STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
SWARTZLE, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v GERALD MAGNANT, Defendant-Appellant. _____/	Supreme Court No. 159371 Court of Appeals No. 341627 Ingham Circuit Court No. 17-407-FH
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JOHN FRANCIS DAVIS, Defendant-Appellant. _____/	Supreme Court No. 159373 Court of Appeals No. 341621 Ingham Circuit Court No. 17-406-FH

SUPPLEMENTAL BRIEF ON APPEAL OF APPELLEE–PEOPLE OF THE STATE OF MICHIGAN

ORAL ARGUMENT REQUESTED

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Dated: October 22, 2020

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STATEMENT OF JURISDICTION

The People agree that this Court has jurisdiction over this matter. MCR 7.303(B)(1); MCR 7.305(H)(1).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Does MCL 205.428(3) require proof that defendants knew they were transporting cigarettes in a manner "contrary to" the Tobacco Products Tax Act (TPTA), i.e., that licensure was required to do so, contrary to the plain language of the relevant statutes and applicable caselaw?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

2. Must an employee be supervisory to fall within the definition of "transporter" under the TPTA, MCL 205.422(y), where the definition specifically applies to individuals?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

3. Does the TPTA's definition of "transporter" violate due process by failing to put defendants on fair notice of the conduct that would subject them to punishment, despite the TPTA's plain language?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

STATUTES INVOLVED

MCL 205.422(o):

> "Person" means an individual, partnership, fiduciary, association, Limited Liability Company, corporation, or other legal entity.

MCL 205.422(y):

> "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 205.423:

> [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.

MCL 205.428(3):

> 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.

INTRODUCTION

Tobacco is one of the most heavily regulated commodities in modern history. Its negative health effects are pervasive and well-documented. To offset this vice, the Michigan Legislature enacted the Tobacco Products Tax Act (TPTA), which provides for the taxes levied against tobacco to support Michigan schools. The TPTA also serves to mitigate black-market distribution of unregulated tobacco.

Enter Defendants Gerald Magnant and John Davis. The Michigan State Police's Tobacco Tax Enforcement Team observed Magnant and Davis get into a truck pulling a trailer, parked at a storage unit or pole barn on property owned by the Keweenaw Bay Indian Community (KBIC). The truck, bearing KBIC license plates, had arrived there from a KBIC-owned convenience store. The men drove the truck from the pole barn to U.S. 41, heading toward Marquette. Suspecting that the truck might contain unregulated cigarettes, a Michigan State Police trooper stopped the men when they began speeding.

The trooper inquired about the contents of the trailer, to which Magnant and Davis advised were only "supplies" or "chips." But when Davis voluntarily opened the trailer for the trooper, the true contents were revealed: 56 cases of Seneca cigarettes. This was not a duffel bag stuffed with a few stray packs—it was 672,000 cigarettes, none of which bore Michigan tax stamps, nor did Magnant, Davis, or the KBIC generally have any licenses under the TPTA to transport those cigarettes. This is worth tens of thousands of dollars in taxes.

Magnant and Davis were subsequently charged under the TPTA, MCL 205.428(3), for transporting 3,000 or more cigarettes without a license. They were

bound over following a preliminary examination and the circuit court denied their motions to dismiss and quash. The Michigan Court of Appeals affirmed.

This Court has now granted a MOAA on three issues: (1) whether a defendant charged under MCL 205.428(3) must know not only that he is transporting 3,000 or more cigarettes but *also* that the TPTA requires licensure to do so (i.e., that the transportation was "contrary to" the TPTA); (2) whether nonsupervisory employees fall within the definition of "transporter" under the TPTA, MCL 205.422(y); and (3) whether the definition of "transporter" provides fair notice of individual criminal liability under the TPTA.

The plain language of the statutes at issue, as well as relevant, binding decisions from the Court of Appeals and this Court, answer all three inquiries in the People's favor. This Court should therefore deny leave to appeal or, alternatively, grant leave and affirm the decision of the Court of Appeals below.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The traffic stop.

While on patrol on December 11, 2015, the Tobacco Tax Enforcement Team alerted Michigan State Police Trooper Chris Lajimodiere to a green Ford pickup truck pulling a utility trailer that was suspected to contain illegal cigarettes. (Def App 19a–20a, 27a.[1]) Upon seeing a truck fitting that description, Trooper Lajimodiere stopped the truck for speeding on U.S. 41 in Marquette County. (Def App 20a–21a.) The truck bore license plates from the Keweenaw Bay Indian Community (KBIC) and lacked any U.S. Department of Transportation markings. (Def App 23a–24a.) The stop took place in the State of Michigan, as KBIC's casino in Marquette was 40 miles away and the tribe's reservation was 60 miles away in Baraga County. (Def App 22a.)

When the vehicle stopped, Trooper Lajimodiere met the driver and noticed a passenger. (Def App 22a.) The driver was John Davis, and the passenger identified himself as Gerald Magnant. (Def App 22a–23a.) Davis indicated he was headed to a new store in Marquette. (Def App 24a.) Trooper Lajimodiere asked what was in the trailer, to which either Magnant or Davis said "supplies" and that "there's just chips and stuff in there." (Def App 24a, 47a.)

[1] The People stipulate to the use of Defendants' appendix in this case for the documents provided therein. The People have also provided an additional appendix to include the April 6, 2017 Preliminary Examination Transcript and the circuit court's bindover order.

Trooper Lajimodiere then asked to see the contents of the trailer and Davis voluntarily got out of the vehicle, unlocked the trailer, and said, "There you go, Boss," once he opened it. (Def App 25a.) Inside the trailer, Trooper Lajimodiere saw brown cardboard boxes bearing the name, "Seneca," similar to People's Exhibit 2, which was a box of Seneca cigarettes. (Def App 9a, 26a, 32a.) Trooper Lajimodiere knew Seneca to be a brand of cigarettes. (Def App 34a.) He then stated to Davis, "[Y]ou knew that stuff was back there," to which Davis replied, "I'm just a worker." (Def App 27a.)

Neither Magnant nor Davis provided a tobacco license, permit, or any invoices for the cigarettes. (Def App 34a.)

Trooper Lajimodiere then radioed for the Tobacco Tax Enforcement Team and maintained the scene until they arrived. (Def App 34a.) The video of the stop from the squad car was also entered into evidence as People's Exhibit 1. (Def App 31a.)

The discovery of 672,000 cigarettes.

Trooper Kevin Ryan was a member of the Tobacco Tax Enforcement Team, for which he had received annual training from the Michigan Department of Treasury, who had contacted Trooper Lajimodiere about the green Ford pickup. (Def App 52a, 63a.) Earlier in the day on December 11, 2015, Trooper Ryan was driving back toward Marquette on U.S. 41 through Baraga County and the KBIC reservation when he passed the Pines Convenience Store, a KBIC business. (Def App 59a–60a.) He noticed several pickup trucks with trailers parked at the back of

the store; he had previously seen those trucks during surveillance for tobacco-tax enforcement. (Def App 60a–61a.) The trucks left the Pines and traveled to the KBIC storage unit or pole barn, across the street from the Baraga KBIC Casino. (Def App 61a.) Two men got into one truck and drove back to U.S. 41 towards Marquette. (Def App 62a.) Trooper Ryan then called for a patrol vehicle to initiate a traffic stop on the truck if there was a legal way to do so. (Def App 62a–63a.) Trooper Lajimodiere answered that call and made the stop. (Def App 63a.)

When Trooper Ryan arrived at the traffic stop, the trailer was already open and he saw cases of Seneca cigarettes inside. (Def App 63a.) Trooper Ryan was familiar with Seneca cigarettes through his training in tobacco-tax enforcement, understanding that Seneca cigarettes "are part of a non-participating manufacturer that don't have . . . agreements with the Department of Treasury to bring the tobacco into the state of Michigan." (Def App 64a.) He took pictures of the scene, including the inside of the trailer, and then opened a package of cigarettes to check for a Michigan tax stamp. (Def App 64a.) The cigarettes contained only a KBIC stamp, which is not recognized or authorized by the Michigan Department of Treasury. (Def App 65a.) The larger shipping containers contained no Michigan markings or labeling, only the Seneca brand name. (Def App 65a.)

The trailer contained 56 cases of Seneca cigarettes, with each case containing 12,000 cigarettes—a total of 672,000 cigarettes.[2] (Def App 66a.) As with Trooper Lajimodiere, neither Magnant nor Davis presented Trooper Ryan with any tobacco licenses, invoices, or any other paperwork. (Def App 66a.) One of the seized cases was placed into evidence as People's Exhibit 2. (Def App 67a.)

Trooper Ryan and his partner transported Magnant to the State Police post. (Def App 68a.) On the way, Trooper Ryan's partner asked Magnant several questions, at which point Magnant admitted that he helped load the trailer with the cigarettes and that he had previously transported cigarettes for KBIC to Marquette. (Def App 68a–70a.)

The TPTA licensing requirements.

Angela Littlejohn, Manager of the Treasury Tobacco Tax Unit, described the types of tobacco licenses available from the State, including a wholesaler license and an unclassified acquirer license.[3] (Def App 107a.) Both individuals and businesses may obtain these licenses. (Def App 108a.) Further, if a person transporting tobacco does not work for a licensed wholesaler or licensed unclassified

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[2] The excise tax for each individual cigarette is $0.10—totaling $67,200 in this case. See Frequently Asked Questions about Tobacco Tax, available at https://www.michigan.gov/taxes/0,4676,7-238-43519_43547-154443--,00.html (last accessed October 21, 2020). This Court may take judicial notice of this fact under MRE 201(b), (e). See *People v Burt*, 89 Mich App 293, 297 (1979) (noting that appellate courts may take judicial notice of facts not noticed below).

[3] While Littlejohn outlined only two types of licenses available under the TPTA, several other types of licenses are also available, including transporter's licenses or permits. See MCL 205.426(8).

acquirer, then the individual transporter (driver) must obtain a transporter's license. (Def App 109a.) Otherwise, the wholesaler or unclassified acquirer would have to use an interstate commerce carrier to transport the tobacco because such a carrier does not require a transporter license. (Def App 110a.) Littlejohn testified that it is far more common to use a carrier than to obtain individual transporter licenses. (Def App 110a.)

The People also entered by stipulation certified records from the Department of Treasury for the defendants, KBIC, the Pines, and the casinos that indicated no KBIC person nor entity maintained a Michigan tobacco tax license. (Def App 106a.) The defense further admitted a blank copy of the Michigan Tobacco Tax License Application (Form 336, included at Def App 1a–7a) without objection. (Def App 117a.)

The sole defense witness was Doug Miller, the Administrator of Special Taxes for the Michigan Department of Treasury. (Def App 124a–125a.) The defense asked Miller about Form 336, specifically whether it allows for an individual to obtain a transporter's license, and, generally, whether an individual transporter requires a license if working for a licensed wholesaler or licensed unclassified acquirer. (Def App 127a–134a.) Miller testified that Form 336 speaks of businesses and that, in his opinion and based on the form, an employee of a licensed wholesaler or unclassified acquirer, transporting tobacco in Michigan, would not require an individual transporter's license. (Def App 129a–132a.) The People objected that the

line of questioning called for a legal conclusion; the district court largely agreed but permitted the defense to ask the questions.[4] (Def App 133a.)

The bindover and motions to dismiss and quash.

Following the presentation of evidence at the preliminary examination, the district court set a second date for the bindover argument. (Def App 148a.) The parties reconvened on April 6, 2017 for argument, (People's App 1b–62b), after which the district court issued a written opinion binding Magnant and Davis over for trial on the charged offense under MCL 205.428(3), (People's App 63b–66b). The district court determined, following the reasoning of the Court of Appeals' unpublished decision in *People v Shouman*, (Def App 206a–212a), on this very issue, that the statute requires only a general intent to transport the cigarettes, not a specific intent that they transport the cigarettes knowing they needed a license to do so. (People's App 64b–66b.)

In the circuit court, both Defendants filed motions to quash the information and to dismiss the charges against them. The circuit court held a hearing on the motions, but ultimately followed *Shouman* and denied the motions in their entirety. (Def App 185a.)

[4] Following the Court of Appeals' unpublished decision in *People v Shouman*, unpublished per curiam opinion of the Court of Appeals, issued on October 4, 2016 (Docket No. 330383), Form 336 was updated to make clear that the license application also applies to individuals. See Tobacco Tax License Application, available at https://www.michigan.gov/documents/taxes/336_2009_274257_7.pdf (last accessed October 21, 2020).

The appellate proceedings.

Following the circuit court's decisions on the motions to dismiss and quash, the defendants sought and obtained leave to appeal in the Michigan Court of Appeals on an interlocutory basis. The Court of Appeals ultimately affirmed, holding that the knowledge requirement implicit in the TPTA applied only to the prohibited act—in this case, the transportation of 3,000 or more cigarettes—and not to the additional requirement of licensure under the TPTA. (Def App 188a–192a.) The Court of Appeals further held that MCL 205.428(3) is not unconstitutionally vague because, read together, the relevant statutes under the TPTA "make[] clear that an individual possessing 3,000 or more cigarettes for transport, without having a license to do so, is guilty of a felony." (Def App 192a–193a.)

Judge Ronayne Krause dissented, reasoning that the individual transporters, i.e., truck drivers, could not be held criminally liable under the TPTA under *People v Assy*, 316 Mich App 302 (2016), because they lacked any supervisory status or control over the operations involved in the transportation of the cigarettes. (Def App 198a–199a.) The dissent further concluded that the TPTA requires specific intent, that is, that the defendants have knowledge of both their prohibited act and that they did so without a license under the TPTA. (Def App 199a–202a.) The dissent did not reach the issue of due process, though it did note that employees could not be held liable for their employer's lack of licensure. (Def App 202a.)

This Court subsequently granted a MOAA on three issues: (1) whether MCL 205.428(3) requires proof that the defendants knew that they were transporting cigarettes in a manner "contrary to" the Tobacco Products Tax Act (TPTA), MCL

205.421 *et seq*.; (2) whether nonsupervisory employees fall within the definition of "transporter" under MCL 205.422(y); and (3) if so, whether the TPTA's definition of "transporter" satisfies due process by putting the defendants on fair notice of the conduct that would subject them to punishment. (3/18/20 Order.)

As outlined below, the People answer the first inquiry in the negative, and the second and third inquiries in the affirmative.

STANDARD OF REVIEW

"Questions of statutory interpretation are reviewed de novo." *People v Lewis*, 503 Mich 162, 165 (2018). Constitutional questions are also reviewed de novo, while the factual findings underlying the application of constitutional law are reviewed for clear error. *People v Rose*, 289 Mich App 499, 505 (2010).

When construing a statute, a reviewing court's "primary goal is to ascertain and give effect to the intent of the Legislature." *Lewis*, 503 Mich at 165 (cleaned up). "When a court interprets a statute, it first looks to its plain language, which provides the most reliable evidence of intent." *Id.* (cleaned up). "Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory." *Whitman v City of Burton*, 493 Mich 303, 311–312 (2013). "The drafters of statutes are presumed to know the rules of grammar, and statutory language must be read within its grammatical context unless a contrary intent is clearly expressed." *Greater Bethesda Healing Springs Ministry v Evangel Bldrs & Constr Mgrs, LLC*, 282 Mich App 410 414 (2009). "If the statute's language is clear and unambiguous, then judicial construction is inappropriate and the statute must be enforced as written." *Lewis*, 503 Mich at 165. "Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent." *Whitman*, 493 Mich at 312. "A necessary corollary of this principle is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Lewis*, 503 Mich at 165 (cleaned up).

ARGUMENT

I. A transporter under the TPTA, MCL 205.428(3), need only have known he transported 3,000 or more cigarettes, *not* that the TPTA also required licensure.

This Court first asks what mens rea a defendant must possess to be charged and convicted of the unlicensed transportation of cigarettes under MCL 205.428(3). Must the defendant only know that he or she is transporting 3,000 or more cigarettes, with the attendant circumstance that the person happens to be unlicensed under the TPTA? Or must the defendant know *both* that he or she is transporting 3,000 or more cigarettes *and* that a transportation license was required under the TPTA? For the reasons outlined below, the TPTA requires only the former.

A. This case tracks the Michigan Court of Appeals' decision in *People v Nasir*, holding that the implicit knowledge requirement applies only to the prohibited act—not the attendant circumstance of doing so without a license.

The first step to answering this question is an examination of the plain language of MCL 205.428(3). *Lewis*, 503 Mich at 165. Again, the statute reads:

> 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. [MCL 205.428(3).]

This statute is part of a general regulatory scheme that the Legislature enacted "in 1993 to, among other things, regulate and license manufacturers [and transporters] of tobacco products, as well as provide penalties for violations of the act." *People v Shami*, 501 Mich 243, 251–252 (2018).

To be sure, MCL 205.428(3) does not explicitly state a requisite mens rea. And because "[s]trict-liability offenses are disfavored" in Michigan, the question is whether the Legislature intended for a defendant charged under MCL 205.428(3) to possess a general intent (to do the illegal act alone) or specific intent (to act with some intent beyond the doing of the act itself) to violate the statute. *Rambin v Allstate Ins Co*, 495 Mich 316, 329 (2014); *People v Janes*, 302 Mich App 34, 41 (2013) (outlining the two types of intent). In this case, general intent would require knowledge of the mere transportation of 3,000 or more cigarettes, while specific intent would further require the defendant to know he or she also had to have a license to transport the cigarettes under the TPTA.

"Whether the Legislature intended to enact a strict-liability offense is generally a matter of statutory interpretation." *Janes*, 302 Mich App at 42, citing *People v Quinn*, 440 Mich 178, 185–188 (1992). Reviewing courts consider several factors to answer such inquiries. In *Quinn*, this Court cited LaFave and Scott's summary of these factors as: (1) the statute's legislative history or its title, (2) guidance to interpretation provided by other statutes, (3) the severity of the punishment provided, (4) the severity of potential harm to the public, (5) the opportunity to ascertain the true facts, and (6) the difficulty encountered by prosecuting officials in proving a mental state. 440 Mich at 190 n 14. The Court also noted that "where a statute requires a criminal mind for some but not all of its elements, it is not one of strict liability . . . ." *Id.* at 187.

The Court of Appeals applied these factors in a strikingly similar case regarding the applicable mens rea for subsection 428(6) of the TPTA, concerning the use of counterfeit tax stamps. See *People v Nasir*, 255 Mich App 38, 41–45 (2003). Subsection 428(6) reads:

> A person who manufactures, possesses, or uses a stamp or manufactures, possesses, or uses a counterfeit stamp or writing or device intended to replicate a stamp without authorization of the department, a licensee who purchases or obtains a stamp from any person other than the department, or who falsifies a manufacturer's label on cigarettes, counterfeit cigarettes, gray market cigarette papers, or counterfeit cigarette papers is guilty of a felony and shall be punished by imprisonment for not less than 1 year or more than 10 years and may be punished by a fine of not more than $50,000.00. [MCL 205.428(6).]

As with subsection 428(3), subsection 428(6) is also silent with respect to mens rea. In *Nasir*, the Court of Appeals weighed the requisite factors and held that the Legislature did not intend for defendants to be strictly liable, thus concluding that intent (knowledge) was required, but only *general* intent, not specific intent. *Id.* at 45–46. The Court of Appeals noted, "We do not believe that the Legislature intended that the offense contain a specific intent element, nor do we believe that a defendant need act with knowledge that the defendant does so without the authorization of the Michigan Department of Treasury." *Id.* at 46.

An identical analysis can be applied to subsection 428(3), substituting the clause "without authorization from the department" in 428(6) with "contrary to this act" in 428(3). Indeed, those two clauses are placed in the same grammatical contexts in their respective statutes. In each instance, the clause to which specific intent would apply comes after the general prohibition: (A) "A person who possess,

acquires, transports or offers for sale *contrary to this act* . . .," and (B) "A person who manufactures, possesses, or uses a stamp or manufactures, possesses, or uses a counterfeit stamp or writing or device intended to replicate a stamp *without authorization of the department* . . . ." As the Court of Appeals reasoned below in applying *Nasir*, the defendant's knowledge applies only to the prohibited act—in this case, transportation of the cigarettes, and in *Nasir*, the use of a counterfeit stamp. (Def App 189a–191a.) Thus, if defendants are not required to "act with knowledge that the defendant does so without the authorization of the Michigan Department of Treasury," under 428(6), then they equally cannot be required to "act with knowledge that the defendant does so ["contrary to this act," i.e., without a transportation license]." See also *Shouman*, in which the Court of Appeals held, albeit in an unpublished opinion, that "there is no support in *Nasir* or other case law for defendant's contention below that the prosecutor had to prove that defendant knew he was required to have a license and that he specifically intended to violate the TPTA . . . in addition to lacking any basis in the language of MCL 205.428(3)." (Def App 210a.)

Because each provision of the TPTA must be read in harmony, the outcome in this case should mirror the outcome in *Nasir*. See *Bush v Shabahang*, 484 Mich 156, 167 (2009) ("A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained. The statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme.").

Further, categorizing the phrase "contrary to the act" as an element of the crime undercuts the legislative intent in enacting a comprehensive regulatory regime to control the import, sale and distribution of unregulated black-market goods. Black's Law Dictionary defines the phrase "contrary to law" as a legal term meaning "unlawful" or is "contrary to the form of the statute." 11th ed (2019). "When a statute employs technical terms of art, it is proper to explain them by reference to the art or science to which they are appropriate." *People v Blunt,* 282 Mich App 81, 83 (2009) (cleaned up). Here, the term "contrary to this act" is not describing an element of an offense, but rather incorporating a regulatory scheme both in the statute itself and any rules the Department of Treasury enacts per statutory authority.

Tellingly, the term "contrary to law" or "contrary to this act" appears in various state and federal statutes that prohibit smuggling or black-market activities (emphasis added below):

- MCL 750.331 (prohibiting black-market horse and animal racing) "Every person who contributes or collects any money, goods, or things in action, for the purpose of making up a purse, plate, or other valuable thing, to be raced for by any animal, *contrary to law*, is guilty of a misdemeanor."

- MCL 750.561 (false weights and measures) "Any person who shall offer or expose for sale, sell, or use or retain in his or her possession a false weight or measure or weighing or measuring device or any weight or measure or weighing or measuring device in the buying or selling of any commodity or thing or for hire or reward; or who shall dispose of any condemned weight, measure or weighing or measuring device contrary to law or remove any tags placed thereon by the sealer of weights and measures; or any person who shall sell or offer or expose for sale less than the quantity he or she represents, or sell or offer or expose for sale any such commodity in any manner *contrary to law*…is guilty of a misdemeanor."

- MCL 28.434 (unlawfully possessed firearms) "all pistols, weapons, or devices carried or possessed *contrary to this act* are declared forfeited to the state, and shall be turned over to the director of the department of state police or his or her designated representative, for disposal under this section."[5]

- Even the federal government uses the same language at times. See 18 USC § 545 (Smuggling goods into the United States) **"**Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces or attempts to smuggle or clandestinely introduce into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or Whoever fraudulently or knowingly imports or brings into the United States, any merchandise *contrary to law*…Shall be fined under this title or imprisoned not more than 20 years, or both…"

In the context of a statute preventing black-market activities, the phrase "contrary to this act" may be reasonably interpreted to show the Legislature's intent to incorporate a regulatory regime by reference—not to delineate a specific evil to be prohibited. Here, the TPTA requires that each defendant knew what he was transporting was a tobacco product; [6] the phrase "contrary to law" does not outline an element, but incorporates the regulatory requirements of the act—namely, that a transporter of a tobacco product hold an appropriate license.

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[5] See also MCL 285.64 (previous version), requiring licenses to trade in grain—"A grain dealer shall not offer storage facilities for farm produce or accept farm produce for storage; or issue warehouse receipts thereon; or charge or collect storage charges therefor; or issue price later agreements; or issue acknowledgments of receipts of delivery of farm produce *contrary to this act*." (Emphasis added.)

[6] As discussed in more detail in the People's Answer in Opposition to Application for Leave to Appeal, and in detail in *People v Shouman* which the majority panel of the Court of Appeals relied on here, the statutory scheme requires the TPTA license to be in the actual possession of the person acting in the capacity of a transporter. Therefore, a person (e.g., an employee, owner, lessee, or supervisor) transporting a tobacco product without a TPTA license in his or her actual possession would be on notice that no license existed and that he or she operated *ultra vires*.

This Court's decision in *Quinn* is also instructive. There, the defendant was charged with transporting or possessing a loaded firearm other than a pistol in a vehicle under MCL 750.227c. *Quinn*, 440 Mich at 180. The question presented was whether the defendant had to know only that he was transporting a firearm or *also* that the firearm was loaded. *Id.* This Court concluded that the statute required only the former. *Id.* at 181. The Court reasoned that "responsibility for the protection of the public should be placed on the person who can best avoid the harm sought to be prevented—the actor himself." *Id.* at 187–188. Thus, the attendant circumstance of the firearm being loaded was not part of the mens rea.

Similarly, here, Magnant and Davis need only have known that they were transporting 3,000 or more cigarettes, not that a license was also required. And the evidence supports an inference that they did know about the cigarettes. The men were seen getting into the truck at the KBIC storage bin or pole barn; Magnant admitted to helping load the contents of the trailer; Magnant and/or Davis lied about the contents of the trailer being only "supplies" or "chips"; and the trailer contained approximately 672,000 cigarettes—a quantity of which no reasonable person could claim ignorance. (Def App 24a, 47a, 61a–62a, 66a, 69a.)

Thus, this Court should affirm on this issue.

B. The Supreme Court's decision in *Rehaif v United States*, 588 US ___; 139 S Ct 2191 (2019) does not compel a different outcome.

In the order granting a MOAA on this issue, this Court pointed the parties to *Rehaif v United States*, 588 US ___; 139 S Ct 2191 (2019). But *Rehaif* is inapposite for several reasons.

First, *Rehaif* is a *direct-appeal* case interpreting *federal* statutes regarding the possession of a firearm by a person illegally residing in the United States. 139 S Ct at 2194. As such, it does not bind this Court. *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 283 (2005) (discouraging reliance on a Supreme Court case interpreting federal statutes). This Court has made clear that "[w]hile federal precedent may often be useful as guidance in this Court's interpretation of laws with federal analogues, such precedent cannot be allowed to rewrite Michigan law." *Id.* The Court must first fully assess "the statutory differences between Michigan and federal law," and yet "even when this has been done and language in state statutes is compared to similar language in federal statutes, federal precedent remains only as persuasive as the quality of its analysis." *Id.*

Second, the state statute at issue here and the federal statutes at issue in *Rehaif* are not comparable. The TPTA provisions in this case are silent with respect to mens rea, whereas the federal statute explicitly called for a "knowing" violation. *Rehaif*, 139 S Ct at 2194. The explicit use of the term "knowingly" in the federal statute provided the Supreme Court with grammatical context for its application. The statute reads, "Whoever knowingly violates subsection . . . (g) . . . of section 922

shall be fined as provided in this title, imprisoned not more than 10 years, or both." 18 USC § 924(a)(2). The Supreme Court reasoned that because "knowingly" modifies "violates" and "its direct object, which in this case is [18 USC] § 922(g)," the Court had to determine "what it means for a defendant to know that he has 'violate[d]' § 922(g)." *Rehaif*, 139 S Ct at 2195. Conversely, the TPTA lacks any grammatical context to which *Rehaif*'s analysis could apply.

Third, in *Rehaif* the Supreme Court limited its holding regarding the application of the knowledge requirement to non-jurisdictional elements, because a jurisdictional element does not "describe the evil [the legislature] seeks to prevent." *Id*. at 2195. The Court noted that its holding did not promote "ignorance of the law," carefully distinguishing between a defendant's knowledge "in respect to the elements of the crime" (necessary to convict) and a defendant's knowledge as to "the existence of a statute proscribing his conduct" (which the law cannot require). *Rehaif*, 139 S Ct at 2198. See also *Cheek v United States*, 498 US 192, 199 (1991) ("ignorance of the law is no defense from a criminal prosecution").

In any event, Magnant and Davis cannot reasonably claim ignorance of the law given the sheer quantity of cigarettes they transported. Not to mention, Magnant admitted that he helped load the trailer with the cigarettes and that he had previously transported cigarettes for KBIC to Marquette. (Def App 68a–70a.) These were sophisticated defendants who knew precisely what they were doing. The charges have also been vetted through the district court, circuit court, and Court of Appeals. Between prosecutorial discretion and this institutional vetting

process, the TPTA does not risk ensnaring innocent defendants. See *People v Conat*, 238 Mich App 134, 150 (1999) (noting that prosecutorial discretion "is not without checks and balances, for the magistrate must determine at the preliminary examination that probable cause exists to believe that the defendant committed the charged offense, and the trier of fact must determine at trial whether the defendant is guilty beyond a reasonable doubt of the charged offense.").

In sum, the knowledge requirement inherent in MCL 205.428(3) extends only to the Defendants' actions—the transportation of 3,000 or more cigarettes—*not* the additional requirement of holding a transporter's license under the TPTA. This Court should therefore affirm on this issue.

II. Nonsupervisory employees, such as truck-drivers Magnant and Davis, plainly fall within the definition of "transporter" under the TPTA, MCL 205.422(y).

This Court further inquired whether nonsupervisory employees fall within the definition of "transporter" under MCL 205.422(y). The plain language of the definition provides a simple answer: yes.

A. This Court's decision in *Shami*—holding that an individual who so much as blends two tobaccos together, regardless of any supervisory status, is a "manufacturer" under the TPTA—dictates the outcome here.

This Court addressed a similar question in *Shami*. There, the term at issue was "manufacturer" under the TPTA, and whether "an individual who combines two different tobacco products to create a new blended product or repackages bulk tobacco into smaller containers with a new label is considered a manufacturer of a tobacco product and must have the requisite license." *Shami*, 501 Mich at 247. The defendant in that case managed a hookah-tobacco store owned by Sam Molasses, LLC. *Id.* at 248. While the business held both wholesaler and unclassified-acquirer licenses under the TPTA, neither the business nor the defendant, individually, held a *manufacturer's* license. *Id.* During an administrative inspection of the store, the state Treasury's Tobacco Tax Enforcement Unit discovered that some labels on hookah-tobacco bins bore different names than the tobacco listed on the invoices for tobacco purchased for the store. *Id.* The defendant informed the investigators that "he had mixed two or more flavors of hookah tobacco to create a new 'special blend,' which was then placed in the plastic tubs and affixed with new labels to reflect the

blended product." *Id.* at 249. The defendant also stated that he had divided bulk tobacco products into smaller containers for resale. *Id.*

The defendant was then charged under the same provisions at issue in this case, albeit as a "manufacturer" rather than a "transporter," being MCL 205.423(1) and 205.428(3). *Id.* A preliminary examination was held and the defendant was bound over to circuit court, after which the circuit court granted the defendant's motion to quash. *Id.* at 250. The Court of Appeals reversed and this Court granted a MOAA on the application. *Id.*

This Court affirmed in part and reversed in part, holding that the defendant was a "manufacturer" under the TPTA by mixing two different tobacco products to create a new tobacco product, but that the dividing of bulk tobacco did not make him a manufacturer. *Id.* at 247. To reach that conclusion, this Court examined the plain language of the definition of "manufacturer" under the TPTA, MCL 205.422(m)(i). Diving deeper, the Court consulted dictionary definitions of the words used to define "manufacturer," including "manufactur[ing]" or "produc[ing]." *Id.* at 253. The dictionary defined manufacturing as "mak[ing] into a product suitable for use" and "mak[ing] from raw materials by hand or by machinery." *Id.* at 253–254 (cleaned up). The Court determined that definition did not fit in the scenario in that case because the original tobacco products were already suitable for use. *Id.* at 254.

"Produc[ing]," however, was a different story. *Id.* The dictionary defined producing as "to give being, form, or shape to[.]" *Id.* (cleaned up). Based on that

definition, this Court concluded that "an individual 'produces' a tobacco product when he or she combines two or more different tobaccos ' to give being, form, or shape to' a single, custom tobacco blend that differs from the ingredient tobaccos." *Id.* at 255. And, thus, an individual who produces tobacco in such a manner is a "manufacturer" under the TPTA. *Id.* Further, because simply dividing bulk tobacco products did not meet either definition of manufacturing or producing, that aspect of the defendant's charge could not proceed. *Id.* at 256.

The relevant term in this case is "transporter" under the very same provisions of the TPTA as those at issue in *Shami*. The plain language of the relevant statutes is the first step of the inquiry. *Shami*, 501 Mich at 253. The TPTA dictates that "a person shall not purchase, possess, acquire for resale, or sell a tobacco product as a . . . transporter in this state unless licensed to do so." MCL 205.423(1). The TPTA defines a "transporter" 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. [MCL 205.422(y), emphasis added.]

The next step is to consult the dictionary definitions of the words used to define "transporter." *Shami*, 501 Mich at 253. The Merriam-Webster Dictionary defines "import[ing]" as a verb meaning "to bring from a foreign or external source," and "transport[ing]" as a verb meaning, "to transfer or convey from one place to another." The TPTA also defines "person" as, in part, an individual. MCL 205.422(o).

Thus, taken together, a "transporter" under the TPTA is *an individual who transfers or conveys from one place to another a tobacco product obtained from a source located outside this state or from any person not duly licensed under the TPTA*. This analysis and definition fully comport with *Shami*, decided less than three years ago under the *same* two TPTA provisions at issue in this case. The only difference being which *word* is at issue.

Magnant and Davis fall squarely into this definition. Both were plainly (1) "individual[s]" who were (2) in the process of "transfer[ing]" or "convey[ing]" (3) "a tobacco product," i.e., cigarettes (3) "obtained from a source located outside this state," i.e., from tribal lands, (4) from one place (tribal lands) to another (supposedly a store in Marquette) via a truck driving on state roads. Indeed, Trooper Ryan observed several trucks stopped at the KBIC-owned Pines store and then drive to the KBIC-located storage unit or pole barn, where two men got into one of the trucks and then drive down U.S. 41 towards Marquette, where Trooper Lajimodiere stopped them for speeding. (Def App 20a–21a, 59a–62a.) During the stop, Davis was found to be driving and Magnant was a passenger, neither of which held a transporter's license under the TPTA—and they were pulling a trailer containing approximately 672,000 unstamped cigarettes. (Def App 34a, 66a.)

The parallels between this case and *Shami* cannot be emphasized enough. The defendants in both cases acted in their individual capacities, and all lacked a license to do the prohibited activity under the TPTA—in *Shami* it was manufacturing and here it was transporting.

In short, there simply is no reason for this Court to decide this case any differently than *Shami*, holding that Magnant and Davis both fit the definition of "transporter[s]" under the TPTA.

B. The definition of "transporter" does not require any level of control over the operations involved in the tobacco trade, unlike a "retailer," as the Court of Appeals held in *Assy*.

The Court of Appeals' well-reasoned treatment of this issue differentiates between the definition of "retailer" in the TPTA as requiring a supervisory component, at issue in *People v Assy*, 316 Mich App 302 (2016), and the definition of "transporter."

The TPTA defines a "retailer" as one who "operates a place of business," and, in *Assy*, the Court of Appeals held that "operation" includes "an element of direction and control." *Assy*, 316 Mich App at 310–311. In this case, however, the Court of Appeals distinguished *Assy*, noting that the definition of "transporter" does *not* include any such element of control. (Def App 193a.) The court noted that Black's Law Dictionary defines "transport" as "[t]o carry or convey (a thing) from one place to another." (Def App 193a.) Therefore, the court reasoned, transportation "requires the physical action of carrying or conveying a thing, in this case, cigarettes." (Def App 193a.) In short, "the ordinary meaning of the term 'transporter' reasonably includes the individuals who drive truckloads of cigarettes." (Def App 193a.)

This conclusion also comports with *Shami*. As an initial point, the notion of supervisor-status never arose in this Court's *Shami* decision. No part of that

decision rested on the defendant's status as a manager of the store as compared to a non-manager employee.

But the issue *did* arise in the Michigan Court of Appeals' *Shami* decision given the defendant's additional charge for improper recordkeeping as a retailer under the TPTA. *People v Shami*, 318 Mich App 316, 325 (2016), rev'd in part on other grounds 501 Mich at 247. In addition to dismissing the manufacturing charge, the district court had also dismissed the invoice charge. *Id.* The prosecution challenged that decision "because, although defendant was not the licensee, he could be held criminally liable for improper recordkeeping because he managed the day-to-day operations of the LLC's retail store." *Id.* The Court of Appeals determined that because the TPTA defines a "person" as an "individual," in part, "under the plain language of the TPTA, an individual can be criminally liable for violations of the act." *Id.* The Court of Appeals looked to *Assy* to conclude that the defendant, as someone who managed day-to-day operations, could be charged for failing to keep records properly under the TPTA as a retailer. *Id.* at 326.

By contrast, the defendant's status as a manager played *no part* in his charge under the *manufacturing* provision of the TPTA. This is likely because, unlike a retailer, the definition of manufacturer does not require the person or entity to exercise any dominion or control over the tobacco operations. Indeed, this Court held that an *individual's* mere act of blending two different tobaccos rendered him a manufacturer under the TPTA. *Shami*, 501 Mich at 255.

Identically, the definition of transporter does not dictate that the person or entity have any control over the operations. It is entirely sufficient for the transporter to be an *individual* who merely transfers or conveys the tobacco products from one place to another—just as Magnant and Davis did in this case. See MCL 205.422(y). The TPTA also requires transporters to have in their possession invoices for their haul and their transporter's license, neither of which Magnant or Davis possessed. See MCL 205.426(7), (8).

Magnant and Davis further claim that the Rule of Lenity skews the interpretation of "transporter" in their favor, but they are mistaken. "The rule of [] lenity provides that courts should mitigate punishment when the punishment in a criminal statute is unclear." *People v Denio*, 454 Mich 691, 699 (1997). The key is when the statute is *unclear*, that is, "only in the circumstances of an ambiguity, or in the absence of any firm indication of legislative intent." *People v Wakeford*, 418 Mich 95, 113–114 (1983). In this case, however, there is no ambiguity: the plain language of MCL 205.422(y), even with consultation of dictionary definitions, unambiguously dictates that individual, nonsupervisory employees can be "transporter[s]" subject to criminal liability under the TPTA.

Thus, this Court should affirm on this point.

III. The TPTA fairly notifies both businesses *and* individuals that the unlicensed transportation of 3,000 or more cigarettes exposes them to criminal liability.

The final inquiry from this Court is whether the TPTA's definition of "transporter" satisfies due process by putting the defendants on fair notice of the conduct that would subject them to punishment. The plain language of the relevant statutes at issue do just that, warning both businesses *and* individuals that transporting 3,000 or more cigarettes without a license under the TPTA can subject them to a felony charge and up to 5 years imprisonment and/or a $50,000 fine. Thus, this Court should affirm.

"A statute challenged on constitutional grounds is presumed to be constitutional and will be construed as such unless its unconstitutionality is clearly apparent." *People v Vronko*, 228 Mich App 649, 652 (1998). A criminal statute is unconstitutionally vague if "(1) it does not provide fair notice of the conduct proscribed, (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed, or (3) its coverage is overly broad and impinges on First Amendment Freedoms." *Id.* "The proper inquiry is not whether the statute may be susceptible to impermissible interpretations, but whether the statute is vague as applied to the conduct allegedly proscribed in this case." *Id.*

The issues in this case are fair notice and vagueness. "The Due Process Clauses of the United States and Michigan Constitutions provide that the state may not deprive any person of life, liberty, or property, without due process of law." *People v Hall*, 499 Mich 446, 460 (2016) (cleaned up). An individual must "receive

fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id*. at 461 (cleaned up). "To give fair notice, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited . . . or required." *People v Noble*, 238 Mich App 647, 652 (1999). To determine whether a person of ordinary intelligence would understand the statutes, courts may employ "judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *People v Sands*, 261 Mich App 158, 161 (2004). "To survive constitutional scrutiny, the words used in a statute are not required to have a single meaning" and, moreover, "a statute need not define an offense with mathematical certainty." *People v Lawhorn*, 320 Mich App 194, 200 (2017) (cleaned up).

As the Michigan Court of Appeals concluded below, the plain language of the statutes at issue here "make[s] clear that an individual possessing 3,000 or more cigarettes for transport, without having a license to do so, is guilty of a felony." (Def App 192a.) As outlined in Arguments I and II, the statutes are easily understood as prohibiting this conduct, especially given the decisions in *Nasir* and *Shami*.

And that clear prohibition was not clouded by the testimony of Littlejohn or Miller at the preliminary examination, nor Form 336. The sum of their testimony was that the wholesaler or unclassified acquirer or the individual transporter—someone or some entity—must hold a transportation license under the TPTA to move cigarettes within the state. (Def App 109a, 127a–134a.) The defense also pushed the notion that Form 336 mentions only businesses applying for a license,

not individuals. (Def App 132a.) But none of these points alter the meaning or application of the relevant statutes. As the Court of Appeals observed, "departmental interpretations of statutes, although entitled to respectful consideration, are not binding on this Court." (Def App 193a, citing *D'Agostini Land Company LLC v Dep't of Treasury*, 322 Mich App 545, 558 (2018).)

Moreover, none of that matters in this case because neither the KBIC nor Magnant nor Davis held any sort of license under the TPTA, transporter's or otherwise. The Defendants *might* have an argument if the KBIC held a wholesaler or unclassified acquirer's license, or even a transporter's license, such that they reasonably relied on those licenses to bless their conduct in this case. But that argument does not even get off the ground for them because there were *no* licenses on which they could rely.

The Court of Appeals in *Nasir* also addressed due process. There, the Court of Appeals held that "any potential due process problem is remedied by the inclusion of the above fault element [being the knowledge requirement] in the prima facie case." *Nasir*, 255 Mich App at 46. The same is true here. By requiring the prosecution to prove probable cause for knowledge of the prohibited act under the TPTA at the preliminary examination—a point the People do not contest—any due process concerns are alleviated.[7]

[7] While this same concern of fair notice was also loosely presented in *Shami*, this Court deemed the issue waived because the defendant "cursorily raised it for the first time in his application for leave to appeal in this Court . . . ." *Shami*, 501 Mich at 257 n 34.

Furthermore, even if this court were to find "transporter" unconstitutionally vague (although the plain language and surrounding caselaw do not support such a result), the word "person" defined, in part, as an "*individual*," is entirely clear. Black's Law Dictionary defines "individual" as, "Of, relating to, or involving a single person or thing, as opposed to a group." 11th ed (2019). This clarifies any doubt as to whether the TPTA imposes criminal liability on an individual transporter for unlawfully transporting tobacco products without a license.

The Michigan Vehicle Code also provides an enlightening parallel. In multiple sections, the Vehicle Code imposes both criminal and civil liability for violations of cargo restrictions, a non-exhaustive list of which includes:

- It is a misdemeanor to haul beyond statutorily imposed size and weight restrictions. MCL 257.716.
- It is a misdemeanor for "[t]he owner or driver of a vehicle that transports, or a shipper who loads a vehicle with a flammable liquid, flammable gas, or compressed flammable gas in violation of this section…" MCL 257.722a.
- It is a civil infraction to "operate or move an implement of [animal] husbandry…without obtaining a special permit for an excessively wide vehicle or load under section 725." MCL 257.717(2).
- It is a civil infraction to operate, draw, or tow "a boat lift or oversized hydraulic boat trailer" except at specific times and on specific roads. MCL 257.717(9).
- It is a civil infraction to operate "a vehicle that is equipped with pneumatic tires" on a highway unless "the maximum width from the outside of 1 wheel and tire to the outside of the opposite wheel and tire shall not exceed 102 inches, and the outside width of the body of the vehicle or the load on the vehicle shall not exceed 96 inches. However, a truck and trailer or a tractor and semitrailer combination hauling pulpwood or unprocessed logs may be operated with a maximum width of not to exceed 108 inches in accordance with a special permit issued under section 725." MCL 257.717(4).

Again, these examples could be multiplied. Since the Legislature imposes restrictions on hauling or requires special licenses for doing so in many regards, the Legislature is well within its constitutional authority to require documentation for transporting cargo that poses both a high risk to the public health (smoking) and a high potential for black-market activity (the distribution of unregulated tobacco), and to impose penalties for violators—both businesses *and* individuals.

Accordingly, the TPTA's definition of "transporter" is not unconstitutionally vague and provides fair notice of the conduct that would subject them to punishment. This Court should therefore affirm.

CONCLUSION AND RELIEF REQUESTED

For these reasons, the People respectfully request this Court deny leave to appeal or, alternatively, grant leave and issue an opinion affirming the Court of Appeals' judgment below.

Respectfully submitted,

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Dated: October 22, 2020

2016-0129263-E/SupplementalBriefonAppeal/Magnant.Gerald