

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 HAMID MOHAMED AHMED ALI REHAIF,)
4 Petitioner,)
5 v.) No. 17-9560
6 UNITED STATES,)
7 Respondent.)
8 - - - - -

9
10 Washington, D.C.
11 Tuesday, April 23, 2019

12
13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 2:02 p.m.

16
17 APPEARANCES:
18 ROSEMARY T. CAKMIS, ESQ., Orlando, Florida;
19 on behalf of the Petitioner.
20 ALLON KEDEM, Assistant to the Solicitor General;
21 Department of Justice, Washington, D.C. ;
22 on behalf of the Respondent.

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P R O C E E D I N G S

(2:02 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 17-9560, Rehaif versus United States.

Ms. Cakmis.

ORAL ARGUMENT OF ROSEMARY T. CAKMIS

ON BEHALF OF THE PETITIONER

MS. CAKMIS: Thank you, Mr. Chief Justice, and may it please the Court:

To knowingly violate 922(g), one must know the crucial fact that transforms his otherwise innocent firearm possession into a 10-year felony. That fact is his status. Applying a knowledge requirement to that fact makes sense because, ordinarily, firearm possession is lawful and, in fact, in most cases, constitutionally protected.

So it only makes sense that a person should be required to know he fits within that status before his firearm possession becomes illegal.

JUSTICE GINSBURG: What do you do with this -- in this very same statute, there are crimes where the legislature has said

1 explicitly -- well, let's take 922(g), says
2 selling firearms to one that the defendant
3 knows or has reasonable cause to believe is a
4 felon, so that makes -- there's a case where
5 the status, felon, has to be known to the
6 defendant, but in the, what is it, 922(g), we
7 don't have that knowing requirement.

8 So why should we insert it when it's
9 not there?

10 MS. CAKMIS: Because 924(a)(2) states
11 that the person must knowingly violate 922(g).
12 "Knowingly" modifies the verb "violate" and the
13 direct object, "922(g)."

14 Several of the provisions that are
15 listed in 924(a)(2) do have other types of
16 knowledge requirements, but the "knowingly"
17 still forms the default or the baseline
18 knowledge if there is not an otherwise inserted
19 knowledge.

20 Additionally, this Court's precedent
21 -- and that makes sense in light of this
22 Court's precedent, which attaches a mens rea to
23 every element that criminalizes otherwise
24 innocent conduct. In fact, this Court does so
25 even when "knowingly" is not in the statute.

1 The Court reads it in.

2 Here, Congress wasn't silent. It put
3 "knowingly" in the statute for a purpose.

4 JUSTICE KAGAN: Ms. Cakmis, do -- do
5 you agree that there is no mens rea element
6 attached to the jurisdictional element?

7 MS. CAKMIS: Yes, Your Honor.

8 JUSTICE KAGAN: And so what is the
9 difference between the two?

10 MS. CAKMIS: This Court has carved out
11 a very narrow exception for jurisdiction,
12 because that relates only to the power of the
13 Congress to legislate, whereas, in our
14 instance, we're talking about a substantive
15 fact, something that criminalizes otherwise
16 innocent conduct, something that goes to the
17 defendant's culpability.

18 JUSTICE ALITO: But isn't the -- the
19 theory behind the conclusion that there's no
20 mens rea element for a jurisdic- -- no mens
21 requirement for a jurisdictional element, the
22 -- the inference that this is not the kind of
23 element for which Congress wanted to have a --
24 a -- a mental element? It's an inference about
25 congressional intent. Would you agree to that?

1 MS. CAKMIS: No, Your Honor, I would
2 respectfully submit it is an exception carved
3 out by the Court.

4 JUSTICE ALITO: Yeah, and --

5 MS. CAKMIS: Because --

6 JUSTICE ALITO: -- and what's the
7 basis for the exception? Why have we carved
8 out that exception?

9 MS. CAKMIS: In the Commerce Clause,
10 for example, the defendant's conduct is not
11 related to that interstate transportation.
12 There's no requirement that the defendant
13 himself must transport the firearms in
14 interstate commerce.

15 JUSTICE ALITO: Well, Congress could
16 attach a mental element to that, could it not?

17 MS. CAKMIS: Yes, it could. And --

18 JUSTICE ALITO: All right. And so why
19 do we infer that it didn't?

20 MS. CAKMIS: Because that goes to
21 Congress's power to legislate and not to the
22 defendant's conduct, whereas the status --

23 JUSTICE ALITO: No, no. Congress
24 could attach a mental element to the
25 jurisdictional element.

1 MS. CAKMIS: Right.

2 JUSTICE ALITO: It could, right?

3 MS. CAKMIS: Yes, sir.

4 JUSTICE ALITO: We infer -- we -- we
5 say but it didn't. Right?

6 MS. CAKMIS: Yes, sir.

7 JUSTICE ALITO: And why do we say
8 that?

9 MS. CAKMIS: Again, because of the
10 difference that's being targeted. The
11 defendant's conduct is not being targeted by
12 that element. It's some --

13 JUSTICE ALITO: But why? Why do we
14 say that it's -- I'll try one final time.

15 MS. CAKMIS: I'm sorry.

16 JUSTICE ALITO: What -- what is the
17 theory behind the conclusion that Congress did
18 not want the mental element to apply to the
19 jurisdiction -- the mental requirement to apply
20 to the jurisdictional element?

21 MS. CAKMIS: And, again, from what
22 I've gleaned from this Court's cases, it's that
23 the defendant's culpability is not at issue.

24 JUSTICE KAGAN: Well, this --

25 JUSTICE KAVANAUGH: The

1 blameworthiness of the defendant is not --

2 MS. CAKMIS: Yes, sir.

3 JUSTICE KAVANAUGH: -- right --

4 MS. CAKMIS: Yes, sir.

5 JUSTICE KAVANAUGH: -- in those
6 elements, because whether you knew about the
7 jurisdictional hook doesn't really go, we've
8 assumed, to your blameworthiness, whereas
9 whether you knew the elements of the offense,
10 the other elements of the offense do, right?

11 MS. CAKMIS: Yes, Your Honor, thank
12 you.

13 JUSTICE ALITO: But it's an inference
14 about what Congress intended. That's what it
15 -- we -- we infer Congress didn't want this.
16 It could have done it, but it didn't do it. It
17 didn't say it didn't do it directly, but we
18 infer that it didn't do it.

19 MS. CAKMIS: Yes, Your Honor.

20 JUSTICE ALITO: And the reason we --
21 we infer that because we think this is just not
22 the kind of element that Congress wants to have
23 a mental requirement attach to, unless it says
24 so expressly.

25 MS. CAKMIS: Yes, Your Honor. We do

1 infer that a mental element would attach to it
2 if it's not simply jurisdictional, if it's not
3 solely concerning Congress's power to legislate
4 but has a substantive hook.

5 JUSTICE ALITO: Okay. So what is the
6 -- what reason would there be to infer that
7 Congress wanted the mental requirement to apply
8 to the -- the defendant's own status?

9 MS. CAKMIS: First of all, there is
10 the language and structure of the statute.
11 They put "knowingly" directly into 922 --
12 924(a)(2) in front of "violate 922(g)."

13 If they had only wanted it to skip and
14 to apply to the jurisdictional element --
15 excuse me -- to the possession element, they
16 logically would have put it immediately in
17 front of the possession element, after the nine
18 categories of people.

19 JUSTICE ALITO: What if there were no
20 mental -- what if the statute itself made no
21 mention of any mens rea?

22 MS. CAKMIS: Even when the statute is
23 silent, this Court has inferred a mens rea for
24 each substantive element, each element that
25 relates to blameworthiness and to the -- it

1 criminalizes otherwise innocent conduct.

2 JUSTICE ALITO: So then your argument
3 really doesn't depend on the text of the
4 statute?

5 MS. CAKMIS: Correct, Your Honor. The
6 text supports us, but, also, this Court's
7 inferences applying a mens rea to each
8 substantive element supports us. Also, the
9 purpose of FOPA in inserting "knowingly" in the
10 first place, in order to ensure gun owners are
11 not caught up in a broad net for honest or
12 innocent mistakes.

13 JUSTICE KAVANAUGH: I thought your
14 argument did depend on the text of the statute,
15 but you were saying in the alternative, even if
16 there were no mens rea element, our cases
17 require us to still require mens rea.

18 MS. CAKMIS: Our argument is --

19 JUSTICE KAVANAUGH: Right?

20 MS. CAKMIS: -- supported by the
21 statute's text and structure, and we would
22 respectfully submit the text and structure are
23 plain, and so we don't need to go to the
24 presumptions or legislative history.

25 But, in the event that the Court feels

1 it's not plain, the next step is to look at the
2 presumptions. And this Court's presumptions,
3 even if "knowingly" is not there, is -- this
4 Court presumes "knowingly" is read in.

5 JUSTICE SOTOMAYOR: Would this be --

6 JUSTICE GINSBURG: I have a --

7 JUSTICE SOTOMAYOR: -- different --

8 JUSTICE GINSBURG: -- question about
9 the consequences of -- of your position and the
10 constitutional -- answer the -- to the
11 constitutional question shouldn't turn on it,
12 but, as a practical matter, I think I'm right
13 that most of these possession cases are
14 felon-in-possession cases.

15 MS. CAKMIS: Yes, Your Honor.

16 JUSTICE GINSBURG: And if that's right
17 and you prevail, then how many people who have
18 been convicted under felon-in-possession
19 charges could now say, well, the Supreme Court
20 has said what has happened to me, I can't be
21 convicted of a crime I was convicted of, so I
22 want -- I want to get out. I want habeas.

23 If we say that the -- read the
24 requirement to go to the status, as well as the
25 conduct, the possession, then wouldn't people

1 who have been convicted have a habeas avenue to
2 pursue?

3 MS. CAKMIS: There would be a habeas
4 avenue to pursue, Your Honor. However, habeas
5 is not nearly as simple to navigate as a
6 criminal proceeding. And once you reach the
7 land of habeas, you have cause and prejudice
8 that have to be shown for procedural default.

9 It's even harsher than harmless error
10 when you get into the habeas world. And so the
11 number of people who might want to ask for
12 relief might be more, but there is only a small
13 but significant number of people out there who
14 actually had a genuine dispute --

15 CHIEF JUSTICE ROBERTS: Well --

16 MS. CAKMIS: -- about their knowledge
17 of their status.

18 CHIEF JUSTICE ROBERTS: Well, I
19 suppose it would get to whether or not a jury
20 was instructed on the element of the offense
21 that had to be -- that it had to be knowing.
22 So it may be broader than -- than that.

23 And in my experience,
24 felon-in-possession is almost always what
25 people are charged with in -- at this level

1 because it's the easiest thing to prove. You
2 can prove whether they're a felon or not and
3 you can prove whether they had a gun. You
4 don't have to get into all the messy stuff
5 about what they were up to.

6 So I would think it would be a very,
7 very substantial number of convictions.

8 MS. CAKMIS: But then there's the
9 practical and the legal answer. The practical
10 answer, in all honesty, is that not that many
11 people are going to be able to overcome all the
12 huge procedural hurdles that are placed in
13 front of habeas relief.

14 And unless they had a genuine issue of
15 fact or a genuine issue regarding their
16 knowledge of their status, the chances of
17 prevailing in habeas are slim to no, if that
18 helps.

19 JUSTICE GORSUCH: What percentage of
20 those guilty verdicts are by way of plea versus
21 trial?

22 MS. CAKMIS: There's, for a Section
23 922(g), approximately 95 percent are guilty
24 pleas. And there's no reason to believe that
25 that's going to change significantly one way or

1 another.

2 JUSTICE SOTOMAYOR: Could -- could you
3 tell me exactly what do you think the -- what
4 are the facts he would need to know to be
5 guilty? Because you can't have a mistake of
6 law.

7 MS. CAKMIS: Correct.

8 JUSTICE SOTOMAYOR: And you can't --
9 and you can't be ignorant of the law. So what
10 are the facts the government would have to
11 prove? That he knew his visa was conditioned
12 --

13 MS. CAKMIS: Yes.

14 JUSTICE SOTOMAYOR: -- on -- on his
15 being a student?

16 MS. CAKMIS: Yes, Your Honor, that he
17 knew he was admitted into this country lawfully
18 on a student non-immigrant visa, that the visa
19 had specific requirements, and that he failed
20 to comply with or violated those requirements.

21 JUSTICE SOTOMAYOR: All right. Does
22 he need to know that -- I thought I read
23 somewhere that he thought an immigration
24 officer or judge had to revoke his visa. Did I
25 read that wrong? Did I --

1 MS. CAKMIS: No, Your Honor. In the
2 trial court, that was another defense that was
3 posited, that he wasn't lawfully and illegally
4 in the country until an immigration judge had
5 adjudged him to be so. But that's not the
6 issue now before the Court.

7 It's the second aspect that the
8 government --

9 JUSTICE SOTOMAYOR: So your -- the
10 condition is that he knew he came in on a -- on
11 a student visa that said he had to remain a
12 student?

13 MS. CAKMIS: Yes, ma'am, Your Honor.

14 JUSTICE SOTOMAYOR: And if they show
15 that he was told that at the time of admission
16 and he stopped being a student, that's enough?

17 MS. CAKMIS: Yes, Your Honor.

18 JUSTICE SOTOMAYOR: So how do we not
19 go to harmless error here? I mean, at some
20 point --

21 MS. CAKMIS: I'm sorry?

22 JUSTICE SOTOMAYOR: -- he knows he
23 stopped going to school.

24 MS. CAKMIS: I -- I apologize. I
25 didn't hear.

1 JUSTICE SOTOMAYOR: How -- how don't
2 we have harmless error here? At some point, he
3 knows he stopped going to school.

4 MS. CAKMIS: We only have --

5 JUSTICE SOTOMAYOR: He knows that he
6 came in on a student visa because that's the
7 only kind of visa he had.

8 So what's his -- why isn't this
9 harmless error, even if we reach this issue in
10 your favor?

11 MS. CAKMIS: In our situation, we only
12 have one side of the story because, before
13 trial, the government moved in limine to keep
14 out the defense and the court agreed with the
15 government on the jury instruction that the
16 jury was specifically instructed the government
17 does not have to prove Mr. Rehaif knew his
18 status.

19 JUSTICE SOTOMAYOR: That doesn't
20 answer my question. What could be -- otherwise
21 be his defense?

22 MS. CAKMIS: That he was unaware that
23 he had been academically dismissed and was now
24 out of school.

25 JUSTICE SOTOMAYOR: That he didn't

1 know he had been -- I mean -- I mean, every
2 student knows whether he goes to school or not.

3 MS. CAKMIS: There is an opportunity
4 for reasonable mistake here, Your Honor, just
5 like with the other categories.

6 JUSTICE GINSBURG: Even though he was
7 -- he was out on a -- a firing range, and he
8 should have been at school if he hadn't been
9 dismissed?

10 (Laughter.)

11 MS. CAKMIS: He also had a hunting
12 license, for example, that the defense wanted
13 to introduce into evidence. And that's --

14 CHIEF JUSTICE ROBERTS: He was taking
15 a course on firearms.

16 MS. CAKMIS: He could have been.

17 CHIEF JUSTICE ROBERTS: But, I mean,
18 does the evidence suggest that there was a lot
19 of confusion about his status as a student?

20 MS. CAKMIS: The government's evidence
21 is all that we have because the defense didn't
22 introduce it. But, if the defense had been
23 allowed to introduce the hunting license, there
24 -- the court said there would be confusion
25 because he didn't have to have knowledge.

1 But a hunting license was relevant
2 because, if he thought he was a student still,
3 if you're on an F1 visa, you're allowed to
4 possess a firearm anywhere at any time if you
5 have a hunting license.

6 So the fact that he went out and got
7 one and then went to the firing range and shot
8 the firearms indicated -- would have indicated
9 or supported his defense.

10 Additionally, he was stopped for a
11 traffic infraction and no one told him at that
12 point that he had a warrant out for him or that
13 he was illegally here, which the court kept
14 that out of evidence because it would have
15 caused confusion as to knowledge and as to
16 status.

17 But, again, it would have been
18 relevant to his knowledge if that was allowed
19 to be a defense.

20 JUSTICE ALITO: Suppose someone who is
21 admitted on a student visa doesn't go to
22 school, has every reason to know, understands
23 that he has to continue in school if -- for his
24 visa to be valid, and he has every reason to
25 know that he's not any longer considered to be

1 a student by the school, hasn't been there for
2 months and months and months, hasn't done one
3 single thing, but doesn't actually know for
4 sure that they have expelled him.

5 Your position is that that person
6 would not fall within the statute?

7 MS. CAKMIS: Our position is that that
8 would be a jury question.

9 JUSTICE ALITO: No. The question is
10 what in the end, in -- in his heart of -- in
11 his mind, he does not know that he is not a
12 student, but he has every reason to know that
13 he is no longer a student.

14 MS. CAKMIS: Again, with respect, if
15 someone has every reason to know, it can be
16 inferred that the person does know.

17 Intent and knowledge are --

18 JUSTICE ALITO: All right. What if
19 the jury or the judge, whoever is the
20 fact-finder, comes to the conclusion he didn't
21 really know, but he had every reason to know?
22 Is that person guilty or not guilty?

23 MS. CAKMIS: If the fact-finder finds
24 that he truly did not know, then he would not
25 be guilty, Your Honor.

1 JUSTICE ALITO: And do you -- do you
2 think that's really what Congress meant here?

3 MS. CAKMIS: Yes, Your Honor, but I
4 don't think that will happen in that type of a
5 situation. I think that -- take, for example,
6 the dreamers, children who come into this
7 country with their parents illegally, live here
8 all their lives and think they're law-abiding
9 citizens, only to find out later in adulthood
10 that they never were law-abiding citizens.
11 They're not citizens at all.

12 But, if that person who had no idea he
13 was here illegally or unlawfully possessed a
14 gun, he would be subject to 10 years in prison
15 under the way the case -- the law has been
16 interpreted by the court below.

17 We're asking the Court to apply its
18 mens rea presumptions, as the Court has done in
19 the past, in every case when confronted by
20 them, and to look at the -- and to apply mens
21 rea to the knowledge -- to the status element.
22 That way, at least --

23 JUSTICE SOTOMAYOR: It does seem
24 fairly easy for the government to prove status
25 like you're a felon-in-possession because

1 there's a whole series of ways you should know
2 you're a felon, a transcript of you pleading
3 guilty could be one of them, or a judgment of
4 conviction, you have to be there to get that.

5 MS. CAKMIS: Exactly.

6 JUSTICE SOTOMAYOR: But how about
7 922(g)(3), who says, where the status element
8 is being addicted to a controlled substance,
9 why would Congress want to punish someone who
10 is aware of being addicted because they sought
11 help but not when someone -- but not someone
12 who is in denial, meaning my parents, yeah, put
13 me in a program, but they put me in against my
14 will.

15 MS. CAKMIS: And if the person knew
16 the facts underlying the legal definition of
17 "addicted," they knew that they were dependent
18 on those drugs, they knew that when they
19 weren't taking them, they started having
20 withdrawals or whatever the legal definition,
21 the facts --

22 JUSTICE SOTOMAYOR: But how would the
23 government be able to prove that? Meaning --

24 MS. CAKMIS: In the bulk of the cases,
25 practically speaking, it's going to be proved

1 by the same evidence that the government uses
2 to show the person was addicted.

3 And in -- as in all the other statutes
4 that require knowledge, the jury will have to
5 infer knowledge through reasonable inferences
6 or find that those reasonable inferences don't
7 support the knowledge.

8 JUSTICE ALITO: What about
9 subparagraph 8, which applies to a very -- to
10 -- to a set of individuals who are defined in a
11 very complicated way? So there has to be a
12 restraining order that includes a finding that
13 the person represents a credible threat to the
14 physical safety of an intimate partner or a
15 child, and then the order by its terms must
16 explicitly prohibit the use, attempted use, or
17 threatened use of physical force against such
18 intimate partner or child that would reasonably
19 be expected to cause bodily injury.

20 So it has to be proven that the
21 defendant knew all of those things?

22 MS. CAKMIS: The defendant knew the
23 fact that he had been to court or he had been
24 given notice of court because of a restraining
25 order that was related to his violent conduct.

1 JUSTICE ALITO: And he -- but he has
2 to know all the -- all those characteristics of
3 the restraining order?

4 MS. CAKMIS: Yes, Your Honor, which
5 would be demonstrated by the restraining order
6 that he received a copy of in the bulk of the
7 cases. That hasn't been prosecuted nearly as
8 much as, of course, the felon-in-possession,
9 but the felon-in-possession is illustrative
10 because it shows, if you have a judgment, for
11 the most part, you're going to know why this
12 judgment came about that you were facing 10
13 years in prison or 50 years in prison. It's --

14 JUSTICE ALITO: If someone is charged
15 with being a felon-in-possession, and it -- the
16 prosecution has to prove that the person knew
17 that this offense was a felony, can the
18 prosecution be prohibited from -- can the
19 defendant, by offering to stipulate, prohibit
20 the prosecution from proving the nature of the
21 felony?

22 Because, if all the jury knows is that
23 there was a conviction for a felony, then, you
24 know, the jury doesn't know how serious this
25 crime was. The more serious it is, the more

1 likely it is the person was aware of it.

2 Normally, you can't force a party to
3 agree to stipulate a fact that the party is
4 entitled to prove.

5 MS. CAKMIS: Which would make Old
6 Chief an even stronger tool in the prosecutor's
7 hands because the prosecutor would not have to
8 stipulate if the defendant is challenging his
9 knowledge of status. He cannot force the
10 prosecutor to stipulate because it would then
11 become probative. The nature of the offense
12 would be probative to a fact, and the probative
13 value would outweigh the prejudice.

14 JUSTICE ALITO: Well, if that's true,
15 then you -- you are perhaps not going to win a
16 great victory for people charged with being a
17 felon in possession. So then the prosecution
18 can prove -- even if there's an offer to
19 stipulate, can prove, well, this person was
20 previously convicted of rape and bank robbery
21 and -- and assault. That's true?

22 MS. CAKMIS: If the defendant is
23 challenging his knowledge that it was a
24 felony -- if he's just challenging his
25 knowledge that he ever was convicted, that

1 might be different.

2 But, if he's challenging his knowledge
3 that he knew this was a felony or that he knew
4 it was a serious offense punishable by more
5 than one year, and he claims, I didn't know
6 that, then he's made that probative, the type
7 of offense, the nature of it, and the name.

8 And we believe -- if Court has no
9 further questions, I would like to reserve the
10 rest of the time.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 MS. CAKMIS: Thank you.

14 CHIEF JUSTICE ROBERTS: Mr. Kedem.

15 ORAL ARGUMENT OF ALLON KEDEM
16 ON BEHALF OF THE RESPONDENT

17 MR. KEDEM: Mr. Chief Justice, and may
18 it please the Court:

19 The Firearm Owners' Protection Act
20 does not take the unusual step of requiring
21 proof that the defendant had subjective
22 awareness of his own legal status, nor does it
23 create a safe harbor for aliens or felons who
24 remain ignorant, even recklessly ignorant, of
25 their own circumstances.

1 Instead, FOPA reflects the
2 long-standing nationwide consensus that a
3 defendant knowingly violates the statute if he,
4 despite his prohibited status, knowingly
5 possesses a gun.

6 I think it's --

7 JUSTICE SOTOMAYOR: What do you do
8 with that dreamer?

9 MR. KEDEM: Pardon?

10 JUSTICE SOTOMAYOR: What do you do
11 with that dreamer -- with that dreamer example
12 or a student who got a visa from a certified
13 institution and all of a sudden, unbeknownst to
14 him or her, the school is decertified? And so
15 they're no longer in status.

16 What -- I -- I agree with you, in the
17 vast majority of cases, the status is pretty
18 self-evident, but -- or lack thereof is
19 self-evident. But do you think Congress
20 intended to include those innocent people as
21 well?

22 MR. KEDEM: So I --

23 JUSTICE SOTOMAYOR: Innocent of
24 knowing their illegality.

25 MR. KEDEM: Sure. I acknowledge that

1 application of the government's test in certain
2 hypothetical examples that we could come up
3 with would produce harsh results. And perhaps
4 you're not comforted by the fact that this
5 provision is applied many thousands of times
6 every year, and no one has been able to
7 identify an example like the type you've raised
8 or anything close to it.

9 JUSTICE SOTOMAYOR: Well, I guess my
10 question becomes, what do we do with the
11 Staples presumption?

12 MR. KEDEM: Sure.

13 JUSTICE SOTOMAYOR: That you -- we're
14 not going -- we're going to not read in a or
15 read out a mental element for the conduct or
16 the part of an element that makes you guilty of
17 something that's otherwise not guilty.
18 Possessing a gun is not in and of itself a
19 blameworthy conduct.

20 MR. KEDEM: That's correct.

21 JUSTICE SOTOMAYOR: And the only
22 blameworthy conduct is if you're an illegal
23 alien.

24 MR. KEDEM: That's correct, but our
25 argument here is not that possessing a gun is

1 blameworthy or inherently dangerous and,
2 therefore, you're charged with knowing the law.
3 Our argument is that there are certain people
4 who, by virtue of their circumstances and
5 status, are charged with knowing or at least
6 being on notice of whether they have a certain
7 status.

8 So someone who is an alien has a --
9 has an obligation, if they're here in the
10 United States, to know whether they're here
11 lawfully or unlawfully.

12 JUSTICE KAVANAUGH: But what if
13 they're mistaken? So it's a mistake of fact.
14 Mistake of fact has always been recognized as a
15 defense, or, put conversely, knowledge has
16 always been required -- going back to Justice
17 Jackson in *Morissette* and all through the
18 cases, as required for all the elements of the
19 offense.

20 MR. KEDEM: The court of appeals
21 acknowledged that --

22 JUSTICE KAVANAUGH: So what if there's
23 a -- what if there's a mistake of fact?

24 MR. KEDEM: Sure. The court of
25 appeals recognized that, in a case of a genuine

1 mistake of fact, it might be willing to
2 acknowledge that.

3 JUSTICE KAVANAUGH: Well --

4 MR. KEDEM: But that would not be --

5 JUSTICE GORSUCH: Well, once -- but
6 then the camel's nose is under the tent, isn't
7 it, counsel? Intent matters except for when it
8 doesn't? Knowledge matters except for when it
9 doesn't?

10 MR. KEDEM: No, Your Honor, mistake of
11 fact is an affirmative defense that has to be
12 raised --

13 JUSTICE GORSUCH: No, I'm -- I'm --

14 MR. KEDEM: -- and proven beyond a
15 preponderance of the evidence.

16 JUSTICE GORSUCH: Oh, okay, so you're
17 just saying there's an affirmative defense.

18 MR. KEDEM: There -- there might --

19 JUSTICE GORSUCH: So we're just going
20 to recreate this as an affirmative defense
21 throughout? So -- so what's the -- what's the
22 delta between the defendant's position and the
23 government's position then?

24 MR. KEDEM: It's whether it has to be
25 proven in every single trial, just as --

1 JUSTICE GORSUCH: Well, let -- let me
2 -- let me ask you, just to -- just to follow up
3 on -- since Robert Jackson's name has been
4 invoked here, Morissette, "the contention that
5 an injury can amount to a crime only when
6 inflicted by intention is no provincial or
7 transient notion. It is as universal and
8 persistent in mature systems of law as belief
9 in freedom of the human will and a consequent
10 ability and duty of the normal individual to
11 choose between good and evil."

12 What do we do with that? And this --
13 this Court's presumption that some mens rea is
14 necessary --

15 MR. KEDEM: And it is.

16 JUSTICE GORSUCH: -- and here we're
17 talking about the only thing that separates not
18 just innocent conduct but constitutionally
19 protected conduct potentially is --

20 MR. KEDEM: So that is --

21 JUSTICE GORSUCH: -- is knowledge of
22 the status, knowledge that I am a felon. I --
23 as you well know, I had a case where the fellow
24 was told by the judge that he was not a felon
25 when he was convicted. And yet he was put in

1 jail for 10 years afterwards because the
2 government didn't have to prove that he knew
3 his status.

4 What do we do about Justice Jackson's
5 admonition to us?

6 MR. KEDEM: His admonition was about
7 creating strict liability offenses, which this
8 is not. If you start with the presumption that
9 the defendant is going to possess the gun --

10 JUSTICE GORSUCH: No, it wasn't just
11 about that. It was about mens rea.

12 MR. KEDEM: So --

13 JUSTICE GORSUCH: And -- and we've got
14 X-Citement Video as well. So if, you know --

15 MR. KEDEM: So all of those cases are
16 ones in which there was a list of elements,
17 usually followed by some -- some word like
18 "knowingly," and the presumption is that it
19 applies to all of the other elements.

20 We don't have that here. We have a
21 separate provision --

22 JUSTICE GORSUCH: Well, with respect,
23 we've got maybe even worse here. "Knowingly"
24 precedes certain elements.

25 MR. KEDEM: It precedes --

1 JUSTICE GORSUCH: And this is the very
2 first element that follows after the word
3 "knowingly violates." This is the very first
4 element.

5 MR. KEDEM: So, Your Honor --

6 JUSTICE GORSUCH: Substantive element.

7 MR. KEDEM: It -- it is not --

8 JUSTICE GORSUCH: And the other
9 element -- if I can just finish my question.
10 You can tell me I'm wrong for -- for as long as
11 you want.

12 But the -- the next -- the element --
13 the elements that follow, you -- you would
14 admit that "knowingly" applies to, but just not
15 this one. How does -- how does that work? I'm
16 -- it's a --

17 MR. KEDEM: Sure.

18 JUSTICE GORSUCH: -- it's a bit of a
19 grammatical gravity I'm not familiar with.

20 MR. KEDEM: So the phrase "knowingly
21 violates" in 924(a)(2) we interpret to mean
22 knowledge of conduct, the same way that this
23 Court did in the International Minerals and
24 Chemical Corporation case. At issue there was
25 a statute that applied to someone who knowingly

1 violates any such regulation.

2 What this Court said is that requires
3 knowledge of the "specific acts or omissions"
4 that underlie the separate regulatory offense.
5 "Specific acts or omissions" is a direct quote.

6 And this Court relied on the same
7 understanding more recently in the Bryan case,
8 which construed a different subsection of
9 924(a).

10 JUSTICE KAVANAUGH: How -- how is the
11 defendant blameworthy if he or she truly
12 thought -- truly thought that the status was
13 lawful and then possesses the gun? Just focus
14 on that question. How is that person
15 blameworthy?

16 MR. KEDEM: So I'm not sure that they
17 are, but I think the more --

18 JUSTICE KAVANAUGH: Well, then okay.
19 Let me stop you there. Then why should that
20 person be subject to 10 years in prison?

21 MR. KEDEM: Because the more relevant
22 question is whether the Congress that enacted
23 FOPA in 1986 had any reason, given its 50-year
24 history with the federal firearm laws, to think
25 that cases of that type would be a problem.

1 Congress normally legislates --
2 JUSTICE KAVANAUGH: But suppose --
3 suppose -- and I think you're right in the
4 sense that 99 percent of the time or 90 percent
5 of the time this is going to be so easy to
6 prove, but there are going to be those cases,
7 the delta of cases where the defendant truly
8 was mistaken about his or her status, and you
9 just said is not blameworthy in that
10 circumstance, I think I have that right, and
11 yet you would put that person in prison for up
12 to 10 years.

13 MR. KEDEM: In the vast majority of
14 those cases -- first of all, almost all of
15 these cases --

16 JUSTICE KAVANAUGH: Well, what was
17 wrong about my summary of your position?

18 MR. KEDEM: Sure. In -- in the vast
19 majority of cases, the type of mistake that the
20 defendant will have made will be a mistake of
21 law. They will have misunderstood --

22 JUSTICE KAVANAUGH: Possibly -- I'm
23 sorry to interrupt -- possibly true. And in
24 those cases, you won't have a problem. But
25 there are going to be some that are mistake of

1 fact, and yet -- and you've said the person's
2 not blameworthy.

3 MR. KEDEM: So it is notoriously
4 difficult to figure out what is a mistake of
5 law versus fact. And let me give you an
6 example.

7 Petitioner says he was mistaken about
8 whether, if he had a hunting license, that
9 allowed him to possess a gun. It doesn't.
10 There is no legal right to possess a gun for an
11 alien unlawfully in the country just because
12 you have a hunting license.

13 But, of course, that is the type of
14 mistake the defendants are liable to raise.
15 And given that 10,000 out of the 11,000
16 prosecutions last year for 922(g) were for
17 being a felon-in-possession, you're going to
18 risk fundamentally changing the entire --

19 JUSTICE GORSUCH: Really?

20 JUSTICE BREYER: So what?

21 JUSTICE GORSUCH: Ninety-five percent
22 are -- I -- I'm sorry, please go ahead.

23 JUSTICE BREYER: Why is everybody
24 assuming there has to be a mistake of fact? I
25 mean, law sometimes can be a fact.

1 I mean, a person overstays his visa.

2 MR. KEDEM: Right. So --

3 JUSTICE BREYER: He doesn't know he's
4 overstayed it. He isn't quite sure what the
5 law is.

6 There's a law that says it is a -- it
7 is a serious crime, 20 years in prison, to stay
8 in a federal building illegally after there's a
9 rule which says you have to leave. Nobody
10 knows about it. In fact, I just made it up, so
11 I doubt that --

12 (Laughter.)

13 JUSTICE BREYER: But -- but -- but,
14 look, there could be many situations where you
15 just don't expect that person to -- to -- to
16 know not necessarily the law that forbids the
17 thing, but where the thing itself is composed,
18 in part, of a law, many cases where they don't
19 know what it is.

20 MR. KEDEM: Sure.

21 JUSTICE BREYER: So where in the
22 Supreme Court has this ever said, even in such
23 a case, always, under all circumstances, right
24 to jail?

25 MR. KEDEM: So I agree with you

1 morally speaking that someone who makes a
2 mistake of law --

3 JUSTICE BREYER: If you agree with me
4 morally speaking --

5 MR. KEDEM: But -- but --

6 JUSTICE BREYER: -- I have a naive
7 view that criminal law by and large should
8 charge -- should follow morals. And if it
9 doesn't, maybe we should look pretty hard.

10 MR. KEDEM: Or require --

11 JUSTICE BREYER: I think that's what
12 Justice Black -- Justice Jackson.

13 JUSTICE GORSUCH: Jackson.

14 JUSTICE BREYER: So if you agree with
15 that too. So go ahead. Where does it -- go
16 ahead.

17 MR. KEDEM: Knowledge that you have to
18 be violating the law is a willfulness
19 requirement. Congress made explicit that it
20 was distinguishing between types of offenses
21 for which willfulness was required, the
22 relatively minor offenses, things like
23 recordkeeping violations, and it was leaving in
24 place the normal knowledge requirement --

25 JUSTICE BREYER: That isn't -- you've

1 missed the question then. I agree with you
2 that it is a willfulness requirement where we
3 are looking at the statute that makes the thing
4 unlawful. All right? So don't look at that.
5 I agree with that.

6 But now let's look at that which it
7 makes unlawful. Now, when we look at that
8 which it makes unlawful, sometimes the that
9 which it makes unlawful could, in part, be
10 composed of rules or laws.

11 MR. KEDEM: Sure.

12 JUSTICE BREYER: And it's that part
13 that I am uncertain -- though you may know --

14 MR. KEDEM: Right.

15 JUSTICE BREYER: -- you know, that --
16 that this Court has always said you have to
17 know the legal status there.

18 MR. KEDEM: Sure. So I think --

19 JUSTICE BREYER: Is it -- does it --
20 has it said that? Have we said that?

21 MR. KEDEM: So I think that this Court
22 has consistently said that, unless a
23 willfulness requirement is imposed, you do not,
24 in fact, have to show that the defendant had
25 any awareness that they were violating any law,

1 much less the specific law. But -- but --

2 JUSTICE BREYER: Even including the --
3 the instance where you have a criminal statute
4 that has within it a -- a -- a thing?

5 MR. KEDEM: Sure.

6 JUSTICE BREYER: And the thing is in
7 part composed of laws. Suppose they're
8 Armenian laws. Suppose they're -- suppose
9 they're so technical.

10 MR. KEDEM: So maybe I could step back
11 and answer your question this way: Even
12 assuming that Congress thought there was some
13 mens rea necessary with respect to status,
14 would Congress have chosen knowingly? And I
15 think we know the answer is no, because we have
16 subsection (d), the firearm dealer provision,
17 which applies where the defendant knows or has
18 reasonable cause to believe that the person
19 who's purchasing the gun has a prohibited
20 status.

21 So why would Congress presume that the
22 firearm dealer has more information about the
23 person purchasing the gun than the person who
24 purchases the gun has about themselves?

25 JUSTICE ALITO: Well, that's a --

1 that's a very good point. And unless -- so
2 unless the text tells us definitively what the
3 mens rea element is for every element of a
4 criminal statute, and is there anything to
5 prevent us from inferring that the mental
6 element required for a -- for -- one -- one
7 element is different from the mental element
8 required for another element?

9 MR. KEDEM: No. Presumably,
10 924(a)(2), the knowingly violates, has to work
11 the same way for all subsections, not just (g)
12 but (d) as well.

13 Except Petitioners have a problem,
14 which is that you cannot knowingly violate a
15 requirement --

16 JUSTICE SOTOMAYOR: Wait a minute.

17 MR. KEDEM: -- to reasonably believe
18 something.

19 JUSTICE SOTOMAYOR: Congress --
20 Congress can legislate exceptions to every
21 general rule.

22 If the baseline is knowing for every
23 element and all of a sudden Congress has
24 another definition that changes it, which it
25 does in -- in the dealer definition --

1 MR. KEDEM: So it --

2 JUSTICE SOTOMAYOR: -- the specific
3 governs the general.

4 MR. KEDEM: So it's -- it's not clear
5 how you get there textually, but it also
6 doesn't explain why, for instance, in
7 subsection (h) or (a)(6) Congress has specified
8 a knowledge requirement there.

9 In (h), for instance, you have to know
10 that your employer has a prohibited status. So
11 why would Congress specify knowledge there if
12 you were already going to import a knowingly
13 requirement into every provision?

14 JUSTICE BREYER: I don't -- I don't
15 think I agree with you on the fact it has to be
16 read the same way in all. I mean, I've written
17 opinions where you have long lists of things,
18 and this one's like that and this is like that
19 and the other thing is like that, and we know
20 for a fact that you don't have to prove
21 knowingly where you're talking about a
22 jurisdictional hook.

23 And so you could have some of these A,
24 B, C, D, E that have jurisdictional hooks and
25 others that don't --

1 MR. KEDEM: So let me --

2 JUSTICE BREYER: -- and we wouldn't
3 apply knowingly to the hook and we would apply
4 it to other things and so forth.

5 MR. KEDEM: So let me speak then
6 directly to the idea of knowledge of status,
7 because, to a certain extent, mens rea is
8 really about what facts a defendant is presumed
9 to know or at least be on notice of versus the
10 type that should be proven to a jury beyond a
11 reasonable doubt.

12 And there's a reason that we don't
13 require in a case of statutory rape the
14 government to prove that the defendant knew the
15 victim was under the age of consent, because,
16 even if he didn't know, he was on notice. It
17 was incumbent upon him to find out.

18 And by the same token, if you are an
19 alien in the United States, it is incumbent
20 upon you to know whether you are here lawfully
21 or unlawfully.

22 JUSTICE GORSUCH: Well, you'd agree,
23 first of all, I think, that the immigration
24 laws are kind of complex.

25 MR. KEDEM: They are.

1 JUSTICE GORSUCH: All right. And
2 people can make mistakes.

3 MR. KEDEM: Absolutely.

4 JUSTICE GORSUCH: No doubt. Like the
5 dreamers we've talked about --

6 MR. KEDEM: Yeah.

7 JUSTICE GORSUCH: -- for example, DACA
8 recipients, whatever.

9 You'd also, I think, agree in (d) that
10 there's language before you get to the new mens
11 rea, before the reasonable cause, that -- that
12 the "knowingly" from 924 could attach to.

13 MR. KEDEM: There is.

14 JUSTICE GORSUCH: Okay. All right.

15 So why -- why shouldn't "knowingly"
16 attach to the first substantive element that it
17 comes across in (g)?

18 MR. KEDEM: Because it's contained in
19 a separate provision, which means that you
20 don't have the same distributive language
21 presumption that you would have if it were
22 "knowingly" followed --

23 JUSTICE GORSUCH: Not distribute, but
24 the very first substantive element.

25 MR. KEDEM: So I don't think anything

1 about Petitioner's argument would change if it
2 said anyone possessing a gun that traveled in
3 interstate commerce who is an alien unlawfully
4 in the United States, I don't think the order
5 matters for that argument.

6 JUSTICE GORSUCH: But it matters to
7 you because you admit it attaches to the second
8 substantive element.

9 MR. KEDEM: Because it's conduct, not
10 because it's the second one.

11 JUSTICE GORSUCH: Well, the status is
12 a product of conduct, isn't it?

13 MR. KEDEM: I don't --

14 JUSTICE GORSUCH: One is an illegal
15 alien because of one's conduct. One is a felon
16 because of one's conduct. These are not
17 immutable characteristics.

18 MR. KEDEM: That is true. But I don't
19 think it means that having been convicted of a
20 crime punishable by more than one year
21 necessarily means that being punishable by more
22 than one year is your status, something of
23 which naturally you would normally be -- be
24 aware.

25 JUSTICE GORSUCH: You'd agree that,

1 you know, most of these cases you're going to
2 be able to resolve by plea agreement?

3 MR. KEDEM: I think that's right.

4 JUSTICE KAVANAUGH: You made a point
5 about Congress and statutes use different kinds
6 of mens rea in different sections.

7 MR. KEDEM: Sure.

8 JUSTICE KAVANAUGH: That's the whole
9 point, right? Congress is all over the place
10 in terms of mens rea.

11 MR. KEDEM: That's right.

12 JUSTICE KAVANAUGH: Old statutes, new
13 statutes. And that's why this Court, for a
14 long time, has started with a presumption of
15 mens rea for every element of the offense.

16 Congress could override that, but the
17 presumption exists for all the elements.
18 Whether Congress put in a -- a mens rea for one
19 element and there are three others, or whether
20 Congress put in no mens rea at all, we apply
21 the mens rea.

22 Is that a correct statement of the
23 law?

24 MR. KEDEM: That is. And let me give
25 you another example, a textual clue that

1 Congress didn't want to require knowledge of
2 status here.

3 There are two instances, only two that
4 we're aware of, where someone actually might
5 not reasonably know or Congress might worry
6 that they wouldn't reasonably know their own
7 status, and Congress was explicit for both of
8 them in its treatment.

9 The first one is subsection (g)(8),
10 which applies to someone who's subject to a
11 restraining order, which you might not know
12 because some restraining orders are issued ex
13 parte. And so Congress specified in (g)(8)
14 that the restraining order has to have been
15 issued "after a hearing of which such person
16 received actual notice and at which such person
17 had an opportunity to participate."

18 The other example is someone who's
19 subject to an indictment. One court pointed
20 out that a lot of indictments are under seal,
21 and so you wouldn't necessarily know that.

22 So Congress took the indictment
23 language, put it into its own subsection,
24 subsection (n), and imposed a willfulness
25 requirement.

1 JUSTICE BREYER: Then a person who
2 overstays his visa --

3 MR. KEDEM: So you have to know.

4 JUSTICE BREYER: -- a person who
5 overstays his visa, just inadvertently, is --
6 always knows that. A person who is brought to
7 this country by two years old by his parents,
8 and now he's 21 years old, and they've never
9 told him anything about being brought here when
10 he was two years old, he's lived in Austin,
11 Texas. He knows that. Now do you see?

12 MR. KEDEM: I understand, but by the
13 same --

14 JUSTICE BREYER: I can fairly easily
15 think of many other examples --

16 MR. KEDEM: Sure.

17 JUSTICE BREYER: -- besides that
18 indictment.

19 MR. KEDEM: And absolutely we can,
20 but, you know, Congress normally legislates
21 with the haystack in mind, not the needle.

22 JUSTICE BREYER: But that's why,
23 perhaps --

24 MR. KEDEM: Especially not --

25 JUSTICE BREYER: That's perhaps why

1 courts tend to read into silent language mens
2 rea requirements, such as our statute I'm
3 making up, but I -- I think it does illustrate
4 the example.

5 Anyone who robs a veteran of a medal
6 that is in categories X, Y, Z, and C, the
7 greatest honors and the lesser honors and so
8 forth, goes to jail for 15 years. I just
9 thought of that because it seems to me
10 incredible that a person who had no idea what
11 category this medal was in would suddenly be
12 charged with knowledge of that legal fact.

13 MR. KEDEM: Right.

14 JUSTICE BREYER: So it's not hard, I
15 think, if you have more time --

16 MR. KEDEM: Right.

17 JUSTICE BREYER: -- to think of
18 tremendous unfairness that can exist.

19 MR. KEDEM: We can come up with
20 hypotheticals, but, again, the question is
21 whether Congress had any reason to redesign the
22 way that firearm prosecutions had always worked
23 in every court of appeals around the country
24 out of concern for a category of cases that, if
25 it exists at all, is vanishingly small.

1 JUSTICE GORSUCH: Counsel, you talk
2 about this -- this prior history as if it were
3 handed to us on tablets, but the -- the only
4 prior history I'm aware of really is that
5 Fourth Circuit opinion, Capps, and it seems to
6 rely on a very convoluted parsing of the
7 legislative history of a predecessor statute.

8 That's what the holdings of the courts
9 of appeals on your side all rest on at the end
10 of the day, and that's a mode of interpretation
11 that's not exactly preeminent today.

12 MR. KEDEM: That's correct.

13 JUSTICE GORSUCH: And even for those
14 of us who do attend carefully to legislative
15 history, it's the legislative history of a
16 prior statute that's been superseded.

17 And I don't know many of us who think
18 that is enough to overcome clear language of a
19 present statute. So what do we do about that?

20 MR. KEDEM: We have made a textual
21 argument that does not rely on the arguments
22 that appear in those Fourth Circuit references.

23 JUSTICE GORSUCH: Fair enough, but you
24 just told us that we should be careful about
25 undoing the careful work of the courts of

1 appeals for the last 50 years, but if it all
2 hinges on a terrible mistake, that argument
3 seems to me -- you may have other arguments,
4 but that one doesn't seem to be a very good
5 one.

6 MR. KEDEM: I'm sorry. I was making a
7 different point. I'm sorry if I was unclear
8 about it. My point was, in 1986, there had
9 been a national consensus. Every court of
10 appeals to consider the issue had held that
11 there was no knowledge of status required.

12 Presumably, if Congress wanted to
13 revolutionize the way that the -- one of the
14 most frequently prosecuted federal crimes
15 worked, it would have been a whole lot clearer.
16 As it was, Congress did something in FOIA that
17 every court of appeals interpreted as leaving
18 in place the underlying rule.

19 If we could turn briefly to the
20 practical consequences of this decision, the --

21 JUSTICE KAGAN: Mr. Kedem, before you
22 do that, sorry, do you think that there's a
23 difference between a jurisdictional element and
24 a status element like this one?

25 MR. KEDEM: I think it's not a

1 difference in kind. I think it goes to the
2 point that Justice Alito was making, namely,
3 that there are some things that we presume
4 people either are aware of or are on notice of
5 or it's just not the type of thing that
6 Congress would want to have to prove to a jury.

7 And there are other things that
8 Congress would assume that we would prove to a
9 jury. We -- our argument is that legal status
10 is the type of thing, especially the
11 defendant's own legal status, that Congress
12 would not have wanted to require.

13 And that becomes even clearer when you
14 see that every time in 922 that Congress wants
15 to require proof of some mental state with
16 respect to the legal status, it is explicit
17 about it. We've mentioned subsections (d),
18 subsections (h), (a)(6). We've talked about
19 subsection (n). We talked about (g)(8). Those
20 are all instances where Congress might have
21 worried that someone wouldn't know, for
22 instance, the status of the person you're
23 selling the gun to.

24 And that's why Congress included an
25 explicit mental state. It did not include the

1 same in subsection (g).

2 JUSTICE ALITO: The inference -- the
3 -- the rule about so-called jurisdictional
4 elements seems to me must rest on an inference
5 about congressional intent. And the argument
6 against reaching a similar inference with
7 respect to a defendant's status is that, in a
8 case like this one, the -- the conduct in
9 question would often not be criminal were it
10 not for the person's status. And I think it's
11 an overstatement to say that it's -- it's
12 always lawful activity. That depends on the
13 jurisdiction.

14 But, in any event, so can that -- can
15 it be distinguished on that ground, or would we
16 run into problems in the situation where the
17 conduct in question is subject to prosecution
18 under state law and federal law, but what the
19 jurisdictional element does is to make it much
20 more serious, to impose a much more serious
21 penalty?

22 MR. KEDEM: So I'm -- I'm not sure it
23 can be distinguished on those grounds. I'm
24 glad that you brought up state law, because
25 we've been talking about federal law here, but

1 nearly every state has its own possession law.
2 And as far as we're aware, not a single one of
3 them requires proof that the defendant had any
4 mental state with respect to their status,
5 which I think is relevant in two ways.

6 First of all, it shows that this is
7 unlikely -- it is unlikely that states would
8 have structured all of their laws this way if
9 it invited abuse or routinely ensnared the
10 innocent. But I think it also goes to, what is
11 the general expectation of what someone is on
12 notice of?

13 And I think it shows that if all
14 states are making the same assumption, that a
15 defendant is on notice of his own status, it's
16 not unreasonable to think that Congress was
17 resting on the same assumption.

18 Going now to the practical problem,
19 Justice Gorsuch, you are 100 percent correct
20 that, in the vast majority of cases, people
21 plead guilty. On the other hand, we're talking
22 about -- about 10,000 felon-in-possession
23 offenses. And what happens is, although it
24 will be extraordinarily rare that a defendant,
25 in fact, will not know that he is -- of his own

1 status, it is something that will have to be
2 proven at every trial, which means that the
3 focus of the trial --

4 JUSTICE GINSBURG: Well, in practice
5 -- practically, that won't be so because the
6 last thing in the world that the defendant will
7 want is for the jury to know that he committed
8 some heinous crime.

9 MR. KEDEM: So that will often be the
10 case. It won't always be the case. It's the
11 easiest thing in the world for a defendant to
12 say, I just didn't know, or even if I did know
13 at one point that my crime was punishable by
14 more than one year, I forgot.

15 Imagine a defendant who received a
16 10-month sentence. Despite --

17 JUSTICE KAVANAUGH: But juries don't
18 believe that.

19 MR. KEDEM: Sometimes they do;
20 sometimes they don't.

21 JUSTICE KAVANAUGH: Well, I mean, if
22 you've got a ridiculous defense, it's not going
23 to work.

24 MR. KEDEM: It's not ridiculous for a
25 defendant who, let's say, five years after his

1 prior offense, for which he received a 10-month
2 sentence, to say, at the time of my later gun
3 possession, it's just not something that I
4 remembered because I only got 10 months, so I
5 wasn't thinking about the potential penalty.

6 JUSTICE GORSUCH: All right. So -- so
7 we're dealing with two classes of cases then if
8 I understand your argument. One is it's going
9 to be easy to prove in the mine run of cases.
10 It's not going to a big deal. But there is a
11 small but significant number of cases where,
12 gee, it's really going to be a colorable
13 question and, therefore, a burden on the
14 government.

15 MR. KEDEM: Our point --

16 JUSTICE GORSUCH: It seems to me a
17 double-edged sword, isn't it?

18 MR. KEDEM: So -- so our argument is
19 not that it's a burden on the government.
20 Sometimes it will be, but usually it won't.
21 And, in any event, we're not asking for your
22 sympathy. Our point is that you risk shifting
23 the focus of all felon-in-possession trials out
24 of -- out of a concern for a category of cases
25 that, if they exist, is extraordinarily small.

1 JUSTICE GORSUCH: That does seem like
2 you're asking for our sympathy, with all
3 respect.

4 JUSTICE KAVANAUGH: You are referring
5 to burden too.

6 JUSTICE GORSUCH: Yeah.

7 JUSTICE KAVANAUGH: I mean, that's
8 your argument.

9 JUSTICE GORSUCH: You say you want to
10 turn to the practical consequences, the burden
11 on the government.

12 MR. KEDEM: It's not --

13 JUSTICE GORSUCH: And then we
14 dismissed most of them as not burdensome at
15 all. And now we're left with these.

16 MR. KEDEM: So, again, the problem is
17 not the burden on the government. Imagine you
18 are a juror at a felon-in-possession --

19 JUSTICE GORSUCH: What is the --

20 MR. KEDEM: -- trial.

21 JUSTICE GORSUCH: -- practical
22 consequence argument then if it isn't the
23 burden on the government?

24 MR. KEDEM: It's that it will be
25 deeply confusing to the jury. So imagine you

1 are a juror.

2 JUSTICE GORSUCH: So you are worried
3 about --

4 JUSTICE BREYER: You are considering a
5 person who didn't know he was brought here at
6 the age of two. Okay? And that's the case I'm
7 imagining, because I imagine our criminal
8 justice system is aimed at proving the guilt or
9 innocence of each individual.

10 And it doesn't help to say there are a
11 lot of other people who are guilty. This one
12 didn't know he overstayed his visa.

13 Now, what fairness --

14 MR. KEDEM: So --

15 JUSTICE BREYER: -- what purpose is it
16 served to send that person to prison for ten
17 years?

18 MR. KEDEM: Respectfully, Justice
19 Breyer, if you reinterpret the mens rea for
20 every 922(g) offense out of concern for that
21 hypothetical category of people, that is worse
22 than letting the tail wag the dog. That is
23 letting the tail wag the dog where the dog is
24 massive and the tail is tiny and largely
25 hypothetical.

1 JUSTICE GORSUCH: And the dog is that
2 we're concerned about juries not being able to
3 understand?

4 MR. KEDEM: And -- and the fact that
5 you were shifting the focus. Imagine you are a
6 juror and you are at a felon-in-possession
7 trial. And all of a sudden the judge, the
8 witnesses, the lawyers, all start talking about
9 a prior crime totally unrelated.

10 And under the best of circumstances
11 that sort of trial within a trial can be deeply
12 confusing.

13 JUSTICE GORSUCH: Deeply confusing for
14 a jury, and we just shouldn't trust juries,
15 even though it's enshrined in the Constitution
16 that -- that every person is entitled to have
17 their guilt or innocence -- then we need to
18 worry -- we need paternalistically to worry
19 about juries?

20 MR. KEDEM: No, Your Honor. But if
21 you are convinced that that is what Congress
22 had in mind when it enacted FOIA in 1986 then,
23 yes, that is the result that you would reach.

24 JUSTICE ALITO: How many people are
25 now serving time in federal prison under the

1 felon-in-possession statute?

2 MR. KEDEM: Well, given that it's
3 about 8, 9, 10,000 a year, it's going to be a
4 very high number.

5 If I could, because my time is limited
6 --

7 JUSTICE KAVANAUGH: Morissette itself,
8 the charge was converting government property.
9 And the defendant's argument was I didn't think
10 it was government property because I thought it
11 was abandoned.

12 MR. KEDEM: Right.

13 JUSTICE KAVANAUGH: The government
14 there argued who cares? It doesn't matter if
15 you thought it was abandoned.

16 MR. KEDEM: Right.

17 JUSTICE KAVANAUGH: And Justice
18 Jackson saw the problem.

19 MR. KEDEM: Right, because that --

20 JUSTICE KAVANAUGH: And why is that
21 different from this case?

22 They are the abandoned property here.
23 You're -- didn't know your status.

24 MR. KEDEM: Because here we're talking
25 not just about a legal status, but the

1 defendant's own legal status, something of
2 which he presumably is aware or at least is
3 charged with being aware.

4 What a defendant can't do is say: I
5 don't remember when my visa was going to expire
6 and, you know what, I'm not going to bother to
7 figure out, because as long as I remain
8 ignorant, even recklessly ignorant about my own
9 status, that means that I can't face liability.

10 If I could just tie together the
11 various strands of our textual argument. It is
12 first that you are separating out knowingly
13 violates from the regulatory prohibition, which
14 this Court has read to mean that it's a
15 reference to the specific acts or omissions
16 that violate the prohibition.

17 Two, the fact that you are dealing
18 with the defendant's own legal status.

19 Three, the fact that knowingly
20 violates, if you import the knowing
21 requirement, produces all sorts of double
22 mental states or incompatible mental states
23 under subsections (d), (h), and (a)(6).

24 Four, the fact that Congress was
25 always explicit in 922 when it wanted to

1 require a particular mental state with respect
2 to background circumstances.

3 And, five, in the two instances where
4 Congress thought that maybe someone reasonably
5 wouldn't be on notice of their status, it made
6 specific provision of those.

7 All of that, combined with the 50-year
8 history that Congress had at its fingertips
9 when it enacted FOIPA in 1986, moreover the fact
10 that if Congress had a problem with the way
11 every court of appeals in the country has
12 interpreted FOIPA, presumably it would have done
13 something about that in the last 30 years.

14 And yet even though 922 and 924 have
15 been modified more than a dozen times, Congress
16 has not done so.

17 If there are no further questions.

18 JUSTICE GINSBURG: I would like to
19 know your -- your view of let's just say we --
20 we would reverse the -- the collateral review
21 issue that I asked about.

22 MR. KEDEM: Sure. So the government's
23 view is that under Bousley, the defendant would
24 have to show on collateral review that he was
25 actually innocent, meaning he actually did not

1 know about his status.

2 But, of course, any defendant could
3 raise that argument and would have every
4 incentive to try and raise that argument.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Six minutes, Ms. Cakmis.

8 REBUTTAL ARGUMENT OF ROSEMARY T. CAKMIS
9 ON BEHALF OF THE PETITIONER

10 MS. CAKMIS: Thank you, Your Honor.

11 First, I would just like to point out
12 I think that 10,000 a year prosecutions under
13 this statute is somewhat overstated in that the
14 sentencing commission has indicated in the past
15 15 years there has only been 65,000.

16 But, regardless, the bulk of them are
17 under the felon-in-possession. And we
18 acknowledge that the bulk of the time there is
19 not going to be a problem.

20 But that small but significant number
21 of cases there is a problem in, where there is
22 honest miss-advice by a judge, and the
23 defendant believes the judge, is he supposed to
24 inquire further and say: Judge, you're wrong?

25 We would respectfully submit that's

1 not practical or fair.

2 In essence, the government says it's
3 not adding or complaining of its burden, but,
4 rather, is concerned about the added burden on
5 the jury and the jury confusion, but virtually
6 every statute has knowledge and the jury sorts
7 it out. That's what they do.

8 The government is, in effect, asking
9 this Court to create a whole new rule, a rule
10 that relieves it of its burden to prove the
11 only critical fact that makes firearm
12 possession in this country illegal, and that
13 fact is status.

14 Our reading, applying it to the
15 status, is consistent with the plain language
16 of the statutes, with this Court's canons of
17 statutory construction, and with the purpose of
18 FOIA in inserting knowledge in the first place.

19 Congress did something different.
20 Prior to FOIA, knowledge was not in the
21 statute. It's there now.

22 The fact that other Congresses
23 afterwards have not changed it adds very little
24 weight in this very weak canon this Court has
25 described.

1 And for all those reasons, we would
2 ask the Court to reverse.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel. The case is submitted.

5 (Whereupon, at 2:58 p.m., the case was
6 submitted.)

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