No. 10-1220

In the Supreme Court of the United States

JOHN REECE ROTH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly instructed the jury on the meaning of the term "willfully" in the Arms Export Control Act, 22 U.S.C. 2778(c), where the court required the jury to find that petitioner voluntarily and intentionally violated a known legal duty, but did not require the jury to find that petitioner knew that the exported items were on the United States Munitions List, 22 C.F.R. 121.1.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 628 F.3d 827.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2011. The petition for a writ of certiorari was filed on April 5, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on one count of conspiracy to export defense articles and services to foreign nationals, in violation of 18 U.S.C. 371; and 15 counts of exporting defense articles and services without a license, in violation of 22

U.S.C. 2778. Pet. App. 1a-2a; 3:08-CR-00069-1 Docket entry No. 93, at 2-3 (E.D. Tenn. July 28, 2009). He was sentenced to 48 months of imprisonment, to be followed by two years of supervised release. *Id.* at 4-5. The court of appeals affirmed. Pet. App. 1a-19a.

1. The Arms Export Control Act authorizes the President to control the import and export of defense articles and "to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services." 22 U.S.C. 2778(a)(1). The items designated under Section 2778(a)(1) constitute the United States Munitions List. *Ibid.* The Munitions List, contained in implementing regulations promulgated by the Department of State,[1] sets forth 21 categories of weapons whose export is prohibited without a license. See 22 C.F.R. 121.1. The Act provides criminal penalties for "[a]ny person who willfully violates any provision of [the Act] * * * or any rule or regulation issued under [the Act]." 22 U.S.C. 2778(c).

Category VIII of the Munitions List includes "[a]ircraft, including * * * drones * * * which are specifically designed, modified, or equipped for military purposes." 22 C.F.R. 121.1, Category VIII(a). It also includes "[c]omponents, parts, accessories, attachments, and associated equipment * * * specifically designed or modified for the articles in paragraph[] (a)," 22 C.F.R. 121, Category VIII(h), as well as "[t]echnical data * * * and defense services * * * directly related

[1] The President has delegated his rulemaking authority under the Act to the Secretary of State, see Exec. Order No. 11,958, 3 C.F.R. 79 (1978), who has promulgated the International Traffic in Arms Regulations, or ITAR. See 22 C.F.R. 120.1-130.17.

to the defense articles enumerated in paragraphs (a) through (h)," 22 C.F.R. 121.1, Category VIII(i).

The term "technical data" encompasses "[i]nformation * * * which is required for the design, development, * * * testing, * * * or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation." 22 C.F.R. 120.10(a)(1). It does not, however, include "information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or information in the public domain." 22 C.F.R. 120.10(a)(5). The term "defense services" includes furnishing "assistance (including training)" about defense articles or "technical data" to "foreign persons." 22 C.F.R. 120.9(a)(1) and (2).

2. Petitioner was a professor of electrical engineering at the University of Tennessee, and the head of the University's Plasma Science Laboratory. Petitioner's former student, Daniel Sherman, was a senior official at Atmospheric Glow Technologies (AGT), a Tennessee company with experience in plasma actuators, a specialized type of technology that can be used to affect aerodynamics by altering air flow.[2] Petitioner was a paid consultant to AGT. Pet. App. 1a-2a; Gov't C.A. Br. 7-8.

In October 2003, the United States Air Force solicited contract bids for a military research and development project to develop plasma technology to control the flight of small, remotely piloted aerial drones. The project had two phases: Phase I involved designing plasma actuators for drone aircraft, and Phase II involved test-

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[2] A plasma actuator is analogous to a circuit board. It is a set of electrodes set in a specialized material. When sufficient voltage is applied, plasma, a collection of charged particles, develops. Gov't C.A. Br. 5 n.2.

ing the new designs for use. Pet. App. 2a; Gov't C.A. Br. 5-7.

In May 2004, the Air Force awarded AGT the contract for Phase I. An Air Force official told petitioner that the Phase I project would involve "6.2 funding" from the Air Force, which petitioner understood to mean that the project was subject to export-control laws. Pet. App. 2a, 14a; Gov't C.A. Br. 7. During Phase I, petitioner assisted AGT in drafting a contract proposal for the second phase of the project, including a subcontract between him and AGT. In the subcontract, the parties acknowledged that the Phase II research would be subject to export-control laws. In both a "project plan" that petitioner sent to Sherman in October 2004 and petitioner's handwritten notes maintained at his office that described how he intended to structure the project, petitioner outlined that he anticipated employing two of his university research assistants during Phase II: one stationed at AGT to work with "Export Controlled Data for Munitions"; and the other stationed at the Plasma Science Laboratory to perform other duties. Pet. App. 3a; Gov't C.A. Br. 8-12. AGT submitted the Phase II contract proposal to the Air Force and, in April 2005, the Air Force awarded the contract to AGT. *Id.* at 9.

Phase II included providing periodic reports to the Air Force about the technical data from the ongoing research. These included quarterly reports, technology transfer reports, a final report, and a test plan, all of which were identified in the award-contract documents as being subject to export-control laws. Quarterly reports were based on weekly reports, which served to memorialize on a weekly basis the project data that was generated at both AGT and the Plasma Science Laboratory. Pet. App. 3a; Gov't C.A. Br. 11-14.

The two research assistants petitioner assigned to work on the Phase II project were Truman Bonds, an American, and Xin Dai, a Chinese national. Sherman was reluctant to have a foreign national involved in the project and, as a result, it was decided that Bonds would work at AGT on the export-controlled data while Dai would work at the University without access to export-controlled data. Pet. App. 3a; Gov't C.A. Br. 10, 12. After a short time, this arrangement broke down and Dai was granted access to all of the Phase II information, including the weekly reports. Pet. App. 3a; Gov't C.A. Br. 12.

The plasma actuators involved in Phase II were tested in part with a highly specialized piece of equipment called a force stand, which was used to collect data before testing the actuators in a wind tunnel. AGT built two force stands, one of which was housed at AGT, and the other of which was housed at the Plasma Science Laboratory. Petitioner directed Dai to work on the force stands, and he directed another of his graduate research assistants, Sirous Nourgostar, an Iranian national, to work on them as well. Pet. App. 3a-4a; Gov't C.A. Br. 18.

Anticipating that Dai would soon complete his doctoral degree, petitioner told Sherman that he intended to replace Dai with Nourgostar on the Phase II work. Sherman objected to including an Iranian national on the project and told petitioner that he would block the move. In response, petitioner sought support from the University of Tennessee's supervisor of faculty research contracts, Carolyn Webb. Pet. App. 4a; Gov't C.A. Br. 18-19. Webb told petitioner that she believed that the Phase II project was subject to export-control laws and referred petitioner to the University's officer in charge

of export-control matters, Robin Witherspoon. Petitioner and Witherspoon discussed the Phase II project, including Nourgostar's involvement. Witherspoon told petitioner that the project was in fact subject to export-control laws and later sent petitioner an e-mail and left him a voicemail reiterating that position. Witherspoon also warned petitioner about a lecture trip he planned to take to China, saying that he should neither speak about the Phase II project nor take any materials relating to it abroad. Pet. App. 4a; Gov't C.A. Br. 18-22.

From May 13 through May 26, 2006, petitioner traveled throughout China and gave several lectures on plasma physics at Chinese universities. He took Phase II project materials with him, including a paper copy of one weekly report and a computer file on his laptop containing another weekly report. Additionally, petitioner directed Dai to send an e-mail to a Chinese university official that included a research paper involving Phase II test data derived from the weekly reports. Petitioner also gave Nourgostar a copy of that research paper in the fall of 2007. Pet. App. 4a-5a; Gov't C.A. Br. 20, 22-23.

On the same trip to China, petitioner also brought with him a proposal relating to "Novel Plasma Actuator Technologies for Advanced Flight Components." Gov't C.A. Br. 15-16, 20; Pet. App. 5a. AGT had prepared the proposal with petitioner's assistance for the Defense Advanced Research Projects Agency (DARPA) at the Department of Defense. The DARPA proposal contained export-controlled information from the Boeing Company's weapons division. Sherman marked each page (save one) of the DARPA proposal with the words "Proprietary and Export Controlled Information." *Ibid.*; Gov't C.A. Br. 16-17.

2. A grand jury sitting in the Eastern District of Tennessee charged petitioner with one count of conspiring to export defense articles and services to foreign nationals, in violation of 18 U.S.C. 371; and 15 counts of exporting defense articles and services, in violation of 22 U.S.C. 2278. The substantive counts were based on petitioner permitting Dai to access Phase II laboratory data, transporting the DARPA proposal and Phase II data to China, having Dai email a paper containing Phase II data to a Chinese university official, and providing Phase II data to Dai and Nourgostar. 3:08-CR-00069-1 Docket entry No. 1, at 9-24 (E.D. Tenn. May 20, 2008).

At the conclusion of petitioner's trial, petitioner requested a jury instruction on willfulness that required the government to prove beyond a reasonable doubt that petitioner knew the items he exported were on the Munitions List. Pet. App. 6a. The district court rejected petitioner's requested instruction and instead instructed the jury as follows:

> To prove that defendant acted knowingly and willfully, the government must prove beyond a reasonable doubt that the defendant voluntarily and intentionally violated a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something he knew was unlawful, that is to say, with intent either to disobey or disregard the law. Negligent conduct, or conduct by mistake or accident, or with a good faith belief that the conduct was lawful, is not sufficient to constitute willfulness.

Ibid.

The jury found petitioner guilty on all counts, and petitioner moved for a judgment of acquittal and a new trial. The district court denied both motions. Pet. App. 6a. The district court sentenced petitioner to 48 months of imprisonment, to be followed by two years of supervised release. 3:08-CR-00069-1 Docket entry No. 93, at 4-5 (E.D. Tenn. July 28, 2009).

3. The court of appeals affirmed. Pet. App. 1a-19a. The court concluded that the jury had been correctly instructed on willfulness. *Id.* at 15a. The court explained that although the courts of appeals have reached "different results" in interpreting the willfulness element of Section 2778(c), *id.* at 12a, no court had "conclusively held that willfulness requires knowledge that an item is on the Munitions List," *id.* at 14a. The court of appeals explained that "[m]ultiple circuits have interpreted willfulness as requiring a defendant to know generally that the act of exporting the underlying items is unlawful without requiring that the defendant know the items are on the Munitions List." *Id.* at 12a (citing *United States* v. *Hsu*, 364 F.3d 192 (4th Cir. 2004); *United States* v. *Tsai*, 954 F.2d 155 (3d Cir.), cert. denied, 506 U.S. 830 (1992); *United States* v. *Smith*, 918 F.2d 1032 (2d Cir. 1990), cert. denied, 498 U.S. 1125 (1991); *United States* v. *Murphy*, 852 F.2d 1 (1st Cir. 1988), cert. denied, 489 U.S. 1022 (1989)). The court identified one circuit that "appears to have interpreted willfully to require that a defendant knew the underlying exported items were on the Munitions List." *Id.* at 12a-13a (citing *United States* v. *Gregg*, 829 F.2d 1430 (8th Cir. 1987)).

The court also examined this Court's decision in *Bryan* v. *United States*, 524 U.S. 184 (1998), a case concerning the construction of the word "willfully" under the federal firearms statute, 18 U.S.C. 924(a)(1)(A). Pet.

App. 13a-15a. The court of appeals noted that the firearms licensing statute in *Bryan* was "extremely similar" to the Arms Export Control Act and that, under *Bryan*, to satisfy the statute's "willfulness" requirement, the jury need merely find that the defendant knew his actions were unlawful, not that he knew of the specific federal licensing requirements he was accused of violating. *Id.* at 13a-14a (citing *Bryan*, 524 U.S. at 194-195). The court of appeals observed that to convict a defendant of certain tax and banking law offenses, the jury must find that the defendant was aware of the specific provision of law that he was charged with violating. *Id.* at 13a (citing *Bryan*, 524 U.S. at 194; *Ratzlaf* v. *United States*, 510 U.S. 135, 137 (1994) (money structuring); *Cheek* v. *United States*, 498 U.S. 192 (1991) (tax evasion)). The court of appeals distinguished these contexts, however, observing that in this case there was little danger of "ensnaring individuals engaged in apparently innocent conduct," because the jury found that petitioner "knew what he did was unlawful, therefore, precluding him from mistaking his action as innocent." *Id.* at 13a-14a (quoting *Bryan*, 524 U.S. at 194).

ARGUMENT

Petitioner contends (Pet. 12-30) that his conviction should be reversed because the jury instruction defining willfulness did not require the jury to find "that [petitioner] knew his conduct violated any prohibition contained in the Munitions List." Pet. 3. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. In *Bryan* v. *United States*, 524 U.S. 184 (1998), this Court stated that the word "'willfully' is sometimes

said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears." *Id.* at 191 (quoting *Spies* v. *United States*, 317 U.S. 492, 497 (1943)). The Court explained, however, that "[a]s a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose,'" *ibid.* (citations omitted), and that "to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'" *Id.* at 191-192 (quoting *Ratzlaf* v. *United States*, 510 U.S. 135, 137 (1994)); cf. *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 57-58 n.9 (2007) (stating that for criminal statutes, the word "willfully" "is characteristically used to require a criminal intent beyond the purpose otherwise required for guilt, or an additional 'bad purpose,' or specific intent to violate a known legal duty created by highly technical statutes") (citations omitted). The Court in *Bryan* accordingly affirmed the following jury instruction for conspiring to violate the federal firearms licensing statute, 18 U.S.C. 922(a)(1):

> A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids.

Bryan, 524 U.S. at 190. As the court of appeals correctly concluded, under *Bryan*, petitioner's jury was correctly instructed that it could convict petitioner for violating the Arms Export Control Act if it found that petitioner knew his actions were unlawful, even if he did not

know the specific federal licensing requirement he was accused of violating. Pet. App. 13a.

Consistent with this Court's decision in *Bryan*, every court to have squarely considered the issue has rejected the claim that conviction under the Arms Export Control Act requires the government to prove that the defendant knew an exported item was on the Munitions List. In *United States* v. *Hsu*, 364 F.3d 192 (2004), the Fourth Circuit rejected the defendants' argument that "the [jury] instructions as to 'willfulness' were deficient because the 'jury was not instructed that the government had to show that the defendants knew that the [encryption device] was covered by the Munitions List . . . [or that] the device was designed for military use.'" *Id.* at 198 n.2 (ellipses and third set of brackets in original). The court stated, "[w]hatever specificity on 'willfulness' is required, it is clear that this extremely particularized definition finds no support in the case law." *Ibid.*

Similarly, in *United States* v. *Murphy*, 852 F.2d 1 (1988), cert. denied, 489 U.S. 1022 (1989), the First Circuit rejected the defendant's argument that "the willfulness requirement of the act mandates proof of his specific knowledge of the licensing requirement and the Munitions List." *Id.* at 6. The court explained that "it it is sufficient that the government prove that [the defendant] knew he had a legal duty not to export the weapons"; evidence that the defendants "knew of the licensing requirement or were aware of the munitions list" was not required for a conviction. *Id.* at 7.

And in *United States* v. *Tsai*, 954 F.2d 155, cert. denied, 506 U.S. 830 (1992), the Third Circuit affirmed the district court's instruction that conviction under the Arms Export Control Act did not require the jury to find that the defendant "knew all of the specifics of the

law or was a lawyer or ever read the law or even the U.S. Munitions List." *Id.* at 160 n.3. The court explained that "[i]f the defendant knew that the export was in violation of the law, we are hard pressed to say that it matters what the basis of that knowledge was." *Id.* at 162. The court acknowledged that "[c]ertainly knowledge of the licensing requirement will likely be the focal point in most cases," but it concluded that "the court did not err in instructing the jury that it could convict if it found that defendant knew the export was illegal." *Ibid.*

As the court of appeals in this case correctly recognized, "no court has conclusively held that willfulness requires knowledge that an item is on the Munitions List." Pet. App. 14a. In fact, courts have consistently held that the word "willfully" in the Arms Export Control Act merely requires that the defendant was aware that he was violating a legal duty not to export certain items without a license, not that he had knowledge of the specific features of the regulatory regime implementing the Act. See, *e.g.*, *United States* v. *Covarrubias*, 94 F.3d 172, 175-176 (5th Cir. 1996) (per curiam) (affirming conviction for violating Section 2778 where "the evidence was sufficient to support the jury's conclusion that [the defendant] knew that either a license or other form of authorization was required before he could transport the weapons hidden in his gas tank into Mexico"); *United States* v. *Beck*, 615 F.2d 441, 451 (7th Cir. 1980) ("The prosecution must only show that the defendant was aware of a legal duty not to export the articles."); *United States* v. *Lizarraga-Lizarraga*, 541 F.2d 826, 828-829 (9th Cir. 1976) (holding that "the 'willfully' requirement of [the predecessor statute to section 2778] indicates that the defendant must know that his conduct

in exporting from the United States articles proscribed by the statute is violative of the law").

2. Petitioner contends (Pet. 13-19) that the court of appeals' decision conflicts with decisions of at least five other circuits. The cases cited by petitioner, however, do not present a direct conflict with the court of appeals' decision.

a. In *United States* v. *Pulungan*, 569 F.3d 326 (2009), the Seventh Circuit reversed the defendant's conviction under 22 U.S.C. 2778 for attempting to export rifle scopes to Indonesia without a license, finding that the government had failed to provide sufficient evidence that the defendant acted willfully. The court of appeals noted that although the government had conceded that the term "'willfully' in [Section] 2778(c) requires it to prove that the defendant knew not only the material facts but also the legal rules," the court was "not decid-[ing] whether the concession is correct." *Id.* at 329. The court of appeals focused on the evidence presented at trial and concluded that the evidence did not show that the defendant had acted with the requisite knowledge or intent to violate the Act.

In particular, the evidence showed that the defendant "was not an industry insider" and, although the defendant subjectively believed that exporting rifle scopes to Indonesia was unlawful, the basis for his belief was erroneous. *Pulungun*, 569 F.3d at 329. The defendant believed that the rifle-scope shipments violated an embargo by the United States on military exports to Indonesia, but the embargo had been lifted before the offense conduct. The court explained that the defendant "evince[d] a belief in a nonexistent rule * * * rather than a belief that an export license was necessary," *id.* at 330, and that the intent to violate a lapsed embargo

could not substitute for the intent to violate the Arms Export Control Act because "the crimes are too different for one intent to suffice for the other," *id.* at 331.

In contrast, petitioner was not under the false impression that his actions violated a nonexistent legal prohibition. Petitioner was repeatedly warned that Phase II project material was subject to the export-control laws, and he does not contend that he was unaware of the Arms Export Control Act or its license requirements.[3]

b. *United States* v. *Adames*, 878 F.2d 1374 (1989) (per curiam), is similarly distinguishable. In *Adames*, the Eleventh Circuit affirmed the district court's decision to grant the defendant's motion for judgment of acquittal based on insufficient evidence that the defendant had acted willfully. The defendant was a vice consul at the Panamanian consulate in Miami who used her official position to assist her brother, who purchased firearms in the United States for his business in Panama. *Id.* at 1376. The government presented no evidence that the defendant had prior experience exporting

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[3] Petitioner asserts (Pet. 9, see also Pet. 24) that the testimony at trial showed a "lack of consensus" among the government witnesses about categories on the United States Munitions List, but that is incorrect. Rather, the testimony petitioner cites (Pet. 8) merely reflects the fact that the Munitions List includes overlapping categories and some items may be covered by more than one category within the list. Petitioner asserts that one government witness, Frederick Davis, "initially testified that Category VIII was *inapplicable* to the data at issue," *ibid.*, but that is incorrect. See 8/25/08 Tr. 121-123. The statement petitioner cites (Pet. 8) was made by his counsel, not the witness. See 8/25/08 Tr. 125. In any event, as petitioner acknowledges (Pet. 8), the witness later clarified that the items at issue could fall within Category VIII and that there was no question that the Phase II contract involved a munitions system covered by the Munition List. 8/25/08 Tr. 149-150.

munitions. See *id.* at 1376-1377. The evidence did show that the defendant took receipt of a number of her brother's purchases from a seller in Miami. *Id.* at 1376. She shipped these purchases to her brother by falsely addressing them to a Panamanian government agency so that the shipper would waive the shipping fees, a fact about which she had been "untruthful" during the investigation. *Ibid.*

After "study[ing] the transcription of the testimony elicited at trial," the court concluded that in those specific circumstances, "[t]he evidence demonstrates, at most, that [the defendant] was negligent in not investigating the legal prerequisites to the exportation of firearms. It does not prove that she intentionally violated a known legal duty not to export the firearms or purposefully perpetuated her ignorance of the [Arms Control Export Act] to avoid criminal liability." *Adames*, 878 F.2d at 1377. The court acknowledged that the defendant's "suspicious conduct" made it reasonable to infer that "she was aware of the generally unlawful nature of her actions," but found that it fell short of demonstrating that she had the specific intent to unlawfully export unlicensed firearms. *Ibid.* Similar to *Pulungun*, the court in *Adames* held that a defendant's mere awareness of the "generally unlawful nature" of her conduct does not by itself demonstrate willfulness under the Arms Export Control Act where that awareness could have resulted from other wrongful conduct (such as the misuse of an official position, fraudulent mislabeling, or lying to investigators). *Ibid.*

c. Nor does *United States* v. *Hernandez*, 662 F.2d 289 (5th Cir. 1981) (per curiam), hold that the government must prove that a defendant had specific knowledge of the Munitions List for conviction under 22

U.S.C. 2778, as petitioner suggests. See Pet. 15-16. In *Hernandez*, the Fifth Circuit reversed the defendant's Section 2778 conviction for unlawfully exporting firearms and ammunition to Mexico because the district court had failed to "instruct the jury on the effect and relevance of a defendant's ignorance of the law." 662 F.2d at 292. In reaching that conclusion, the court of appeals explained that the Section 2778 willfulness requirement was satisfied by "a voluntary, intentional violation of a known legal duty." *Ibid*. (citing *United States* v. *Davis*, 583 F.2d 190 (5th Cir. 1978), and *Lizarranga-Lizarranga*, *supra*).

In petitioner's case, the district court expressly instructed the jury on ignorance of the law. The district court instructed the jury that "the defendant must have acted * * * with intent either to disobey or disregard the law" and that "[n]egligent conduct, or conduct by mistake or accident, or with a good faith belief that the conduct was lawful, is not sufficient to constitute willfulness." Pet. App. 6a. Furthermore, *Hernandez*'s holding that the willfulness requirement of the Arms Export Control Act is satisfied by proof of "a voluntary, intentional violation of a known legal duty," 662 F.2d at 292, is entirely consistent with the instructions here. Petitioner does not contest that the district court instructed, and the jury found, that "the government * * * prove[d] beyond a reasonable doubt that the defendant voluntarily and intentionally violated a known legal duty." Pet. App. 6a.

Moreover, the Fifth Circuit later rejected an argument similar to the one petitioner presses here. In *United States* v. *Covarrubias*, *supra*, the Fifth Circuit rejected the defendant's claim based on *Hernandez* that "the government ha[d] not sufficiently proved that he

acted with specific intent because the government's evidence demonstrates only a general awareness of the illegality of his conduct and falls short of establishing that he was aware of the United States Munitions List or of the duty to obtain a license in order to export the items listed on it." 94 F.3d at 175. The court of appeals explained that the defendant's reliance on *Hernandez* was "misplaced" and that the trial evidence was sufficient because it showed "that [the defendant] knew that either a license or other form of authorization was required before he could transport the weapons hidden in his gas tank into Mexico." *Id.* at 175-176. The court of appeals did not hold that to sustain a defendant's conviction under Section 2778, the government had to prove that the defendant had specific knowledge of the Munitions List.

d. Petitioner further attempts to bolster his position (Pet. 16) by citing a pair of cases from the Second Circuit, *United States* v. *Smith*, 918 F.2d 1032 (1990), and *United States* v. *Durrani*, 835 F.2d 410 (1987), claiming that the Second Circuit has required specific proof of a defendant's knowledge that exported items were on the Munitions List. That is incorrect. In *Smith*, the defendant challenged a jury instruction on the knowledge required for a conviction under Section 2778. The Second Circuit held that it was "sufficient" for the jury to have been "told that defendant must have known that the helicopters to be exported were subject to the licensing requirements of the Arms Export Control Act and that he intended to export them in a manner inconsistent therewith." *Smith*, 918 F.2d at 1038 (citing *Durrani*, 835 F.2d at 423). In *Durrani*, the Second Circuit held that the district court's jury instruction on specific intent was "more than adequately justifie[d]" where the

jury was instructed that "if the defendant * * * knew he was required to obtain an export license before causing defense articles to be exported, * * * and intentionally failed to do so with the purpose of evading the arms exportation laws and regulations * * * then he would have willfully failed to obtain the appropriate export license." 835 F.2d at 423. Neither *Smith* nor *Durrani* holds that the willfulness requirement of Section 2778 requires the government to prove that the defendant knew that an item was on the Munitions List. By their express terms, these cases concern sufficient conditions, not necessary conditions. Neither case indicates that the Second Circuit would overturn petitioner's conviction based on the instruction given in this case.

e. The Ninth Circuit's decision in *United States* v. *Lizarraga-Lizarraga*, *supra*, also does not hold that a defendant can be convicted under the Arms Export Control Act only if he knows that the items he exported were on the Munitions List. In *Lizarraga-Lizarraga*, the jury was given a "general intent" instruction, which stated that to prove a violation of the predecessor statute to 22 U.S.C. 2778, "it [wa]s not necessary * * * for the Government to prove that the defendant knew that his act was a violation of the law." 541 F.2d at 827 (citation omitted). The court concluded that the defendant was entitled to a specific intent instruction and that the government must prove that the defendant "voluntarily and intentionally violated a known legal duty not to export the proscribed articles." *Id.* at 829. The court did not hold that the defendant had to be aware of the specific features of the regulatory regime at issue.

f. Finally, petitioner cites (Pet. 19-20) the Eighth Circuit's decision in *United States* v. *Gregg*, 829 F.2d 1430 (1987), cert. denied, 486 U.S. 1022 (1988), in which

the court of appeals rejected the defendant's argument that the Arms Export Control Act and the regulations promulgated under it were void for vagueness. *Id.* at 1437. Petitioner, however, does not raise a void-for-vagueness challenge before this Court and did not raise one below. And, although the Eighth Circuit in *Gregg* approved a jury instruction that "directed acquittal if the jury was not satisfied beyond a reasonable doubt that the defendant knew that the items exported were on the Munitions List and required [a] license [to export]," *id.* at 1437 n.14, the court of appeals did not suggest that it would have rejected the jury instruction if it had failed to make reference to the Munitions List. See *Murphy*, 852 F.2d at 7 n.6 ("We do not read footnote 14 in [*Gregg*] as requiring proof that the defendant know that the arms are on the United States Munitions List.").

None of the cases petitioner identifies presents a direct conflict with the court of appeals' decision or any of the cases that have squarely addressed petitioner's contention that a conviction under Section 2778 requires the jury to find that a defendant knew his conduct violated specific prohibitions contained in the Munitions List. This Court's intervention is not necessary to resolve a conflict in the courts of appeals.

3. Petitioner further contends (Pet. 25-30) that the court of appeals' decision conflicts with this Court's decisions in *Cheek* v. *United States*, 498 U.S. 192 (1991), and *Ratzlaf* v. *United States*, *supra*, which hold that in certain cases involving complex statutory crimes, the jury must find that the defendant was aware of the specific statutory provision that he is accused of violating. *Cheek* and *Ratzlaf* do not help petitioner.

In *Bryan* v. *United States*, *supra*, the Court distinguished *Cheek*, noting that "[i]n certain cases involving willful violations of the tax laws, we have concluded that the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating." *Bryan*, 524 U.S. at 194 (citing *Cheek*, 498 U.S. at 201). Similarly, citing *Ratzlaf*, the Court observed that for the purposes of the statute prohibiting money structuring (that is, breaking single transactions into multiple separate transactions to evade federal financial reporting obligations), 31 U.S.C. 5324, "the jury had to find that the defendant knew that his structuring of cash transactions to avoid a reporting requirement was unlawful." *Ibid*. (citing *Ratzlaf*, 510 U.S. at 138, 149).

The *Bryan* Court, however, found the tax and banking laws at issue were "readily distinguishable" from the federal firearms licensing requirements. *Bryan*, 524 U.S. at 194. The Court explained that *Cheek* and *Ratzlaf* "involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct," but that the "danger of convicting individuals engaged in apparently innocent activity * * * is not present here because the jury found that this petitioner knew that his conduct was unlawful." *Id.* at 194-195.

Unlike in *Cheek* and *Ratzlaf*, petitioner was not at risk of being ensnared for apparently innocent conduct. The district court instructed the jury that an action done "willfully" for the purposes of the Arms Export Control Act was one that "voluntarily and intentionally violated a known legal duty," Pet. App. 6a, and that "[n]egligent conduct, or conduct by mistake or accident, or with a good faith belief that the conduct was lawful, is not suffi-

cient to constitute willfulness." *Ibid.* Further, as the court of appeals recognized, "exporting defense articles and services without a license * * * is not innocent in the way an everyday, uninformed citizen may unintentionally violate complex, confusing tax laws." *Id.* at 14a. It is readily apparent that a military-funded project for the development of unmanned aerial vehicles would be subject to the export-control laws. Petitioner was also specifically advised by University officials that the Phase II project was subject to the export-control laws, *id.* at 4a, and by his "own admission, he knew that receiving '6.2' funds from the Air Force imposed regulations on his research." *Id.* at 14a. He was warned by University officials not to take any Phase II materials with him to China. *Id.* at 4a. The concerns that animated *Cheek* and *Ratzlaf* about the danger of punishing apparently innocent activity are not present here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2011