IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL STEELE,

PETITIONER,

- v -

UNITED STATES OF AMERICA,

RESPONDENT.

PETITIONER'S PETITION FOR WRIT OF *CERTIORARI* TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the Ninth and Eleventh Circuits misconstrue the *mens-rea* requirements of 8 U.S.C. § 1101(a)(43)(B), when they created an aggravated felony for "illicit trafficking" as a strict-liability offense without express, congressional intent, contrary to this Court's precedents in *Liparota v. United States*, *Staples v. United States*, and *United States v. X-Citement Video, Inc.*?

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Petitioner, Michael Steele, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

This Petition concerns the Ninth Circuit's attribution of a strict-liability mental state to the "illicit trafficking" aggravated felony defined in 8 U.S.C. § 1101(a)(43)(B), as confirmed by decisions of the Eleventh Circuit. The appeal arises out of the district court's denial of a motion to dismiss the information under 8 U.S.C. § 1326(d). In rejecting Mr. Steele's categorical challenge to a drug conviction, the Ninth Circuit construed the "illicit trafficking" aggravated felony as encompassing state offenses that have no *mens rea* (i.e., strict liability). It did so, despite the lack of any indication—express or implied—that Congress intended to create a strict-liability, aggravated-felony offense in just one half of one subparagraph among the

eighty-some offenses classified as aggravated felonies under the statute.

The Court should accept review of this case for three reasons. First, the Ninth Circuit's opinion defies this Court's consistent line of precedent holding that Congress does not implicitly adopt strict liability for criminal offenses, but always makes that intention express and overt. Second, the Ninth Circuit's analysis also contradicts the fundamental principle of uniformity underpinning the categorical approach since *Taylor v. United States*, substituting the vicissitudes of state definitions for the consistency of a national standard. Third, the Ninth Circuit's reasoning also gainsays established canons of construction by reading a single half-subparagraph as unique among the 27 other definitional provisions in § 1101(a)(43).

The definition of *aggravated felony* is an important question of federal law, particularly when it relates to the ubiquitous field of drug crimes. The application of § 1101(a)(43) and its subparts affects thousands of immigration cases annually and an equally large number of criminal cases, either as an element of the offense or as a predicate offense crucial to sentencing enhancements. The proper operation of the *Taylor* analysis is likewise a matter of prime significance in federal jurisprudence, especially when, as here, the national uniformity of the categorical protocol is threatened.

This case, because of its very streamlined procedural posture, presents an ideal vehicle to focus on the precise, legal questions at issue. It is a case where the Court's answer to the Question Presented will be virtually dispositive of whether Mr. Steele is entitled to relief on his motion to dismiss the prosecution against him.

The Court should therefore grant the Petition.

OPINIONS BELOW

The Ninth Circuit, in an unpublished order, granted a motion for summary affirmance of a conviction for violation of 8 U.S.C. § 1326. *See* Appendix A.

The panel denied a motion to reconsider, for itself and on behalf of the court en banc. *See* Appendix B.

JURISDICTION

On June 4, 2018, the Ninth Circuit granted a Government motion for summary affirmance. *See* Appendix A. On October 15, 2018, it denied a motion for reconsideration by the panel and by the court en banc. *See* Appendix B. The Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT PROVISIONS[1]

8 U.S.C. § 1101
8 U.S.C. § 1326

STATEMENT OF THE CASE

A. The District Court Proceedings

Mr. Steele was charged by information with illegal re-entry under 8 U.S.C. § 1326. He filed a motion to dismiss the information under § 1326(d), claiming that his prior, predicate removal order was invalid. He argued that the immigration judge violated due process by failing to offer Mr. Steele relief from removal, believing that a California, controlled-substance conviction was a disqualifying aggravated felony.

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[1] The text of these provisions is laid out in Appendix C, pursuant to Sup. Ct. R. 14.1(f).

Mr. Steele contended that Cal. Health & Safety Code § 11359 was not an aggravated felony under § 1101(a)(43)(B), because the state offense requires a categorically overbroad mental state. Whereas generic (federal) controlled-substance offenses require the defendant know that the substance is a *federally* controlled substance, California requires knowledge that the substance is controlled under the *state* schedules. As the California schedules are well-established as overbroad and overinclusive, the attendant scienter is likewise broader and so non-categorical.

The Government's opposition to the motion sidestepped the categorical argument altogether. Instead, it asserted a counterargument based on the statutory interpretation of § 1101(a)(43)(B), citing three Ninth Circuit decisions—*Rendon v. Holder*, 520 F.3d 967 (9th Cir. 2008), *Lopez-Jacuinde v. Holder*, 600 F.3d 1215 (9th Cir. 2010), and *Daas v. Holder*, 620 F.3d 1050 (9th Cir. 2010). The Government maintained these cases held that Subparagraph (B) of § 1101(a)(43) sets out two discrete "routes" to aggravated-felony status: (1) "illicit trafficking in a controlled substance (as defined in section 802 of Title 21)" and (2) "a drug trafficking crime (as defined in section 924(c) of Title 18)." The Government asserted that only the latter route requires that the target, state offense match all the generic elements of a federal, controlled-substance offense; the former route, however, adopts/absorbs whatever *mens rea* the state offense requires. By this reasoning—the Government's argument runs—the California offense is not overbroad as regards *Route 1* in § 1101(a)(43)(B), because that definition does not require that the mental state match the generic, federal mental state.

The district court, with some additional reasons of its own, adopted the Government's two-route analysis. Accordingly, it held, the California offense is not overbroad as an "illicit trafficking" aggravated felony, even if the state *mens rea* is broader than the federal one. On that basis, it denied the motion to dismiss.

B. The Appellate Decisions

On appeal, Mr. Steele filed an opening brief that disputed both the Government's original argument and the district court's extended version. He argued principally that this novel construal of one half of § 1101(a)(43)(B) was unsupported by the cited authorities, inconsistent with standard canons of construction, and defied a foundational rationale of *Taylor v. United States,* 495 U.S. 575 (1990), because it pegged the generic definition of a federal, predicate conviction to the varying, state definitions.

Before the Government filed its answering brief, it sought to stay the briefing on the appeal pending the outcome of two related appeals. Mr. Steele had also noted these related cases, but asked the Court of Appeals to batch his case with those for argument, since his appeal—due to its very different procedural posture—presented additional arguments on the issue that had not been raised in those other cases. The Ninth Circuit denied the request to batch Mr. Steele's case and granted the stay.

After joint argument on the other two appeals, the Ninth Circuit issued its opinion in *United States v. Verduzco-Rangel*, 884 F.3d 918 (9th Cir.), *cert. denied*, 139 S. Ct. 290 (2018) (henceforth simply *Verduzco*). In that opinion, the Ninth Circuit also adopted the two-route construal of § 1101(a)(43)(B), holding that Route

1 does not require the federal *mens rea*, and so the California statute at issue was not categorically overbroad, even if its *mens rea* indeed differed as claimed.

The Government subsequently moved the court to affirm summarily Mr. Steele's conviction on the basis of *Verduzco*.

Mr. Steele opposed that motion, claiming: (1) the substance and procedural status of his appeal did not warrant disposition by the extraordinary method of summary affirmance, which is typically reserved for manifestly frivolous claims, since (2) plenary consideration of his appeal was necessary, because his opening brief raised a number of arguments that were unique to the process in his case, and so not addressed in the opinion in *Verduzco* nor refuted by the Government.

The panel granted the motion and summarily affirmed. Mr. Steele sought reconsideration. He laid out in detail multiple arguments that were not fairly addressed by *Verduzco*, but which fatally undermined the reasoning of that decision. These were: (1) lack of precedential support; (2) conflicts with circuit precedents (including en banc decisions); (3) the presence of federal, statutory cross-references in Subparagraph (B); (4) a facially incorrect claim that one route is a "subset" of the other; (5) conflict with basic *Taylor* principles and established canons of construction; and (6) misconstrual of *McFadden v. United States,* 135 S. Ct. 2298 (2015), resulting in the creation of strict-liability, aggravated felonies for which Congress has made no provision, contrary to cases like *Liparota v. United States*, 471 U.S. 419 (1985), and *Staples v. United States,* 511 U.S. 600 (1994).

The panel denied the motion to reconsider and denied en banc consideration

on behalf of the full court. *See* Appendix B.

REASONS FOR GRANTING THE PETITION

THE NINTH AND ELEVENTH CIRCUITS' ANALYSIS OF THE AGGRAVATED-FELONY STATUTE CREATES STRICT-LIABILITY OFFENSES, WITHOUT ANY INDICATION CONGRESS INTENDED TO DO SO

This Petition engages the proper definition of a legal term having fundamental importance to a large portion of federal, administrative and judicial adjudications every year. The concept of *aggravated felony* is applied in and affects tens of thousands of cases, both civil, immigration matters and criminal cases. *See* Bryan Baker, Dep't of Homeland Security, *Immigration Enforcement Actions: 2016* at 10, tbl. 8 (Dec. 2017), available at https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_016.pdf (135,570 aliens were removed due to criminal convictions in 2016, 17% of which (23,217) involved drug crimes); U.S. Sentencing Comm'n, *Illegal Reentry Offenses* 8-9 (Apr. 2015) (illegal re-entry constitutes 26% of federal, criminal prosecutions and 40% of those defendants face enhanced sentences due to an aggravated-felony conviction). Consequently, court decisions misapplying the concept can lead to erroneous results in a very large swath of cases. This is particularly so for the application of the statute at issue here, § 1101(a)(43)(B), because it defines drug crimes as aggravated felonies, and drug offenses are a leading category of criminal charge serving as a potential, predicate conviction. *See, e.g.,* Admin. Office of the United States Courts, *Federal Judicial Caseload Statistics 2018* tbl. D-2 (showing immigration and drugs offenses consistently make up the greatest number of criminal cases filed from 2014 to 2018).

Because the application of *aggravated felony* permeates federal adjudication, the Ninth and Eleventh Circuits' misconstrual of that term in a way that defies this Court's precedents on *mens rea* requirements (*see* Parts A & B *infra*), as well as categorical analysis and general canons of construction (*see* Part C *infra*), merits review to address this important question of federal law. *See* Sup. Ct. R. 10(c). Moreover, this case presents a highly suitable vehicle to explore that question. *See* Part D *infra*.

A. The Court Has Consistently Held That Congress Does Not Intend to Apply Strict Liability As a Criminal Mental State Absent Express Indications

In a consistent line of decisions, this Court has emphasized that a culpable mental state is required for every criminal offense, unless the legislature expressly states otherwise. This line has its fountainhead in *Morissette v. United States,* 342 U.S. 246 (1952), where Justice Jackson examined the long, legal history of presumed mental states, summing up, "Congress, therefore, omitted any express prescription of criminal intent from the enactment before us in the light of an unbroken course of judicial decision in all constituent states of the Union holding intent inherent in this class of offense, even when not expressed in a statute." *Id.* at 261-62.

Because "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute," *Liparota*, 471 U.S. at 424 (citing *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812)), courts may not supply one where the legislature has chosen to omit one. But statutory silence must be understood against the backdrop of Justice

Jackson's description of the lengthy pedigree of presumed *mens rea*, which means "that criminal offenses requiring no *mens rea* have a 'generally disfavored status.' " *Id.* at 426 (quoting *United States v. United States Gypsum Co.,* 438 U.S. 422, 438 (1978)). Consequently, the legislative intent to forgo a required *mens rea* must be manifest, so that silence is not to be construed as a deliberate adoption of strict liability: "the failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law." *Id.* This rule is so entrenched, that where the statute is ambiguous on the question, the rule of lenity would operate to require a culpable mental state. *See id.* at 427.

Time and again this Court has ruled that statutory silence about *mens rea* will not give rise to strict liability, absent a clear indication of legislative intent. *See, e.g., Staples*, 511 U.S. at 606 ("we have stated that offenses that require no *mens rea* generally are disfavored, and have suggested that some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime") (citations omitted); *Posters 'N' Things, Ltd. v. United States,* 511 U.S. 513, 517-24 (1994) (applying this rule to a drug-trafficking offense under Title 21); *United States v. X-Citement Video, Inc.,* 513 U.S. 64, 71 (1994) (citing as factors against presuming strict liability the penal nature of the law, the types of penalties attached, and the risk of criminalizing conduct reasonably thought lawful); *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("Although there are exceptions, the 'general rule' is that a guilty mind is 'a necessary element in the indictment and proof of every

crime.' We therefore generally 'interpret [ ] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them.' ") (citations omitted); *Torres v. Lynch*, 136 S. Ct. 1619, 1631 (2016) ("Or otherwise said, … absent an express indication to the contrary, … Congress intended such a mental-state [scienter] requirement").

The lesson to be drawn here from the Court's consistent precedent is that Congress does not countenance strict-liability offenses (particularly those bearing harsh penalties), unless it does so deliberately. The "general rule," therefore, is to read into statutory silence the intent to impose at least a minimum, scienter requirement. This presumption of a culpable mental state extends to all elements of the offense that grammatical analysis of the statute will reasonably allow. *See X-Citement Video*, 513 U.S. at 70-72 (citing *Liparota* and *Staples* as applying this rule). In sum, absent some explicit or implicit basis for eliding all *mens rea*, a statute will not be read so as to create a strict-liability offense.

However, that is precisely what the Ninth and Eleventh Circuits have done in construing one portion of § 1101(a)(43)(B) in defining one type of "aggravated felony."

B. The Ninth and Eleventh Circuits' Construal of the "Illicit Trafficking" *Mens Rea* Necessarily Entails That Some Instances of This Aggravated Felony Will Be Based on Convictions Under Strict Liability

Verduzco acknowledged the above line of case law.[2] *See* 884 F.3d at 922 n.2. But it did so only in response to the defendant's claim that *Rendon* (*Verduzco*'s lead

[2] Unlike the Eleventh Circuit cases, which appear entirely unaware of the issue, citing none of the Court's strict-liability case law.

authority for the dual-route analysis) did not specify what mental state the federal statute required for a state-equivalent offense under Route 1 ("illicit trafficking"): "Verduzco counters that (1) *Rendon* did not address what state of mind federal law requires a state statute to have for a conviction under that statute to be an aggravated felony under the first route." *Id.* at 922. The appended footnote states, "As a general matter, all federal criminal statutes are presumed to incorporate a requirement that the defendant act with a culpable state of mind unless the statute expressly indicates otherwise." *Id.* n.2 (citing *Morissette* and *X-Citement Video*). *Verduzco* seems to be saying that *Rendon*'s silence just means that the default, "general rule" of culpable scienter is presumed.

Mr. Verduzco agreed, but claimed that that scienter was knowledge of a *federal-controlled* substance, as stated in *McFadden*, not knowledge of a *state-controlled* substance, which is the mental state for the California offense. The Ninth Circuit responded to this argument thus: "But there is no good reason to suppose that, when Congress defined 'aggravated felony' in the INA to include 'illicit trafficking in a controlled substance,' it meant to implicitly incorporate such a requirement [viz. "the federal law's scienter requirement that the substance in which the defendant intends to traffic be a substance controlled by federal law"]." *Id.*

Verduzco goes on to justify its analysis by stating:

> Indeed, the plain meaning of the statutory language is to the contrary. If the first route were to require (1) a trafficking element, (2) the actual involvement of a drug that is banned federally, and (3) that federal law control the substance in which the defendant intended to traffic, then it would cover only drug trafficking crimes punishable as felonies under federal law—exactly what the second route already encompasses. In

> addition to rendering the statute redundant, Verduzco's proposed reading ignores the word "including," which suggests that what follows is a subset of what preceded, and not that the two are coextensive.

Id. at 922–23.

However, as Mr. Steele noted below, despite *Verduzco*'s citation of the rule against silent omission of culpable mental state, strict liability versions of an "aggravated felony" are the unavoidable and demonstrable result of the 'dual-route' analysis. *Verduzco* posits a reading of Route 1 whereby its *mens rea* is adopted or absorbed from whatever mental state the state offense requires:

> Under *Rendon*'s first route, we need not consider whether a state drug crime would also be punishable under federal law. *See* 520 F.3d at 974. Rather, it is sufficient that the state statute contains an "illicit trafficking" element, which [Cal. Health & Safety Code] section 11378 clearly does. *See id.* at 976 & n.7. To the extent "illicit trafficking" in route one incorporates a mens rea requirement, section 11378 suffices because it requires that the defendant intend to possess for sale a controlled substance and actually possess for sale a controlled substance, and that both the intended substance and the actual substance be controlled. This is, in fact, the same mens rea required under federal law. *See McFadden*, 135 S. Ct. at 2304. That Congress would impose consistent deportation consequences for those who engage in equally culpable activity is hardly surprising and is consistent with a generic understanding of "drug trafficking."

Id. at 923.

This reasoning may avoid the *Morissette-Liparota-Staples* problem as regards the California offense, where the state crime actually requires a scienter of some sort. But it does not, as Mr. Steele pointed out below, work when the state has explicitly adopted strict liability for its equivalent, trafficking crime. That is what has occurred in Florida, as shown by *Choizilme v. Attorney General*, 886 F.3d 1016 (11th Cir. 2018).

In *Choizilme,* the Eleventh Circuit addressed whether a noncitizen's Florida conviction for sale of cocaine was an "illicit trafficking" aggravated felony, even though "the Florida statute does not include knowledge of the illicit nature of the controlled substance as an element of the offense" *Id.* at 1027. The question arose because in 2002, the Florida legislature amended its drug statutes to eliminate knowledge as an element. *See* Fla. Stat. § 893.101 (2002). In *Choizilme*, then, the court was forced to address whether the generic definition of "illicit trafficking" "require[s] knowledge of the illicit nature of the substance trafficked." 886 F.3d at 1028.

Citing the panel decision in *Spaho v. Attorney General,* 837 F.3d 1172 (11th Cir. 2016), the court answered no. *See* 886 F.3d at 1027-29. As support for its position, the court considered: (1) the plain language of the statute (the word "including" shows that the second definitional route is only a subset of the first—*cf. Verduzco-Rangel,* 884 F.3d at 922-23); (2) the ordinary meaning of the word "illicit," which does not necessarily imply a *mens rea* element; and (3) Congress's intent to expand, rather than limit, the removal of aliens convicted of drug offenses. *See id.* For these three reasons, the court "conclude[d] that 'illicit trafficking' under § 1101(a)(43)(B) does not require a specific mens rea of knowledge of the illicit nature of the controlled substance being trafficked." *Id.* at 1029.

Judge Jordan concurred in the judgment in light of circuit law, but also noted several problems with the majority's analysis of Route 1 in Subparagraph (B). *See id.* at 1029-31 (Jordan, J., concurring in the judgment). Thus, he noted that

"trafficking" already connotes some level of illegality or unlawfulness, so that its appearance in combination with "illicit," a point central to the majority's reasoning (*see id.* at 1028), actually adds little. *See id.* at 1029 (Jordan, J., concurring in the judgment). Moreover, as Mr. Steele noted regarding *Verduzco*'s identical argument, the interpretation of "including" (linking the two routes in Subparagraph (B)) as signaling Route 2 is a "subset" of Route 1 is patently incorrect. *See id.* at 1030; *see also* Part C *infra.* Finally, as Mr. Steele also argued, the *Verduzco-Choizilme* treatment of "illicit trafficking" defies the well-established canon that identical words have identical meaning within the four corners of an act, since "illicit trafficking" in related provisions is not read as transparent to the state mental element. *See id.* at 1031; *see also* Part C *infra.*

Although the Eleventh Circuit's construal of § 1101(a)(43)(B) is at least as deficient as the Ninth's,[3] the operative fact remains that, if this dual-route analysis is adopted, it necessarily creates a strict-liability version of aggravated felonies. That is because, under the *Verduzco-Choizilme* logic, the federal predicate in Route 1 has no fixed *mens rea*, but adopts/absorbs whatever *mens rea* the state offense has. But under Florida law, all state trafficking offenses have *no knowledge requirement*, that is, embrace strict liability: "The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter." Fla.

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[3] As observed in n.2 *supra*, the Eleventh Circuit did not address the *Morissette-Liparota-Staples* issue even obliquely; neither did Judge Jordan's concurrence in *Choizilme* nor his dissent in *Spaho.*

Stat. § 893.101(2).

It is ineluctable under the *Verduzco-Choizilme* reasoning, that, since some state trafficking is strict liability, and Route 1 simply borrows whatever mental state the state offense requires, § 1101(a)(43)(B) creates aggravated felonies without any *mens rea.* But no judge, not the *Verduzco* panel nor the *Choizilme* panel, has pointed to any indication that Congress intended this result—and only for *this* portion of *this* subparagraph in § 1101(a)(43). In fact, the "general rule" derived from this Court's *Morissette* line militates for just the opposite conclusion: Congress did not contemplate a solitary, outlier provision lacking any culpable mental state.

Consequently, the Ninth Circuit's decision in *Verduzco-Rangel* and the Eleventh's in *Choizilme* defy this Court's lengthy and consistent line of precedent disfavoring strict liability, absent evidence of the deliberate, legislative intention to create it. The Ninth Circuit's analysis therefore warrants review by the Court to enforce the proper application of binding precedent. Sup. Ct. R. 10(c).

C. This Petition Raises Important Questions of Law Affecting a Wide Swath of Immigration and Criminal Cases Nationwide

The Ninth and Eleventh Circuits' stark divergence from the *Morissette* principles deserves review by the Court. There are three reasons.

First, as noted *supra*, the proper definition of *aggravated felony* is central to the outcome in tens of thousands of immigration and criminal cases nationwide every year. Just on the basis of potential impact on the adjudication of the federal caseload, this question has supreme importance, warranting this Court's review to address a

growing mischaracterization of the "aggravated felony" concept.

Moreover, review of the Question Presented is warranted as important to federal law, because it implicates not only the Court's consistent analysis of mental-state requirements, but also the proper application of the categorical analysis under *Taylor v. United States.* The categorical analysis remains an essential protocol that serves a number of important legal and equitable values. *See Descamps v. United States,* 570 U.S. 254, 267-71 (2013) (describing the *Taylor* goals of abiding by congressional intent, avoiding Sixth Amendment concerns, and avoiding the unfairness of a fact-based approach). Also, *Taylor* itself emphasized the paramount value of securing national uniformity in defining federal, predicate offenses as underpinning the categorical approach. *See* 495 U.S. at 592 ("We think that 'burglary' in § 924(e) must have some uniform definition independent of the labels employed by the various States' criminal codes."); *see generally id.* at 590-92.

The *Verduzco-Choizilme* analysis is the logical converse of the uniformity rationale of *Taylor*—whereas the latter expressly eschewed incorporating individual, state elements into the 'generic' definition, the former expressly inserts a blank, placeholder *mens rea* into the 'generic' offense that is instantiated by whatever a state attaches to its trafficking offense. All that matters under the *Verduzco* logic is that the state offense involve generic "trafficking," and the precise mental state it requires is irrelevant. In this regard, *Verduzco* not only defies *Taylor* principles, but it misconstrues the Court's analysis in *McFadden* in doing so.

Verduzco acknowledges that, under *McFadden,* "a person actually selling cocaine who thought he was selling baking soda does not possess the required mens rea to be guilty of drug trafficking." 884 F.3d at 922. But then it later applies the Court's holding in a rather different manner:

> To the extent "illicit trafficking" in route one incorporates a mens rea requirement, **section 11378 suffices** because it requires that the defendant intend to possess for sale **a** controlled substance and actually possess for sale **a** controlled substance, and that both the intended substance and the actual substance be controlled [by some jurisdiction]. **This is, in fact, the same mens rea required under federal law**. *See McFadden*, 135 S.Ct. at 2304.

Id. at 923 (emphasis added). But what *McFadden* specifically says about the federal *mens rea* is that it "requires a defendant to know only that the substance he is dealing with is some unspecified substance listed on the federal drug schedules." 135 S. Ct. at 2304. Nowhere does *McFadden* hint that the federal *mens rea* for a drug offense is knowledge that the substance is **a** controlled substance, under **any** jurisdiction's law; rather, the required scienter is that it is a "substance listed on the *federal* drug schedules." *Id.* (emphasis added). A Florida trafficking offense that lacks *any culpable mental state* clearly does not have the "same mens rea" (884 F.3d at 923) as that stated in *McFadden.*

Thirdly, a separate series of divergences from well-established law warrants review. These departures from precedent stem from the rather cavalier, interpretational steps *Verduzco* takes to reach its result. Mr. Steele noted several in his motion to reconsider. One of these involves the existence in both routes of an express statutory cross-reference to a *federal* statute: 21 U.S.C. § 802 for Route 1 and

18 U.S.C. § 924(c) as to Route 2. Mr. Steele argued that the existence of express, federal cross-references, in this subparagraph as in other subdivisions of § 1101(a)(43), signals the intent to adopt *federal* definitions for the offenses encompassed under the rubrics "illicit trafficking" and "drug trafficking offense." *Verduzco* appears to accept that Route 1 employs federal definitions for "controlled substance" and "trafficking" (*see* 884 F.3d at 921, 922), but not for the attendant *mens rea.* The disparate treatment of identical structures within a single statute defies logic and normal canons of construction. *See, e.g., Dep't of Revenue of Oregon v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994) (applying "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning") (citations and internal quotation marks omitted). Cross-referencing is a common and accepted, legislative-drafting practice. *See* In re *Heath*, 144 U.S. 92, 93 (1892); *Hassett v. Welch*, 303 U.S. 303, 314 (1938) ("A wellsettled canon tends to support the position of respondents: 'Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute.' ") (citation omitted); 2B N. Singer & S. Singer, *Sutherland Statutes and Statutory Construction* § 51:7 (7th ed. 2018). When one attends to the nature of these cross-references in Subparagraph (B), it is plain that both routes incorporate the federal definitions in their respective

cross-references, contrary to *Verduzco*'s reasoning.[4]

Mr. Steele also noted that *Verduzco* is contrary to the canon in *ACF Indus.* in another way: the same phrase "illicit trafficking" that *Verduzco* defines so idiosyncratically appears in the very next subparagraph in § 1101(a)(43)(C), but there dealing with trafficking in firearms. No cases have ever attributed anything but a generic meaning to this phrase in Subparagraph (C) and one that is fully subject to the usual, categorical analysis. *See United States v. Aguilera-Rios*, 789 F.3d 626, 636 (9th Cir. 2014) (following *Moncrieffe*'s reasoning that the aggravated-felony provision in (C) incorporates federal definition of *firearm*); *Olivas-Motta v. Holder*, 748 F.3d 907, 913 (9th Cir. 2013) (citing subparagraphs (B) and (C) as examples of provisions subject to the categorical analysis, not the 'circumstance specific' approach); *Joseph v. Attorney General*, 465 F.3d 123, 127 (3d Cir. 2006) ((C) is analyzed under the categorical approach). *Verduzco* is silent why the conduct in (B) does not follow the federal-elements approach, but the identically described conduct in (C) does. The Ninth Circuit analysis either contradicts standard canons or threatens to spread implicit, strict liability to other portions of § 1101(a)(43). *See also Choizilme*, 886 F.3d at 1031 (Jordan, J., concurring in the judgment).

A third departure from canonical analysis is the reading of "including" given by both *Verduzco* and *Choizilme*. As Mr. Steele and Judge Jordan observed, this word

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[4] Mr. Steele also argued that *Verduzco*'s treatment of these cross-references conflicts with how the Court construed their effect in *Moncrieffe v. Holder,* 569 U.S. 184, 188 (2013), where this Court described the two routes as equally partaking of federal parameters through a "chain of definitions."

linking Routes 1 and 2 cannot mean that the latter is a "subset" of the former, as claimed, because the cross-reference in Route 2 makes it greater in scope than "illicit trafficking." One definition simply cannot be a proper "subset" of another, when it is demonstrably broader than the narrower term.[5] Instead, as Mr. Steele argued, the use of the word "including" in Subparagraph (B) makes perfect sense when construed to mean "as well as," in which case it is the canonical signal of *eiusdem generis* in the context of general versus specific provisions. *See* 2A Singer & Singer, *supra*, § 47:19.

As a result of its attributing a counterfactual meaning to the word "including," *Verduzco* incorrectly claimed the two routes would otherwise be "redundant" if they had the same *mens rea.* 844 F.3d at 922. But the difference in the statutory scope of the two cross-references demonstrates that the two routes cannot be "redundant," but are simply overlapping. There is no interpretational concern in reading statutory provisions as overlapping, as the two can still operate fully within their respective scopes. *See* 2A Singer & Singer, *supra*, § 47:19, 2B Singer & Singer, *supra,* § 51:5; *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957) ("The question is not whether [Route 1] is clear and general, but, rather, it is, pointedly, whether [it] supplements [Route 2], or, in other words, whether the latter is complete, independent and alone controlling in its sphere … or is, in some measure, dependent

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[5] Mr. Steele noted that the purported "subset" definition in Route 2 includes offenses that cannot be considered "trafficking" under *Verduzco*'s definition of that term, and so is actually more inclusive than Route 1, *e.g.,* recidivist, simple possession (21 U.S.C. § 844(a)), possession onboard a vessel/aircraft (21 U.S.C. §§ 955/960(b)), and concealing cash on a smuggling-outfitted vessel (46 U.S.C. §§ 70503(a)(3)/70506(D)).

for its force upon the former.").

Consequently, the *Verduzco-Choizilme* reasoning defies the Court's precedents on three levels: (1) it contradicts the *Morissette* line concerning presumed *mens rea* by adducing no evidence of congressional intent to apply strict liability, and (2) it inverts the uniformity rationale that was a foundation for adopting the categorical analysis in *Taylor*. Along the way, it also (3) ignores or violates well-settled canons of construction, indicating its construal of Subparagraph (B) is strained and implausible. These divergences from important, legal principles warrant review from the Court to stem further error. *See* Sup. Ct. R. 10(c).

D. The Instant Case Is a Suitable Vehicle for Addressing the Question Presented

This case provides a suitable, and in some ways ideal, vehicle for the Court's taking up the Question Presented. There are several reasons why this is so.

First, unlike the case where the opinion in *Verduzco* was issued, the 'dual-route' rationale was litigated in Mr. Steel's case from the outset. The Government opposed his original district court motion to dismiss on that basis; Mr. Steele formulated replies thereto; the court held a brief hearing on the issue; and then the written order denying the motion was based entirely on a version of that concept. On appeal, Mr. Steele therefore addressed all versions of the argument in his brief. As a result, he raised multiple arguments against this reasoning that were not addressed in the process of considering *Verduzco*, where the 'dual-route' argument first appeared on appeal in the Government's answering brief.

The more thorough litigation of the various arguments in this case provides a solider basis for this Court's analysis, because Mr. Steele presented the broadest array of counterarguments to the *Verduzco-Choizilme* reasoning, including several noted above that not the Ninth Circuit, the Eleventh Circuit, nor the Government has ever responded to. In that light, the denial of review in *Verduzco* (*see* 139 S. Ct. 290) is of no import to why the Court should accept review here: Mr. Steele's appeal raises several, different and weighty flaws in the *Verduzco* logic, as outlined *supra*. This case provides the best vehicle to explore all the legal and logical bases for the 'dual-route' analysis in both the Ninth and Eleventh Circuits, including arguments neither addressed or at best raised only late in the litigation.[6]

Procedurally, the legal arguments in this case are precisely teed-up. That is because the conviction was summarily affirmed and the appeal dismissed on the laser-focused issue that *Verduzco* controlled the arguments raised by Mr. Steele. By this, the appeal is distilled down to the viability of the *Verduzco-Choizilme* logic, as framed by the issue-specific arguments Mr. Steele presented in his opposition to summary affirmance and his motion for reconsideration. The procedural posture of this appeal could not more narrowly focus the review on the precise Question Presented.

Not only does that Question fill the entire, analytical spotlight of the case, but

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[6] For these same scope and litigation-history reasons, this case provides a better vehicle for analysis than does the petition in *Choizilme v. Whitaker*, No. 18-526 (U.S.).

this Court's resolution of it will be virtually dispositive of Mr. Steele's original motion. That is because the sole basis on which the district court denied the motion was that no violation of due process had occurred under § 1326(d)(3). The other requirements for relief under § 1326(d) were either shown to be met as a matter of law or were based on uncontested evidence. Thus, the Court's answer to the Question Presented will provide genuine relief—as a basis for the district court to dismiss the information underlying the conviction.

CONCLUSION

This Petition presents the Court with an instance of multiple violations of its precedents and long-established, general principles. It raises unaddressed, dispositive flaws in the circuits' logic in a procedurally well-honed context and a case where the Court's resolution is determinative of Mr. Steele's appeal and case. In order to stem further spread of unsupported findings of strict-liability in a statute affecting thousands of federal cases annually, the Court should accept review.

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Respectfully submitted,

s/ James Fife

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