No.

IN THE SUPREME COURT OF THE UNITED STATES

DEMETRIO CISNEROS,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can failure to investigate suspicious circumstances, without more, constitute the "deliberate actions" to avoid knowledge under the willful-blindness standard?

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JURISDICTION

Petitioner Demetrio Cisneros was convicted of importing methamphetamine in violation of 21 U.S.C. §§ 952 & 960, in the U.S. District Court for the Southern District of California. The Ninth Circuit reviewed his conviction under 28 U.S.C. § 1291 and affirmed it on July 16, 2018. Petitioner filed a petition for rehearing, which the Ninth Circuit denied on October 2, 2018. This Court has jurisdiction to review the Ninth Circuit's decision under 28 U.S.C. § 1254(1).

OPINION BELOW

The memorandum opinion of the U.S. Court of Appeals for the Ninth Circuit, *United States v. Cisneros*, 730 F. App'x 555 (9th Cir. July 15, 2018), is reproduced in the appendix. *See* Pet. App. 1a-3a.

STATEMENT OF THE CASE

I. District Court Prosecution

Petitioner, a U.S. citizen, lived in the United States and received regular medical treatments in Mexico for chronic kidney problems. A coworker, aware of Petitioner's recurring travel between Mexico and the United States, recruited Petitioner to import illegal goods into the United States. In accordance with the recruiter's instructions, Petitioner dropped off his car at a mechanic's shop in Tijuana and went to a pre-scheduled doctor's appointment. Three hours later, he picked up his car and was instructed to drive it to Los Angeles. But a border patrol dog alerted to Petitioner's car and agents ultimately discovered twenty-three pounds of methamphetamine hidden in a narrow compartment in the floor of the car.

Petitioner was arrested for unlawful importation of methamphetamine in violation of 21 U.S.C. §§ 952 & 960.

In his post-arrest interview, Petitioner admitted that he was being paid to drive what he knew was some type of illicit product to Los Angeles but explained that he did not know what the car the product was. "I'm assuming it was something not legit," he said, reasoning that "they're not going to give me $6,000 to bring food from over there or something like that. Of course it will have to be something probably illegal, right?" But he repeatedly explained that he did not know what the "something" was or where they put it in his car. And he shook his head 'no' when the interrogating agent asked if he thought it was drugs.

At trial, Petitioner's theory of defense was that while he knew there was "something not legit" in his car, he did not know that the something was methamphetamine. He therefore argued that he should not be found guilty of knowingly importing methamphetamine under the statutes charged, but only of importing illegal goods.

The district court instructed the jury that Petitioner need not have actually known there was methamphetamine in the car. Instead, the court instructed, "you may find that the defendant acted knowingly if you find beyond a reasonable doubt that, one, he was aware of a high probability that drugs were in the car that he was . . . trying to drive into the United States, and, two that he deliberately avoided learning the truth." The government then argued to the jury (over Petitioner's repeated objections) that Petitioner met that this standard of knowledge because he:

- "deliberately avoided learning the truth when he agreed to transport something across the border and *didn't ask what*;"

- "deliberately avoided learning the truth when he drove the car away after it had been modified and *didn't look* for that compartment;"

- "deliberately avoided learning the truth when he ignored the fact that he was asked to cross the border multiple times to show he wasn't scared and *didn't ask why*;"

- "deliberately avoided learning the truth when he picked up his loaded car and *didn't check why* he was getting paid $6,000 to bring something that he couldn't see in the car."

(emphasis added). In other words, the government argued that the jury could find that Petitioner had the requisite mental state for the offense because he *failed to investigate* what he was transporting or where in the car it was located.

About fifteen minutes after the jury retired to deliberate, the foreperson sent out a note asking the district court to "re-explain" the deliberate-avoidance instruction. The court, over Petitioner's objection, gave the following supplemental instruction to the jury: "it . . . has to be established beyond a reasonable doubt, first, that he had – there was a high likelihood in his mind that he knew, a high likelihood that there were drugs, some type of drugs in the car, and then he consciously or deliberately avoided learning the truth when he was in a position to do so, when he was in a position to know the truth and he avoided it purposefully." The jury then resumed deliberations, and eventually returned a verdict of guilty.

II. Appeal

On appeal, Petitioner argued that his conviction could not stand under the standard for willful blindness set forth in *Global-Tech Appliances, Inc. v. SEB S.A.,*

563 U.S. 754 (2011). Specifically, Petitioner argued that the district court's instruction conflated knowledge, recklessness, and negligence—and thus lowered the requisite knowledge *mens rea* for the charged offense—because it permitted a conviction based merely on Petitioner's failure to investigate what he was transporting or where it was in the car.

A panel of the Ninth Circuit affirmed Petitioner's conviction in a memorandum opinion. The panel held that "a jury could have rationally found that [Petitioner's] decision to have his vehicle modified for smuggling without asking what was being smuggled was precisely the kind of deliberate action at which the instruction is directed." 730 F. App'x at 555 (internal quotation marks and citation omitted).

Petitioner filed a petition for panel and en banc rehearing, which the lower court denied on October 2.

REASONS FOR GRANTING THE PETITION

This case presents an excellent vehicle for resolving a question that has long split the lower courts: can a failure to investigate satisfy the "willful blindness" standard

In *Global-Tech*, this Court held that willful blindness exists only when the defendant takes "deliberate actions" or "affirmative steps" to avoid knowledge. 563 U.S. at 760, 769. Following *Global-Tech*, the Seventh Circuit has held that a willful-blindness instruction "should not be given unless there is evidence that the defendant engaged in behavior that could reasonably be interpreted as having been intended to shield him from confirmation of his suspicion that he was involved in criminal

activity." *United States v. Macias*, 786 F.3d 1060, 1062 (7th Cir. 2015). And other circuits have similarly applied *Global-Tech* in criminal cases and revised their pattern jury instructions to reflect *Global-Tech*'s "deliberate actions" requirement.

But the Second, Eighth, and Ninth Circuits adhere to the position that a failure to investigate suspicious circumstances suffices to establish willful blindness. And the First, Fifth, and Eleventh Circuits have approved jury instructions that omit the "deliberate actions" requirement altogether.

Because it is undisputed that Petitioner took no "affirmative steps" to avoid knowledge, *Global-Tech*, 563 U.S. at 760, but merely failed to investigate where and what he was transporting, this case provides an ideal opportunity to clarify *Global-Tech* and resolve the split.

I. Under *Global-Tech*, deliberate indifference of a disputed fact is not enough to establish knowledge of that fact.

In *Global-Tech*, this Court considered whether a plaintiff could prove induced patent infringement—which "requires knowledge that the induced acts constitute patent infringement"—by showing that the defendant acted with "deliberate indifference to a known risk that a patent exists." 563 U.S. at 766. The Court held it could not. *See id.* In reaching that conclusion, the Court contrasted the concepts of "willful blindness," which has long been regarded in criminal law as a substitute for actual knowledge, and "deliberate indifference," a lesser mental state that cannot substitute for knowledge. *Id.* at 766, 769-770.

The Court defined the elements of "willful blindness" as follows: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take *deliberate actions* to avoid learning the truth of that fact. 563 U.S. at 769 (emphasis added). The Court emphasized the second element—that the defendant take "deliberate actions" to avoid learning the key fact, stating: "Under this formulation, a willfully blind defendant is one who takes *deliberate actions* to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts." *Id.* (emphasis added). Indeed, this additional element gave the willful-blindness standard "an appropriately limited scope that surpasses recklessness and negligence." *Id.* at 769. As a result, defendants who act to "deliberately shield[] themselves from clear evidence of critical facts that are strongly suggested by the circumstances"—thus satisfying the test for willful blindness—"are just as culpable as those who have actual knowledge." *Id.* at 766.

In contrast to the willful-blindness standard, the Court determined that "deliberate indifference" required something less than knowledge. 563 U.S. at 770. Indeed, the Court elsewhere has observed that deliberate indifference is "equivalent [to] reckless[ness]" rather than to knowledge. *Farmer v. Brennan*, 511 U.S. 825, 836 (1994).

The Court in *Global-Tech* ultimately concluded that the Federal Circuit had erred in requiring only "deliberate indifference" instead of "willful blindness." 563 U.S. at 770-71. The Court faulted the Federal Circuit's test for "not requir[ing]

active efforts by an inducer to avoid knowing [the fact]." *Id.* (emphasis added). The Court found the evidence sufficient to support a finding of willful blindness because the jury could have inferred that the defendant "took *deliberate steps* to avoid knowing [the disputed] fact." *Id.* at 770 (emphasis added).

In reaching this conclusion, the Court imported its analysis from the criminal context. The Court relied extensively on criminal precedents and the Model Penal Code to define and distinguish willful blindness and deliberate indifference. *See* 563 U.S. at 766-70 & n.9. Given the "long history" of the willful-blindness standard in the criminal context, the Court found "no reason why" that standard, which has "an appropriately limited scope that surpasses recklessness and negligence," "should not apply in civil lawsuits" where knowledge is an element of liability." *Id.* Indeed, the Court's analysis was so intertwined with criminal law that Justice Kennedy recognized its holding would affect "all federal criminal cases." *Id.* at 774 (Kennedy, J., dissenting).

II. The courts of appeals are deeply divided over whether a failure to investigate can satisfy the willful-blindness standard.

Since *Global-Tech*, the lower courts have come to widely divergent—and sometimes internally conflicting—conclusions regarding whether the government's failure to prove that a defendant took deliberate steps to avoid learning a disputed fact can nonetheless satisfy the willful-blindness standard. The confusion among the lower courts is dep and intractable. Only this Court can resolve it.

A. Consistent with *Global-Tech*, several circuits have required that a defendant affirmatively take deliberate actions to meet the willful-blindness standard

Many courts of appeals have faithfully applied *Global-Tech* in criminal cases. The Seventh Circuit, for example, has "noted that although *Global-Tech* was a civil case, several courts of appeals have deemed its definition of willful blindness applicable to criminal cases." *United States v. Macias*, 786 F.3d 1060, 1062 (7th Cir. 2015). In *Macias*, a person who had previously smuggled undocumented aliens and who ran a (lawful) cross-border alien-transportation business was recruited to "mov[e] money from the United States to Mexico." *Id.* at 1061. He was indicted for participating in a drug-distribution conspiracy and bulk-cash smuggling. *Id.* at 1060.

At trial, Macias testified that he didn't know the money consisted of proceeds from the sale of illegal drugs, but had assumed (and had been told) by his recruiter that the proceeds were from alien smuggling. *Id.* at 1061. He testified that he never asked what was being smuggled so as to disabuse him of his assumption that the proceeds were from smuggling people, not drugs. *Id.* The government sought and obtained a willful-blindness instruction. *Id.*

On appeal, the Seventh Circuit held that the district court erred in giving the instruction. *Id.* at 1061-62. The court of appeals reasoned that "[t]here is no evidence that suspecting he might be working for a drug cartel Macias took active steps to avoid having his suspicions confirmed." *Id.* at 1062; *see also United States v. L.E. Myers Co.*, 562 F.3d 845, 854 (7th Cir. 2009) ("Failing to display curiosity is

not enough; the defendant must affirmatively *act* to avoid learning the truth." (quotation omitted; emphasis in original).

Consistent with the Seventh Circuit, other circuits have applied *Global-Tech* in criminal cases. *See United States v. Sorensen*, 801 F.3d 1217, 1233 (10th Cir. 2015), *cert denied*, 136 S. Ct. 1163 (2016); *see also United States v. Potter*, 583 F. App'x 178, 180 (4th Cir. 2014) (per curiam). And the Third Circuit has revised its model criminal jury instructions to reflect the *Global-Tech* "deliberate actions" requirement. Third Circuit Model Criminal Jury Instructions § 5.06 (2014).

B. Several other circuits have held that a mere failure to investigate is sufficient to satisfy the willful-blindness standard.

In contrast to the Third, Fourth, Seventh, and Tenth Circuits—which have faithfully applied *Global-Tech*'s "deliberate actions" requirement—the Second, Eighth, and Ninth Circuits adhere to the position that a failure to investigate suspicious circumstances suffices to establish willful blindness. And the Fifth and Eleventh Circuits have approved instructions that omit the "deliberate actions" requirement altogether.

In this case, for example, the record is devoid of evidence that Petitioner took "deliberate actions" or "active steps" to avoid knowledge. Nonetheless, a panel of the Ninth Circuit affirmed Petitioner's conviction in a memorandum opinion. The panel held that "a jury could have rationally found that [Petitioner's] decision to have his vehicle modified for smuggling without asking what was being smuggled was precisely the kind of deliberate action at which the instruction is directed." 730 F.

App'x at 555 (internal quotation marks and citation omitted). In other words, the panel held that a simple failure to investigate was sufficient.

Consistent with the Ninth Circuit's holding in this case, the Second and Eighth Circuits have held that a failure to investigate satisfies the *Global-Tech* "deliberate actions" standard. *See, e.g.,* U*nited States v. Hansen,* 791 F.3d 863, 868-69 (8th Cir. 2015); *United States v. Whitman*, 555 F. App'x 98, 104-06 (2d Cir. 2014); *United States v. Goffer*, 721 F.3d 113, 128 (2d Cir. 2013). Moreover, the Fifth and Eleventh Circuits have likewise upheld willful-blindness instructions that did not include the "deliberate action" language at all. *See United States v. Brooks*, 681 F.3d 678, 702-03 (5th Cir. 2012); *United States v .Grant*, 521 F. App'x 841, 848 (11th Cir. 2013); *see also Sovereign Military Hospitaller Order of Saint John of Jerusalem of Rhodes & of Malta v. Florida Priory of Knights, Hospitallers of Sovereign Order of Saint John of Jerusalem, Knights of Malta, Ecumenical Order*, 702 F.3d 1279, 1291 (11th Cir. 2012).

III. The need to resolve the dispute is urgent, and only this Court can resolve it.

The circuits are split with respect to whether a failure to investigate can establish the "deliberate actions" requirement of the willful-blindness standard. But only the Third, Fourth, Seventh, and Tenth Circuits' application can be squared with *Global-Tech.* By contrast, the Second, Fifth, Eighth, Ninth, and Eleventh Circuits have fallen hopelessly out of line with this Court's holding in *Global-Tech*. Only this Court can correct their course.

The approach to willful blindness in the Second, Fifth, Eighth, Ninth, and Eleventh Circuits collapses the distinction that *Global-Tech* draws between recklessness and negligence on the one hand and knowledge (including willful blindness) on the other. The Court in *Global-Tech* sought to "give willful blindness an appropriately limited scope that *surpasses recklessness and negligence*." *Global-Tech*, 563 U.S. at 769 (emphasis added). A reckless defendant, the Court noted, "knows of a substantial and unjustified risk of . . . wrongdoing." *Id.* at 770. Recklessness thus corresponds to the first prong of the willful-blindness standard—a "subjective belie[f] that there is a high probability that a fact exists." It is the second prong—the "deliberate actions" requirement, that propels the willful-blindness standard beyond recklessness and makes it a form of knowledge. So, for example, a reckless defendant is one who knows of a substantial risk that a fact exists and does nothing about it or is indifferent to it. By contrast, a willfully blind defendant knows of a substantial risk (or "high probability") that a fact exists *and takes deliberate actions to avoid* confirming that fact.

The equation of a failure to act with deliberate action eviscerates this Court's carefully drawn distinction between recklessness and knowledge. But that is precisely the equation that the Ninth Circuit drew in this case and that the Second, Fifth, Eighth, and Eleventh Circuits have condoned. A reckless defendant who does not investigate the "substantial and unjustified risk of wrong doing"—that is, by definition, *every* reckless defendant—will be found willfully blind. This collapse of the recklessness-knowledge distinction undermines long-standing principles of

culpability and has fractured the lower courts intractably since *Global-Tech*. With nearly every circuit weighing in and the split virtually even, it is time for this Court to resolve the question.

IV. This case is an ideal vehicle for the Court to resolve the question presented.

This case presents an ideal opportunity for the Court to resolve the question whether a knowledge requirement in a criminal statute can be satisfied by proof of deliberate indifference.

First, the issue is preserved. Petitioner objected to the deliberate-indifference instruction on the ground that it contravened *Global-Tech*, and the district court considered those objections. The issue was then fully considered by a panel of the court of appeals and rehearing was denied by the court en banc. The case thus comes to the Court with a developed record and unencumbered by the plain-error doctrine.

Second, the issue is outcome-determinative. Here, the only disputed issue at issue was Petitioner's knowledge. And there was no evidence that Petitioner took deliberate actions to avoid ascertaining the disputed fact; the government at trial argued only that Petitioner failed to ask or look for what he was transporting—that he, in other words, failed to investigate. Thus, the question of wehther a failure to investigate can satisfy the willful-blindness standard is decisive. This, too, makes Petitioner's case an ideal vehicle to resolve the entrenched split among lower courts in their application of *Global-Tech*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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s/ Sarah R. Weinman

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