APPENDIX

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-40836

[Filed August 16, 2018]

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

DAVID ALLEN ANDERTON,

Defendant - Appellant

Appeals from the United States District Court for the Eastern District of Texas

Before JOLLY, JONES, and HAYNES, Circuit Judges

EDITH H. JONES, Circuit Judge:

David Anderton was convicted of making a false statement in an immigration document in violation of 18 U.S.C. § 1546(a) (Count 1); conspiracy to encourage and induce an illegal alien to reside in the United States in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I) (Count 2); and encouraging an illegal alien to reside in the United States in violation of 8 U.S.C.

§ 1324(a)(1)(A)(iv) (Counts 3-6). On appeal, he challenges (1) the constitutionality of 8 U.S.C. § 1324(a)(1)(A)(iv) and his conviction thereunder; (2) whether the indictment should have been dismissed for failure to state an offense; (3) the sufficiency of the evidence to sustain a conviction for Count One; (4) the United States Court of Appeals constitutionality of some of the search warrants; and (5) the final order of forfeiture for the property on 2949 West Audie Murphy Parkway. For the reasons given below, we AFFIRM.

BACKGROUND

Anderton was president of A&A Landscape and Irrigation GP ("A&A"), a company operating around the greater Dallas, Texas area. In December 2011, Anderton signed a Form I-129 (Petition for a Nonimmigrant Worker) for A&A, stating that the job would not involve overtime and the visa workers would be paid "the highest of the most recent prevailing wage that is or will be issued by the Department [of Labor]." The "prevailing wage" hourly rate at the time was $8.16 to $11.16 or $12.24 for overtime. Anderton signed this document under the penalty of perjury.

In 2016, Anderton was charged with violating 18 U.S.C. § 1546(a) (Count 1), 8 U.S.C. § 1324(a)(1)(A)(v)(I) (Count 2), and 8 U.S.C. § 1324(a)(1)(A)(iv) (Counts 3-6). Anderton moved to dismiss Count One for failure to state an offense. He also moved to dismiss Counts Two-Six, arguing that "reckless disregard" is a constitutionally deficient scienter. The court denied both motions. Anderton also moved to suppress evidence that was obtained under search warrants he argued were unconstitutional general warrants. The court denied this motion.

At trial, three visa workers testified that they worked overtime and were not paid more for overtime. Two testified that Anderton withheld $1,000 of their pay for "visa expenses" and one stated that Anderton withheld this amount from other visa workers as well. They also testified that Anderton withheld some of their pay for rent. All were paid far less than time and a half for their overtime and two claimed to have been paid less than minimum wage. They testified that they were paid for regular time by check and overtime with cash. Timesheets for these three workers reflected substantial amounts of overtime.

The former vice president of operations for A&A, Anthony Diesch, confirmed that workers were paid in part by check and in part by cash. Further, Anderton instructed that workers who "had papers" were to be paid partially by check, but other workers would be paid only in cash. According to Diesch's records, one employee was paid as little as $5.50 an hour in 2008. In October 2008, Anderton reported to Diesch there was some "heat" regarding payroll and they needed to get rid of the payroll spreadsheets. Anderton also explained that money was withheld from visa workers' pay to reimburse A&A for visa expenses.

Diesch described Anderton's system of writing checks to "Refugio Rivera," which he would cash for currency to pay the workers. Leslie Ducharme, a former employee, testified that Anderton told her to create false invoices, which were drafted after the checks had been written and purportedly covered tree purchases. Anderton directed Diesch that the checks must be written for less than $10,000 because he believed the IRS would flag checks over that amount.

Blanca Lenal, another government witness and previous A&A employee, testified that Anderton would ask workers during job interviews whether they had legal documents. If they lacked legal documentation, he would tell them they would get paid cash at a rate less than minimum wage. According to Ducharme, when the Social Security Administration informed A&A that the names on employee W-2s did not match the social security numbers A&A had provided, Anderton advised his managers to take the employees off payroll, and "[t]hey'll have a different I.D. at another time." A few weeks later, such workers would have a new social security number.

The government presented testimony from four A&A employees who admitted being in the U.S. illegally. Two of these workers stated that Anderton told them to go back to Mexico and get work visas. When they could not obtain visas, they so informed Anderton, but he employed them anyway. Finally, social security records were admitted in evidence, demonstrating that "of 375 names and corresponding social security numbers gleaned from A&A records, only 128 of the names and numbers matched and 37 of the employee names had no social security number."

The jury convicted Anderton on all counts. After the criminal trial, the jury convened to hear a forfeiture motion and found that the company's property at 2949 West Audie Murphy Parkway was used to facilitate all six counts of the offenses. Over Anderton's repeated objections, the district court granted the final order of forfeiture covering this property.

Anderton moved unsuccessfully for acquittal and for a new trial. The court sentenced him to five years'

probation, a $60,000 fine ($10,000 per count), and restitution exceeding $19,000.

Anderton timely appealed.

STANDARDS OF REVIEW

This court reviews preserved challenges to the sufficiency of an indictment de novo. *United States v. Grant*, 850 F.3d 209, 214 (5th Cir. 2017). If a defendant fails to preserve an issue in the district court, this court will review the objection for plain error. *United States v. Fairley*, 880 F.3d 198, 206 (5th Cir. 2018). Plain error "requires that there was (1) error, (2) that is plain, and (3) that affects substantial rights." *Id.* (citation omitted). Courts "should correct a forfeited plain error that affects substantial rights if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018) (citations and quotation marks omitted).

If a defendant preserves a sufficiency of the evidence claim, it is reviewed de novo but "with substantial deference to the jury verdict." *United States v. Suarez*, 879 F.3d 626, 630 (5th Cir. 2018) (citation omitted). This court affirms convictions "if a reasonable trier of fact could conclude . . . the elements of the offense were established beyond a reasonable doubt." *Id.* (citation omitted).

"Factual findings in a ruling on a motion to suppress are reviewed for clear error" and questions of law are reviewed de novo. *United States v. Moore*, 805 F.3d 590, 593 (5th Cir. 2015). Furthermore, the "evidence is viewed in the light most favorable to the prevailing party." *Id.*

DISCUSSION

I. Counts Two-Six

(a)Challenges to Section 1324(a)(1)(A)(iv), (v)

Pursuant to 8 U.S.C. § 1324(a)(1)(A)(iv), it is illegal to "encourage[] or induce[] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such . . . residence is or will be in violation of law." Subsection (v) criminalizes conspiracy to that end. Anderton argues that this statute is unconstitutionally vague as applied to him for several reasons. He contends that the terms "encourage" and "induce" are so broad as to have no discernible parameters and may include many activities, such as engaging in charitable or educational relationships with illegal aliens, that are not inherently illegal. He asserts that making such conduct a felony offense under a mens rea of reckless disregard of other persons' illegal presence exacerbates the vagueness, particularly because various statutes and regulations strictly limit an employer's ability to question the immigration status of new or existing hires. Finally, he likens his situation to cases in which other provisions of Section 1324 have been construed to require the defendant's active concealment of illegal aliens' status. *See, e.g., United States v. Varkonyi*, 645 F.2d 453, 459 (5th Cir. 1981) (illegal harboring does not include "mere employment"); *DelRio Mocci v. Connolly Props. Inc.*, 672 F.3d 241, 247 (3d Cir. 2012) ("knowingly renting an apartment to an alien lacking lawful immigration status" does not constitute illegal harboring). We discuss each of these propositions in turn.

As to vagueness, Justice Scalia summed up, "[o]ur cases establish that the Government violates this guarantee [of the Due Process clause] by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58, 103 S. Ct. 1855, 1858 (1983)). This court is concerned that the instant statutes of conviction, Sections 1324 (a)(1)(A)(iv) and (v), are extremely broad and the consequences of a felony conviction are harsh. Whether these terms are unconstitutionally vague is another matter. Courts must indulge a presumption of constitutionality and carefully examine a statute before finding it unconstitutional. *Skilling v. United States*, 561 U.S. 358, 405-06, 130 S. Ct. 2896, 2929-30 (2010).

Anderton acknowledges, moreover, that he did not assert the vagueness of "encourage" and "induce" in the district court. Consequently, our appellate review is confined to "plain error," the standards of which are noted above. In the absence of relevant circuit precedent, Anderton relies on general principles and cites no similar case law concerning the vagueness doctrine to demonstrate error that was or is "plain." The lack of legal authority "is often dispositive in the plain-error context." *United States v. Gonzalez*, 792 F.3d 534, 538 (5th Cir. 2015). In fact, our sister circuit has affirmed convictions under these statutes where the defendants were employers of multiple illegal aliens. *United States v. Khanani*, 502 F.3d 1281 (11th Cir. 2007). Given this background, it would be difficult to find plain error.

Looking to the statutory language, we are strongly inclined to conclude that "encourage" and "induce" are sufficiently clear to provide fair notice to the public and guide law enforcement. The district court instructed the jury succinctly that "[e]ncourage means to knowingly instigate, help or advise. Induce means to knowingly bring about, to effect or cause or to influence an act or course of conduct." *See United States v. He*, 245 F.3d 954, 957 (7th Cir. 2001). The instructions respond to Anderton's complaint that this aspect of Section 1324(a)(1)(A)(iv) fails to require purposeful conduct.

The Third Circuit discussed these terms in the course of rejecting a RICO claim based on an apartment owner's having rented to illegal aliens. *DelRio-Mocci*, 672 F.3d at 248-50. The court reached a narrower interpretation than the acts of offering mere "help" or "advice" to aliens, terms included in the district court's instructions here. As the Third Circuit would have it, dictionary definitions provide that "encourage" and "induce" imply conduct "incit[ing] aliens to remain in this country unlawfully when they would otherwise not have done so." *Id.* at 250. Anderton urges this court to adopt that interpretation. For two reasons, we need not do so. First, the Third Circuit acknowledged that cases using "help" and "advise" to expound the statutory provision had actually involved far more activity in support of illegal aliens' entering or remaining in the U.S. *Id.* Second, Anderton's conduct, in employing illegal aliens over a period of years with persistent disregard for federal immigration law, plainly exerted influence on the aliens' decisions to remain here illegally in the U.S. Thus, this was not a case of episodic or humanitarian

aid, which could give rise to vagueness issues on an as-applied basis. A facial attack on a non-First Amendment statute can prevail only if the statute is unconstitutional in all applications or lacks any "plainly legitimate sweep." *United States v. Stevens,* 559 U.S. 460, 472, 130 S. Ct. 1577, 1587 (2010) (citations omitted).

As for the requirement that a defendant exhibit "reckless disregard" that an alien's residence in the U.S. will be illegal, the government points out that recklessness is a common mens rea feature in criminal law generally and in several provisions of Section 1324 itself. *See* 8 U.S.C. §§ 1324(a)(1)(A)(ii), (iii), (iv), and 1324(a)(1)(C)(2). Courts are bound to "follow Congress' intent as to the required level of mental culpability for any particular offense." *United States v. Bailey*, 444 U.S. 394, 406, 100 S. Ct. 624, 632 (1980). This court has previously affirmed use of the reckless disregard standard in immigration prosecutions. *See, e.g., United States v. Nolasco-Rosas*, 286 F.3d 762, 765 (5th Cir. 2002) (discussing Section 1324(a)(1)(A)(ii) (alien transportation)); *see also United States v. Dominguez*, 661 F.3d 1051, 1063-64 (11th Cir. 2011) (citing Section 1324(a)(2) (smuggling aliens)); *Khanani*, 502 F.3d at 1286-87 (discussing 1324(a)(1)(A)(iii) and (iv)).

Anderton also analogizes his conduct to cases signaling that "mere renting" to illegal aliens or "mere employment" alone cannot establish illegal immigration conduct. *See, e.g., Villas at Parkside Partners v. City of Farmers Branch,* 726 F.3d 524, 529-30 (5th Cir. 2013) (en banc) (furnishing housing without more is not illegal "harboring" under Section 1324(a)); *Varkonyi,* 645 F.2d at 459 (harboring does not

include "mere employment"); *DelRio-Mocci,* 672 F.3d at 248-50 (mere apartment rentals to illegal aliens did not violate Section 1324(a)(1)(A)(iv)). However, as pointed out by our sister circuit, when the elements of Section 1324(a)(1)(A)(iv) are properly stated to the jury, they require "a level of knowledge and intent beyond the mere employment of illegal aliens." *Khanani,* 502 F.3d at 1289.

In sum, Anderton's threshold challenges to the statute of conviction fail to establish reversible error.

(b) Sufficiency of the Evidence

Counts Three to Six of the indictment alleged Anderton, "for the purpose of commercial advantage and private personal gain, encouraged and induced [four identified] illegal aliens to reside in the United States, knowing and in reckless disregard of the fact that such residence would be in violation of the law." Anderton argues that these allegations fail to establish a violation of the law. The facts proven at trial contradict this contention.

Initially, Anderton argues that he could not have *caused* aliens to reside in the United States if they were already here. This is a red herring; the government was not required to prove that Anderton caused illegal aliens to *enter* the United States. The statute alternatively criminalizes encouragement to "reside" here, and that is what was shown at trial. Anderton continues, however, that merely residing in the United States as an illegal alien is not a crime, hence, he could not have induced or encouraged residence that would be "in violation of the law" (citing *Arizona v. United States*, 567 U.S. 387, 407, 132 S. Ct.

2492, 2505 (2012)). This, too, is wrong. This court has recognized that "[a]lthough '[a]s a general rule, it is not a crime for a removable alien to remain present in the United States,' it is a civil offense." *Texas v. United States*, 787 F.3d 733, 757 n.62 (2015) (quoting *Arizona,* 567 U.S. at 407, 132 S. Ct. at 2505). Aliens who reside here without authorization are "in violation of law" for purposes of Sections 1324(a)(1)(A)(iv) and (v).

Anderton principally contends that the statutory framework and case law establish that mere employment of illegal aliens is not a felony. Specifically, he points to 8 U.S.C. § 1324a(a)(1)(A) and (2), which are misdemeanor offenses that explicitly prohibit the knowing hiring or continued employment of aliens who are unauthorized with respect to such employment. The misdemeanor provisions can be distinguished from the convictions at issue here by the requirements of "inducing" and "encouraging" aliens to reside illegally in the United States; criminalizing "knowing employment" lacks the concepts of instigation and influence embodied in the felony offense. In any event, the existence of a lesser grade of offense does not prevent the government from charging the more serious offense where the facts justify it.

The government recites the evidence that went well beyond Anderton's "mere employment" of illegal aliens. Summarizing this evidence, the government showed that "Anderton knew that most of his workers [were] not lawfully present and that he worked with others at A&A to employ them, anyway; that he took advantage of their illegal status; that he rented or facilitated rental of living space to some of them; and that he assisted some in attaining public benefits." Despite

Anderton's possible exploitation of the undocumented workers, the totality of his conduct persistently and knowingly provided inducements and encouragements to the employees to reside in the United States. Legally sufficient evidence supports the convictions.

II. Count One False Statement Offense

Count One charged Anderton with making a false statement in an immigration document in violation of 18 U.S.C. § 1546(a) because he stated in the December 2011 I-129 petition that he would pay visa workers $8.16 to $11.16 an hour for regular work and $12.24 an hour for overtime when "he knew" he would pay the workers substantially less.

Anderton argues the truth or falsity of his statements depended on future events, that is, whether he would in fact pay his workers according to legal requirements. Therefore, he contends, the indictment impermissibly charged a crime of "pure intent." This court rejected a similar argument in *United States v. Shah*, a false statement case under 18 U.S.C. § 1001. 44 F.3d 285 (5th Cir. 1995). *Shah* held that "a promise may amount to a 'false, fictitious or fraudulent' statement if it is made without any present intention of performance and under circumstances such that it plainly, albeit implicitly, represents the present existence of an intent [not] to perform." *Id.* at 294. The district court did not err when it held that Count One stated an offense because "a person's statement that he intends to do something when he has no present intention of doing it is a false statement of existing fact." *See Shah*, 44 F.3d at 293.

Anderton also challenges the sufficiency of evidence to support this count, arguing that the evidence did not show his intent to underpay visa workers when he signed the I-129 petition. He charges that the government presented testimony from only three visa workers and improperly extrapolated that A&A's visa workers generally were underpaid. Anderton criticizes the government for not presenting certain kinds of evidence (for example, payroll tax records) or a forensic accounting analysis to prove systematic underpayments. In contrast, Anderton introduced a forensic accounting analysis purportedly refuting the government's position. Anderton also offered evidence that visa workers were paid better than prevailing wage rates and that a year-long Department of Labor investigation concluded with no action.

In addition to testimony from three visa workers, the government introduced A&A time sheet records for visa workers as well as evidence that he systematically underpaid non-visa workers. When the district court denied Anderton's motion for acquittal, it held that the "evidence demonstrate[d] that Defendant had a pattern of underpaying both visa and non-visa workers before and during the time he filled out the Petition and had the intent to continue to underpay workers and charge visa fees."

Anderton's arguments and evidence were presented to the jury, which was entitled to weigh the evidence, and still convicted him. As noted above, this court decides only whether the evidence admitted at trial was sufficient for "a reasonable trier of fact [to] conclude . . . the elements of the offense were established beyond a reasonable doubt." *Suarez*, 879

F.3d at 630 (citation omitted). There was sufficient evidence to convict on this count.

III. The Search Warrants

Anderton argues that the search warrants were not particularized and essentially authorized a general search in violation of the Fourth Amendment. He presented these arguments to the district court in a motion to suppress, which was denied.[1] Attachment F to the warrant lists the items to be searched for/seized. Anderton argues that Attachment F:

> . . . authorized the seizure of all business records without limitation and all personal records pertaining in any way to financial matters, and all electronic devices and electronic storage devices and electronic media, also without limitation, at any of the search warrant locales, and all electronic mail from the business account.

(emphasis removed). He contends that "there were no limits upon what could be searched for and what could be seized." (emphasis removed). Anderton argues that the good-faith exception cannot apply here because the warrant "fail[s] to particularize the place to be searched or the things to be seized," and it does not apply to general searches. *United States v. Leon*, 468 U.S. 897, 923, 104 S. Ct. 3405, 3421 (1984)).

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[1] The court also held that Anderton did not have standing to challenge some of the searches, a ruling Anderton does not contest on appeal.

Anderton mischaracterizes the breadth of Attachment F. For example, Attachment F does not state that "all employee records" may be seized. Instead, it permits the seizure of: "[e]mployee earning and leave statements, employee payroll records, employee time sheets, H2-B visa employee passport and visa records, I-129 Nonimmigrant Worker petition records, U.S. citizen applicant rejection letters, [and] contractor invoices."[2] The descriptions of other types of items, although broad, are sufficiently particularized as to confine the discretion of the officers conducting the search. After all, "generic language is permissible if it particularizes the *types* of items to be seized." *United States v. Kimbrough*, 69 F.3d 723, 727 (5th Cir. 1995) (emphasis in original) (citation omitted). *United States v. Leon* held that "evidence obtained by officers in objectively reasonable good-faith reliance upon a search warrant is admissible." *United States v. Satterwhite*, 980 F.2d 317, 320 (5th Cir. 1992) (citing *Leon*, 468 U.S. at 922-23, 104 S. Ct. at 3420). Attachment F was sufficiently particular for the good-faith exception to apply.

IV. The Order of Forfeiture

Anderton disputes the order of forfeiture based on his claim that the government did not meet its burden to identify precisely where the A&A office was located, 2949 West Audie Murphy Parkway. Specifically,

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[2] This is not Anderton's only mischaracterization of Attachment F. He claims that it allows "all personnel and payroll records" to be seized, when it actually allows seizure of "[p]ersonnel and payroll/commission records for all employees that appear to be engaged in the business."

Anderton argues that the government failed to provide the correct legal description of the property at trial. Instead, the government offered legal descriptions of over 300 acres, less than 10 of which were ultimately forfeited. Consequently, the government never "established a nexus between [the unique legal description of this parcel of real property] and the offense." *See* Fed. R. Crim. P. 32.2(b)(1)(A) (alteration supplied by Anderton).

This contention is meritless. A government trial exhibit accurately described the location of the A&A office at 2949 W. Audie Murphy Parkway, except that it erroneously included a half acre that had been sold to the State of Texas as a right-of-way. This portion of the property was dismissed from the final order of forfeiture. Anderton does not contend that he received inadequate notice that the government sought to forfeit this property, nor does he contend that it was not subject to forfeiture. His only complaint is that the property description presented by the government included an extra half acre (which was corrected in the final forfeiture order). No error is presented.

For the foregoing reasons, Anderton's convictions and the final order of forfeiture are **AFFIRMED**.

APPENDIX B

AO 245B (Rev. 11/16) Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Case Number: 4:16-CR-00030-001
USM Number: 26258-078

[Filed October 20, 2017]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
DAVID ALLEN ANDERTON	)
Reason for Amendment:	)
Modification of Restitution Order	)
(18 U.S.C. 3664)	)
	)

AMENDED JUDGMENT IN A CRIMINAL CASE

Shirley Ann Baccus-Lobel
Defendant's Attorney

THE DEFENDANT:

□	pleaded guilty to count(s)	
□	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	

□	pleaded nolo contendere to count(s) which was accepted by the court	
☒	was found guilty on count(s) after a plea of not guilty	**1 – 6 of the Third Superseding Indictment.**

The defendant is adjudicated guilty of these offenses:

Title & Section /Nature of Offense		**Offense Ended**	**Count**
18:1546(a)	False Statement in an Immigration Document	02/18/2016	1
8:1324(a)(1)(A)(v)(I)	Conspiracy to Encourage and Induce an Illegal Alien to Reside in the U.S.	02/18/2016	2
8:1324(a)(1)(A)(iv)	Encouraging an Illegal Alien to Reside in the U.S.	02/18/2016	3, 4, 5, 6

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

□ The defendant has been found not guilty on count(s)

☒ Count(s) all indictments remaining □ is ☒ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days

of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

July 27, 2017
Date of Imposition of Judgment

/s/Amos Mazzant
Signature of Judge

AMOS L. MAZZANT, III
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

October 20, 2017
Date

PROBATION

The defendant is hereby sentenced to probation for a term of:

5 years as to each of Counts 1 – 6, to run concurrently.

Mandatory Conditions:

1. You must not commit another federal, state or local crime.

2. You must not unlawfully possess a controlled substance.

3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from

imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☒ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

4. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

7. ☒ You must make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664.

8. You must pay the assessment imposed in accordance with 18 U.S.C. § 3013.

9. If this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment.

10. You must notify the court of any material change in your economic circumstances that

might affect your ability to pay restitution, fines, or special assessments.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where you live or anything

about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the www.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF PROBATION

You must pay any financial penalty that is imposed by the judgment.

You must provide the probation officer with access to any requested financial information for purposes of monitoring your sources of income and to determine your compliance with Department of Labor and Internal Revenue Service laws.

You must not incur new credit charges or open additional lines of credit without the approval of the probation officer unless payment of any financial obligation ordered by the Court has been paid in full.

You must not participate in any form of gambling unless payment of any financial obligation ordered by the Court has been paid in full.

You shall not employ illegal aliens.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assess-ment	**JVTA Assess-ment***	**Fine**	**Restitution**
TOTALS	$600.00		$60,000.00	$19,073.63

Note: Fine consists of $10,000.00 for each of Counts 1 – 6.

☒ The determination of restitution is deferred until 10/25/2017. An *Amended Judgment in a*

Criminal Case (AO245C) will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

Mariano Venegas: $ 14,558.55
Asael Salazar: $ 4,515.08

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☒ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the	☒ fine	☐ restitution
☐ the interest requirement for the	☐ fine	☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payments of $ 79,673.63 due immediately, balance due

* * *

F ☒ Special instructions regarding the payment of criminal monetary penalties: Any amount that remains unpaid when your supervision commences is to be paid on a monthly basis at a rate of at least 10% of your gross income, to be changed during supervision, if needed, based on your changed circumstances, pursuant to 18 U.S.C. § 3572(d)(3). If you receive an inheritance, any settlements (including divorce settlement and personal injury settlement), gifts, tax refunds, bonuses, lawsuit awards, and any other receipt of money (to include, but not be limited to, gambling proceeds, lottery winnings, and money found or discovered) you must, within 5 days of receipt, apply 100% of the value of such resources to any fine still owed. It is ordered that the Defendant Shall pay to the United States a special assessment of $600.00 for Counts 1 - 6 which shall be due immediately.

> Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to: the Clerk, U.S. District Court. Fine & Restitution, 211 West Ferguson Street Rm 106, Tyler, TX 75701.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

* * *

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

CASE NUMBER 4:16-CR-00030

[Filed December 1, 2016]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
DAVID ALLEN ANDERTON (1)	)
	)

MEMORANDUM OPINION AND ORDER

Pending before the Court is Defendant David Anderton's Motion to Dismiss Counts Two through Six of the Second Superseding Indictment (Dkt. #52). Having considered the pleadings, the Court finds that the motion should be denied.

BACKGROUND

The Government alleges that beginning in 2008 and continuing through on or about February 18, 2016, Defendant knowingly and willfully conspired to encourage and induce aliens to reside in the United States and encouraged and induced four aliens to reside in the United States.

On March 9, 2016, Defendant was charged in a seven-count indictment. On June 21, 2016, the

Government filed a Second Superseding Indictment. Count Two charges Defendant with violating 8 U.S.C. § 1324(a)(1)(A)(v)(I), which prohibits conspiring to encourage and induce an alien to reside in the United States, knowing and in reckless disregard of the fact that such alien's residence would be in violation of law. Counts Three through Six charge Defendant with violating 8 U.S.C. § 1324(a)(1)(A)(iv), which prohibits encouraging and inducing aliens to reside in the United States, knowing and in reckless disregard of the fact that such residence would be in violation of the law.

On October 10, 2016, Defendant also moved for dismissal of Counts Two through Six of the Second Superseding Indictment (Dkt. #52). On October 27, 2016, the Government responded (Dkt. #70).[1]

LEGAL STANDARD

Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure supplies the procedural means for a criminal defendant to challenge the sufficiency of an indictment. In general, an indictment is sufficient to survive a motion to dismiss "if it contains the elements of the charged offense, fairly informs the defendant of the charges against him, and insures that there is no risk of future prosecutions for the same offense." *United States v. Cavalier*, 17 F.3d 90, 92 (5th Cir. 1994) (citing *United States v. Arlen*, 947 F.2d 139, 144 (5th Cir. 1991)). The propriety of granting a motion to dismiss

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[1] On November 10, 2016, the Government filed a Third Superseding Indictment. The Court will nevertheless consider the Motion to Dismiss Counts Two through Six of the Second Superseding Indictment to the extent it addresses claims asserted in the Third Superseding Indictment.

an indictment pursuant to Rule 12(b)(3)(B) "is by-and-large contingent upon whether the infirmity in the prosecution is essentially one of law or involves determinations of fact." *United States v. Fontenot*, 665 F.3d 640, 644 (5th Cir. 2011) (quoting *United States v. Flores*, 404 F.3d 320, 324 (5th Cir. 2005)). "If a question of law is involved, then consideration of the motion is generally proper." *Id.* (quoting *Flore*s, 404 F.3d at 324).

The determination of whether an indictment sufficiently alleges the elements of an offense is a question of law properly raised by a motion to dismiss. *United States v. Shelton*, 937 F.2d 140, 142 (5th Cir. 1991). When reviewing a motion to dismiss an indictment for failure to state an offense, a court must take the allegations of the indictment as true and determine whether an offense has been stated. *Fontenot*, 665 F.3d at 644 (citing *United States v. Crow*, 164 F.3d 229, 234 (5th Cir. 1999)). An indictment must allege each and every essential element of the charged offense in order to pass constitutional muster. *Shelton*, 937 F.2d at 142. However, the Court must also be mindful that "the law does not compel a ritual of words," and that the validity of an indictment depends on practical, not technical, considerations. *United States v. Ratcliff*, 488 F.3d 639, 643 (5th Cir. 2007) (citation omitted). An indictment need only "be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1).

ANALYSIS

Defendant moves for dismissal of Counts Two through Six of the Second Superseding Indictment "because the scienter element of those charges,

recklessness, is constitutionally deficient." (Dkt. #52 at p. 1). Defendant contends that he cannot be charged with encouraging and inducing aliens to reside in the United States in reckless disregard of the fact that such residence would be in violation of the law (or conspiring to do the same) because other statutes prohibit discrimination based on national origin or citizenship status. This argument is without merit. Counts Two through Six of the Second Superseding Indictment track the statutory language of 8 U.S.C. § 1324(a)(1)(A)(iv), which provides a *mens rea* requirement of "knowing" or "reckless disregard." Courts are required "to follow Congress' intent as to the required level of mental culpability for any particular offense." *United States v. Bailey*, 444 U.S. 394, 406 (1980). Here, Congress explicitly included the *mens rea* requirement of "reckless disregard" in the statutory text of 8 U.S.C. § 1324. Counts Two through Six of the Second Superseding Indictment thus do not fail to allege constitutionally sufficient scienter.

CONCLUSION

It is therefore **ORDERED** that Defendant's Motion to Dismiss Count Two through Six of the Second Superseding Indictment (Dkt. #51) is hereby **DENIED**.

SIGNED this 1st day of December, 2016.

/s/Amos Mazzant
AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40836

[Filed September 24, 2018]

UNITED STATES OF AMERICA,	)
	)
Plaintiff - Appellee	)
	)
v.	)
	)
DAVID ALLEN ANDERTON,	)
	)
Defendant - Appellant	)
	)

Appeals from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING

Before JOLLY, JONES, and HAYNES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

____/s/EDITH H. JONES_____
UNITED STATES CIRCUIT JUDGE

APPENDIX E

8 U.S.C. § 1324. Bringing in and harboring certain aliens

(a) Criminal penalties

(1)(A) Any person who—

(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or

(v)(I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts, shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs—

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under title 18, imprisoned not more than 10 years, or both;

(ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under title 18, imprisoned not more than 5 years, or both;

(iii) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) during and in relation to which the person causes serious bodily injury (as defined in section 1365 of title 18) to, or places in jeopardy the life of, any person, be fined under title 18, imprisoned not more than 20 years, or both; and

(iv) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) resulting in the death of any person, be punished by death or imprisoned for any term of years or for life, fined under title 18, or both.

(C) It is not a violation of clauses[1] (ii) or (iii) of subparagraph (A), or of clause (iv) of subparagraph (A) except where a person encourages or induces an alien to come to or enter the United States, for a religious denomination having a bona fide nonprofit, religious organization in the United States, or the agents or officers of such denomination or organization, to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year.

(2) Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien shall, for each alien in respect to whom a violation of this paragraph occurs—

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[1] So in original. Probably should be "clause".

(A) be fined in accordance with title 18 or imprisoned not more than one year, or both; or

(B) in the case of—

(i) an offense committed with the intent or with reason to believe that the alien unlawfully brought into the United States will commit an offense against the United States or any State punishable by imprisonment for more than 1 year,

(ii) an offense done for the purpose of commercial advantage or private financial gain, or

(iii) an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry,

be fined under title 18 and shall be imprisoned, in the case of a first or second violation of subparagraph (B)(iii), not more than 10 years, in the case of a first or second violation of subparagraph (B)(i) or (B)(ii), not less than 3 nor more than 10 years, and for any other violation, not less than 5 nor more than 15 years.

(3)(A) Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under title 18 or imprisoned for not more than 5 years, or both.

(B) An alien described in this subparagraph is an alien who—

(i) is an unauthorized alien (as defined in section 1324a(h)(3) of this title), and

(ii) has been brought into the United States in violation of this subsection.

(4) In the case of a person who has brought aliens into the United States in violation of this subsection, the sentence otherwise provided for may be increased by up to 10 years if—

(A) the offense was part of an ongoing commercial organization or enterprise;

(B) aliens were transported in groups of 10 or more; and

(C)(i) aliens were transported in a manner that endangered their lives; or

(ii) the aliens presented a life-threatening health risk to people in the United States.

(b) Seizure and forfeiture

(1) In general

Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of subsection (a) of this section, the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture.

(2) Applicable procedures

Seizures and forfeitures under this subsection shall be governed by the provisions of chapter 46 of title 18 relating to civil forfeitures, including section 981(d) of such title, except that such duties as are imposed upon the Secretary of the Treasury under the customs laws described in that section shall be performed by such officers, agents, and other persons as may be designated for that purpose by the Attorney General.

(3) Prima facie evidence in determinations of violations

In determining whether a violation of subsection (a) of this section has occurred, any of the following shall be prima facie evidence that an alien involved in the alleged violation had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law:

(A) Records of any judicial or administrative proceeding in which that alien's status was an issue and in which it was determined that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(B) Official records of the Service or of the Department of State showing that the alien had not received prior official authorization to come to, enter, or reside in the United States or that

such alien had come to, entered, or remained in the United States in violation of law.

(C) Testimony, by an immigration officer having personal knowledge of the facts concerning that alien's status, that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(c) Authority to arrest

No officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.

(d) Admissibility of videotaped witness testimony

Notwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) of this section who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence.

(e) Outreach program

The Secretary of Homeland Security, in consultation with the Attorney General and the Secretary of State,

as appropriate, shall develop and implement an outreach program to educate the public in the United States and abroad about the penalties for bringing in and harboring aliens in violation of this section.