No. 17-9560

In The
Supreme Court of the United States

HAMID MOHAMED AHMED ALI REHAIF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

THOMAS W. HILLIER, II
Counsel of Record
ERIN K. EARL
PERKINS COIE LLP
1201 Third Avenue
Suite 4900
Seattle, WA 98101
206-359-8000
THillier@perkinscoie.com

ANNA C. MOURLAM
PERKINS COIE LLP
3150 Porter Drive
Palo Alto, CA 94304

DAVID OSCAR MARKUS
Co-Chair, Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
40 NW 3rd Street, PH1
Miami, FL 33128

Counsel for Amicus Curiae *National Association of Criminal Defense Lawyers*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

INTERESTS OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a keen interest in the issue presented. The question addresses the scienter requirement for prosecution of persons of various statuses who are prohibited from possessing firearms or ammunition. NACDL has long advocated for enforcement of rigorous scienter requirements in criminal prosecutions. The depth of its interest is manifest in *Without Intent*, a white paper produced in collaboration with the Heritage Foundation and published in April 2010. *See generally* Brian Walsh & Tiffany Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent*

---

[1] Counsel for all parties received timely written notice of NACDL's intent to file this brief. Letters of consent have been provided by both parties. No counsel of a party authored this brief in whole or part, and no person other than NACDL, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Requirement in Federal Law, at 3 (Heritage Foundation & NACDL 2010).

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is whether an individual may be imprisoned up to ten years for possessing a firearm or ammunition despite being unaware of the facts making that possession unlawful.

Congress in 18 U.S.C. § 924(a)(2) specified 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" (emphasis added). Subsection (g) of Section 922, in turn, provides that "[i]t shall be unlawful for any person" who qualifies for any of nine enumerated statuses to, among other things, "possess in or affecting commerce, any firearm or ammunition."

The question presented is whether an individual can knowingly violate Section 922(g) when he knows that he possessed a firearm or ammunition (which is not unlawful) but does not know that he qualifies for one of the nine enumerated statuses (which makes his possession unlawful). The answer is no.

One of the most fundamental precepts of our criminal justice system is that only an individual who acts with criminal intent (*mens rea* or scienter) is subject to punishment for commission of an offense. This

safeguard of individual liberty has endured for centuries to protect those accused of crimes from being punished for apparently innocent conduct. So essential is the requirement of *mens rea* that this Court interprets federal criminal statutes with a background presumption that such a requirement exists even when the statutory text is silent. The presumption is particularly strong where, as here, the element at issue distinguishes innocent conduct (possession of a firearm or ammunition) from unlawful conduct (possession of a firearm or ammunition *while* being an alien illegally or unlawfully within the United States). That the crucial element involves the status of the accused himself provides no reason to disregard this bedrock principle of criminal justice.

ARGUMENT

I. *MENS REA* IS A FOUNDATIONAL SAFEGUARD AGAINST PUNISHMENT FOR UNKNOWINGLY UNLAWFUL CONDUCT

Criminal law "governs the strongest force that we permit official agencies to bring on individuals." Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1098 (1952). Accordingly, its prohibitions, commands, and penal power "must be firmly grounded in fundamental principles of justice." Walsh & Joslyn, *Without Intent*, at 3.

One such fundamental principle is that "wrongdoing must be conscious to be criminal." *Morissette v.*

United States, 342 U.S. 246, 252 (1952). This idea "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." *Id.*; *see also* Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 Harv. L. Rev. 75, 81 (1908) ("It is a fundamental principle of the criminal law, for which no authorities need be cited, that the doer of a criminal act shall not be punished unless he has a criminal mind.").

This "core principle of the American system of justice" is deeply rooted in both Anglo-American law and its classical antecedents. Edwin Meese III & Norman L. Reiner, *Foreword* to Walsh & Joslyn, *Without Intent*, at vi. During the Hellenistic period, for example, philosophic sects "introduced moral concepts into legislation and thereby made it necessary to distinguish between the harmful result and the evil will" and to cabin punishment to the latter as much as possible. Max Radin, *Criminal Intent*, 7 Encyclopaedia Soc. Sci. 126, 126 (eds. Edwin R. Seligman & Alvin Johnson 1932). And, according to some scholars, criminal intent in Roman law "has roots as ancient as the founding of the city itself." Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 St. John's L. Rev. 725, 756 (2004).

The necessity of criminal intent arrived in England primarily through the church. *See* Albert Levitt, *Origin of the Doctrine of Mens Rea*, 17 Ill. L. Rev. 117, 136 (1922) (concluding that "the genesis of the modern doctrine of mens rea is . . . the mutual influences and

reactions of Christian theology and Anglo-Saxon law"). Indeed, the earliest reference to *mens rea* in English law appears to be "a scrap copied in from the teachings of the church." Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 983 (1932). Pentateuchal law, for example, distinguished between "ignorant" and "presumptuous" wrongs. Radin, 7 Encyclopaedia Soc. Sci. at 126. Because church teachings established that moral guilt should dictate punishment, and because mental culpability is essential to moral guilt, English criminal law began making *mens rea* "a factor of prime and decisive importance in the determination of criminal responsibility." Sayre, 45 Harv. L. Rev. at 988, 992-93.

By the late seventeenth century, English law universally accepted the maxim "that an evil intent was as necessary for [a] felony as the act itself." *Id.* at 993; *see also* Radin, 7 Encyclopaedia Soc. Sci. at 127. William Blackstone observed in the eighteenth century that a "vicious will" is necessary to constitute a crime. 4 William Blackstone, Commentaries *21; *see also* Ann Hopkins, *Mens Rea and the Right to Trial by Jury*, 76 Cal. L. Rev. 391, 394 (1988) (describing the "great deal of consensus" about the criminal intent requirement among the foremost English criminal law scholars of the eighteenth century); Radin, 7 Encyclopaedia Soc. Sci. at 129-30 (describing Enlightenment reformers as insisting on personal guilt, which necessarily required the presence of criminal intent).

Early American law incorporated and built on the *mens rea* requirement of English law. *Morissette*, 342

U.S. at 251-52 (the concept of crime as requiring the "concurrence of an evil-meaning mind with an evil-doing hand . . . took deep and early root in American soil"). As state legislatures codified common law crimes, state courts inferred the presence of *mens rea* requirements even where the statutes were silent. *Id.* at 252; *see also* Radin, 7 Encyclopaedia Soc. Sci. at 126-27 (observing that "mens rea is not so readily constituted from any wrongful act" in American law as elsewhere). This Court has recognized that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978) (alteration in original) (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)).

As society evolved from a retributive theory of justice toward more modern penal theories of deterrence and rehabilitation, the importance of *mens rea* in criminal law increased in accordance with its centrality to those theories. *See* Radin, 7 Encyclopaedia Soc. Sci. at 129 (describing deterrence as the accepted penal theory of modern communities); *Morissette*, 342 U.S. at 251 n.5 (recognizing reformation and rehabilitation as important goals of criminal law). Under deterrence theory, punishment acts "against the will of the prospective offender" and thus can be "effective only if the offense is a matter which the will can control"—that is, an action intended by the actor. Radin, 7 Encyclopaedia Soc. Sci. at 129. Intent likewise is essential to rehabilitation theory, as "it is only the wicked will that can be the subject of correction and reformation." *Id.*;

see also Morissette, 342 U.S. at 251 n.5 (modern penological goals of reformation, rehabilitation, and fitting the punishment to the offender "would seem illusory if there were no mental element in crime").

Throughout these centuries of relevant history, *mens rea* requirements "restricted criminal punishment to those who were truly blameworthy and gave individuals fair notice of the law." Walsh & Joslyn, *Without Intent*, at x. By comparison, so-called "public welfare" offenses that "depend on no mental element but consist only of forbidden acts or omissions" are of relatively recent vintage. *Morissette*, 342 U.S. at 252-53; *see generally* Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933). But offenses that at least appear not to require scienter have been enacted at an accelerating rate.

For example, a 2010 study conducted by *amicus* NACDL in partnership with the Heritage Foundation found that over 57 percent of the 466 non-violent and non-drug criminal offenses considered by the 109th Congress included only a weak *mens rea* requirement—such as "us[ing] the terms 'knowingly' or 'intentionally' in a blanket manner or as part of the introductory language of the offense"—or none at all. Walsh & Joslyn, *Without Intent*, at 12, 35. The weak or absent *mens rea* requirements in proposed legislation "appear to be related to the reckless pace of criminalization" and absence of judiciary committee oversight, not necessarily congressional intent to eliminate the longstanding *mens rea* tradition. *Id.* at x; *see also* John S. Baker, Jr., *Revisiting the Explosive Growth of*

Federal Crimes, Heritage Foundation L. Memo. No. 26, at 1 (June 16, 2008) (estimating that, at the end of 2007, the U.S. Code included at least 4,450 federal crimes, of which 452 were added between 2000 and 2007).

Despite the decrease in clear *mens rea* requirements, this Court has been a bulwark against several recent attempts to interpret federal criminal statutes as criminalizing apparently innocent conduct. *See*, *e.g.*, *McFadden v. United States*, 135 S. Ct. 2298, 2302 (2015) (knowing manufacture, distribution, or possession with intent to distribute controlled substances requires proving the accused knew the substance, including an analogue, was a "controlled substance"); *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) (prohibition against transmitting a threat requires subjective *mens rea* in communicating that threat); *Flores-Figueroa v. United States*, 556 U.S. 646, 647 (2009) (aggravated identity theft requires knowledge that the identification used without lawful authority belongs to another person). The same result is warranted here.

II. A "KNOWING" VIOLATION OF 18 U.S.C. § 922(G) REQUIRES KNOWLEDGE OF THE STATUS ELEMENT MAKING THE POSSESSION OF FIREARMS OR AMMUNITION ILLEGAL

The interpretation of federal criminal law is primarily a matter of statutory construction. Generally,

"[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota v. United States*, 471 U.S. 419, 424 (1985). As such, "determining the mental state required for commission of a federal crime requires 'construction of the statute and . . . inference of the intent of Congress.'" *Staples v. United States*, 511 U.S. 600, 605 (1994) (omission in original) (quoting *United States v. Balint*, 258 U.S. 250, 253 (1922)).

The statutory text provides "the starting place for [this] inquiry," but does not end it. *Id.* Rather, it is the well-recognized and fundamental principle "that a defendant must be 'blameworthy in mind' before he can be found guilty" that provides the background rule for construing intent requirements for criminal statutes. *Elonis*, 135 S. Ct. at 2009 (quoting *Morissette*, 342 U.S. at 252). Relying on the "background presumption of evil intent" arising out of the "common-law history of *mens rea*," this Court many times has "interpret[ed] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994) (citing *Morissette*, 342 U.S. 246; *Liparota*, 471 U.S. 419; *Staples*, 511 U.S. 600). These cases make clear that the strength of the presumption "that criminal statutes require some sort of *mens rea* for conviction" overrides the Court's ordinary resistance to "reading words or elements into a statute that do not appear on its face." *Elonis*, 135 S. Ct. at 2014-15 (Alito, J., concurring in part and dissenting in

part). Instead, "some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime." *Staples*, 511 U.S. at 605-06; *see also Gypsum Co.*, 438 U.S. at 436 ("[I]ntent generally remains an indispensable element of a criminal offense.").

Three interpretive principles that emerge from these background presumptions are particularly important to the question presented here. First, "courts ordinarily read a phrase in a criminal statute that introduces a crime with the word 'knowingly' as applying that word to each element." *Flores-Figueroa*, 566 U.S. at 653. Second, this Court has emphasized that "the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video*, 513 U.S. at 72; *see also Liparota*, 471 U.S. at 426 (1985) (presumption favoring a scienter requirement is particularly apt if a contrary construction would "criminalize a broad range of apparently innocent conduct"). Finally, although the rule of lenity is inapplicable where, as here, congressional intent to include a *mens rea* requirement can be discerned, it provides a final backstop preventing the subject statute from being interpreted as essentially a strict-liability offense. *See Liparota*, 471 U.S. at 427 ("[R]equiring *mens rea* is in keeping with our longstanding recognition of the principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' " (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971))).

1. When Congress prefaces the elements of an offense with a "knowing" requirement, courts apply that mental state to each material element. *Flores-Figueroa*, 556 U.S. at 562; *see also Liparota*, 471 U.S. at 420 n.1, 433 (holding that a statute penalizing anyone who "knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [law]" required proof that the accused "knew that his acquisition or possession of food stamps was in a manner unauthorized by the statute or regulations"); *X-Citement Video*, 513 U.S. at 68, 78 (holding that a statute prohibiting knowingly transporting, shipping, receiving, or distributing any visual depiction if the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct requires proof the accused knew the sexually explicit nature of the material and the age of the performers).

This rule accords with the Model Penal Code, which is "one source of guidance upon which the Court has relied to illuminate questions" about *mens rea*. *Gypsum Co.*, 438 U.S. at 444. In promulgating the Model Penal Code, the American Law Institute "attempt[ed] to systematically clarify the criminal law, particularly the role played by the mental element" and "[c]ontinu[ed] the common law's process of focusing on precise states of mind." Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 Utah L. Rev. 635, 684-85. The Code responds in particular to a "pervasive ambiguity in definitions of offenses that

include a culpability requirement," which is "that it is often difficult to determine how many of the elements of the offense the [*mens rea*] requirement is meant to modify." ALI, Model Penal Code § 2.02(4), Explanatory Note. To provide a solution to that interpretive dilemma, the Code adopts a rule that:

> When the law defining an offense 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 material elements of the offense, unless a contrary purpose plainly appears.

Id. § 2.02(4). The broad applicability of this rule accords with the Code's "preference for subjective culpability," which "reflect[s] the common law traditions of several hundred years in assessing prima facie culpability in terms of nonnormative states of mind." Gardner, 1993 Utah L. Rev. at 684.

Applying a leading adverb to each subsequently listed element also generally reflects the most natural reading of statutory language. In *Flores-Figueroa*, for example, the Court found "strong textual reasons" to interpret language penalizing one who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" as extending only to one who "knows" the means of identification belongs to another person. 556 U.S. at 650; *see also id.* ("As a matter of ordinary English grammar, it seems natural to read the statute's word 'knowingly' as

applying to all the subsequently listed elements of the crime.").

Here, the statute similarly contains a *mens rea* requirement prefacing the elements of the offense. Congress provided in 18 U.S.C. § 924(a)(2) that only an individual who *knowingly violates* the prohibitions in Section 922(g) may be punished. Section 922(g) contains no separate intent requirement, but sets out the elements of the underlying offense, which are (1) the accused has a status listed in Section 922(g)(1)-(9); (2) the accused later possessed a firearm or ammunition; and (3) the possession was in or affecting interstate commerce. In combination, these statutes "introduce[ ] the elements of a crime with the word 'knowingly.'" *Flores-Figueroa*, 556 U.S. at 652. Ordinary principles of statutory interpretation therefore provide that the term "knowingly" should be applied to each material element. *Id.*

That the scienter requirement is contained in a separate statutory section than the elements of the offense does not diminish the strength of this interpretation. Section 924(a)(2) prohibits "*knowingly violating*" Section 922(g), and a violation of Section 922(g) can occur only if the status, conduct, and jurisdictional elements all are met. A natural grammatical reading thus would apply "knowingly" to each material element of the offense listed in Section 922(g). *See United States v. Games-Perez*, 667 F.3d 1136, 1144 (10th Cir. 2012) (Gorsuch, J., concurring in the judgment) (in Section 922(g), "Congress gave us three elements in a particular order" so "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"). Further, the Court in *X-Citement Video* applied the term "knowingly" to phrases appearing in a different subsection. 513 U.S. at 68-73. By the same logic, "knowingly violating" a separate section should require knowledge of the material elements defined in that section. *See*, *e.g.*, *United States v. Wilson*, 133 F.3d 251, 261 (4th Cir. 1997) (interpreting prohibition in Clean Water Act, 33 U.S.C. § 1319(c)(2)(A), against "knowingly violating" other sections to require knowledge of each element constituting the proscribed conduct); *United States v. Ahmad*, 101 F.3d 383, 390 (5th Cir. 1996) (same).

2. It is particularly vital that "knowingly" be applied to the status elements in Section 922(g)(1)-(9) because only that status transforms otherwise innocent—indeed, constitutionally protected—activity into felonious conduct. *See*, *e.g.*, *Elonis*, 135 S. Ct. at 2011 (a mental state requirement must apply to the threatening nature of a communication because it comprises "the crucial element separating legal innocence from wrongful conduct" (quoting *X-Citement Video*, 513 U.S. at 73) (internal quotation marks omitted)); *X-Citement Video*, 513 U.S. at 72 (the "presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct"); *see also Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 522 (1994) ("Even statutes creating public welfare offenses generally require proof that the defendant had knowledge of sufficient facts to alert

him to the probability of regulation of his potentially dangerous conduct.").

The Court confronted a similar question in *Staples v. United States*. 511 U.S. 600 (1994). At issue in *Staples* was whether a violation of 26 U.S.C. § 5861(d), which prohibits possessing an unregistered "firearm," requires proof that the accused knew the characteristics of the weapon that made it a "firearm" as defined by the statute. 511 U.S. at 602-04. Invoking the "long tradition of widespread lawful gun ownership by private individuals in this country," the Court observed that "guns generally can be owned in perfect innocence." *Id.* at 610-11. The array of regulations governing gun ownership was not sufficient reason to dispense with a *mens rea* requirement because the Court questioned "whether regulations on guns are sufficiently intrusive that they impinge upon the common experience that owning a gun is usually licit and blameless conduct." *Id.* at 613.

The Court had "little doubt" that the statute should not be interpreted to "impose criminal sanctions on a class of persons whose mental state—ignorance of the characteristics of the weapons in their possession—makes their actions entirely innocent." *Id.* at 614-15.

The potential for a ten-year sentence confirmed the Court's conclusion that only individuals who *know* the circumstances bringing a weapon within the statute's ambit may be convicted for its violation. *Id.* at 616. The Court noted that only "small penalties" are

typically at issue in public welfare statutes dispensing with *mens rea* requirements. *Id.* at 616; *see also Morissette*, 342 U.S. at 256 (noting that courts considered the relatively small penalties for public welfare offenses in dispensing with *mens rea* requirements for those statutes). Because "dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct"—possessing a gun—"a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement." *Staples*, 511 U.S. at 618.

For these reasons, the Court held that only someone with knowledge that a gun's features brought it within the scope of the prohibition may be convicted of a violation. *Id.* at 619; *see also Carter v. United States*, 530 U.S. 255, 269 (2000) (describing *Staples* as "interpret[ing] a federal firearms statute to require proof that the defendant knew that the weapon he possessed had the characteristics bringing it within the scope of the statute" for the purpose of "avoid[ing] criminalizing the innocent activity of gun ownership").

The reasoning in *Staples* applies with even stronger force here. Without knowledge of prohibited status, an individual accused under Section 922(g) also would know only that he or she possessed a firearm or ammunition, which is "usually licit and blameless conduct." *Staples*, 511 U.S. at 613. The penalty for violating Section 922(g) is as severe as the penalty in *Staples*: up to ten years of imprisonment and a fine. 18 U.S.C. § 924(a)(2). Unlike the statute in *Staples*, which lacked *any* prescribed *mens rea* requirement, here

Congress *expressly required* that a violation be committed "knowingly," providing stronger proof of congressional intent to require knowledge of all material elements.

Finally, since *Staples*, this Court has ruled that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Dist. of Columbia v. Heller*, 554 U.S. 570, 592 (2008). Interpreting the statute to criminalize knowing possession of a firearm or ammunition without knowing the facts of one's status that makes the possession unlawful would allow criminal penalties to be imposed for the apparently innocent exercise of a constitutional right. Such an interpretation at minimum "would raise serious constitutional doubts." *X-Citement Video*, 513 U.S. at 78. Applying the foundational principle of *mens rea* to the status elements in Section 922(g) alleviates any need to confront those constitutional questions, accords with longstanding principles of statutory interpretation, and protects fundamental fairness by criminalizing only knowingly unlawful conduct.

3. Because traditional interpretive tools provide an affirmative answer to the question whether "knowingly" applies to the status elements in Section 922(g), the rule of lenity is unnecessary to decide this case. *Staples*, 511 U.S. at 619 n.17. But even if the Court deems the statute ambiguous, that "venerable rule" supports interpreting "knowingly" to apply to the status elements in Section 922(g). *United States v. Santos*, 553 U.S. 507, 514 (2008) (opinion of Scalia, J.).

The rule of lenity provides that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (quoting *Rewis*, 401 U.S. at 812). In doing so, it "not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed," but also "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *Santos*, 553 U.S. at 514 (opinion of Scalia, J.).

Here, traditional principles of statutory construction establish congressional intent, as described above. But one who disagreed and sought guidance in legislative history would encounter uncertainty. Those jurists who wade into the legislative history of the Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986), the source of the applicable statutory provisions, have found "that the relevant legislative history is stocked with ample artillery for everyone." *Games-Perez*, 667 F.3d at 1144 (Gorsuch, J., concurring in the judgment); *compare, e.g.*, *United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995) (en banc) (observing that "it is not clear from the legislative history of FOPA whether Congress intended to extend the term 'knowingly' to one or all of the substantive elements of each offense in § 922" but concluding "there is no suggestion that Congress intended to dispense with the judicial interpretation of § 922(g)(1)'s predecessor

statutes"), *with id.* at 613 (Phillips, J., concurring and dissenting) (review of legislative history "confirms what logic so strongly suggests: that Congress intended the 'knowingly' and 'willfully' language in amended § 924(a) to be read as imposing *mens rea* requirements upon all substantive offenses to which the § 924(a) penalties apply").

If any doubt remains after "recourse to traditional rules of statutory construction," the rule of lenity dictates that "the tie must go to the defendant." *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015); *Santos*, 553 U.S. at 514 (opinion of Scalia, J.). Applying this rule "ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota*, 471 U.S. at 427. The petitioner has shown this statute to be at least ambiguous as to whether the government must prove that the accused knew of the status that made his otherwise innocent possession of firearms and ammunition unlawful. The rule of lenity requires any ambiguity to resolve in his favor.

III. THAT THE CRUCIAL ELEMENT OF THE OFFENSE IS THE STATUS OF THE ACCUSED HIMSELF DOES NOT PERMIT DISPENSING WITH *MENS REA*

Several courts of appeals tasked with interpreting Sections 924(a)(2) and 922(g) have brushed aside the traditional commitment to *mens rea* and the related

principles of construction adopted by this Court. Rather, they reasoned that the presumption favoring *mens rea* does not apply if the element at issue concerns the status of the accused himself. *See*, *e.g.*, Pet. App. 15a-17a; *United States v. Capps*, 77 F.3d 350, 353 (10th Cir. 1996); *Langley*, 62 F.3d at 607. There is no basis for such an exception, which undermines the well-established protection of *mens rea* and which precludes accused individuals from presenting evidence showing they were unaware of the circumstances making their otherwise innocent possession of firearms or ammunition unlawful.

1. Although felon-in-possession prosecutions are by far the majority under Sections 924(a)(2) and 922(g), individuals assigned numerous other statuses likewise are prohibited from possessing firearms or ammunition. These include being a fugitive from justice, being an unlawful user of or addicted to any controlled substance, being adjudicated as a mental defective or committed to a mental institution, being discharged from the Armed Forces under dishonorable conditions, having renounced one's citizenship, being subject to a restraining order, being convicted of a misdemeanor crime of domestic violence, being an alien admitted to the United Sates under a nonimmigrant visa, and—the status at issue here—being an alien illegally or unlawfully in the United States. 18 U.S.C. § 922(g)(2)-(9).

Basic principles of statutory construction require "knowingly" to be applied the same way to each status listed as a subsection of Section 922(g). *See Ratzlaf v.*

United States, 510 U.S. 135, 143 (1994) (recognizing that "a single formulation" should be construed "the same way each time it is called into play"); *United States v. Stein*, 712 F.3d 1038, 1041 (7th Cir. 2013) ("[T]here is no reason to think Congress intended 'knowingly' to mean different things for different subsections of § 922(g)."); *United States v. Butler*, 637 F.3d 519, 524 (5th Cir. 2011) (same); *United States v. Sherbondy*, 865 F.2d 996, 1002 (9th Cir. 1988) (same).

For some subsections of Section 922(g), courts *have* applied the "knowing" requirement to the circumstances comprising the prohibited status. *See*, *e.g.*, *United States v. Bostic*, 168 F.3d 718, 723 (4th Cir. 1999) (rejecting due process challenge to 18 U.S.C. § 922(g)(8) conviction because defendant "was aware that he possessed a firearm" *and* "was also aware that he was subject to a domestic violence restraining order which included a finding that he represented a physical threat" to others "and prohibited him from abusing" them); *United States v. Allen*, No. 96-5694, 129 F.3d 1265 (6th Cir. 1997) (Tbl.) (evidence sufficient to show knowledge of involuntary commitment to a mental institution under 18 U.S.C. § 922(g)(4)); *United States v. Ballentine*, 4 F.3d 504, 506 (7th Cir. 1993) (conviction for possessing firearms while a fugitive requires "know[ing] that charges are pending against him, that he has refused to answer to those charges and that he has left the jurisdiction where the charges are pending"); *see also United States v. Cook*, 914 F.3d 545, 550-51 (7th Cir. 2019) (conviction for possessing firearms as an unlawful user of or addict to unlawful substances

not impermissibly vague in part because it requires "knowledge of the facts that constitute the offense"); *cf. United States v. Renner*, 496 F.2d 922, 926 (7th Cir. 1974) (under predecessor statute, conviction for possessing a firearm while being a person under indictment requires knowledge of the indictment). *But see*, *e.g.*, *Butler*, 637 F.3d at 524 (knowledge of dishonorable discharge not required for conviction under 18 U.S.C. § 922(g)(6)).

Because "knowingly" applies identically to each prohibited status enumerated under Section 922(g), requiring knowledge of involuntary commitment or the facts underlying fugitive status means knowledge of the facts underlying unlawful presence in the United States likewise should be required. But if the judgment of the court of appeals is affirmed and punishment can be imposed without any showing that the accused *knew* his presence in the United States was illegal or unlawful, a wide swath of apparently innocent conduct would be punishable by up to ten years' imprisonment. Such a result runs counter to fundamental fairness and the longstanding role of *mens rea* as protection against punishment for unknowingly unlawful conduct.

2. The "purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction." *Morissette*, 342 U.S. at 263. But that purpose should not be imputed when "it would mean easing the path to convicting persons whose conduct would not even alert them to the probability of strict regulation." *Staples*, 511 U.S. at 616.

Here, the relevant conduct—possessing a firearm or ammunition—is not only innocent but constitutionally protected. *See Heller*, 554 U.S. at 592; *Staples*, 511 U.S. at 610-11. And although individuals with at least some of the statuses enumerated in Section 922(g) might reasonably anticipate heightened regulation of their firearm possession, they only can do so *if they have knowledge of their prohibited status*. *See United States v. Kitsch*, No. 03-cr-594, 2008 WL 2971548, at *5 (E.D. Pa. Aug. 1, 2008) ("Only a knowing felon can reasonably expect to be subject to additional regulation.").

Most people prosecuted for violations of Section 922(g) may well be aware of their prohibited status. But that supplies no reason to criminalize the innocent conduct of those who lack such awareness. Individuals who, for example, do not receive notice of dishonorable discharge, *see Butler*, 637 F.3d at 524; are told a conviction is a misdemeanor, not a felony; unknowingly leave the jurisdiction where charges against them are pending; or have the mistaken impression they were born in the United States when in fact they were brought here unlawfully by their parents should not face up to ten years in prison for possessing a firearm or ammunition. And at minimum they are entitled to make the case to the jury that they lacked knowledge of the circumstances that criminalized their otherwise innocent possession of a firearm.

This Court in other contexts has declined to dispense with *mens rea* requirements when the Government argues they make prosecution too *difficult*. *See*,

e.g., *Flores-Figueroa*, 556 U.S. at 656-57; *Staples*, 511 U.S. at 615 n.11. There is still less reason to dispense with *mens rea* where the accused's knowledge of his prohibited status may be easy to establish in the mine run of cases. And when such knowledge is difficult to establish, that suggests the accused may well be ignorant of "the crucial element separating legal innocence from wrongful conduct," *Elonis*, 135 S. Ct. at 2011—the exact scenario in which a scienter requirement is most needed. This is especially important for issues of immigration law, which is "complex" and "a legal specialty of its own." *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010).

An individual facing up to ten years in prison for "knowingly" violating Section 922(g) must be allowed to argue to the jury that he in fact was unaware of the circumstances making his possession of firearms or ammunition unlawful.

CONCLUSION

For the foregoing reasons, the Court should interpret "knowingly" as applying to the status elements in 18 U.S.C. § 922(g). The judgment should be reversed.

Respectfully submitted,

THOMAS W. HILLIER, II
Counsel of Record
ERIN K. EARL
PERKINS COIE LLP
1201 Third Avenue,
Suite 4900
Seattle, WA 98101

ANNA C. MOURLAM
PERKINS COIE LLP
3150 Porter Drive
Palo Alto, CA 94304

DAVID OSCAR MARKUS
Co-Chair, Amicus Committee
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
40 NW 3rd Street, PH1
Miami, FL 33128

Counsel for Amicus Curiae *National Association of Criminal Defense Lawyers*

March 1, 2019