No. 17-9560

IN THE

Supreme Court of the United States

HAMID MOHAMED AHMED ALI REHAIF,
Petitioner,

v.

UNITED STATES,
Respondent.

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

REPLY BRIEF OF PETITIONER

VIRGINIA A. SEITZ
JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-0063

DONNA LEE ELM
FEDERAL DEFENDER

ROBERT GODFREY*
ROSEMARY CAKMIS
ALLISON GUAGLIARDO
ADEEL BASHIR
CONRAD KAHN
FEDERAL DEFENDER OFFICE
201 South Orange Ave., Suite 300
Orlando, FL 32801
(407) 648-6338
robert_godfrey@fd.org

Counsel for Petitioner

* Counsel of Record

April 12, 2019

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

STATUTES

OTHER AUTHORITIES

REPLY BRIEF OF PETITIONER

INTRODUCTION

The government spends much of its brief ignoring 18 U.S.C. § 924(a)(2)'s text. In the little time it spends on the text, the government fails to overcome the reality that 18 U.S.C. § 922(g) sets forth two substantive elements—status and possession. Based on the plain text, statutory scheme, and this Court's precedent, § 924(a)(2) is best read as requiring a knowing *mens rea* for both of those elements.

The government claims Mr. Rehaif's reading creates a "textual muddle" of § 922's neighboring provisions. Mr. Rehaif's reading, however, is consistent with Congress's scheme.

The government additionally contends that Mr. Rehaif's position would allow defendants to claim ignorance of the law. But "knowingly violates" means knowledge of the facts, not the law. Consistent with *Liparota v. United States*, 471 U.S. 419 (1985), and *McFadden v. United States*, 135 S. Ct. 2298 (2015), there is no impediment to applying a knowing *mens rea* to a factual element containing a legal component, such as § 922(g)'s status element.

The government raises several other misplaced concerns. First, the government argues Congress's "typical practice" is to relieve the government of its burden to prove a defendant knew his status. But what the government calls "typical practice" is simply a newly invented theory that runs contrary to the presumption that a *mens rea* applies to all substantive elements criminalizing otherwise innocent conduct.

The government also suggests Mr. Rehaif's interpretation conflicts with *Old Chief v. United*

States, 519 U.S. 172 (1997). *Old Chief*, however, is a Federal Rule of Evidence 403 decision, and it did not purport to interpret § 924(a)(2)'s "knowingly violates" requirement. Further, *Old Chief*'s unfair-prejudice analysis regarding a defendant's offer to stipulate to his status applies equally to a defendant's offer to stipulate to his knowledge of his status.

The government's concerns about the practical difficulties of proving knowledge and Congress's alleged policy goals are overstated and do not defeat the plain text of the statutes. Finally, the government wrongly argues harmless error applies.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE STATUTES DEMONSTRATES THAT § 924(a)(2)'S "KNOWINGLY VIOLATES" PROVISION APPLIES TO BOTH OF § 922(g)'S SUBSTANTIVE ELEMENTS.

Section 924(a)(2) plainly applies a knowing *mens rea* to both of § 922(g)'s substantive elements. Moreover, applying a knowing *mens rea* to those elements adheres to the overarching presumption that a *mens rea* applies to all substantive elements criminalizing otherwise innocent conduct. The government suggests "knowingly violates" applies to only § 922(g)'s possession element, but nothing in the text limits the knowledge requirement. The government also argues Mr. Rehaif's reading would render other terms in § 922 provisions superfluous, but the government misconstrues Congress's statutory scheme. Finally, the government argues there is a "general principle" that Congress "typically" relieves the government of the burden of proving a defendant knew his status, but no such "general principle" or "typical practice" exists.

A. Section 924(a)(2) Criminalizes Knowing Violations of § 922(g).

The government reads § 924(a)(2)'s "knowingly violates" requirement as applying to only § 922(g)'s possession element, which it calls § 922(g)'s prohibited "conduct." Brief for the United States 13, 18, *Rehaif v. United States*, No. 17-9560 (Mar. 25, 2019) ("GB"). That truncated reading is inconsistent with the plain text of the statutes.

Section 924(a)(2) provides that "[w]hoever knowingly violates subsection . . . (g) . . . of section 922" shall be punished by up to 10 years' imprisonment. Section 922(g), in turn, prohibits (1) certain categories of persons from (2) possessing a firearm or ammunition. The plain text of the statutes leaves no room for the government's contention that "knowingly violates" refers to only § 922(g)'s possession element.

As a matter of ordinary English, the adverb "knowingly" modifies the verb "violates" and its direct object "subsection . . . (g) . . . of section 922." Nothing in § 924(a)(2)'s text limits "knowingly violates" to only the second-listed element in § 922(g). Indeed, in *Flores-Figueroa v. United States*, this Court stated "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." 556 U.S. 646, 652 (2009). Thus, a person "knowingly violates subsection . . . (g)" by knowing both his status and gun possession.

Jurisdictional elements, however, are unique in that they concern only Congress's power to legislate, not a defendant's culpability. This Court, therefore, has recognized knowledge of jurisdictional facts is ordinarily not required. *Torres v. Lynch*, 136 S. Ct. 1619, 1630-31 (2016); *United States v. Yermian*, 468

U.S. 63, 68 (1984); *United States v. Feola*, 420 U.S. 671, 676-77 & n.9 (1975).[1] But the Court has never recognized a similar exception for substantive elements, such as § 922(g)'s status element. The treatment of jurisdictional elements therefore does not undermine that § 924(a)(2)'s *mens rea* requirement applies to § 922(g)'s first-listed element, status, which is not a jurisdictional element.

The government's reading requires rewriting § 924(a)(2) to say, for instance, "knowingly violates the conduct prohibited" in § 922(g), or taking "knowingly" out of § 924(a)(2) and inserting it in § 922(g) after its list of prohibited possessors. But Congress did neither.

The government nonetheless asserts that "knowingly violates" applies to only § 922(g)'s possession element, reasoning that § 922(g) is a "regulatory provision" designed to keep firearms away from certain individuals—i.e., "regulated person[s]." GB 15-16. By labeling § 922(g) a "regulatory provision . . . without attaching any punishment," the government suggests § 922(g) may be read separately from § 924(a)(2). GB 15-16. But even the government does not believe that. GB 21 (acknowledging the offense here is "defined by Sections 922(g) and 924(a)(2)"). Indeed, "Congress does not create criminal offenses having no sentencing component." *Ball v. United States*, 470 U.S. 856, 861 (1985).

Moreover, labeling § 922(g) a "regulatory provision" does not change § 924(a)(2)'s text. "It is hardly crazy to

---

[1] Congress was presumably aware of this longstanding precedent when it enacted the Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) (FOPA). *See United States v. Wells*, 519 U.S. 482, 495 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents.").

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." *United States v. Games-Perez*, 667 F.3d 1136, 1145 (10th Cir. 2012) (Gorsuch, J., concurring).[2]

B. Mr. Rehaif's Reading is Consistent with the Statutory Scheme.

The government rightly does not claim Mr. Rehaif's reading of "knowingly violates" renders any term in § 922(g) superfluous. Instead, it contends Mr. Rehaif's reading, if applied to the other § 922 provisions referenced in § 924(a)(2), would create surplusage and a "textual muddle." GB 21-22. The government misconstrues the statutory scheme. Moreover, its proposed reading creates the "textual muddle" of which it complains.

1. Congress inserted "knowingly" into § 924(a) "to add a scienter requirement as a condition to the imposition of penalties" for § 922. *Bryan v. United States*, 524 U.S. 184, 188 (1998). Congress thereby created a default rule—where a substantive element of a violation listed in § 924(a)(2) is silent on *mens rea*, § 924 supplies it. Section 922(g) contains no express *mens rea*. Thus, by congressional design, "knowingly violates" ensures a knowing *mens rea* applies to § 922(g)'s substantive elements, status and possession.

But where Congress provided a specific *mens rea* in § 922's text, it demonstrated its intent to depart from

---

[2] Nowhere in its brief does the government acknowledge then-Judge Gorsuch's opinions in *Games-Perez*.

§ 924(a)(2)'s default rule. *See Russello v. United States*, 464 U.S. 16, 23 (1983). For example, Congress provided a specific and different *mens rea*, namely "knowing or having reasonable cause to believe," for offenses involving the sale of firearms to prohibited persons in § 922(d) and the sale or transportation of stolen firearms in §§ 922(i) and (j). Congress's decision to apply a specific *mens rea* in §§ 922(d), (i), and (j) reflects its choice to depart from § 924(a)(2)'s default rule and apply a broader *mens rea* to prove a person's knowledge about another's prohibited status or a firearm having been stolen. *See Hinck v. United States*, 550 U.S. 501, 506 (2007) (discussing the general/specific canon). Thus, Mr. Rehaif's reading gives full effect to the text of the statutes. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (noting "the cardinal rule that, if possible, effect shall be given to every clause and part of a statute" (citation omitted)).[3]

The only "textual muddle" is created by the government's proposed reading. For instance, the government contends "'knowingly violates' must refer to the act" prohibited in § 922. GB 22. But § 922(a)(6), to which § 924(a)(2) applies, makes it unlawful "knowingly to make any false or fictitious oral or written statement . . . ." Under the government's reading, "knowingly violates" applies to the conduct element in § 922(a)(6), thus creating the very redundancy of which it complains. *See Microsoft Corp. v. I4I Ltd. P'ship*, 564 U.S. 91, 106 (2011) ("But the

[3] Section 922(h), which uses "who to that individual's knowledge and while being employed," includes that language to introduce requirements beyond those in § 924(a)(2). In other words, Congress made it clear that a person must know that he is employed and that he is employed by a person covered under (g).

canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute.") (internal quotation marks and citations omitted).

2. The government also argues that applying different *mens rea* requirements to § 922(g)'s neighboring provisions would produce anomalies. GB 22. For example, the government speculates Congress could not have intended a firearms seller to be convicted if the seller has reasonable cause to know a purchaser is an illegal alien, while an illegal alien could be convicted only if he has actual knowledge of his immigration status. GB 22 (citing § 922(d)). But the government fails to explain why Congress's decision to place a higher burden on those in the firearms business is an anomaly. The government's speculation aside, Congress's decision to lower the *mens rea* to prosecute sellers makes sense given the practical difficulties in proving one's knowledge about another person's status. Reasonable cause to know suffices in those instances.[4]

3. The government's surplusage argument resembles its argument in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). There, an

[4] The government suggests another anomaly, positing a hypothetical statute punishing anyone who "knowingly violates" another statute prohibiting "driving under the influence of alcohol causing the death of a pedestrian." GB 40. The government's example, though, is consistent with Mr. Rehaif's reading. Just as § 924(a)(2)'s "knowingly violates" requirement applies to § 922(g)'s first-listed element (status), in the government's example "knowingly violates" modifies the first-listed element ("driving under the influence of alcohol"). But the second-listed element in the government's example (causation) does not criminalize otherwise innocent conduct. Moreover, whether a legislature imposed a knowing causation requirement is irrelevant to the question here.

indictment charged that petitioner "did knowingly, intentionally and corruptly persuade . . . other persons, to wit: [petitioner's] employees, with intent to cause" them to withhold documents from, and alter documents for use in, "official proceedings, namely: regulatory and criminal proceedings and investigations." *Id.* at 702.[5] The issue was what it means to "knowingly . . . corruptly persuad[e]" another person "with intent to . . . cause" that person to "withhold" documents from, or "alter" documents for use in, an "official proceeding." 544 U.S. at 703.

The government suggested "knowingly" did not modify "corruptly persuades," but this Court rejected that argument because "that is not how the statute most naturally reads." *Id.* at 704-05. The statute first provided the *mens rea*—"knowingly"—and then a list of acts—"uses intimidation or physical force, threatens, or corruptly persuades." *Id.* at 705.

The government also suggested it was "questionable whether Congress would employ such an inelegant formulation as 'knowingly . . . corruptly persuades.'" *Id.* The Court rejected that argument as well: "Long experience has not taught us to share the Government's doubts on this score, and we must simply interpret the statute as written." *Id.* The Court thus held the "natural meaning" of the terms

---

[5] The statute interpreted in *Andersen* provided: "Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . cause or induce any person to . . . withhold testimony, or withhold a record, document, or other object, from an official proceeding [or] alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding . . ." *Id.* at 703; *see* 18 U.S.C. § 1512(b)(2)(A) and (B).

"knowingly" and "corruptly" provided "a clear answer": "Only persons conscious of wrongdoing can be said to 'knowingly . . . corruptly persuade.' And limiting criminality to persuaders conscious of their wrongdoing sensibly allows [the statute] to reach only those with the level of culpability we usually require in order to impose criminal liability." *Id*. at 705-06 (internal brackets, ellipses, and citation omitted). The case was remanded because the jury instructions failed to convey the requisite *mens rea*. *Id*. at 706. The same result is warranted here.

C. Mr. Rehaif's Reading is Consistent with Background Assumptions about *Mens Rea* in Criminal Statutes.

Missing from the government's brief is the overarching principle of statutory construction that a "scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994); *Staples v. United States*, 511 U.S. 600, 605 (1994). Rather than contend with that principle, the government invents its own "general principle" and rule of "typical practice," under which the government does not have to prove a defendant knew his status. GB 18-19, 22-23. The government contends "[l]ittle reason exists to conclude that Congress deviated from its normal approach" in § 922(g). GB 24.

The cases and statutes the government cites, however, are textually distinguishable, inapposite, or support Mr. Rehaif. For instance, some statutes make clear that a knowing *mens rea* does not apply to being a public official, officer, or parent. GB 23-24 (citing 18 U.S.C. § 201(b)(2); 18 U.S.C. § 1924(a); 18 U.S.C.

§ 2251(b)).[6] Others involve "public welfare" offenses, which have been long held to not require a *mens rea*. GB 23 (citing *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 561-65 (1971) (dealing with sulfuric and other dangerous acids); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 342-43 (1952) (involving explosive, flammable materials)); GB 44 (citing *United States v. Freed*, 401 U.S. 601 (1971) (addressing possession of unregistered grenades)).

Moreover, whether the "typical practice" in the immigration context is to impose restrictions based on status is irrelevant to whether "knowingly violates" applies to § 922(g)'s status element. GB 24-25. Unlike immigration statutes, §§ 924(a)(2) and 922(g) are informed by a "long tradition of widespread lawful gun ownership by private individuals in this country." *Staples*, 511 U.S. at 610. Further, the statutes the government cites (28 U.S.C. §§ 1864 and 1865(b)(1) and (5)) merely outline the procedures by which federal district courts determine who may serve on a jury. Those provisions, however, say nothing about § 924(a)(2)'s *mens rea* requirement. True enough, it is a crime for an alien to knowingly or willfully make a false statement about his status on a federal form. 18 U.S.C. § 1001; *see also* 18 U.S.C. § 924(a)(1)(A) (criminalizing "knowingly" make any false statement or representation when purchasing a firearm). But that supports Mr. Rehaif because it reflects Congress's understanding that people can make reasonable mistakes about their status.

---

[6] The government also cites 21 U.S.C. § 861. GB 23. But that statute is "intended to protect a vulnerable class defined by age," thereby implicating special concerns that have led courts to construe narrowly *mens rea* requirements in similar exceptional contexts. *United States v. Chin*, 981 F.2d 1275, 1280 (D.C. Cir. 1992).

II. APPLYING A KNOWING *MENS REA* TO § 922(g)'S STATUS ELEMENT IS CONSISTENT WITH THIS COURT'S PRECEDENT AND EASY TO APPLY.

Attempting to overcome the plain text and structure of the statutes and the presumption that a *mens rea* applies to all substantive elements criminalizing otherwise innocent conduct, the government presents several unpersuasive arguments. Contrary to the government's contentions, knowledge of the law is unnecessary to apply "knowingly violates" to § 922(g)'s status element, there is no conflict between Mr. Rehaif's reading and *Old Chief*, and few defendants will go to trial solely to contest knowledge of status.

A. Applying a Knowing *Mens Rea* to § 922(g)'s Status Element Does Not Require Knowledge of the Law.

The government contends that requiring a knowing *mens rea* for § 922(g)'s status element would require knowledge of the law and "ignorance of the law is no defense." In support of its position, the government suggests Congress would have used "willfully" rather than "knowingly" had it intended a person in § 922(g) to know about his legal status. GB 19-21.

But as the government acknowledges (GB 19), Mr. Rehaif never argues "knowingly violates" requires a willful intent, *i.e.*, proof he knew his conduct was unlawful. *See, e.g.*, *Bryan*, 524 U.S. at 193. That Congress used "knowingly violates" in § 924(a)(2) as opposed to "willfully" is therefore irrelevant.[7]

---

[7] The government seeks to buttress its claim by pointing to Congress's use of "knowingly" in § 924(a)(2)'s neighboring provision, § 924(a)(1). "Knowingly," however, has the same meaning in both subsections—knowledge of the facts. *See Bryan*, 524 U.S. at 193.

Moreover, Mr. Rehaif's reading accords with how this Court applies a knowing *mens rea* to elements containing a legal component. For instance, *Liparota* involved a federal statute that criminalized "knowingly" transferring a food stamp "in any manner not authorized by [the statute] or the regulations." 471 U.S. at 420. The Court concluded "knowingly" required "the Government must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations." *Id.* at 433. The Court observed that, "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Id.* at 426.

Another example is *McFadden,* which addressed 21 U.S.C. § 841's prohibition on "knowingly" distributing "controlled substances." 135 S. Ct. at 2302. The Court found the "knowledge requirement can be established in two ways." *Id.* at 2305. First, it can be established by evidence a defendant knew the substance is some controlled substance—that is, one actually listed on the federal drug schedules or treated as such by operation of the Analogue Act—regardless of whether he knew the substance's particular identity. Second, it can be established by evidence the defendant knew the specific analogue, even if he did not know its legal status as an analogue. *Id.*

As *Liparota* and *McFadden* demonstrate, there is no barrier to applying a knowing *mens rea* to § 922(g)'s status element, even though some of the prohibited statuses have legal components. In a § 922(g) prosecution the government must establish certain facts to prove the defendant's status to the jury. *See, e.g.*, Doc. 69 at 11-12, 17; Doc. 109 at 168-69, 171. Mr. Rehaif's reading simply requires the government to prove a defendant knew those facts. In Mr. Rehaif's case, for instance, the government could attempt to

establish he knew he was an alien illegally or unlawfully in the United States by establishing the facts that: (1) he knew he was admitted into this country on a student visa with specific requirements, and (2) he knew he violated those requirements. The district court, though, instructed the jury that: "The United States is not required to prove that the Defendant knew that he was illegally or unlawfully in the United States." Doc. 69 at 16; Doc. 109 at 170. It thus *removed* from the jury's consideration *any* defense concerning lack of knowledge.

Finally, the government cites *Hamling v. United States*, 418 U.S. 87, 121 (1974), for the proposition that "this Court has repeatedly rejected arguments 'that the prosecution must prove a defendant's knowledge of the legal status' of items, persons, or actions as a prerequisite to a criminal conviction[.]" GB 22-23. But *Hamling* merely held that a federal obscenity statute's scienter requirement extends only to knowledge of the factual contents of expression, not to knowledge of its legal status as obscene. 418 U.S. at 123. That holding fits Mr. Rehaif's reading of "knowingly violates," which requires knowledge of the facts forming a § 922(g) offense, not knowledge of the law.

B. Mr. Rehaif's Reading is Consistent with *Old Chief*.

The government relies on *Old Chief* to contend Mr. Rehaif's interpretation of § 924(a)(2) is incorrect. GB 8-14, 26-29, 37-39. Mr. Rehaif's reading of § 924(a)(2), though, comports with both the statutory text and *Old Chief*.

In *Old Chief*, this Court considered whether a district court abuses its discretion in a § 922(g)(1) trial when it rejects a defendant's offer to stipulate to the fact of his prior conviction. 519 U.S. at 174. Relying on

Fed. R. Evid. 403, this Court concluded that, when a defendant offers to stipulate to the fact of his prior conviction, the unfair prejudice of the name and nature of the prior conviction substantially outweighs its probative value. *Id.* at 191-92. The Court made clear its "holding is limited to cases involving proof of felon status." *Id.* at 183 n.7.

The government nonetheless contends an essential premise of *Old Chief* was that the government must prove knowledge as to only the firearm possession and not felon status. GB 26-29. In resolving the Rule 403 unfair-prejudice issue, however, the Court did not narrow § 924(a)(2)'s *mens rea* requirement. The defendant in *Old Chief* did not contest his felony conviction or his knowledge of it. 519 U.S. at 175. *Old Chief* therefore did not decide the statutory interpretation question now before this Court.

Mr. Rehaif's interpretation adheres to both the statutory text and *Old Chief*. Reading "knowingly violates" to require the government to prove the defendant knew his status affords a jury trial for those defendants, like Mr. Rehaif, who contest that element. *See, e.g.*, *Games-Perez*, 667 F.3d at 1143 (Gorsuch, J., concurring) ("Mr. Games-Perez concedes he knowingly possessed a firearm but protests that he had no idea he was a convicted felon."). As the government suggests, the number of such defendants may be few. GB 34.

At the same time, Mr. Rehaif's interpretation accords with *Old Chief*'s Rule 403 analysis. In a § 922(g)(1) prosecution, when a defendant neither contests his felony conviction nor his knowledge of it, the same Rule 403 decision applies—a court must accept a defendant's offer to stipulate to his felon status and knowledge of it. 519 U.S. at 174, 186-92. As this Court concluded in *Old Chief*, the name and

nature of the conviction presents a risk of unfair prejudice in a § 922(g)(1) prosecution. *Id.* at 185. A defendant's offer to stipulate to knowledge of his felon status would be "not merely relevant but seemingly conclusive evidence of the element." *Id.* at 186.

A defendant's stipulation that he knew his felon status would be "at least equivalent" to the evidence the government would present to prove knowledge. *See id.*[8] The government's assertion that proving a defendant knew his status will be "complicated" (GB 11, 36-37) only underscores that a defendant's stipulation to his knowledge will be at least equivalent, if not superior, to the evidence the government would seek to present.

Finally, *Old Chief* does not depend on the premise that the government must prove knowledge as to only the firearm possession. Indeed, the government's own argument demonstrates Mr. Rehaif's reading will not overrule *Old Chief*. As the government recognizes, the evidence the government would rely on to prove the defendant knew his felon status is "extraneous to the defendant's illegal firearm possession." GB 12. A defendant's offer to stipulate to his felon status and knowledge of it thus fall squarely within this Court's holding in *Old Chief*, 519 U.S. at 190-92. Mr. Rehaif's interpretation of § 924(a) therefore comports with the statutory text and does not undermine *Old Chief*.

---

[8] For example, suppose a prosecutor presents the judgment and transcript from the prior proceeding showing the defendant was clearly advised he was convicted of a crime punishable by more than one year in prison. From that evidence, the prosecutor could argue the defendant must know his felon status. But a defendant's admission that he knew his felon status would be at least equivalent to the judgment and transcript, without the unfair prejudice of the details concerning the name and nature of the conviction.

C. Mr. Rehaif's Reading is Easy to Apply.

1. According to the government, adopting Mr. Rehaif's position would "unrealistically presume a defendant to be unaware of his own personal characteristics" and "would require proof of knowledge that all but the rarest defendants will in reality have." GB 14. Being an alien in the United States illegally, however, is not a "personal characteristic." It is a fact-driven status. The law does not presume a defendant is aware of his status. What then remains of the government's pragmatic complaint is that it must prove Mr. Rehaif knew his status.

In a small but significant number of cases, defendants can raise a viable lack-of-knowledge defense concerning their status. *See* Jeffrey A. Meyer, *Authentically Innocent: Juries and Federal Regulatory Crimes*, 59 Hastings L.J. 137, 169-70 & nn.169-72 (2007) (collecting cases in which defendants had viable challenges to their knowledge of being a convicted felon but were barred at trial from arguing they had an innocent state of mind); *United States v. Games-Perez*, 695 F.3d 1104, 1117 (10th Cir. 2012) (Gorsuch, J., dissenting from denial of rehearing en banc).

2. Nonetheless, the government asserts that Congress has "sound reasons" for requiring proof of knowledge of the second, but not the first, substantive element of § 922(g). GB 34. The government's speculation about potential effects fails to overcome the plain text of the statutes.

(a) Practical Effect. The government asserts that applying a knowing *mens rea* to § 922(g)'s status element will have "little practical benefit." GB 34. This assertion misses the point that reasonable mistakes regarding the § 922(g) categories do exist.

For example, "it is common for noncitizens brought to the U.S. as young children to discover that they lack U.S. citizenship when they are in high school or when it is time to apply to college." Brief of Amicus Curiae of the National Immigrant Justice Center in Support of Petitioner 18, *Rehaif v. United States*, No. 17-9560 (Mar. 1, 2019) (citing David Martinez, *I didn't know I was undocumented* (Dec. 30, 2014) https://www.cnn.com/2014/06/25/living/david-martinez-undocumented-immigrant-irpt/index.html)).

Other examples include when judges misstate facts, *see, e.g.*, *Games-Perez*, 667 F.3d at 1137-39; or when the statute is a "wobbler," which has both felony and misdemeanor options. *See, e.g.*, *United States v. Bridgeforth*, 441 F.3d 864, 870-72 (9th Cir. 2006); *United States v. Crooked Arm*, 853 F.3d 1065 (9th Cir. 2017).

The government acknowledges *some* defendants might not know their status. GB 34. Yet it opts to sacrifice the liberty of the few on the altar of expediency based on the alleged burdens and complexities of proving knowledge.

(b) Burden on government. The government also vacillates between the burden of proving the defendant's knowledge of his status being either too difficult or too easy. GB 35-37. The government cannot have it both ways. To the extent it is too difficult, the government overstates the potential problems it may encounter if it must prove knowledge of the facts attendant to status. GB 37-38. Normally, evidence the government already marshals to prove status also proves knowledge of status.

To the extent it is too easy, that disproves the government's theory that countless defendants will go to trial solely to contest knowledge of status. In fact, in

most cases, defendants will invoke *Old Chief* because such proof will not be an issue.

(c) Unfairness to defendants. The government also speculates that proving a defendant's knowledge of his status "would fundamentally alter the nature of the trial." GB 13, 37. The government's case of primary reliance, *Old Chief,* counsels against that. *See supra* at II.B. Moreover, it is not unfair to require the government to carry its burden of proof, particularly when a defendant is genuinely mistaken about his status.

III. MR. REHAIF'S READING IS CONSISTENT WITH FOPA'S HISTORY.

The government claims Congress added "knowingly" to § 924(a)(2) to codify § 922(g)'s pre-FOPA *mens rea* requirements. GB 32. But "when Congress alters the words of a statute, it must intend to change the statute's meaning." *United States v. Wilson*, 503 U.S. 333, 336 (1992). Thus, Congress's addition of "knowingly" must have meant something other than to codify the status quo. Given the near-uniform pre-FOPA interpretation requiring a *mens rea* for only possession, that "something" must have been applying a *mens rea* to § 922(g)'s other substantive element—status.[9]

The government ignores this history, wading through Senate and House reports for evidence of

---

[9] The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), does not suggest otherwise. GB 41-42. The ACCA is a sentencing-enhancement provision applicable to only certain defendants, and its applicability is not determined by the jury at trial but by the court at sentencing. *See, e.g., Descamps v. United States*, 570 U.S. 254, 258-71 (2013). The ACCA does not define the underlying crime, as the government recognizes (GB 42), and therefore does not support the government's attempt to narrow § 924(a)(2).

congressional intent to support its position. GB 29-32. But "whatever Congress's *intent* may have been, any statutory interpretation must take reasonable account of the language Congress *actually adopted*." *Games-Perez*, 667 F.3d at 1144 (Gorsuch, J., concurring).[10] Here, the "most natural reading" of "knowingly violates" is that it applies to both of § 922(g)'s substantive elements, status and possession. *See, e.g.*, *McFadden*, 135 S. Ct. at 2304.

The government further suggests "knowingly violates" applies to only § 922(g)'s possession element because Congress's overall concern was protecting law-abiding citizens and keeping guns away from potentially dangerous people. GB 32-33, 42-43. But "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). Instead, Congress generally reserves criminal sanctions for those who act with full knowledge of the facts that make their conduct unlawful. *See Staples*, 511 U.S. at 605.

Finally, the government relies on Congress's inaction since enacting FOPA as evidence that "knowingly violates" applies to only the possession element. GB 33. But "[c]ongressional inaction cannot amend a duly enacted statute." *Cent. Bank of Denver, N.A. v. First Interstate Bank*, 511 U.S. 164, 186 (1994) (citation omitted). The Court does "not expect

---

[10] Likewise, amicus's policy arguments based on state prohibited possessor statutes are unpersuasive because "state laws are written differently" and "[n]one adopts a mens rea through a specifically applicable separate statutory provision like §§ 922(g) and 924(a)(2)." Brief Amicus Curiae of Everytown for Gun Safety in Support of Respondent 4-5, *Rehaif v. United States*, No. 17-9560 (Apr. 1, 2019).

Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation [of a statute]. In short, the original legislative language speaks louder than such judicial action." *Jones v. Liberty Glass Co.*, 332 U.S. 524, 534 (1947). When, as here, Congress has not "comprehensively revised a statutory scheme but has made only isolated amendments," this Court has "bluntly" stated: "It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation." *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (internal quotation marks omitted).

IV. THE RULES OF CONSTITUTIONAL AVOIDANCE AND LENITY SUPPORT MR. REHAIF.

Two additional rules of statutory construction support construing "knowingly violates" to require proof of both § 922(g)'s substantive elements—the rules of constitutional avoidance and lenity.

In *Staples*, this Court relied on the "long tradition" and "common experience" of lawful gun possession in this country to require proof a defendant knew the characteristics of a gun that made it criminal under 26 U.S.C. § 5861(d). 511 U.S. at 610-11, 619. Just as all guns are not prohibited, not all individuals are prohibited from possessing guns. Mr. Rehaif's reading gives full force to § 924(a)(2)'s *mens rea* requirement and avoids the due process concern of imposing severe penalties on someone who did not know the one fact—his status—that made his firearm possession criminal. *See Games-Perez*, 667 F.3d at 1145 (Gorsuch, J., concurring). The government's narrow reading of

§ 924(a)(2) should therefore be rejected. *See Clark* v. *Martinez*, 543 U.S. 371, 385 (2005).[11]

Regarding the rule of lenity, if the Court is left with any doubt about whether "knowingly violates" applies to § 922(g)'s status element, it should read the statutes in Mr. Rehaif's favor. *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015).

V. HARMLESS ERROR DOES NOT APPLY.

The government's final argument is that any error is harmless because, based on the trial evidence, any jury would have convicted Mr. Rehaif. GB 46-48.

When a faulty jury instruction prevents the jury from hearing or considering a planned defense and the evidence supporting it, harmless error cannot be established by looking solely at the government's evidence in the light most favorable to the government. A remand is appropriate to permit the lower court to determine in the first instance if the error is harmless. *See Neder v. United States*, 527 U.S. 1, 25 (1999).

---

[11] *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978), and *Freed*, 401 U.S. at 607, concerned "public welfare" statutes and are therefore distinguishable. GB 44; *Staples*, 511 U.S. at 608-12.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

VIRGINIA A. SEITZ
JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-0063

DONNA LEE ELM
FEDERAL DEFENDER

ROBERT GODFREY*
ROSEMARY CAKMIS
ALLISON GUAGLIARDO
ADEEL BASHIR
CONRAD KAHN
FEDERAL DEFENDER OFFICE
201 South Orange Ave., Suite 300
Orlando, FL 32801
(407) 648-6338
robert_godfrey@fd.org

Counsel for Petitioner

* Counsel of Record

April 12, 2019