No. 17-132

IN THE
Supreme Court of the United States

JAMES LINDSEY,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

REPLY BRIEF FOR PETITIONER

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The extraordinarily thin evidence on the larceny charge consisted of testimony that Mr. Lindsey placed his jacket over some hats for about 20 seconds, before being accosted by a store employee accusing him of removing (nonexistent) theft-deterrent devices. That's it.

The *only* reason Mr. Lindsey was convicted of larceny, while being acquitted of the other charges, was the jury instruction. The jury was told that if it found Mr. Lindsey willfully concealed the hats, that was enough: the concealment "is evidence of [larcenous] intent …, unless there is believable evidence to the contrary." Pet. App. 2a, 31a. The necessary implication was that *Mr. Lindsey* would have to present that "contrary" "evidence" on a key element of the offense.

The high courts of other jurisdictions would reject such an instruction because it unconstitutionally shifts the burden of proof and usurps the jury's role. The instruction gave the jury no choice but to draw the prosecution's preferred inference *unless* Mr. Lindsey rebutted it. The instruction given here contains "no permissive language." *People v. Pomykala*, 784 N.E.2d 784, 790 (Ill. 2003). Indeed, other courts have invalidated burden-shifting instructions even when the jury is told that the presumptive inference "is not binding." *State v. Deal*, 911 P.2d 996, 1001 (Wash. 1996). The instruction here contained no such safeguard. This Court should resolve the conflict that the Virginia Supreme Court has now deepened.

I. The decision below perpetuates a deep conflict.

The petition demonstrated two related conflicts on the due-process question presented here. First, does the "unless" language impermissibly shift the burden to the criminal defendant? Pet. 13-19, 22-23. And second, can an instruction be recharacterized as "permissive," and therefore not unconstitutional, when it contains no permissive language? Pet. 20-21.

Respondent does not engage directly with either issue or either conflict. On the first issue, respondent barely acknowledges the "unless" language that was dispositive in other courts, and instead seeks to distinguish those cases on a variety of different, unpersuasive grounds. On the second, respondent rests on the unsupported (though repeated) insistence that *this* jury instruction is permissive. Respondent fails to dispel either split.

1. The petition showed that several state and federal courts have explicitly held that the "unless" clause violates due process by shifting the burden to the defendant. That is true not only in cases in which the language *before* the "unless" clause is mandatory, as in this case, but also in several cases in which the language is *permissive*, such as *Deal*, 911 P.2d at 999-1001, and *State v. LaForge*, 347 N.W.2d 247, 254 (Minn. 1984). Pet. 14-16; *see also* Pet. 22.

It is therefore quite perplexing that respondent chooses to focus entirely on the language *before* "unless." Respondent ignores the holdings treating "unless" clauses as dispositive *whether or not* the rest of the instruction was "cast in the language of a command to the jury," Opp. 5. *See, e.g.*, *Deal*, 911 P.2d at 1000-

01; *State v. Leverett*, 799 P.2d 119, 124 (Mont. 1990); *State v. Chambers*, 709 P.2d 321, 326 (Utah 1985); *LaForge*, 347 N.W.2d at 254 (treating the "unless" clause as "determinative").[1] Even in the case that respondent attacks most forcefully (Opp. 5), the "unless" clause was enough to render the instruction unconstitutional. *See Pomykala*, 784 N.E.2d at 790 ("[T]he language 'unless disproved by evidence to the contrary' may be reasonably interpreted as requiring the defendant to rebut the presumption.").

Indeed, respondent *concedes* that the so-called *Mann* instruction rejected by numerous federal circuits (Pet. 21-23) "plainly is an impermissible burden-shifting instruction." Opp. 13. But the *Mann* instruction is phrased permissively ("the jury may draw the inference"). So why is it "impermissible"? Because the "unless" clause shifts the burden. *Mann v. United States*, 319 F.2d 404, 407, 409 (5th Cir. 1963); *see, e.g.*, *United States v. Lawrence*, 405 F.3d 888, 900 (10th Cir.

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[1] Respondent contends (Opp. 9-10) that *Deal*'s holding about jury instructions has been undermined by a case *that involved no jury instruction*. The later case actually reaffirms that *Deal* held "that a *jury instruction* that included the 'unless' clause created a mandatory presumption because it required 'the defendant to prove by some quantum of evidence that the inference should not be drawn.'" *State v. Drum*, 225 P.3d 237, 244 (Wash. 2010) (emphasis added; citation omitted). Whether a jury instruction is unconstitutional turns on how the jury may have understood it. *See* Pet. 6 n.1. By contrast, *Drum* involved the underlying *statute*, which did not unconstitutionally taint a bench trial because there was no jury to confuse and the trial judge did not treat the statute as shifting the burden. *See* 225 P.3d at 244. Washington courts continue to apply *Deal* to jury-instruction cases and have not read *Drum* to undermine *Deal*. *See, e.g.*, *State v. Arredondo*, No. 32993–3–III, 2016 WL 4203200 (Wash. Ct. App. Aug. 9, 2016).

2005) (in *Mann*, "[i]t was the additional statement 'unless the contrary appears from the evidence,' which shifted the burden of proof from the prosecution to the defendant."). Respondent offers no other explanation for the *Mann* cases.

The court below used precisely the opposite reasoning: that the "unless" clause actually *benefited* the criminal defendant. Pet. App. 8a ("The remaining language of the instruction, 'unless there is believable evidence to the contrary,' reinforced that the Commonwealth had the burden of proving each element beyond a reasonable doubt."). That is a stark conflict indeed: a formulation that has been held toxic in other states is treated as beneficial in Virginia.

2. Respondent's attempt to distinguish away the split based on wording differences among the instructions is also ineffective. The Virginia Supreme Court treated this instruction as "permissive," whereas other jurisdictions would reject it based on the complete absence of any "permissive" language.[2]

"[M]ost jurisdictions considering similar jury charges have found that they create mandatory presumptions unless the language of the inference is unambiguously permissive." *Leverett*, 799 P.2d at 122; Pet. 20-21. In *Pomykala*, for instance, the court held the instruction mandatory because it contained "no permissive language." 784 N.E.2d at 790.

The Virginia Supreme Court identified no permissive language here (except for its mistaken reading of

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[2] Even jurisdictions holding that an "unless" clause is sometimes permissible insist that it be used only as part of a *permissive* inference. *See, e.g.*, *Coe v. Bell*, 161 F.3d 320, 331-32 (6th Cir. 1998).

the "unless" clause, discussed above). Respondent therefore seeks to invert the presumption, arguing that there is no constitutional problem unless the instruction uses the magic words "presume" or "prima facie." Opp. 5-6, 7-8. That position is unsupported and incorrect. Indeed, the *Mann* instruction that respondent calls "plainly … impermissible" (Opp. 13) contains neither. Nor do various other cases. *See State v. Smith*, 613 S.E.2d 304, 311 (N.C. Ct. App. 2005) ("Although the trial court does not use the term 'presume' in the instruction, we conclude the instruction was a presumption."), *aff'd as modified*, 626 S.E.2d 258 (N.C. 2006); *see also, e.g.*, *State v. Jensen*, 735 P.2d 781, 786 (Ariz. 1987) ("the law implies malice").

Other courts correctly distinguish between instructions that *allow* the jury to draw an inference and instructions that *require* the jury to draw an inference (unless rebutted). This instruction fell on the unconstitutional side of that line. Instead of giving Mr. Lindsey's permissive version, the court instructed the jury that evidence of concealment "*is evidence*" of larcenous intent. That is "the language of a command." Opp. 5.

Indeed, if anything, that phrasing is *more* unambiguously commanding than the similar instructions struck down by several other jurisdictions. For example, in *Government of the Virgin Islands v. Parrilla*, 7 F.3d 1097 (3d Cir. 1993), the Third Circuit struck down as a "mandatory presumption" an instruction specifying that inflicting injury "is presumptive evidence of intent." *Id.* at 1100, 1103. And in *Pomykala*, the instruction directed the jury that evidence of intoxication "shall be presumed to be evidence" of recklessness "unless disproved." 784 N.E.2d at 787. Respondent's attempt to distinguish "is evidence" from (*e.g.*) "shall be

presumed to be evidence" is just unpersuasive hair-splitting; the "is evidence" instruction is certainly no *less* mandatory than these other, slightly wordier variations.

At a minimum, nothing makes this instruction "unambiguously permissive." The jury was not "free to credit or reject the inference." *County Court v. Allen*, 442 U.S. 140, 157 (1979); *accord Francis v. Franklin*, 471 U.S. 307, 316 (1985) ("The jurors 'were not told . . . that they *might* infer that conclusion.'" (citations omitted)). Accordingly, in other jurisdictions, this instruction would result in reversal.

3. Finally, respondent suggests that the analysis should ignore any case decided before this Court refined the standard for constitutional challenges to jury instructions in *Boyde v. California*, 494 U.S. 370 (1990), or that quotes the pre-*Boyde* language from *Francis* and *Sandstrom v. Montana*, 442 U.S. 510 (1979), as in *Deal*. That over-reads this Court's clarification. As the Court observed, "there may not be great differences among the[] various phrasings" used to assess jury instructions. *Id.* at 379. Both before and after *Boyde*, a defendant need not show that the instruction "more likely than not" affected the jury; a reasonable likelihood will do. *Id.* at 380.

Moreover, the principles that the lower courts have used to invalidate comparable jury instructions come right from this Court's decisions—decisions that this Court has never questioned, in *Boyde* or any other case. For instance, the principle that permissive inferences must, in fact, be phrased *permissively* comes from this Court's statement in *Allen* that a permissive

presumption is one that "leaves the trier of fact free to credit or reject the inference." 442 U.S. at 157.

Perhaps respondent's argument might have some force if, after *Boyde*, lower courts had stopped invalidating burden-shifting instructions. That is simply not the case. *See, e.g.*, Pet. 13-16, 17 n.4. A 27-year-old decision of this Court is not going to resolve the conflict on these issues.

II. The issue recurs frequently.

The question presented is an important question of federal law that comes up often in both state and federal courts. Pet. 28-30. Respondent does not even try to dispute the importance or the frequent recurrence of this issue. To the contrary, respondent acknowledges that there are "numerous State statutes that establish both rebuttable and irrebuttable presumptions of intent." Opp. 18. The courts are split on how to implement those statutes, and others that treat proof of one fact as proof of another (not limited to intent), through jury instructions that do not violate due process. This Court should take the opportunity to provide clear guidance on that legal question.

III. The Virginia Supreme Court's decision is wrong.

Respondent offers three points in defense of the decision below on the merits. Each is incorrect.

First, respondent contends that the instruction was permissive because it did not use the word "presumed." That is squarely at odds with this Court's permissive-inference decisions, because it gave the jury no choice, as already explained. *See* pp. 4-6, *supra*.

Second, respondent contends that the inference the instruction required the jury to draw was a rational one. That is not the point—not in a system that requires that the government prove every element *to a jury* beyond a reasonable doubt. The point is that by *requiring* the inference (whether rebuttable or not), the instruction "subvert[ed] the presumption of innocence accorded to accused persons and also invade[d] the truth-finding task assigned solely to juries in criminal cases." *Carella v. California*, 491 U.S. 263, 265 (1989) (per curiam); *see id.* at 268 (Scalia, J., joined by Brennan, Marshall, and Blackmun, JJ., concurring in the judgment); *Francis*, 471 U.S. at 317. Only if the instruction were phrased permissively would a court move on to examine whether the suggested inference is accurate. *Id.* at 314-15.

Third, respondent repeats the state supreme court's reliance on other elements of the jury charge. But as this Court has clearly and repeatedly held, a general "reasonable doubt" instruction cannot cure the constitutional flaw in a specific burden-shifting instruction. *Compare* Pet. 26-27 *and Francis*, 471 U.S. at 320 ("[G]eneral instructions as to the prosecution's burden and the defendant's presumption of innocence do not dissipate the error …."), *with* Opp. 23-24 *and* Pet. App. 9a-10a ("[T]he trial court also instructed the jury that the Commonwealth had the burden of proving each element of the offense beyond a reasonable doubt, that the defendant was presumed innocent until proven guilty, that the presumption of innocence remained with him throughout trial, and that he had no burden to produce any evidence.").

The reason why the Virginia Supreme Court's decision conflicts with so many other holdings is that this

Court's decisions are so clear. The Virginia Supreme Court's misapplication of clear precedent warrants immediate review—and reversal.

IV. Respondent's vehicle arguments are insubstantial.

The federal question here was properly preserved and finally decided on the merits, in a precedential opinion, by a divided state supreme court. Respondent does not dispute any of those points. Instead, it advances two "vehicle" arguments that do not implicate certworthiness at all.

A. The Virginia statute is no basis for denying review.

Curiously, respondent argues (at 17) that this case is somehow a poor vehicle because Virginia has a statute embodying the unconstitutional burden-shift, and that Mr. Lindsey "has not fully apprised this Court of what it will be deciding." *But see* Pet. 29-30. That reasoning makes no sense. The constitutional violation here arose because the trial court refused to give Mr. Lindsey's proposed instruction, which would have made clear to the jury that the statute creates only an inference that the jury *may* choose to draw. Pet. 8. Respondent has never argued, not even in its brief in opposition, that Mr. Lindsey's proposed instruction would have been an inaccurate statement of Virginia law. *E.g.*, Va. S. Ct. App. 183-190. (Indeed, respondent defends the notion that Virginia law creates only a permissive inference. Opp. 4, 22.) All respondent argues is that the instruction actually given was *also* an accurate statement of Virginia law. Opp. 17-18. Even if true, that does not show that the statute *compels* the instruction. For instance, the statute says nothing

about rebutting the presumption with "believable evidence."

What the Virginia statute *does* show is that the question presented here will continue to recur—and often evade appellate review (*see* Pet. 29). The instruction used here is the "model" used in Virginia. Va. S. Ct. App. 187, 190. And the similar burden-shifting statutes in other States (Pet. 29-30) heighten the issue's nationwide importance. But just because prosecutors and trial courts are choosing to implement those statutes through unconstitutional jury instructions does not mean that the statutes cannot be implemented in *any* constitutional way. *See* note 1, *supra* (citing cases holding that statute survives while implementing jury instruction does not); *Yap v. Commonwealth*, 643 S.E.2d 523, 528 (Va. Ct. App. 2007) (statute creating inference should be construed to avoid constitutional concerns).

And in any event, the existence of a state statute is no "vehicle problem." The legislature did not create a strict-liability offense; it chose to make intent an element. Unconstitutionally shifting the burden of proof on that element (or any other) is unconstitutional, whether the state legislature or the trial judge is responsible. *See* U.S. Const. Art. VI, § 2. The state statute furnishes no reason why this Court should pass up this opportunity to resolve the conflict.

B. Respondent's harmless-error argument is no basis for denying review.

Respondent's final vehicle objection, that any error was harmless, is without merit. Respondent essentially contends that the error is harmless unless *Mr. Lindsey* can show his innocence. Opp. 19 ("[T]here is no ev-

idence in the record to suggest that the jury would have found Lindsey not guilty"); Opp. 20 (Mr. Lindsey has not affirmatively pleaded a "non-criminal motive"). That is not how harmless-error analysis works: *the prosecution* has the burden to prove a burden-shifting instruction was harmless beyond a reasonable doubt. *Yates v. Evatt*, 500 U.S. 391, 402-03 (1991).

Respondent also mischaracterizes the evidence. Mr. Lindsey acted not like a thief, but like a shopper who had money in his pocket and who was angry about being falsely accused of removing *nonexistent* theft-deterrent devices from hats.[3] He used his phone to record his interactions with the store personnel, he encouraged them to check security tapes, and he offered to wait—for hours, if necessary—while they did. He did not flee from the store upon being challenged; he awaited and even welcomed the arrival of the police. He ran out only after a further altercation with store personnel, *for which he was acquitted*. Even if he did conceal the hats, the prosecution's witness said he did so for only about 20 seconds, while continuing to browse. The store personnel simply did not wait long enough to see what Mr. Lindsey was going to do with the hats. Pet. 7-8.

Respondent insists that covering the hats, even for 20 seconds, is consistent with criminal intent. Opp. 19. But where the prosecution must prove harmlessness

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[3] Bizarrely, respondent contends (at 1) that the jury "rejected" any possibility that the store personnel were too quick to accost an African-American shopper who intended to make a purchase. The only count that did not result in *acquittal* was tainted by the jury instruction. The jury never got a chance to reject the prosecution's theory of intent. That is the constitutional error.

beyond a reasonable doubt, that is not enough: "while this inference from the evidence was undoubtedly permissible, it was not compelled as a rational necessity." *Yates*, 500 U.S. at 410 (holding that a burden-shifting instruction was not harmless because the prosecution did not show intent beyond a reasonable doubt).

The harmless-error argument is not a serious vehicle objection in any event. This Court regularly identifies error and then remands to consider harmlessness. Pet. 28. The mere possibility of harmless error, which no court has yet examined, does not justify denying review of an important, properly preserved constitutional question.

CONCLUSION

For the foregoing reasons and those presented in the petition, certiorari should be granted.

Respectfully submitted.

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