic violence restraining order, § 922(g)(8)); *United States v. Games-Perez*, 667 F.3d 1136, 1140 (10th Cir. 2012) (majority opinion) (felony conviction, § 922(g)(1)); *United States v. Bryant*, 523 F.3d 349, 354 (D.C. Cir. 2008) (same).

[4] As the Fourth Circuit explained in *Langley*, "[t]he predecessor statutes to § 922(g)(1) contained no mens rea requirement. However, cases interpreting these predecessor statutes made clear that these statutes required proof of a mens rea element and were not strict liability offenses; that is, courts required proof that 'the defendant knowingly received, transported, or possessed a firearm,' but, at the same time, recognized that 'the defendant's knowledge of the weapon's interstate nexus or of his felon status was irrelevant.' " 62 F.3d at 604 (citing *Dancy*, 861 F.2d at 81). We presume that when Congress enacted the Firearms Owners' Protection Act of 1986, establishing § 922(g), and its subsequent amendments, it was aware of this history. *See White v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1434 (11th Cir. 1997) ("Congress is assumed to act with the knowledge of existing law and interpretations when it passes new legislation.").

Entm't, LLC, 135 S. Ct. 2401, 2409–10 (2015) ("All our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects. . . . Congress's continual reworking of the patent laws . . . further supports leaving the decision in place."). Indeed, after appellate courts confirmed that the mens rea requirement of § 924 applied only to the possession element of offenses under § 922, Congress *expanded* the scope of § 922(g) without revisiting § 924(a)(2). In 1996—after the decisions in *Dancy* and *Langley*—Congress extended the prohibition on firearm possession to individuals "who ha[ve] been convicted in any court of a misdemeanor crime of domestic violence." Pub. L. No. 104–208, § 658, 110 Stat. 3009, 372 (1996) (codified at § 922(g)(9)).

Although it may seem that failing to require proof that the defendant had the requisite knowledge with respect to the status element is at odds with the traditional rule that the government must prove mens rea for each substantive element of the crime, upon closer inspection, even at common law and early American law, the government did not have the burden of proving that the defendant knew a specific fact or detail about himself. Two examples illustrate this point: statutory rape and bigamy. In the instance of statutory rape, while there may be issues of proof with respect to the victim's age, the government does not

have to prove that the defendant knew he was the age of majority. *See, e.g.*, *State v. Running*, 208 N.W. 231, 233–34 (N.D. 1926) (requiring that the government prove the defendant's age–but not that he knew his age–to establish the degree of statutory rape); *Hall v. State*, 58 N.W. 929, 930 (Neb. 1894) (requiring that an information charging statutory rape charge that the defendant was over 18, but not that he knew he was over 18). Similarly, with respect to bigamy, the government does not have to prove that the defendant knew he was married. *See* G.A. Endlich, *The Doctrine of Mens Rea*, 13 CRIM. L. MAG. 831, 841–42 (1891). In short, even traditional crimes have never required the defendant's knowledge of the status element. [5]

That the Supreme Court has repeatedly underscored a "presumption in favor of a scienter requirement [for] . . . 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, 469 (1994); *see also Torres*, 136 S. Ct. at 1630 ("In general, courts interpret criminal statutes to require that a defendant possess a mens rea, or guilty mind, as to every element of an offense."), does not change the conclusion that the government need not prove that the defendant knew *his own status*, even when this status is what brings the defendant within the ambit of a criminal law. Instead, precedents on this point require only that the government prove mens rea

[5] Of course, there could be a mistake of fact defense–but such defense is not alleged here.

for elements of an offense that concern the characteristics of *other people* and *things*. For example, in *Staples v. United States*, the Supreme Court explained that the government could secure a conviction under a statute that forbade the possession of automatic firearms only if it could prove that the defendant "knew" that the gun he possessed was capable of automatic fire in addition to proving that the defendant knowingly possessed the gun. 511 U.S. 600, 602–03, 619, 114 S. Ct. 1793, 1795–96 (1994). In *X-Citement Video*, the Supreme Court interpreted a statute that forbade the "knowing" transportation, receipt, or distribution of "visual depiction[s] involv[ing] the use of a minor engaging in sexually explicit conduct" to require the government to prove that the defendant knew that the depiction in question featured a minor, and not just that the defendant knowingly possessed the depiction. 513 U.S. at 68, 78, 115 S. Ct. at 467, 472 (internal quotation and citation omitted). In *Flores-Figueroa v. United States*, the Supreme Court explained that a statute that forbade a person from "knowingly transfer[ing], possess[ing], or us[ing] . . . *a means of identification of another person*" required the government to prove that the defendant knew that the identification belonged to another person, and not just that the defendant knowingly used the identification. 556 U.S. 646, 647, 129 S. Ct. 1886, 1888 (2009) (internal citation and quotation omitted). And in *Posters 'N' Things, Ltd. v. United States*, the Supreme Court interpreted a statute that forbade the sale of drug paraphernalia to require the

government to prove that the defendant "knew that the items at issue [were] likely to be used with illegal drugs." 511 U.S. 513, 524, 114 S. Ct. 1747, 1753 (1994). But we are aware of no precedent that requires the government to prove that the defendant knew of his own status. To the contrary, the Supreme Court has suggested that the "presumption of mens rea" for an element of an offense carries far less force when there is little "opportunity for reasonable mistake" about that element. *X-Citement Video*, 513 U.S. at 72 n. 2, 115 S. Ct. at 469 n. 2. A defendant's knowledge of his own status offers little room for "reasonable mistake." *Id.*

Finally, as the Fourth Circuit held in *Langley*,

> Our conclusion that Congress did not intend, through [Firearms Owners' Protection Act of 1986] to place the additional evidentiary burdens on the government suggested by Langley is supported by several other considerations. First, it is highly unlikely that Congress intended to make it easier for felons to avoid prosecution by permitting them to claim that they were unaware of their felony status and/or the firearm's interstate nexus. Second, in light of Congress' repeated efforts to fight violent crime and the commission of drug offenses, it is unlikely that Congress intended to make the application of the enhancement provision contained in § 924(e)(1) more difficult to apply.

Id. at 606 (footnote omitted).

Textual support, prior precedent, congressional acquiescence, and analogous common law all support the conclusion that there is no mens rea requirement with respect to the status element of § 922(g). Therefore, we conclude that the district court did not err when it gave the jury instruction stating that "[t]he government is

not required to prove that the defendant knew that he was illegally or unlawfully in the United States."

B. "Illegally or unlawfully"

While this court has never addressed at what point an alien becomes illegally or unlawfully in the United States for purposes of § 922(g)(5)(A), Rehaif's argument that an alien does not become illegal until he has been adjudicated as such by an USCIS official or an immigration judge fails for four reasons.

First, the district court's instruction– that "[a]n alien illegally or unlawfully in the United States is an alien whose presence within the United States is forbidden or not authorized by law"–is more consistent with the plain text of § 922(g)(5)(A). *See* Unlawful, Black's Law Dictionary (10th ed. 2014) (defining "unlawful" as "[n]ot authorized by law").

Second, as the Tenth Circuit explained in *United States v. Atandi*, "Congress has proven quite capable of demonstrating the circumstances in which it intended federal firearms disabilities to hinge upon the result of an adjudication." 376 F.3d 1186 (10th Cir. 2004). Other § 922(g) subdivisions refer to, for example, a person "who is subject to a court order[ed]" restraining order, or to a person "who has been convicted in any court of a misdemeanor crime of domestic violence." 18 U.S.C. § 922(g)(8)–(9); *Atandi*, 376 F.3d at 1188. If Congress had intended for § 922(g)(5)(A) to depend on a decisionmaker's adjudication, it would have so stated.

Atandi, 376 F.3d at 1188 (citing *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983)).

Third, the Immigration and Nationality Act's ("INA") definition of "unlawful" is consistent with the district court's instruction. The INA prohibits the admission of aliens who have been unlawfully present in the United States for certain periods of time. INA § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I). The INA states that "[f]or purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States *after the expiration of the period of stay authorized* by the Attorney General. . . ." INA § 212(a)(9)(B)(ii), 8 U.S.C. § 1182(a)(9)(B)(ii) (emphasis added). As such, a student admitted under an F-1 visa is unlawfully present if he remains in the United States after he is no longer enrolled as a full-time student. *See* 8 C.F.R. § 214.2(f)(5)(i) (defining duration of status as "the time during which an F-1 student is pursuing a full course of study at an educational institution approved by the [USCIS] for attendance by foreign students, or engaging in authorized practical training following completion of studies."); *see also* 27 C.F.R. § 478.11 (defining unlawful as "any alien . . . [w]ho is a nonimmigrant and whose authorized period of stay has expired or who has violated the terms of the nonimmigrant category in which he or she was admitted.").

Finally, the rule of lenity does not apply because § 922(g)(5)(A)'s plain text is not ambiguous. *See Johnson v. U.S.*, 529 U.S. 694, 713 n.13, 120 S. Ct. 1795, 1807 n.13 (2000) ("Lenity applies only when the equipoise of competing reasons cannot otherwise be resolved"). Furthermore, even if we found § 922(g)(5)(A) ambiguous, the ambiguity is resolved by the definition provided by 27 C.F.R. § 478.11, which was promulgated in 1997. *See* 62 Fed. Reg. 34,634, 34,639 (June 27, 1997). The rule of lenity is not applicable where a longstanding, unambiguous regulation gives potential offenders fair notice of what is proscribed. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or.*, 515 U.S. 687, 704 n.18, 115 S. Ct. 2407, 2416 n.18 (1995).

Therefore, we conclude the district court did not err when it instructed the jury that "[a]n alien illegally or unlawfully in the United States is an alien whose presence within the United States is forbidden or not authorized by law."

IV. CONCLUSION

For the aforementioned reasons, we affirm Rehaif's convictions.

AFFIRMED.

Initial Opinion
(filed August 17, 2017)

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-15860

D. C. Docket No. 6:16-cr-00003-JA-DAB-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HAMID MOHAMED AHMED ALI REHAIF,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(August 17, 2017)

Before ED CARNES, Chief Judge, WILLIAM PRYOR, and DUBINA, Circuit Judges.

DUBINA, Circuit Judge:

Hamid Mohamed Ahmed Ali Rehaif ("Rehaif"), a citizen of the United Arab Emirates, appeals his convictions for possessing a firearm and ammunition while being illegally or unlawfully in the United States, in violation of 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2). Rehaif argues that the district court erred by instructing the jury that the government did not have to prove that he knew he was in the United States unlawfully. Rehaif further argues that the district court abused its discretion by failing to instruct the jury that an alien is not unlawfully in the United States until the U.S. Citizenship and Immigration Services ("USCIS") or an immigration judge has declared him unlawfully present. After reviewing the record, reading the parties' briefs, and having the benefit of oral argument, we affirm the convictions.

I. BACKGROUND

The United States issued Rehaif an F-1 nonimmigrant student visa to study mechanical engineering at the Florida Institute of Technology ("FIT") on the condition that he pursue a full course of study–except as otherwise authorized by a "Designated School Official"–or engage in training following graduation. When applying for his F-1 student visa, Rehaif signed a Certificate of Eligibility for Nonimmigrant Student Status, certifying that he agreed to comply with the terms and conditions of his admission and that he sought "to enter or remain in the

United States temporarily, and solely for the purpose of pursuing a full course of study."

After three semesters at FIT, Rehaif was academically dismissed on December 17, 2014. One month later, on January 21, 2015, FIT sent Rehaif an email stating that he had been academically dismissed and that his "immigration status will be terminated on February 5, 2015, unless you transfer out before that date, or you notify our office that you have already left the United States." Rehaif did not take any action. As such, according to the Department of Homeland Security's foreign student database, Rehaif's status was officially terminated on February 23, 2015.

On December 2, 2015, Rehaif went to a shooting range. He purchased a box of ammunition and rented a firearm for one hour. Videos from the shooting range show Rehaif firing two different firearms. The firearms were manufactured in Austria and then imported into the United States through Georgia. The ammunition was manufactured in Idaho.

Six days later, an employee at the Hilton Rialto Hotel in Melbourne, Florida, called the police to report that a guest at the hotel–Rehaif–had been acting suspiciously. Special Agent Tom Slone with the Federal Bureau of Investigation went to the hotel to speak with Rehaif. Rehaif admitted, in an unrecorded interview, that he had fired two firearms at the shooting range and that he was

aware that his student visa was out of status because he was no longer enrolled in school. Rehaif consented to a search of his hotel room, where the agents found the remaining ammunition that he had purchased at the shooting range.

A federal grand jury charged Rehaif with two counts of violating § 922(g)(5)(A). That statute provides that:

> (g) It shall be unlawful for any person —
> . . .
> (5) who, being an alien —
> (A) is illegally or unlawfully in the United States . . .
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition. . . .

18 U.S.C. § 922(g)(5)(A). Section 922(g) does not itself provide for any punishment. That gap is filled by § 18 U.S.C. § 924(a)(2), which states that:

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

18 U.S.C. § 924(a)(2).

Before trial, both parties submitted proposed jury instructions to the district court. During the charge conference, the government requested an instruction stating that "[t]he United States is not required to prove that the defendant knew that he was illegally or unlawfully in the United States." Rehaif disagreed, arguing that the United States had to prove both that he had knowingly possessed a firearm and that he had known of his prohibited status–that he was illegally or unlawfully

in the United States when he had possessed the firearm. The district court overruled Rehaif's objection.

The government also requested an instruction stating that "[t]he alien's presence becomes unlawful upon the date of the status violation." Rehaif, on the other hand, proposed an instruction stating that "[a] person admitted to the United States on a student visa does not become unlawfully present until an Immigration Officer or an Immigration Judge determines that [he] ha[s] violated [his] student status." The district court gave an instruction closer to the government's request, telling the jury that "[a]n alien illegally or unlawfully in the United States is an alien whose presence within the United States is forbidden or not authorized by law." Rehaif then perfected this appeal, challenging the district court's jury instructions with respect to the "knowingly" requirement and the "illegal or unlawful" requirement, as well as the constitutionality of §922.[1]

II. STANDARD OF REVIEW

This court will review the district court's jury instructions "*de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the objecting party." *United States v. James*, 642 F.3d 1333, 1337 (11th Cir. 2011) (quotation omitted).

[1] Rehaif argues that 18 U.S.C. § 922(g) is unconstitutional, both facially and as applied, because it has too attenuated a connection to interstate commerce. This argument is foreclosed by circuit precedent. *See United States v. Wright*, 607 F.3d 708, 715-16 (11th Cir. 2010); *United States v. Scott*, 263 F.3d 1270, 1271-74 (11th Cir. 2001).

III. ANALYSIS

On appeal, Rehaif challenges the district court's jury instructions regarding the "knowingly" requirement and the "illegal or unlawful" requirement.

With respect to the "knowingly" requirement, Rehaif argues that the district court erred by instructing the jury that the government need not prove that he knew he was in the United States illegally or unlawfully, because the phrase "knowingly violates," in 18 U.S.C. § 924(a)(2), modifies § 922(g) to require proof that the defendant knew at the time that he possessed the firearm that he was in the United States illegally or unlawfully. Rehaif further argues that, although several courts have ruled that knowledge of one's status as a convicted felon is not necessary for a conviction under § 922(g)(1), the question of whether knowledge is necessary for a conviction under § 922(g)(5)(A) is not settled. As such, Rehaif argues, the district court's jury instruction misstated the law and eviscerated his planned defense that he did not know he was in the United States illegally or unlawfully.

The government argues that a violation of § 922(g) only requires that the defendant knowingly possessed a firearm, not that the defendant had knowledge of his status, and that nothing in the statute indicates that § 922(g)(5)(A) has a different mens rea requirement. For support, the government points to the fact that no circuit has required proof of the defendant's knowledge of his prohibited status under any subsection of § 922(g). The government also argues that § 922(g)

consolidates previously separate sections that did not contain mens rea provisions but that had been interpreted to require knowledge of the firearm possession, and that Congress did not intend to expand the mens rea requirement when it consolidated the statutes.

With respect to the "illegal or unlawful" requirement, Rehaif argues that federal immigration law defines "unlawful presence" as presence in the United States after the expiration of the period of stay authorized by the Attorney General. This definition, he argues, supports his position that a person is not unlawfully in the United States until a USCIS official or an immigration judge declares him to be so. Additionally, Rehaif argues that both his position and the government's position have a basis in case law or statute and that the ambiguity in the statute requires the application of the rule of lenity.

The government responds that, although this court has not addressed this issue, five other circuits have held that an alien who is permitted to remain in the United States only for the duration of his status becomes illegally or unlawfully in the United States under § 922(g)(5)(A) upon the violation of his status. Therefore, Rehaif became unlawfully in the United States the moment he failed to comply with the conditions of his F-1 visa. The government also argues that the case Rehaif cites to support his position does not state that an alien only becomes illegally or unlawfully present when a USCIS officer or immigration judge

determines that he has violated his status. Moreover, the government argues that because the statute is not grievously ambiguous, the rule of lenity does not apply.

In short, we are left with two questions: (1) what does "knowingly" modify; and (2) what does "illegally or unlawfully" mean? Each argument will be addressed in turn.

A. "Knowingly"

Under 18 U.S.C. § 922(g), persons falling within particular categories are prohibited from possessing any firearm or ammunition that has been transported in interstate commerce. To successfully prosecute a defendant under § 922(g), the government must prove three elements: (1) the defendant falls within one of the categories listed in the § 922(g) subdivisions ("the status element"); (2) the defendant possessed a firearm ("the possession element"); and (3) that the possession was "in or affecting [interstate or foreign] commerce." *See* 18 U.S.C. § 922(g). By its own terms, § 922(g) does not have a mens rea requirement; instead, the applicable mens rea is set out by § 924(a)(2), which provides that "[w]hoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both." 18 U.S.C. § 924(a)(2). It is undisputed that the mens rea requirement applies to the possession element–that Rehaif "knowingly possessed" the firearm. *See United States v. Winchester*, 916 F.2d 601, 604 (11th Cir. 1990). At issue is whether the "knowingly" requirement

also applies to the status element–that Rehaif knows he is an alien "illegally or unlawfully in the United States." 18 U.S.C. § 922(g)(5)(A).

As Rehaif points out, the strongest argument in favor of requiring proof of mens rea with respect to the status element is laid out in then-Judge, now Justice Gorsuch's concurrence in *United States v. Games-Perez*. 667 F.3d 1136, 1142 (10th Cir. 2012) (Gorsuch, J., concurring in judgment). Acknowledging that prior precedent dictated that the mens rea requirement does not apply to the status element, then-Judge Gorsuch concluded that the plain language of the statute compelled the opposite conclusion. *Id.* ("[Prior precedent] reads the word "knowingly" as leapfrogging over the very first § 922(g) element and touching down only at the second. This interpretation defies linguistic sense—and not a little grammatical gravity."). In drawing such a conclusion, then-Judge Gorsuch noted that, "Congress gave us three elements in a particular order. And it makes no sense to read the word "knowingly" as so modest that it might blush in the face of the very first element only to regain its composure and reappear at the second." *Id.* at 1144. He also pointed out that "[t]he Supreme Court has long held that courts should presum[e] a mens rea requirement attaches to each of the statutory elements that criminalize otherwise innocent conduct." *Id.* at 1145 (quotations omitted) (alteration in original).

While then-Judge Gorsuch opined that § 922(g) "is a perfectly clear law as it is written, plain in its terms, straightforward in its application," *id.*, there is evidence to suggest otherwise. The fact that § 924(a)(2) only punishes defendants who "knowingly violate" § 922(g) begs the question "what does it mean to knowingly violate the statute?" Does the statute proscribe merely conduct, or both conduct and the surrounding circumstances that make the conduct a federal crime? *See United States v. Langley*, 62 F.3d 602, 613 (4th Cir. 1995) (en banc) (Phillips, J., concurring in part and dissenting in part) *cert. denied*, 516 U.S. 1083, 116 S. Ct. 797 (1996). While the defendant's status might be inextricably tied to the violation, the actual violation occurs when the defendant knowingly possesses a firearm.

Moreover, although the Supreme Court has instructed us to presume a mens rea requirement attaches to statutory elements that criminalize innocent conduct, *see United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72, 115 S. Ct. 464, 469 (1994), the status element of § 922(g) does not involve innocent conduct. Indeed, the only innocent conduct that § 922(g) does criminalize is the possession of a gun, and the mens rea requirement attaches to the possession element. At most, then-Judge Gorsuch's concurrence serves to illustrate that the language of § 922 and § 924(a)(2) is not "perfectly clear," and that other tools of interpretation must be

employed to ascertain whether a mens rea requirement attaches to the status element.

In *United States v. Jackson*, we resolved the issue of whether "knowingly" applies to the status element of § 922(g).[2] 120 F.3d 1226 (11th Cir. 1997). *Jackson* involved § 922(g)(1), which is identical to § 922(g)(5)(A), except that it proscribes gun possession by felons, as opposed to possession by those illegally or unlawfully in this country. *Compare* 18 U.S.C. § 922(g)(1), *with* § 922(g)(5)(A). Much like Rehaif, the defendant in *Jackson* argued that "the district court erroneously instructed the jury that it was not necessary for [him] to know that he had been convicted of a felony" to find him guilty of violating § 922(g)(1). *Jackson*, 120 F.3d at 1229. Relying on cases from the Fourth and Fifth Circuits, this court held that the government need not prove that the defendant knew of his prohibited status. *See id.* (citing *Langley*, 62 F.3d at 604-606 (majority opinion); *United States v. Dancy*, 861 F.2d 77, 81 (5th Cir.1988)).

Additionally, there is a longstanding uniform body of precedent holding that the government does not have to satisfy a mens rea requirement with respect to the status element. No court of appeals has required proof of the defendant's

[2] This court has not specifically addressed the illegal-alien prohibited status of § 922(g)(5)(A), but we have recognized that "each subdivision of subsection (g) differs only in its requirement that the offender have a certain "status under the law." *Winchester*, 916 F.2d at 605 (quotations omitted). Not only would it be bizarre for two § 922(g) subdivisions to have different mens rea requirements, but also, there is nothing in the text or history of § 922 to support such deviation.

knowledge of his prohibited status under any subsection of § 922(g).[3] Moreover, despite ample opportunity to do so, Congress has never revisited the issue.[4] "The long time failure of Congress to alter [the law] after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488, 60 S. Ct. 982, 989 (1940); *see also Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409-10 (2015) ("All our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects. . . .

[3] *See United States v. Smith*, 940 F.2d 710, 713-14 (1st Cir. 1991) (felony conviction, § 922(g)(1)); *United States v. Huet*, 665 F.3d 588, 596 (3d Cir. 2012) (same); *Langley*, 62 F.3d at 606 (same); *United States v. Butler*, 637 F.3d 519, 524-25 (5th Cir. 2011) (dishonorable discharge, § 922(g)(6)); *United States v. Olender*, 338 F.3d 629, 637 (6th Cir. 2003) (felony conviction, § 922(g)(1)); *United States v. Stein*, 712 F.3d 1038, 1041 (7th Cir. 2013) (misdemeanor domestic violence conviction, § 922(g)(9)); *United States v. Kind*, 194 F.3d 900, 907 (8th Cir. 1999) (felony conviction, § 922(g)(1)); *United States v. Kafka*, 222 F.3d 1129, 1131 (9th Cir. 2000) (domestic violence restraining order, § 922(g)(8)); *United States v. Games-Perez*, 667 F.3d 1136, 1140 (10th Cir. 2012) (majority opinion) (felony conviction, § 922(g)(1)); *United States v. Bryant*, 523 F.3d 349, 354 (D.C. Cir. 2008) (same).

[4] As the Fourth Circuit explained in *Langley*, "[t]he predecessor statutes to § 922(g)(1) contained no mens rea requirement. However, cases interpreting these predecessor statutes made clear that these statutes required proof of a mens rea element and were not strict liability offenses; that is, courts required proof that 'the defendant knowingly received, transported, or possessed a firearm,' but, at the same time, recognized that 'the defendant's knowledge of the weapon's interstate nexus or of his felon status was irrelevant.' " 62 F.3d at 604 (citing *Dancy*, 861 F.2d at 81). We presume that when Congress enacted the Firearms Owners' Protection Act of 1986, establishing § 922(g), and its subsequent amendments, it was aware of this history. *See White v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1434 (11th Cir. 1997) ("Congress is assumed to act with the knowledge of existing law and interpretations when it passes new legislation.").

Congress's continual reworking of the patent laws . . . further supports leaving the decision in place.").

Although it may seem that failing to require proof that the defendant had the requisite knowledge with respect to the status element is at odds with the traditional rule that the government must prove mens rea for each substantive element of the crime, upon closer inspection, even at common law and early American law, the government did not have the burden of proving that the defendant knew a specific fact or detail about himself. Two examples illustrate this point: statutory rape and bigamy. In the instance of statutory rape, while there may be issues of proof with respect to the victim's age, the government does not have to prove that the defendant knew he was the age of majority. *See, e.g., State v. Running*, 208 N.W. 231, 233-34 (N.D. 1926) (requiring that the government prove the defendant's age–but not that he knew his age–to establish the degree of statutory rape); *Hall v. State*, 58 N.W. 929, 930 (Neb. 1894) (requiring that an information charging statutory rape charge that the defendant was over 18, but not that he knew he was over 18). Similarly, with respect to bigamy, the government does not have to prove that the defendant knew he was married. *See* G.A. Endlich, *The Doctrine of Mens Rea*, 13 CRIM. L. MAG. 831, 841-42 (1891). In short, even

traditional crimes have never required the defendant's knowledge of the status element. [5]

Finally, as the Fourth Circuit held in *Langley*,

> Our conclusion that Congress did not intend, through [Firearms Owners' Protection Act of 1986] to place the additional evidentiary burdens on the government suggested by Langley is supported by several other considerations. First, it is highly unlikely that Congress intended to make it easier for felons to avoid prosecution by permitting them to claim that they were unaware of their felony status and/or the firearm's interstate nexus. Second, in light of Congress' repeated efforts to fight violent crime and the commission of drug offenses, it is unlikely that Congress intended to make the application of the enhancement provision contained in § 924(e)(1) more difficult to apply.

Id. at 606 (footnote omitted).

Textual support, prior precedent, congressional acquiescence, and analogous common law all support the conclusion that there is no mens rea requirement with respect to the status element of § 922(g). Therefore, we conclude that the district court did not err when it gave the jury instruction stating that "[t]he government is not required to prove that the defendant knew that he was illegally or unlawfully in the United States."

B. "<u>Illegally or unlawfully</u>"

While this court has never addressed at what point an alien becomes illegally or unlawfully in the United States for purposes of § 922(g)(5)(A), Rehaif's

[5] Of course, there could be a mistake of fact defense–but such defense is not alleged here.

argument that an alien does not become illegal until he has been adjudicated as such by an USCIS official or an immigration judge fails for four reasons.

First, the district court's instruction– that "[a]n alien illegally or unlawfully in the United States is an alien whose presence within the United States is forbidden or not authorized by law"–is more consistent with the plain text of § 922(g)(5)(A). *See* Unlawful, Black's Law Dictionary (10th ed. 2014) (defining "unlawful" as "[n]ot authorized by law").

Second, as the Tenth Circuit explained in *United States v. Atandi*, "Congress has proven quite capable of demonstrating the circumstances in which it intended federal firearms disabilities to hinge upon the result of an adjudication." 376 F.3d 1186 (10th Cir. 2004). Other § 922(g) subdivisions refer to, for example, a person "who is subject to a court order[ed]" restraining order, or to a person "who has been convicted in any court of a misdemeanor crime of domestic violence." 18 U.S.C. § 922(g)(8)–(9); *Atandi*, 376 F.3d at 1188. If Congress had intended for § 922(g)(5)(A) to depend on a decisionmaker's adjudication, it would have so stated. *Atandi*, 376 F.3d at 1188 (citing *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983)).

Third, the Immigration and Nationality Act's ("INA") definition of "unlawful" is consistent with the district court's instruction. The INA prohibits the admission of aliens who have been unlawfully present in the United States for

certain periods of time. INA § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I). The INA states that "[f]or purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States *after the expiration of the period of stay authorized* by the Attorney General. . . ." INA § 212(a)(9)(B)(ii), 8 U.S.C. § 1182(a)(9)(B)(ii) (emphasis added). As such, a student admitted under an F-1 visa is unlawfully present if he remains in the United States after he is no longer enrolled as a full-time student. *See* 8 C.F.R. § 214.2(f)(5)(i) (defining duration of status as "the time during which an F-1 student is pursuing a full course of study at an educational institution approved by the [USCIS] for attendance by foreign students, or engaging in authorized practical training following completion of studies."); *see also* 27 C.F.R. § 478.11 (defining unlawful as "any alien . . . [w]ho is a nonimmigrant and whose authorized period of stay has expired or who has violated the terms of the nonimmigrant category in which he or she was admitted.").

Finally, the rule of lenity does not apply because § 922(g)(5)(A)'s plain text is not ambiguous. *See Johnson v. U.S.*, 529 U.S. 694, 713 n.13, 120 S. Ct. 1795, 1807 n.13 (2000) ("Lenity applies only when the equipoise of competing reasons cannot otherwise be resolved"). Furthermore, even if we found § 922(g)(5)(A) ambiguous, the ambiguity is resolved by the definition provided by 27 C.F.R. § 478.11, which was promulgated in 1997. *See* 62 Fed. Reg. 34,634, 34,639 (June

27, 1997). The rule of lenity is not applicable where a longstanding, unambiguous regulation gives potential offenders fair notice of what is proscribed. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 704 n.18, 115 S. Ct. 2407, 2416 n.18 (1995).

Therefore, we conclude the district court did not err when it instructed the jury that "[a]n alien illegally or unlawfully in the United States is an alien whose presence within the United States is forbidden or not authorized by law."

IV. CONCLUSION

For the aforementioned reasons, we affirm Rehaif's convictions.

AFFIRMED.

Order denying petition for
rehearing en banc as moot

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-15860-AA

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HAMID MOHAMED AHMED ALI REHAIF,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(August 17, 2017)

ON PETITION FOR REHEARING

Before ED CARNES, Chief Judge, WILLIAM PRYOR, and DUBINA, Circuit Judges.

PER CURIAM:

Having considered Rehaif's petition for rehearing en banc, we conclude that it is due to be denied as moot. On March 26, 2018, while the petition was pending, we vacated our opinion in this case and substituted a new one. See United States v. Rehaif, __ F.3d __, 2018 WL 1465527 (11th Cir. March 26, 2018). Because a new opinion containing substantial revisions has been issued, Rehaif's petition is due to be denied as moot. See Fed. R. App. P. 35, I.O.P. 4; see also Cadet v. Fla. Dep't of Corrs., 853 F.3d 1216, 1218, 1248 (11th Cir. 2017) (concluding that issuance of a substantially revised opinion meant the petition for rehearing en banc had effectively been mooted).

If he wishes to do so Rehaif may file a petition for panel rehearing and/or for rehearing en banc addressing the substituted new opinion of the Court if he wishes to do so. See Cadet, 853 F.3d at 1248 ("Because new opinions have been issued, the parties are free to file petitions for rehearing and for rehearing en banc addressing this decision of the Court . . . if they wish to do so."); Int'l Caucus of Labor Comms. v. City of Montgomery, 111 F.3d 1548, 1556 (11th Cir. 1997) (same). We extend the deadline for filing that petition to 21 days from the issuance of this order. See Fed. R. App. P. 35, 40; 11th Cir. R. 35-2, 40-3.

The petition for rehearing en banc is DENIED AS MOOT.