STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

v.

JOHN FRANCIS DAVIS,

Defendant/Appellant.
_____/

Supreme Court No. 159373

Court of Appeals No. 341621

Ingham County Cir. Ct. No. 17-406-FH

DEFENDANT/APPELLANT JOHN DAVIS' SUPPLEMENTAL BRIEF IN SUPPORT OF HIS APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT GRANTED

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I. BACKGROUND

This matter is before the Court on Defendant/Appellant John Francis Davis' ("Davis") Application for Leave to Appeal ("Application") from the Court of Appeals' February 5, 2019, unpublished decision that affirmed, on an interlocutory basis, orders entered by the Ingham County Circuit Court denying motions to quash the Information and to dismiss for a due process violation ("Decision"). (*See* Appx. at 187a-194a). On March 18, 2020, this Court issued an Order directing that this Application, along with that of Davis' Co-Defendant, Gerald Magnant ("Magnant"), be scheduled for oral argument, and directing the parties to file supplemental briefs addressing the three issues specified in the Order. (*See id.* at 204a-205a). This is Davis' supplemental brief in support of his Application. Per the Court's further directive, this brief will, to the extent possible, avoid restating arguments previously submitted to the Court. Davis expressly re-affirms all of those arguments and otherwise incorporates them by reference herein for this Court's continued consideration.

II. SUPPLEMENTAL QUESTIONS PRESENTED

1. Does MCL § 205.428(3) require proof that a defendant knew that he was transporting cigarettes in a manner "contrary to" the Tobacco Products Tax Act ("TPTA"), MCL § 205.421, *et. seq.*?

   Appellant and Court of Appeals' dissent answer: Yes

   Court of Appeals' majority answers: No

2. Do non-supervisory employees fall within the definition of "transporter" under the TPTA?

   Appellant and Court of Appeals' dissent answer: No

   Court of Appeals' majority answers: Yes

3. If non-supervisory employees do fall within the definition of "transporter" under the TPTA, does the TPTA satisfy due process by putting such employees on fair notice of the conduct that would subject them to punishment?

Appellant answers:[1]	No
Court of Appeals' majority answers:	Yes

III. ARGUMENT

A. MCL § 205.428(3) Requires Proof that Davis Knew that He was Transporting Cigarettes in a Manner "Contrary To" the TPTA, *i.e.*, that He had Knowledge that He was Required to Obtain a Transporter License (but Did Not Do So)

Davis is charged with a single count of violating the TPTA, specifically, MCL § 205.428(3) ("Subsection (3)"), by virtue of not having a transporter license as purportedly required by MCL § 205.423(1). Subsection (3) provides, in pertinent part:

> A person who possesses, acquires, transports, or offers for sale *contrary to this act* 3,000 or more cigarettes . . . is guilty of a felony, punishable by a fine of not more than $50,000.00 or imprisonment for not more than 5 years, or both.

(emphasis added).

As argued in Davis' Application filings, the plain language of Subsection (3), the legislative history of and amendments to MCL § 205.428, and the binding holdings of this Court and the Court of Appeals all dictate that, in order to convict Davis for violating Subsection (3), there must be proof that he knowingly possessed or transported cigarettes "contrary to this act," *i.e.*, with knowledge that he was required to obtain a transporter license but did not do so. (*See* Application at 8-9, 13-27; Amended Reply Br. at 2-7). The lower courts' holding that the prosecution need only prove that Davis knew that he was in possession of or transporting cigarettes turns otherwise innocent conduct—the possession or transport of cigarettes—into a felony punishable by up to 5 years of imprisonment, and eliminates the most important factor from the criminal justice equation:

[1] The Court of Appeals' dissent did not believe that it needed to reach this issue based upon its other findings, but otherwise expressed disagreement with the majority's reasoning on the issue. (*See* Appx. at 202a).

the *mens rea* element required for conduct to amount to a crime. *See Morissette v. United States*, 342 U.S. 246, 264 (1952).

"'The criminal law is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability.'" *People v. Aaron*, 409 Mich. 672, 711 (1980) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975)). In *Morissette*, the United States Supreme Court aptly recognized:

> Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation.

342 U.S at 251-52.

Scienter requirements advance this basic principle of criminal law by serving "to separate those who understand the wrongful nature of their act from those who do not." *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 72 n. 3 (1994). The cases emphasizing "scienter's importance in separating wrongful from innocent acts are legion." *Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019). As one commentator opined:

> The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or a retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea*.

Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109 (1962).

The United States Supreme Court has recognized that courts, therefore, generally interpret "criminal statutes to include broadly applicable scienter requirements," even where the statutes, by their terms, do not contain them or where "the most grammatical reading of the statute[s]" does not support them. *X-Citement Video*, 513 U.S. at 70. Moreover, the "presumption . . . that Congress intends to require a defendant to possess a culpable mental state" applies to "'each of the statutory elements that criminalize otherwise innocent conduct.'" *Rehaif*, 139 S. Ct. at 2195 (quoting *X-Citement Video*, 513 U.S. at 72).

This Court has adhered to these fundamental principles and recently confirmed that "courts will infer an element of criminal intent when an offense is silent regarding *mens rea* unless the statute contains an express or implied indication that the legislative body intended that strict liability be imposed." *People v. Likine*, 492 Mich. 367, 391-92 (2012) (internal quotations omitted). Moreover, this Court has similarly recognized that "this presumption in favor of a criminal intent or *mens rea* requirement applies to *each element* of a statutory crime." *Rambin v. Allstate Ins. Co*, 495 Mich. 316, 327-28 (2014) (emphasis added).[2]

[2] While not applicable to this case because the alleged offense occurred just prior to January 1, 2016, the Michigan Legislature recently enacted MCL § 8.9, a statute that incorporates a *mens rea* requirement into statutes that are otherwise silent on the issue. This statute is in harmony with federal and state case law addressing the primacy of a *mens rea* requirement for the imposition of criminal liability. MCL § 8.9(1) provides that, except as is otherwise provided in the statute, "a person is not guilty of a criminal offense" unless that "person's criminal liability is based on conduct that includes either a voluntary act or an omission to perform an act or duty that the person is capable of performing" and "[t]he person has the requisite degree of culpability for each element of the offense as to which a culpable mental state is specified by the language defining the offense." Here, that defining language includes "contrary to this act." *See* MCL § 205.428(3). MCL § 8.9(3) further provides that, "if statutory language defining an element of a criminal offense that is related to knowledge or intent or as to which *mens rea* could reasonably be applied neither specifies culpability nor plainly imposes strict liability, the element of the offense is established only if the person acts with intent, knowledge, or recklessness." MCL § 205.428(3) neither plainly imposes strict liability nor specifies culpability; however, its "contrary to this act" element is one to which *mens rea* should reasonably be applied. Thus, had Davis been stopped just a few weeks later, this default statute would have required proof that Davis knew that he was transporting cigarettes "contrary to this act" or that he was required to obtain a transporter license but did not do so.

The offense spelled out in Subsection (3) contains *three* distinct elements:

1. The defendant must possess or transport cigarettes;

2. The defendant must do so contrary to the act, *i.e.*, without the transporter license purportedly required by Subsection (1); and

3. The defendant must possess or transport the required quantity of 3,000 or more cigarettes.

The prosecution readily concedes that Subsection (3) requires some proof of *mens rea* but contends that it is limited to only the first element describing what is, in itself, innocent conduct—the possession or transport of cigarettes. However, under the fundamental principles discussed above, the *mens rea* presumption also applies to at least the second element, which makes the otherwise innocent possession or transport of cigarettes blameworthy: doing so "contrary to this act" or as a "transporter" without such a license. The prosecution proposes to discard the *mens rea* presumption as to this element and subject Davis to felony prosecution without proving that he even knew the wrongful nature of his conduct—*i.e.*, that he knew that a transporter license was required but did not obtain one. The prosecution has no sound basis for its construction of Subsection (3).

The United States Supreme Court, in *Liparota* v. *United States*, 471 U.S. 419 (1985), and *Rehaif*, 139 S. Ct. 2191, and this Court, in *Rambin*, 495 Mich. 316, considered the *mens rea* requirement for criminal offenses that, like Subsection (3), are defined in part by the defendant's violation of another law or authority. In all three cases, the Courts held that the *mens rea* requirement applied to, if not all the elements, at a minimum, to those elements that separate wrongful from innocent conduct. These cases aptly illustrate why the presumption in favor of *mens rea* must apply to the "contrary to this act" element in Subsection (3).

In *Liparota*, the United States Supreme Court addressed the *mens rea* requirement for a food stamp fraud statute that was structured, in all relevant respects, the same as Subsection (3).

See 471 U.S. at 420-21 (1985). That statute, 7 U.S.C. § 2024(b)(1), provided that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by the statute or the regulations" is subject to a fine and imprisonment. *Id.* at 420. After the defendant, whose restaurant the Department of Agriculture had not authorized to accept food stamps, had purchased food stamps from an undercover agent on several occasions for substantially less than their face value, the defendant was indicted for acquiring and possessing food stamps in violation of the statute. *Id.* at 421. The question before the Court was whether the statute required the federal government to prove that "the defendant knew that he was acting in a manner not authorized by [the] statute or regulations." *Id.* at 420-21.

The federal government's position, like that of the prosecution here, was that the defendant violated the statute if (1) he knowingly acquired or possessed food stamps (or here, if he knowingly transported cigarettes) and (2) such acquisition or possession of food stamps was not, in fact, authorized by the statute or regulations (or here, such transport of cigarettes was, in fact, "contrary to this act"). 471 U.S. at 423. Or, put another way, that no "evil-meaning mind" would be necessary for conviction. *Id.* The defendant's position, like Davis' here, was that an individual violates the statute only if he both (1) knowingly acquired or possessed food stamps, *and* (2) knowingly did so in a manner not authorized by the statute or regulations. *Id.* The defendant maintained that adopting the federal government's position would "dispense with the only morally blameworthy element in the definition of the crime." *Id.*

Agreeing with the defendant, the *Liparota* Court held that, in the absence of any "contrary purpose in the language or legislative history of the statute," the food stamp fraud statute "requires a showing that the defendant knew his conduct to be unauthorized by [the] statute or regulations." 471 U.S. at 425. This construction, the Court held, serves the "universal" principle that "an injury can amount to a crime only when inflicted by intention," and construing the statute otherwise

would criminalize "a broad range of apparently innocent conduct." *Id*. at 425-26. The Court reasoned that there is nothing inherently wrongful about using, transferring, acquiring, altering, or possessing food stamps, and that individuals could otherwise innocently do so in a manner that happens to be contrary to the food stamp statute or regulations. *Id.* at 426-27. The Court noted, for example, that a food stamp recipient might use "stamps to purchase food from a store that, unknown to him, charged higher than normal prices to food stamp program participants," or that a person might possess food stamps even though ineligible to receive them "because he was mistakenly sent them through the mail due to administrative error." *Id.* Similarly here, absent requiring knowledge that one's possession or transport of cigarettes was "contrary to" the TPTA, *i.e.*, that one was required to obtain a transporter license but did not do so, Subsection (3) would criminalize a broad range of otherwise innocent conduct, as there is nothing inherently wrongful about possessing or transporting cigarettes.

Notably, the *Liparota* Court rejected two arguments made by the government that the prosecution also makes here. In emphatic fashion, the Court disagreed with the government that applying a knowledge requirement to the "not authorized by the statute or regulations" element would create an ignorance-of-the-law defense:

> Our holding today no more creates a 'mistake of law' defense than does a statute making knowing receipt of stolen goods unlawful. . . .In both cases, there is a legal element in the definition of the offense. In the case of a receipt-of-stolen-goods statute, the legal element is that the goods were stolen; in this case, the legal element is that the 'use, transfer, acquisition,' etc. were in a manner not authorized by [the] statute or regulations. It is not a defense to a charge of receipt of stolen goods that one did not know that such receipt was illegal, and it is not a defense to a charge of a [7 U.S.C.] § 2024(b)(1) violation that one did not know that possessing food stamps in a manner unauthorized by [the] statute or regulations was illegal. It *is*, however, a defense to a charge of knowing receipt of stolen goods that one did not know that the goods were stolen, just as it is a defense to a charge of a [7 U.S.C. §] 2024(b)(1) violation that one did not know that one's possession [of food stamps] was unauthorized.

471 U.S. at 425 n.9. The Court also dismissed the government's argument that requiring proof of the defendant's knowledge as to the legal element would "put an unduly heavy burden on the [g]overnment in prosecuting violators" of the food stamp fraud statute. *Id.* at 434. The Court noted that, "as in any other criminal prosecution requiring *mens rea*, the [g]overnment may prove by reference to facts and circumstances surrounding the case that [the] petitioner knew that his conduct was unauthorized or illegal." *Id.*

In *Rehaif*, the United States Supreme Court confirmed the principles set forth in *Liparota* in construing another statute similar to Subsection (3). *See* 139 S. Ct. at 2194 (2019). *Rehaif* involved a prosecution under a statute that criminalized the possession of a firearm by one who was "illegally or unlawfully in the United States." *Id.* After the defendant's student visa expired, he visited a gun range where he shot two firearms, and he was subsequently charged with illegal possession of a firearm. *Id.* There, as here, everyone agreed that the *mens rea* element of "knowingly" (a term expressly used in the statute there) applied to the defendant's conduct (*i.e.*, possession of a firearm or, here, possession or transport of cigarettes). *Id.* at 2196. The federal government contended, however, that "knowingly" did not apply to the defendant's unlawful status (*i.e.*, being an alien unlawfully in the United States or, here, acting "contrary to this act" or as a transporter without such a license). *Id.* at 2194. The *Rehaif* Court rejected the government's argument and held that the statute requires both "that the defendant knew [that] he possessed a firearm and also that he knew [that] he had the relevant [unlawful immigration] status when he possessed it." *Id.*

As the *Rehaif* Court aptly reasoned, "[a]s 'a matter of ordinary English grammar,' we normally read the statutory term 'knowingly' as applying to all the subsequently listed elements of the crime,'" and there was no basis to interpret "knowingly" as applying only to the subsequently listed conduct elements and not to the subsequently listed status element, which was actually

situated before the former elements. 139 S. Ct. at 2196. Similarly, as to the offense charged here, there is no basis to apply the *mens rea* presumption only to the conduct element of possessing or transporting cigarettes and not to the intervening status element of acting "contrary to this act" or as a "transporter" without such a license.

The *Rehaif* Court further reasoned that its reading of the statutory text "is consistent with a basic principle that underlies the criminal law, namely, the importance of showing . . . 'a vicious will.'" 139 S. Ct. at 2196. According to the Court, "[a]pplying the word 'knowingly' to the defendant's status . . . helps advance the purpose of scienter, for it helps to separate wrongful from innocent acts." *Id.* at 2197. As the Court explained, since "the possession of a gun can be entirely innocent, . . . it is therefore the defendant's *status*, and not his conduct alone, that makes the difference" and, "[w]ithout knowledge of that status, the defendant may well lack the intent needed to make his behavior wrongful." *Id.* Davis' knowledge of his status (*i.e.*, acting "contrary to this act" or as a "transporter" without such a license) is likewise the "'crucial element' separating innocent from wrongful conduct" as there is nothing inherently wrongful about possessing or transporting cigarettes. *See id.* As in *Liparota*, the *Rehaif* Court rejected the prosecution's arguments that its decision would create an "ignorance of the law" defense and that proving the legal element of the offense would be unduly burdensome. *Id.* at 2198.

Consistent with *Liparota* and *Rehaif*, this Court, in *Rambin*, held that a legal element in a statutory offense was subject to the same *mens rea* requirement as the other elements of the offense. *See* 495 Mich. at 320 (2014). In *Rambin*, Allstate Insurance Company sought to deny coverage under the no-fault statute for injuries that plaintiff incurred while operating a motorcycle that he did not own on the ground that he had taken the motorcycle "unlawfully" within the meaning of the statute (specifically, MCL § 500.3113(a)). *Id.* at 321-22. The no-fault statute previously had been construed to include violations of Michigan's "joyriding" statutes, *i.e.*, MCL § 750.413 and

MCL § 750.414. *Id.* at 319-20. Allstate argued that the plaintiff had violated the latter "joyriding" statute, MCL § 750.414, which makes it a misdemeanor for any person to "take[] or use[] *without authority* any motor vehicle without intent to steal same." (emphasis added). *Id.* at 320, 327. The plaintiff claimed that "he did not knowingly lack authority to use the motorcycle because he believed that the person who had given him access to the motorcycle was the rightful and legal owner of it." *Id.* at 327. Allstate argued that MCL § 750.414 is a "strict liability crime" and that, "absent express consent from the actual owner," the plaintiff committed that offense regardless of whether he knew the actual owner's identity. *Id.*

This Court, therefore, was called upon to decide, for the purpose of applying MCL § 500.3113(a), whether MCL § 750.414 is a strict liability crime or whether "it contains a *mens rea* element that the taker must intend to take a vehicle 'without authority.'" 495 Mich. at 320. In rejecting the former and finding the latter, this Court confirmed that "'strict-liability offenses are disfavored'" and "'courts will infer an element of criminal intent'" that "applies to each element of a statutory crime" unless the statute contains an express or implied indication that strict criminal liability applies. *Id.* at 327-28. The Court found no indication in the statute that the Legislature intended joyriding to be a strict liability offense. The Court noted that, although the Legislature made clear that an "intent to steal" the vehicle need not be shown to establish a violation of the joyriding statute, this "does not suggest that the Legislature intended to dispense with *mens rea* altogether." *Id.* at 330. Rather, because the Legislature easily "could have substituted the phrase 'without an intent to steal' with 'without regard to intent' and created a strict liability offense, . . . it is reasonable to infer that the Legislature's elimination of 'an intent to steal' without a complete elimination of intent altogether reflects an intent to retain an element of *mens rea*." *Id.* This Court further found that "[t]here are several indications within the statute that militate toward the existence of the element of *mens rea*," such as that the terms "take" and "use" and the phrase

"without authority" all "have expansive meanings" and "contemplate voluntary and knowing conduct on the part of the accused." *Id.* at 332. Notably, the Court also emphasized that, "if there were no *mens rea* element respecting the taking or using of a vehicle without authority, the statute could punish otherwise innocent conduct." *Id.*

The analytical approach and reasoning of *Liparota*, *Rehaif*, and *Rambin* apply here to require *mens rea* for at least the first two elements of the offense proscribed by Subsection (3). Turning first to the statutory language, there is no express or implied indication that the Legislature intended Subsection (3) to set forth a strict liability offense. The terms "possess" and "transport" and the phrase "contrary to this act" in Subsection (3) contemplate voluntary and knowing conduct and have expansive meanings, with "contrary to this act" having an even more expansive meaning than "without authority" in the joyriding statute that was at issue in *Rambin*. The phrase "contrary to" means "in conflict with." *See* Merriam-Webster.com. As used in Subsection (3), it refers to conduct that is "in conflict with" one or more of the myriad prohibitions, rules, and regulations contained in the TPTA—a revenue statute that, as described by the prosecution, "heavily regulates tobacco products, as well as people involved in the purchase, sale, importation, transportation, export, and distribution of tobacco products in, or into, Michigan." (People's Answer at 8.) Thus, "contrary to this act" reaches a much broader scope of conduct than does the prohibition in the joyriding statute against taking or using a vehicle "without authority." Consequently, Subsection (3) has the potential to criminalize a much wider range of otherwise innocent conduct and, therefore, clearly requires a *mens rea* element that applies to the specifically proscribed conduct of "contrary to this act."

This reading of Subsection (3) is underscored by the Legislature's 2008 amendment to MCL § 205.428, which, among other things, added Subsection (11), a misdemeanor offense that is otherwise identical to the felony offense in Subsection (3), but which involves a smaller quantity

of cigarettes and expressly contains a "knowingly" element. *See generally* 2007 MI SB 882 (as enacted January 9, 2009); MCL § 205.428(11) ("A person who *knowingly* possesses, acquires, transports, or offers for sale *contrary to this act* 600 or more, but not more than 1,199 cigarettes, tobacco products other than cigarettes with an aggregate wholesale value of $50.00 or more but less than $100.00, or 600 or more, but not more than 1,199 counterfeit cigarettes, counterfeit cigarette papers, gray market cigarettes, or gray market cigarette papers is guilty of a misdemeanor punishable by a fine of not more than $1,000.00 or imprisonment of not more than 90 days, or both.") (emphasis added). Thus, rather than expressly disclaim any *mens rea* element in MCL § 205.428, the Legislature made clear that it intended a specific *mens rea* element (*i.e.*, "knowingly" transports "contrary to this act" the specified amount of cigarettes) even for a misdemeanor offense. Once similarly inserted in Subsection (3), "the term 'knowingly' is normally read 'as applying to all the subsequently listed elements of the crime.'" *Rehaif*, 139 S. Ct. at 2196. *See also Rambin*, 495 Mich. at 327-28. The prosecution's position, however, would anomalously apply the term "knowingly" to the subsequently listed elements of transports and cigarettes but not to the intervening "contrary to this act" element (which actually modifies transports).

Apart from the statutory language of Subsection (3) and the legislative history of and amendments to MCL § 205.428, applying the *mens rea* element of "knowingly" to Davis' unlicensed status advances the purpose of scienter by separating wrongful from innocent acts in that it is only such status that makes the otherwise innocent act of transporting cigarettes unlawful. *See Rehaif*, 139 S. Ct. at 2197. Put another way, absent such a *mens rea* requirement, Subsection (3) would have the effect of criminalizing otherwise innocent conduct without requiring any culpable or guilty state of mind whatsoever.

Finally, the prosecution's contentions that applying the *mens rea* presumption to the "contrary to this act" element would create an "ignorance of the law defense" and impose an undue

burden on the prosecution were readily dismissed in *Liparota* and *Rehaif* and likewise should be dismissed here. *See Liparota*, 471 U.S. at 425 n.9, 434; *Rehaif*, 139 S. Ct. at 2198. Requiring, as an element of Subsection (3), knowledge that the possession or transport of cigarettes was "contrary to" the TPTA (*i.e.*, knowledge that the defendant was required to obtain a transporter license but did not do so) is not the same thing as requiring knowledge that the possession or transport of cigarettes without the necessary license was illegal under Subsection (3) (or requiring a specific intent to violate that statute).[3] If Davis knew that he was required to have a transporter license but did not do so—but did not know that he was, therefore, transporting cigarettes in violation of Subsection (3), his ignorance of that statute would not be a defense to a prosecution thereunder. However, if the prosecution could not show that Davis knew that he was in violation of the transporter licensing requirement,[4] then this would serve as a valid defense to a prosecution under Subsection (3) in that Davis would not know that his transport of cigarettes was "contrary to" the Act and, thus, he would not possess the necessary state of mind to make his otherwise innocent transport of cigarettes morally blameworthy.

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[3] As explained by Justice Corrigan in her concurring opinion in *People v. Cohen*, "the adverb 'knowingly' is derived from the verb 'know' and, more directly, from the adjective 'knowing,' which is defined as 'having knowledge or information; conscious; intentional; deliberate.'" 467 Mich. 874, 876 (2002) (citing *Random House Webster's College Dictionary* (2000)). "The word 'knowingly' . . . does not encompass a specific intent . . . ; it merely requires proof of a general criminal intent." *Id.* (citing to *People v. Motor City Hosp. & Surgical Supply, Inc.*, 227 Mich. App. 209, 216 (1997), and *People v. Watts*, 133 Mich. App. 80, 83 (1984), as cases in which the Court of Appeals has reached a similar conclusion when considering the element of "knowledge" in the context of other offenses). Notably, Justice Corrigan also explained that the term "knowingly," in requiring proof of a general criminal intent, still requires a "culpable mental state" such that innocent behavior is not criminalized. *Id.*

[4] As discussed in Part B, the TPTA, when read as a whole, does not require a mere employee of a business involved in the transportation of tobacco products individually to obtain a transporter license to deliver tobacco products on behalf of his employer.

With respect to the purported burden of imposing this requirement on the prosecution, as noted in *Liparota* and *Rehaif*, *mens rea* can be established through circumstantial evidence.[5] *See Liparota*, 471 U.S. at 434; *Rehaif*, 139 S. Ct. at 2198. Further, in enacting Subsection (3), the Legislature neither criminalized nor intended to criminalize the mere possession or transport of cigarettes but, rather, only the possession or transport of cigarettes under circumstances that undermine or evade the TPTA's revenue-raising framework. Because the possession or transport of cigarettes is generally lawful, it is only right that the prosecution—to effectuate the actual purpose behind the TPTA—has the burden of proving the defendant's knowledge of the circumstances that render such possession or transport unlawful.

At issue here is the proper construction of Subsection (3), a statute that carries serious felony sanctions for transporting a legal commodity in an unlicensed manner. For the reasons set forth herein and in Davis' Application filings, there are clear indicia of a legislative intent to require, as an element of a Subsection (3) felony offense, knowledge that one's possession or transport of cigarettes was "contrary to" the TPTA (and there is no indication of any legislative intent to the contrary). However, even if the legislative intent were somehow ambiguous or unclear, this Court has repeatedly recognized the rule that, in doubtful cases, revenue statutes must be construed most strongly against the Government and in favor of the taxpayer. *See e.g.*, *Standard Oil Co. v. Michigan*, 283 Mich. 85, 88 (1937); *Metzen v. Dept. of Revenue*, 310 Mich. 622, 627 (1945); *F.M. Sibley Lumber Co. v. Dept. of Revenue*, 311 Mich. 654, 660 (1945); *Waterways*

[5] Indeed, even in *People v. Shouman*, the case upon which the prosecution relies so heavily, the defendant previously had his own tobacco business and his license had been revoked; this would clearly be circumstantial evidence of the defendant's knowledge of the TPTA's licensing requirements. *See* No. 330383, 2016 Mich. App. Lexis 1812, at *17 n.3 (Oct. 4, 2016) (unpublished)(also noting his claim that he was now employed by another business was in dispute)(Appx. at 206a-212a).

Navigation Co. v. *Corp. & Securities Comm'n*, 323 Mich. 153, 159 (1948). Further, construing Subsection (3) to contain such a *mens rea* requirement would merely be in keeping with the long-standing rule of lenity, which provides that "courts should mitigate punishment when the punishment in a criminal statute is unclear." *People v. Denio,* 454 Mich. 691, 699 (1997).

In sum, the plain language of Subsection (3), the holdings of the United States Supreme Court, this Court, and the Court of Appeals, as well as the legislative history of and amendments to MCL § 205.428 all make clear that the prosecution must prove that Davis knowingly possessed or transported cigarettes "contrary to this act," *i.e.*, with knowledge that he was required to obtain a transporter license but did not do so.

B. Employees like Davis Do Not Fall Within the Definition of "Transporter" under the TPTA so as to be Required Individually to Obtain a Transporter License to Deliver Tobacco Products on Behalf of Their Employer

1. *The Charge, the Pertinent TPTA Licensing Provisions, and Michigan Treasury Form 336*

Davis is charged with violating Subsection (3) by virtue of not having a transporter license as purportedly required by MCL § 205.428(1), which provides:

> [A] person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer, wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transportation company, or transporter in this state unless licensed to do so.

A "transporter" is defined as follows:

> Transporter means a person importing or transporting into this state, or transporting in this state, a tobacco product obtained from a source located outside this state, or from any person not duly licensed under this act. Transporter does not include an interstate commerce carrier licensed by the interstate commerce commission to carry commodities in interstate commerce, or a licensee maintaining a warehouse or place of business outside of this state if the warehouse or place of business is licensed under this act.

MCL § 205.422(y). Further, a "person" is defined as "an individual, partnership, fiduciary, association, limited liability company, corporation, or other legal entity." MCL § 205.422(o).

These provisions, when read in their entire statutory context, were intended to apply to businesses involved in the transportation of tobacco products or to those individuals operating such businesses on their own account and not to mere employees of such businesses. The following statutory provisions reflect this legislative intent:

- The TPTA provides that, with respect to transporters and certain other regulated classes (*i.e.*, manufacturers, wholesalers, secondary wholesalers, vending machine operators, and unclassified acquirers), "each place of business shall be separately licensed"; it does not require separate licenses for each employee of such classes. MCL § 205.423(2).

- The TPTA provides that "[e]ach license or a duplicate copy shall be prominently displayed on the premises covered by the license." MCL § 205.423(2). In other words, a single license applies to a single business premises.

- The TPTA provides that licenses shall expire "on the June 30 next succeeding the date of issuance unless revoked by the department, unless *the business for which the license was issued changes ownership*, or unless *the holder of the license removes the business from the location covered by the license*." MCL § 205.424(1) (excepting licenses issued in 1994, which are addressed in subsection (2)) (emphasis added). Again, licenses are issued for businesses, not employees of such businesses.

- The TPTA requires, among other things, that each applicant for a license show proof of the following, among other things: "[t]he applicant's financial responsibility, including but not limited to, satisfactory proof of a minimum net worth of $25,000.00"; and "[t]hat the applicant owns, or has an executed lease for, a secure nonresidential facility for the purpose of receiving and distributing cigarettes and conducting its *business* if the applicant owns or has an executed lease for such a facility." MCL § 205.423(6)(a), (b) (emphasis added). This language contemplates that the only license applicants would be businesses or those individuals operating such businesses on their own account.

- The TPTA mandates that the Michigan Department of Treasury ("Treasury") shall issue a license only "[u]pon proper application" and that such application "shall be on a form prescribed by the department," MCL § 205.423(2), thereby incorporating that form as well as its contents into the Act's licensing provisions. The prescribed form, Treasury Form 336, limits eligibility for a transporter license to "[a] *business* that imports or transports into this state, or transports in this state, cigarettes or other tobacco products obtained from a source located outside this state, or obtained from a person that is not a Michigan tobacco tax licensee," and otherwise requires certain application information for the "*business*." (Appx. at 1a-7a) (emphasis added).

The TPTA authorizes Treasury to adopt rules for the administration of the Act. MCL § 205.433(2). However, since the TPTA was enacted over 25 years ago, Treasury has not adopted any rule, regulation, or guideline advising or in any way addressing whether and/or under what circumstances mere employees of a business involved in the transportation of tobacco products are required individually to obtain a transporter license.

2. *The TPTA's Transporter Licensing Requirement Does Not Apply to Employees like Davis*

The TPTA provisions governing eligibility for and issuance and maintenance of transporter licenses, as outlined above, show that the transporter licensing requirement is intended to apply to businesses involved in the transportation of tobacco products and to individuals operating such businesses on their own account—not to individual employees of such businesses, like Davis. A well-worn canon of statutory construction, *noscitur a sociis*, provides that "'a word or phrase is given meaning by its context or setting.'" *G.C. Timmis & Co. v. Guardian Alarm Co.*, 468 Mich. 416, 420 (2003). This Court aptly explained that any particular provision in a statute, including a definition, "does not stand alone" and, thus, "cannot be read in a vacuum"; rather, "'it exists and must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute." *Id.* at 421-25, 429-30. As this Court sensibly underscored, although a statutory phrase or provision "may mean one thing when read in isolation, it may mean something substantially different when read in context." *Id.* at 421 (applying *noscitur a sociis* in determining the meaning of a statutory definitional provision); *see also* 29 M.L.P.2d Statutes § 101 (2020) ("The court may not isolate a provision under consideration and construe it without reference to the rest of the enactment.") (citing *General Motors Corp. v. Erves*, 395 Mich. 604 (1975), and *Smith v. Behrendt*, 278 Mich. 91 (1936)).

In finding that the TPTA's transporter licensing requirement applies to individual employees like Davis, the Court of Appeals' majority improperly cited only to selected provisions of the TPTA (*i.e.*, the definition of "transporter" as including a "person" and the definition of "person" as including an "individual"). (*See* Appx. at 193a). It overlooked the many other provisions that, along with Treasury Form 336, make clear that this requirement was only intended to apply to businesses or to individuals operating such businesses on their own account and not to mere employees of such businesses. (*See also* Davis' Application at 10-11, 34-43). Indeed, it would be onerous, if not impossible, for low-level employees earning minimum wage to meet the $25,000 minimum-net-worth requirement to qualify for a transporter license. *See* MCL § 205.423(6)(a).

Additionally, it is impossible to imagine that the Legislature would have intended to require every employee of every business involved in the transportation of tobacco products to obtain a separate transporter license for each of their employer's places of business; to post each and every such license (or a duplicate) at each and every respective place of business; and to renew each and every such license on, at least, a yearly basis. *See* MCL § 205.423(2); MCL § 205.424(1). Not only would this be unduly burdensome (and, frankly, a logistical nightmare) for these employees as well as the agency charged with processing the applications, but it would do little to serve the TPTA's revenue-raising purpose. Thus, consistent with the TPTA's overall framework, Form 336, the statutorily-prescribed license application form (which provides the only other guidance on this issue), states that only a "business" is required to obtain and, indeed, is even eligible for a license.[6]

[6] The Court of Appeals' majority did not specifically address Form 336. However, Form 336 expresses a sound and careful understanding of the TPTA's licensing framework by the Treasury officials charged with carrying it out. Thus, Form 336's application of the TPTA's transporter licensing requirement to only a "business" engaged in the transportation of tobacco products should be given deference because it is not clearly wrong and another construction is not plainly required. *See ACCO Industries, Inc. v. Dept. Treasury,* 134 Mich. App. 316, 322 (1984); *see also*

(*See* Form 336, Appx. at 1a-7a; *see also* Dissenting Opinion, Appx. at 198a-199a, recognizing that transporter licensure under the TPTA is, much like the situation in *People v. Assy,* 316 Mich. App. 302 (2016), "linked to some degree of meaningful control" and does not apply to mere employees). In short, the overall framework of the TPTA clearly shows that the transporter license requirement does not apply to mere employees of a business involved in the transportation of tobacco products.

According to the Court of Appeals' majority, the TPTA "makes clear that *someone*—either the individual or the individual's employer—must have a license authorizing the possession for transport" of tobacco products. (*See* Appx. at 193a). *See* MCL § 205.422(y)(defining a "transporter," in pertinent part, as "a person importing or transporting into this state, or transporting in this state, a tobacco product obtained from a source located outside this state, *or from any person not duly licensed under this act*")(emphasis added). However, this holding begs the issue of whether the employee would otherwise fall within the definition of "transporter" in the first instance—which, as explained herein, is not the case. Indeed, even if an employer did not have the requisite tobacco license, mere employees transporting tobacco products on that employer's behalf would still not constitute "transporters" under the TPTA, and the Government's only recourse would and should be to prosecute the employer for failing to have the necessary tobacco license.

3. *Any Ambiguity as to Whether the TPTA's Transporter Licensing Requirement Applies to Employees like Davis Must be Construed to Effectuate the TPTA's Purpose and Otherwise in Favor of Davis and Against the Government*

As explained above, the TPTA's statutory framework plainly shows that its transporter licensing requirement does not apply to employees like Davis. However, even if one were to

In Re: Complaint of Rovas, 482 Mich. 90, 117-118 (2008); *Fulman v. United States*, 434 U.S. 528, 533 (1978).

assume for the sake of argument that the TPTA were somehow ambiguous in this regard, the well-established legal principles for resolving any such ambiguity would still mandate a statutory construction in Davis' favor.

a. Statutory Purpose

"Indications of legislative intent or purpose are of primary concern" in construing an ambiguous statute; thus, when "confronted with ambiguous language, courts generally seek to determine the construction that appears most likely to be in accord with the legislative purpose in light of all the circumstances." *People v. Rehkopf,* 422 Mich. 198, 207 (1985); *see also People v. Denio,* 454 Mich. 691, 699 (1997); 29 M.L.P.2d Statutes § 92 (2020) ("[W]here the language of a statute is of doubtful meaning, the courts must give it a reasonable construction, looking to the purpose that it is to serve, the object sought to be accomplished, and its occasion and necessity. Statutes that are ambiguous must be construed in accordance with their manifest intent.") (citing, among other cases, *Shelby Charter Twp. v. State Boundary Comm'n,* 425 Mich. 50 (1986), and *Knapp v. Palmer,* 324 Mich. 694 (1949)).

"The TPTA 'is at its heart a revenue statute, designed to assure that tobacco taxes levied in support of Michigan schools are not evaded.'" *Value, Inc. v. Dep't of Treasury,* 320 Mich. App. 571, 577 (2017); *see* MCL § 205.427(a) ("[I]t is the intent of this act to impose the tax levied under this act upon the consumer of the tobacco products by requiring the consumer to pay the tax at the specified rate."). The fundamental purpose of the TPTA is "ensuring [that] tax revenue is properly collected from the ultimate consumers of tobacco products." (*See* Dissenting Opinion, Appx. at 199a). As the Court of Appeals' dissent recognized, construing the TPTA's transporter licensing requirement to apply to mere employees of a business involved in the transportation of tobacco products who, like Davis, have no meaningful control over their employer's transportation operations is contrary to this fundamental purpose and "amounts to an overreach that makes a

mockery of both the Legislature's intent and fundamental justice." (*Id.*). Prosecuting as "transporters" low-level employees who are tasked with merely driving or simply riding as a passenger in a vehicle transporting tobacco products on behalf of their employer fails to advance the revenue-compliance purpose of the TPTA; such employees clearly do not have the necessary knowledge of or control over their employer's operation so as to be able to serve that purpose.

"Transporters" are neither responsible for collecting or remitting tobacco tax nor do they have any role or responsibility with respect to the handling of tobacco tax stamps. Rather, as the prosecution states, the TPTA's requirements "exist so that Michigan's Treasury can track tobacco product sales from manufacturers, through distributors and transporters, and ultimately to retailers" for the purpose of verifying that "unclassified acquirers and wholesalers are remitting the appropriate tobacco tax." (People's Answer at 9, 16). To that end, the TPTA requires "transporters" to maintain certain records with certain specified information for each load being transported (*i.e.*, the name and address of the purchaser, seller, and transporter; the date of delivery; "the quantity and trade name or brand of each tobacco product"; "the price paid for each trade name or brand"). MCL § 205.426(7). It also requires "transporters" to obtain a permit from Treasury for each load being transported, with each permit setting forth certain specified information (*e.g.*, "the name and address of the purchaser, seller, and transporter, the license number of the purchaser, the date of the delivery of the tobacco product or the date of importation into this state"). *See* MCL § 205.426(8).

Low-level or non-managerial employees tasked simply with delivering tobacco products on behalf of their employer would not have the necessary knowledge of or control over their employer's operation so as to be able to fulfill these requirements. Thus, as the Court of Appeals' dissent pointed out, prosecuting such employees as "transporters" for "what is really a wrong committed by their employer" violates "the spirit and intent, if not the letter, of the TPTA." (*See*

Appx. at 199a, 203a). Imposing license requirements on individuals who are not in any position to meet the obligations of a license holder is not consistent with and would do nothing to advance the TPTA's purpose.

b. The Rule of Lenity

The rule of lenity is a fundamental principle of justice, providing that any doubt or ambiguity in the enforcement of a criminal statute must be resolved in a defendant's favor. *See e.g., People v. Gilbert*, 414 Mich. 191, 211 (1982); *see generally* 12 M.L.P. 2d Criminal Law and Procedure, § 871 (2020) ("Because courts are wary of creating crimes, penal statutes are to be strictly construed and any ambiguity is to be resolved in favor of leniency. The rule of lenity provides that courts should mitigate punishment when the punishment in a criminal statute is unclear.") (citing numerous United States Supreme Court and Michigan Supreme Court cases applying this rule). The rule of lenity applies with particular force in a case like this involving a complex web of tax laws, which are to be construed *against* the government. *See e.g., Michigan Bell v. Treasury,* 445 Mich. 470, 477 (1994); *Brunswick v. Treasury,* 267 Mich. App. 682, 685 (2005); *Dekoning v. Treasury,* 211 Mich. App. 359, 361 (1995); s*ee also People v. Beydoun,* 283 Mich. App. 314, 328 (2009) (describing the TPTA as a "pervasive group of tobacco regulations" containing "detailed definitions, licensing and stamping requirements, recordkeeping and document maintenance obligations, schedules of tax rates, civil and criminal penalties for violations of the TPTA, procedures governing seized property, and a delineation of tobacco tax disbursements for various purposes"). The rule requires that any ambiguity in the applicability of the TPTA's transporter licensing requirement to employees like Davis be construed in favor of leniency and against the government.

c. Avoiding Absurd and Unjust Results

It is black-letter law that, where the construction of a statute is necessary, that construction should avoid an absurd or unjust result to the extent possible. *See Rafferty v. Markovitz*, 461 Mich. 265, 270 (1999); 29 M.L.P.2d Statutes, § 105 (2020) (recognizing that "a statutory construction that leads to whimsical and arbitrary results is not favored," and that "[t]here is a strong presumption in favor of a construction that does not work injustice") (citing, among other cases, *Wyandotte Sav. Bank v. State Banking Comm'r*, 347 Mich. 33 (1956); *Williams v. Cleary*, 338 Mich. 202 (1953); and *Miller v. Detroit*, 156 Mich. 630 (1909)). Here, construing the TPTA's transporter licensing requirement to apply to mere employees delivering tobacco products on behalf of their employer would lead to absurd and unjust results. As noted above, such a construction would require every employee of every business involved in the transportation of tobacco products to obtain a separate license for each of their employer's places of business; to post each and every such license at each and every respective place of business; and to renew each and every license, at least, yearly. *See* MCL § 205.423(2); MCL § 205.424(1). It would also have the effect of imposing requirements on low-level employees that they would not even be able to meet, including, by way of example, the $25,000 minimum-net-worth requirement. *See* MCL § 205.423(6)(a).

The testimony of Treasury officials responsible for implementing and enforcing the TPTA further reinforces the absurd and unjust results that follow from the Court of Appeals' Decision. Doug Miller, the Administrator of Special Taxes for Treasury, testified that the law on this topic is very unclear (*see* March 16, 2017 Preliminary Examination Transcript, Appx. at 142a-146a),[7] but

[7] In fact, based on the prosecutions here, it appears that the prosecution would have the TPTA require that even the employee *passenger* (Magnant) obtain his own transporter license. (*But see* March 16, 2017, Preliminary Examination Transcript, Appx. at 142a)(Miller testifying that he is not aware of any Treasury policy indicating whether one or two transporter licenses would be required).

that an applicant can rely on the information set forth on Form 336 (*id*. at 128a-129a), which provides that only businesses are eligible for a transporter license (*see* Form 336, Appx. at 1a-7a). Angela Littlejohn, the manager of Treasury's Tobacco Tax Unit, testified even more directly that the TPTA's licensing provisions do *not* require employees to obtain a license separate from their employer. (*See* March 16, 2017, Preliminary Examination Transcript, Appx. at 109a, 113a). Thus, if Davis had attempted to obtain an individual transporter license for himself, he would have found it to be a futile effort, given that Treasury's implementation of the licensing system—as consistent with the TPTA's overall framework—only provides for issuance of a transporter license to a "business" involved in the transportation of tobacco products. *See People v. Likine*, 492 Mich. 367, 399 (2012) (recognizing that "a defendant cannot be held criminally liable for failing to perform an act that was genuinely impossible for the defendant to perform").

There is no fair or legitimate basis for prosecuting Davis as a "transporter" for any licensure wrong committed by his employer. This is true because it is undisputed that Davis was not the owner of the truck, the trailer, or any of the cigarettes contained in the cardboard boxes found therein—all of which belonged to his employer. Indeed, Treasury has assessed Davis' employer, the Keweenaw Bay Indian Community ("KBIC"), for the tax on the seized cigarettes. Thus, as the Court of Appeals' dissent rightly recognized, "the only entity truly acting *as a transporter*" here is KBIC. (Appx. at 199a). Holding an employee agent like Davis strictly liable for the misconduct of his employer principal would achieve exactly the type of absurd and unjust result noted by the dissent: it would be tantamount to adopting a doctrine of *respondeat inferior*, for which there is no Michigan or other supporting legal authority. (*See* Appx. at 199a n.6, 202a).

The Court of Appeals' majority's construction of the TPTA to require "that *someone*—either the individual or the individual's employer—must have a license authorizing the possession for transport" of tobacco products would require employees to inquire whether their employer

holds the requisite tobacco license "before accepting the load for transport." (Appx. at 193a). However, this purported solution is too simplistic to be of any practical use. It fails to consider that, for employers like KBIC that are involved in many other revenue-raising activities besides tobacco commerce, their employees would not necessarily know or be able to assume that any given load contains tobacco products; rather, they first would have to inquire about this with respect to each and every load. It also disregards the fact that, for those loads known to contain tobacco products, employees would have to verify that their employer has obtained and maintained the proper tobacco license before undertaking each and every delivery for their employer. This would be an unworkable system since licensure is subject to suspension, revocation, or other expiration at any time such that an employee would not even be able to rely upon a posting of a physical copy of the employer's license. *See* MCL § 205.424(1)(providing that, except for licenses issued in 1994, which are addressed in subsection (2), the expiration of each license issued shall occur "on the June 30 next succeeding the date of issuance unless revoked by the department, unless *the business for which the license was issued changes ownership*, or unless *the holder of the license removes the business from the location covered by the license*")(emphasis added); MCL § 205.425(1)(providing that "[t]he department may suspend, revoke, or refuse to issue or renew a license issued under this act for failure to comply with this act or for any other good cause").

A non-supervisory employee like Davis with limited knowledge of and no meaningful control over his employer's tobacco-related operations is not in any reasonable position to truly know let alone ensure his employer's compliance with any TPTA licensing requirements, thereby making the Court of Appeals' supposed solution an imaginary one. The practical effect of the Court of Appeals' holding is that any employee who might happen to transport tobacco products on behalf of his employer at any time during his employment would be required to attempt to

comply successfully with all of the provisions of the TPTA's licensing regime or confirm that his employer has done so—or else face felony prosecution.

C. The TPTA Does Not Give Fair Notice that Employees like Davis Would Fall Within the Definition of "Transporter" and Could Face Felony Charges for Failure to Obtain a Transporter License When Delivering Tobacco Products on Behalf of their Employer

Due process of law requires fair notice of the prohibited conduct before a defendant may be convicted of violating that law. *See e.g., People v. Hall*, 499 Mich. 446, 460-61 (2016) (discussing what due process of law requires); *People v. Howell*, 396 Mich. 16, 20 n.4 (1976) (same). The TPTA provides no such fair notice regarding the applicability of its transporter licensing requirement to mere employees like Davis. Rather, as shown above, the TPTA, when read as a whole, as well as Treasury's reasonable implementation of it via Form 336 actually lead employees like Davis to believe that they are not required to obtain a transporter license and, indeed, would not even be eligible for one. At most, individuals of reasonable intelligence are simply left to guess at, speculate about, and differ meaningfully in opinion as to the existence of any such requirement—and that does not qualify as fair notice. *See e.g., People v. Mesick*, 285 Mich. App. 535, 545 (2009) (recognizing that this amounts to an unconstitutional lack of "fair warning").

In denying Defendants' Joint Motion to Dismiss for Due Process Violation, the circuit court improperly relied on *People v. Shouman*, No. 330383, 2016 Mich. App. Lexis 1812 (Oct. 4, 2016) (unpublished)(Appx. at 206a-212a), to find that the TPTA provided adequate notice that individuals like Davis can be "transporters" under the statute.[8] (November 2, 2017, Motion

[8] Notably, in finding in *dicta* that the TPTA's transporter licensing requirement applies to individual employees, the *Shouman* Court, like the Court of Appeals' majority here, improperly relied on only selected provisions of the TPTA (*i.e.,* the definition of "transporter" as including a "person" and the definition of "person" as including an "individual") while disregarding the many other provisions of the TPTA as well as Treasury Form 336 that make clear that this requirement

Hearings Transcript, Appx. at 185a). The existence of the "fair notice" required by the Due Process Clause must be determined as of December 11, 2015, the date of the alleged TPTA violation here, and *Shouman* was not decided until almost one year later. *See People v. Dempster*, 396 Mich. 700, 714-17 (1976) (in reversing the defendant's conviction for selling unregistered securities in violation of the Uniform Securities Act ("USA") as infringing on her due process rights, and finding that the securities sold did not fall within the USA's "commercial paper" exemption under the "clarifying gloss" that the Court was then placing on that otherwise-ambiguous exemption, but holding that such "clarifying gloss"—as "'an unforeseeable judicial enlargement of a criminal statute'"—can only serve to provide constructive notice to future defendants and cannot be applied retroactively without violating a defendant's due process rights to fair notice of the proscribed conduct). Thus, even if *Shouman* might otherwise have any persuasive value as to the application of the TPTA's transporter licensing requirement to non-supervisory employees—a proposition that Davis hotly contests[9]—the case has no bearing on the due process challenge here. Rather, any interpretation or "clarifying gloss" put on MCL § 205.428(3) by the *Shouman* Court would

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was only intended to apply to businesses or to individuals operating such businesses on their own account and not to mere employees of such businesses. 2006 Mich. App. Lexis at *19-23. (Appx. at 206a-212a).

[9] As explained in more detail in Davis' Application, *Shouman* is an unpublished per curiam opinion that is rife with *dicta*, and is also legally and factually distinguishable from this case. *See e.g.*, *Shouman*, 2016 Mich. App. Lexis at *20 n.6 (underscoring that the defendant there had conceded that he "arguably was a transporter of other tobacco products" and that "a driver could be charged and convicted of violating the TPTA" and that "[t]hese concessions are inconsistent with [the] defendant's suggestion that only a business could qualify as a transporter"); *id.* at *17 n.3 (noting that the defendant previously had his own tobacco business and his license had been revoked, and that his claim that he was now employed by another business was in dispute); *id.* at *22 (noting that Treasury's license application form upon which the defendant relied—Treasury Form 336—was not properly before the Court, but then proceeding to hold that "the plain language of the TPTA supports the conclusion that an individual may be a 'transporter'" and that "[a] governmental agency's statement on a form cannot supersede the statutory text")(Appx. at 206a-212a).

constitute an "unforeseeable judicial enlargement" of the statute and cannot be retroactively applied to Davis without violating his due process rights. *See Dempster*, 396 Mich. at 714-17.

In sum, there is nothing in the TPTA that gives an employee like Davis fair warning that merely driving a truck on December 11, 2015 as part of his employment, could result in felony prosecution for the failure to have his own transporter license. *See Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018) (holding that, if the offense of impeding the administration of the Internal Revenue Code were read to make minor tax infractions—like keeping certain receipts—felonies, then there would be a lack of the requisite "fair warning" as it is sincerely doubtful that individuals engaging in that behavior would know that they would be facing felony prosecution for tax obstruction).

IV. CONCLUSION AND REQUEST FOR RELIEF

Wherefore, Davis respectfully requests that this Honorable Court reverse the Court of Appeals' Decision affirming the trial court's denial of Defendants' Joint Motion to Quash the Information and Joint Motion to Dismiss for Due Process Violation and dismiss this case.

Respectfully submitted,
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