No. _____

IN THE

Supreme Court of the United States

CESAR RAUL ACEVES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

18 U.S.C. § 922(g) prohibits individuals falling into particular status categories from possessing firearms or ammunition. *Rehaif v. United States*, 588 U.S. __, 139 S.Ct. 2191 (2019), held that to convict a defendant of violating § 922(g), the government must prove not only that the defendant knew he had engaged in the prohibited conduct (e.g., possessing a firearm), but also that he knew he fell within one of the status categories (e.g., felon or alien unlawfully in the United States) to which the prohibition applied.

The unlawful reentry statute, 8 U.S.C. § 1326(a), similarly, contains one conduct element—that the defendant "enter[ed], "attempt[ed] to enter", or was "found in" the United States—and three status elements: that the defendant (1) is an "alien"; (2) had previously been "denied admission, excluded, deported, or removed or had departed the United States while an order of exclusion, deportation, or removal is outstanding"; and (3) lacks the Attorney General's "express[] consent[] to . . . reapply[] for admission."

The question presented is whether, to prove a violation of 8 U.S.C. § 1326(a), the government must show that the defendant knew he fell within the relevant categories of people to whom the statute's prohibition applies.

STATEMENT OF RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

United States v. Cesar Raul Aceves, No. 2:15-cr-00245-GW (May 26, 2017)

United States Court of Appeals (9th Cir.):

United States v. Cesar Raul Aceves, No. 17-50195 (June 18, 2020)

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On Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Cesar Raul Aceves respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 809 Fed. Appx. 449. App. 1a-4a. The order of the district court is unreported. App. 6a-11a, 22a.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 2020. App. 1a. A timely petition for rehearing and rehearing en banc was denied on September 9, 2020. App. 5a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

8 U.S.C. § 1326(a). Reentry of removed aliens.

(a) In general

Subject to subsection (b), any alien who—

> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

STATEMENT OF THE CASE

1. In 2015, a federal grand jury indicted petitioner for being an alien "found in" the United States after having been "officially deported and removed from the United States," in violation of 8 U.S.C. § 1326. ER 1 (C.A. Doc. 15).

Section 1326(a) contains four elements: one conduct element—that the defendant "enter[ed], "attempt[ed] to enter", or was "found in" the United States—and three status elements: that the defendant (1) is an "alien"; (2) had previously been "denied admission, excluded, deported, or removed or had departed the United States while an order of exclusion, deportation, or removal is outstanding"; and (3) lacks the Attorney General's "express[] consent[] to . . . reapply[] for admission."

2. The district court, following Ninth Circuit Model Jury Instruction 9.8, instructed the jury on the elements of the offense, as follows:

> The Defendant is charged with a violation of 8 U.S.C. § 1326(a). He is accused of being an alien who, after removal and/or deportation from the Untied States, was found in this country. In order for the Defendant to be found guilty of that change, the Government must prove each of the following elements beyond a reasonable doubt:
>
> First, the Defendant was removed or deported from the United States or he departed the United States while an order of removal or deportation was outstanding;
>
> Second, thereafter, the Defendant voluntarily entered the United States;
>
> Third, after entering the United States, the Defendant knew that he was in the United States and knowingly remained.
>
> Fourth, the Defendant was found in the United States without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission to the United States; and
>
> Fifth, the Defendant was an alien at the time of his entry into the United States. An alien is a person who is not a natural-born or naturalized citizen of the United States.

ER 50.

These instructions required the government to prove petitioner's mental state with respect to only one of the four elements of the offense, the conduct element—that he knew he was in the United States and remained here knowingly. But the jury instructions imposed no mens rea requirement on the three other elements of the offense, which all turned on petitioner's status: that he had previously been deported, that he was an alien, and that he lacked consent from the Attorney General to reapply for admission to the United States.

3. Before trial, petitioner requested an additional jury instruction concerning his mens rea. He asked the court to instruct the jury that the

government additionally had to prove that petitioner "knew he had been deported or removed." ER 19.

a. The government objected to defendant's request. It argued that because § 1326(a) is a "general intent offense," the government need only prove that a defendant had knowledge of his *conduct*—here, his being in the United States; it need not prove that a defendant was aware of his *status* as someone who had been deported. The government therefore urged the court not to modify the Ninth Circuit's model jury instruction and to decline to give the defense's additional requested instruction. ER 28, 39; App. 17a ("We believe that the mens rea in this case only applies to the defendant's conduct . . . His conduct in this case is the entry and remaining in the United States, and that's consistent with the model jury instruction that he knowingly enter and knowingly remain. ¶The mens rea does not apply to any of the other elements.")

The defense responded by pointing to cases from this Court showing that a statute's mens rea requirement presumptively applies to *all* non-jurisdictional elements of an offense necessary to make a defendant's conduct criminal. ER 23 (citing *Torres v. Lynch*, 578 U.S. __, 136 S. Ct. 1619, 1631 (2016), *Elonis v. United States*, 575 U.S. __, 135 S.Ct. 2009, 2011 (2015), *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009), *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994), and *Staples v. United States*. 511 U.S. 600, 603-4 (1994)); ER 41; App. 13a.

b. The district court ultimately agreed with the government. App. 11a. But it waited until the second day of trial to consider the issue, taking it up only

after the government objected to a defense cross-examination of a government witness that sought to cast reasonable doubt on whether petitioner knew he had previously been deported. ER 485-508; App. 6a. Rather than permit petitioner's counsel to continue the cross-examination and then call witnesses to testify to petitioner's lack of knowledge of his prior deportation, the district court adjourned to consider the jury-instruction issue. ER 504.

In a tentative opinion provided the next morning, immediately before trial was to resume, the district court noted that the language of § 1326(a) itself does not include any type of mens rea requirement. App. 7a. And a consistent line of Ninth Circuit cases, dating back to *Pena-Cabanillas v. United States*, 394 F.2d 785 (9th Cir. 1968), the district court observed, have held that § 1326(a) is a general-intent crime and that, consequently, the government need prove *only* that a defendant's underlying act or conduct—here, entering or remaining in the United States—was done knowingly. App 7a-11a. Therefore, the court concluded, the Ninth Circuit model instruction is right: the only element of the offense that contain a mens rea requirement is the one that goes to a defendant's conduct—that the defendant "'*voluntarily* entered the United States'" and "'*knew* that he was in the *United States* and *knowingly* remained.'" App. 11a (quoting Ninth Circuit Manual of Model Criminal Jury Instruction No. 9.8 (2010)). The other three elements, which concern a defendant's status—being an alien, having a prior deportation, and lacking express consent of the Attorney General to seek readmission—do not carry a mens rea requirement at all. App. at 9a-11a. After oral argument, the district court

declined to alter its tentative ruling and confirmed that it would not give the requested defense jury instruction. App. 22a; U.S. C.A. Br. 12.

c. As soon as the district court made its ruling, before the jury returned, the defense made an offer of proof, showing what it would have introduced into evidence, had it obtained the requested jury obstruction, in order to cast reasonable doubt on petitioner's purported knowledge of his prior deportation. App. 22a-23a. This offer of proof reiterated the detailed factual plan petitioner had already submitted to the district court in a declaration of counsel, which was accompanied by an application for several subpoenas. *See* Supp. ER (C.A. Doc. 54) 1-13.

The jury convicted petitioner, and the district court sentenced him to 20 months imprisonment. U.S. C.A. Br. 12; ER 54.

4. Petitioner appealed his conviction to the Ninth Circuit, arguing, *inter alia*, that the district court erred in declining to instruct the jury that the government had to prove that petitioner knew he had previously been deported. App. 2a.

a. After the opening brief was filed, this Court decided *Rehaif v. United States*, 588 U.S. __, 139 S.Ct. 2191 (2019). Rejecting the law of every circuit that had considered the issue, *Rehaif* held that, in a prosecution of an alien illegally or unlawfully in the United States for possessing a firearm, in violation of 18 U.S.C. § 922(g), the government must prove not only that the defendant knew he was engaging the conduct set out in the statute (possessing a gun), but also that he knew his status (alien in the United States unlawfully), because both are material,

non-jurisdictional elements of the offense. This Court rejected the distinction that the government drew, and that the court of appeals below had drawn, between knowledge of one's conduct and knowledge of one's status. *Id.* at 2195, 2197-98. *Rehaif* based its holding on the presumption, which spans the criminal law, that "Congress did not intend to impose criminal liability on persons who, due to lack of knowledge, did not have a wrongful mental state." *Id.* at 2198. This presumption, this Court emphasized, ordinarily applies "even where 'the most grammatical reading of the statute' does not support one," *id.* at 2196 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)), and "even when the statutory text is silent on the question," *id.* Absent specific congressional indication to the contrary, this Court could envision "no convincing reason to depart from the ordinary presumption in favor of scienter." *Id.* at 2195.

b. The government's Court of Appeals brief relied on the longstanding law of the Ninth Circuit, which has for over fifty years held that because unlawful reentry is a "general intent" offense, the government need only prove that a defendant knowingly undertook the prohibited act of being in the United States; it need not prove a defendant's knowledge of his status as an alien or person who had previously been deported. U.S. C.A. Br. 43-47 (citing, inter alia, *Pena-Cabanillas*, 394 F.2d at 788-90). The government further argued that this Court's recent decisions in *Elonis v. United States*, 135 S. Ct. 2001 (2015) and *Rehaif* did not undermine the general-intent/specific-intent or conduct/status distinctions that the Ninth Circuit, and most other circuits, had long drawn when determining that three

of § 1326(a)'s four elements contain no mens rea requirement at all. U.S. C.A. Br. 47-55. The government further argued that even if it had been error for the district court not to give the requested jury instruction, the error was harmless under *Neder v. United States*, 527 U.S. 1 (1999). U.S. C.A. Br. 55-59.

Petitioner replied that *Rehaif* undermined the Ninth Circuit case law on which the government and the district court relied. Aceves C.A. Reply Br. 1-21. *Rehaif*'s evisceration of the conduct-status distinction that the courts of appeals had uniformly drawn in the context of § 922(g) applied equally to the conduct-status distinction that the Ninth had for over 50 years drawn in the § 1326 context. *Id.* Petitioner further argued that the failure to instruct the jury on the mens rea standard was not harmless under *Neder* because it was subject to vigorous contestation, both through petitioner's counsel's offer of proof, which was made as soon as the district court declined, in the middle of trial, to give the requested instruction, and through counsel's subpoena requests and declaration. *Id.* at 22-27.

c. The Ninth Circuit, in an unpublished memorandum disposition, affirmed, holding that the government need not prove any mental state concerning a § 1326 defendant's prior-deportation status, despite that status constituting an essential element of the offense. App. 2a. It pointed to "established Ninth Circuit law" holding that in a § 1326 prosecution, there is no mens rea requirement for the three elements concerning a defendant's status, as opposed to his conduct. App. 2a. The Court of Appeals acknowledged that petitioner "presents a substantial argument that these cases are inconsistent with recent Supreme Court authority

and are therefore no longer good law." App. 2a-3a (citing *Elonis v. United States*, 135 S. Ct. 2001 (2015) and *Rehaif v. United States*, 139 S.Ct. 2191 (2019)). But it determined that it "remain[ed] bound . . . by controlling Ninth Circuit precedent, because *Elonis* and *Rehaif* addressed different statutes from the one charged in this case." App. at 3a. It added that even if petitioner lacked knowledge that he had been deported, his entry "into the United States without complying with immigration procedures was not 'otherwise innocent conduct.'" App. 3a (quoting *Elonis*, 135 S. Ct. at 2010). The Court of Appeals also held, alternatively, that "even if the district court were deemed to have erred by omitting the instruction Aceves sought, the error would have been harmless on the record in this case." App. 3a. Because petitioner's counsel had not in the court's view submitted a "declaration or other cognizable evidence," but only made an offer of proof, the court thought he had failed to "establish that Aceves lacked the requisite knowledge" of his prior deportation. App. 3a-4a.

Petitioner filed a timely petition for rehearing and rehearing en banc, which the Court of Appeals denied. App. 5a.

REASONS FOR GRANTING THE PETITION

This case presents an opportunity for this Court to resolve a historic division of the courts of appeals. It concerns the proper mens rea standard for the frequently charged illegal-reentry offense, 8 U.S.C. § 1326(a), over which the courts of appeals were divided for nearly two decades. Although the circuit split was ultimately patched, the consensus reached in the ten courts of appeals to have addressed the

question—that three of the four elements of this crime are strict-liability elements—is fundamentally flawed. It flies in the face of what then-Judge Kavanaugh identified as the "rule of statutory interpretation for federal crimes" that this Court "has established and applied": "A requirement of mens rea applies to each element of the offense unless Congress has plainly indicated otherwise." *United States v. Burwell*, 690 F.3d 500, 537 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting).

This Court's recent decision in *Rehaif v. United States*, 488 U.S. __,139 S.Ct. 2191 (2019), illustrates the scope of that rule and reveals how far short of it the Ninth Circuit and the other courts of appeals have come. Immediately before this Court decided *Rehaif*, it was the law, of every circuit, that the government need not prove a defendant's knowledge of his own status; it needed only to show that the defendant had knowingly taken a prohibited action, even though the defendant's status was equally an element of the crime.[1] Thus if a felon held a gun and knew

[1] *See United States v. Rehaif*, 888 F.3d 1138, 1142 (11th Cir. 2018), *rev'd and remanded*, 139 S.Ct. 2191 (noting, before being reversed by this Court, that "no circuit has required proof of the defendant's knowledge of his prohibited status under any subsection of § 922(g)"); *United States v. Capps*, 77 F.3d 350, 352 (10th Cir. 1996) ("Moreover, as far as we can tell, no circuit has extended the knowledge component of § 922(g)(1) beyond the act of possession itself."). *But see United States v. Games-Perez*, 667 F.3d 1136, 1142-45 (10th Cir. 2012) (Gorsuch, J., concurring in the judgment) (calling refusal to apply a mens rea requirement to a defendant's status, despite the Supreme Court's expansive scienter jurisprudence, a "topsy turvy result"); *United States v. Langley*, 62 F.3d 602, 618 (4th Cir. 1995) (en banc) (Phillips, J., concurring and dissenting) (decrying absence of a "principled basis" for failing to apply the presumption of mens rea to "an episode in a defendant's life-history" when it is a fact necessary to make defendant's conduct fit the definition of the offense).

the object in his hand was a gun, he faced criminal liability under 18 U.S.C. § 922(g), even if entirely unaware of his prior felony conviction; knowing one's own status was a defendant's personal responsibility.

Rehaif upended all that. It abolished any meaningful conduct-status distinction and reiterated that unless Congress states otherwise, mens rea must attach to each non-jurisdictional element of an offense.

Rehaif itself concerned § 922(g), which prohibits certain categories of people from possessing firearms. But it cannot reasonably be read as applying to § 922(g) alone. What's true for that statutory provision is, or ought to be, equally true for other criminal statutes—such as § 1326(a)—that also contain personal-status elements and thus apply only to individuals who fall into these particular status categories.

Yet the Ninth Circuit chose in this case to cleave to its pre-*Rehaif* law, despite the strong contrary message that *Rehaif* should have sent it. Every premise and every conclusion in the Ninth Circuit's half-century old § 1326(a) mens rea case law is profoundly at odds with *Rehaif* and the last quarter-century of this Court's mens rea jurisprudence. The Ninth Circuit acknowledged as much in its opinion in this case. Yet it still refused even to consider budging.

The Ninth Circuit was equally wrong in thinking that if the government did have to prove petitioner's knowledge of his deportation, the failure to so instruct the jury was harmless in this case. Defense counsel attempted to call and cross-examine witnesses to show reasonable doubt concerning whether petitioner knew he had

been deported, as opposed to given a voluntary departure. But the government objected, and the district court quickly shut down the defense's lines of inquiry. Petitioner's counsel, who had already requested subpoenas and submitted a declaration explaining the facts he would develop to show petitioner's lack of knowledge of the deportation, then made an offer of proof, again explaining what he would have introduced on that score had the court permitted him to do so. Yet the Ninth Circuit, Catch-22-like, faulted the defense for not introducing the very evidence that the district court excluded.

In fact, because the defense did contest, vigorously, whether petitioner knew he had previously been deported, this case provides an excellent vehicle for deciding whether *Rehaif*'s holding applies beyond § 922(g), to the similarly structured § 1326(a)—the most frequently charged federal crime.

This Court should grant the writ of certiorari and reverse the Ninth Circuit.

A. The courts of appeals were long divided over whether the status elements of § 1326 are strict liability elements.

For nearly two decades, the courts of appeals were divided over the mens rea standard that governs § 1326(a).

1. The Ninth Circuit first endorsed strict liability.

It has been the view of the Ninth Circuit, for the past half century, that § 1326(a)'s three status elements—being an alien, having been previously deported, and lacking the Attorney General's consent to seek readmission— are strict liability elements. *Pena-Cabanillas v. United States*, 394 F.2d 785, 790 (9th Cir. 1968), held that short of being "drugged and dragged across the line," an alien who had

previously been deported and who is found in the United States is guilty of violating § 1326—even if he mistakenly thought he was a citizen, or erroneously believed he had permission of the Attorney General to be here, or did not know he had previously been deported.

Pena-Cabanillas concerned an alien, charged with § 1326(a) unlawful reentry, who wished to introduce his delayed United States birth certificate, from the files of the New Mexico Department of Health, to show that he mistakenly thought himself a United States citizen. 394 F.2d at 786, 788. The Ninth Circuit held the certificate irrelevant and inadmissible; what mattered—and all that mattered—was whether the defendant was in fact an alien, not whether he knew it. *Id.* at 788-90. *Pena-Cabanillas* is built on several key premises and claims:

- *Conduct elements vs. status elements*: *Pena-Cabanillas* held that mens rea attaches *only* to "the prohibited act" in § 1326, entering the United States, and not to the statute's three status elements. *Id.* at 790.
- *General-versus-specific intent*: *Pena-Cabanillas* framed the case as turning on a single, fundamental question: does § 1326 set out a specific- or a general-intent crime? *Id.* at 788 ("The answer . . . depends on whether the government must prove 'a specific intent' under 8 U.S.C. Sec. 1326.") If § 1326 is a specific-intent crime, the case held, the government must prove "the issue of his intent"; but if the crime is one of general intent, the government need not prove a defendant's knowledge of his status—the defendant may only "defend upon the ground that he did no voluntary act;

that he was asleep or unconscious at the time an act occurred." *Id.* at 786, 788 n. 2.

- *The meaning of statutory silence*: *Pena-Cabanillas* held that Congress must speak clearly *if it wishes* mens rea to attach to particular elements of an offense: "It would be absurd for this court to think that Congress inadvertently left 'intent' out of Section 1326. ¶Since Congress used no words bearing on specific intent, such an element is not part of the statute or of the government's burden of proof." *Id.* at 790. Strict liability, on this understanding, serves as the baseline, the default rule, for elements that do not involve one's actions or conduct.
- *Regulatory or public-welfare offense*: *Pena-Cabanillas* regarded § 1326 as falling into a category of regulatory or public-welfare offenses that "dispense with the conventional requirement for criminal conduct, to-wit, awareness of some wrongdoing." *Id.* at 788. This category, in the court's view, was expansive. Indeed, the Ninth Circuit took the view that any "mala prohibita," as opposed to common-law, offense qualified as "regulatory" and so was exempt from customary mens rea rules. *Id.* at 789.

Over the decades, the Ninth Circuit has reaffirmed the vitality of *Pena-Cabanillas*'s holding that in a § 1326 prosecution, "the government d[oes] not have to prove that the defendant acted under any particular mens rea." *United States v. Castillo-Mendez*, 868 F.3d 830, 835 (9th Cir. 2017) (citing *Pena-Cabanillas*, 394 F.2d

at 788-90). And it has done so based on the sharp general-versus-specific-intent dichotomy on which *Pena-Cabanillas* relied. *See United States v. Flores-Villar*, 536 F.3d 990, 999 (9th Cir. 2008), *aff'd by equally divided Court on other grounds*, 564 U.S. 210, *abrogated on other grounds by Sessions v. Morales-Santana,* 137 S. Ct. 1678 (2017) (defendant's mistaken belief that he was a citizen held inadmissible because "found in" illegal reentry is a general-intent crime and so only requires knowledge of "the facts that make what he *does* illegal"—i.e., that he knew he was in the United States); *United States v. Leon-Leon*, 35 F.3d 1428, 1432-33 (1994) (following *Pena-Cabanillas* to hold that because "specific intent was not an element of § 1326," defendant's green card, to show his belief that he had permission to reenter the United States, was inadmissible).

The Ninth Circuit's decision in this case not to reconsider *Pena-Cabanillas*, notwithstanding *Rehaif*, indicates just how entrenched its approach remains.

2. The Seventh Circuit then rejected the Ninth Circuit's strict-liability approach.

The Ninth Circuit's approach has not gone undisputed. In 1982, the Seventh Circuit took sharp issue with *Pena-Cabanillas*. Objecting to every one of the Ninth Circuit's premises and conclusions, the Seventh Circuit held that because there was no clear congressional intent to *impose* strict liability and *disclaim* scienter, mens rea should attach to each element of the § 1326 illegal reentry offense. *United States v. Anton*, 683 F.2d 1011 (7th Cir. 1982).

- *General versus specific intent.* In *Anton*, the Seventh Circuit rejected *Pena-Cabanillas*'s general-versus-specific intent framing as having no

bearing on which elements should carry mens rea. In fact, *Anton* observed that this framing serves only to obfuscate what is at stake. Saying that § 1326 is a general intent crime merely masks the reality that, under the Ninth Circuit's holding, "section 1326 has no criminal intent requirement and thus defines a strict-liability offense." *Anton*, 683 F.2d at 1014. The real question, *Anton* argued, was whether strict liability was appropriate given the ordinary common-law presumption of means rea and against strict liability. *Id.* at 1016-19. And so it held that the mens rea presumption should apply to each element of the statute.

- *The meaning of statutory silence. Anton* disputed the Ninth Circuit's conclusion that § 1326's silence on mens rea meant that Congress intended to omit it for the status elements. To the contrary, the Seventh Circuit believed that because the "'existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence,'" mens rea should be presumed to apply to every element of an offense absent a strong congressional indication to the contrary. *Id.* at 1015 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978)).
- *Regulatory/public-welfare offense*: Anton found wanting *Pena-Cabanillas*'s characterization of § 1326 as a regulatory or public-welfare offense exempt from ordinary mens rea requirements. Such offenses, the Seventh Circuit explained, were limited in this Court's cases to a quite

narrow class of violations, such as selling adulterated drugs, not subject to significant penalties. *Id.* at 1015, 1017. The Ninth's Circuit's characterization of § 1326 as regulatory, and thus exempt from ordinary mens rea requirement, did no independent work in the Seventh Circuit's eyes, but rather "simply restated the court's conclusion." *Id.* at 1015.

Following "well-established common-law principles," the Model Penal Code, and this Court's cases, *Anton* thus rejected the Ninth Circuit's strict liability conclusion, holding that a defendant *could* introduce evidence—a visa obtained after discussions with the American consulate, the Chicago federal immigration office, and the Attorney General's office—to show that he believed he had the necessary permission to reenter the United States. *Id.* at 1013, 1019.[2]

3. Eight other circuits coalesced behind the Ninth Circuit's conduct-status distinction and strict-liability approach, and the Seventh Circuit eventually yielded.

Over the years, the First, Second, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits came to line up behind the Ninth Circuit, mostly in brief portions of opinions emphasizing the lack of language in § 1326(a) that would make it a "specific intent" crime.[3] And from the premise that § 1326 was a crime of general

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[2] Judge Posner dissented in *Anton*, 683 F.2d at 1019-22, stating that "[t]he construction of the statute I am advocating is the one the Ninth Circuit adopted in *Pena-Cabanillas v. United States*." *Id.* at 1021.

[3] *See, e.g., United States v. Soto*, 106 F.3d 1040, 1041 (1st Cir. 1997) (rejecting *Anton* and noting that most circuits have rejected mens rea for the status elements of § 1326; asserting that "an alien who has broken our laws once should not be given the benefit of the doubt," and stating that "it is appropriate that the reentry law

rather than a specific intent, it followed to these courts that, for mens rea purposes, only a defendant's conduct—crossing the border or being in the United States—and not his awareness of his status that made that conduct fall within the statute's purview, mattered.

In 2001, the Seventh Circuit, "[i]n the interest of promoting uniformity of federal law," changed its view. *United States v. Carlos-Colmenares*, 253 F.3d 276, 277 (7th Cir. 2001). It now adopted the reasoning in Judge Posner's dissenting opinion in *Anton*, 683 F.2d at 1019-22, and embraced the Ninth Circuit's view in *Pena-Cabanillas*. *Carlos-Colmenares*, 253 F.3d at 278-80. It partially walked away,

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have teeth"); *United States v. Champegnie*, 925 F.2d 54, 55-56 (2d Cir. 1991) (following *Pena-Cabanillas*; noting that specific intent is not part of § 1326 and thus rejecting the possibility of a mistaken-belief defense concerning a defendant's status; noting that an alien unaware of his or her status acts "at his or her peril"); *United States v. Espinoza-Leon,* 873 F.2d 743, 746 (4th Cir. 1989) (agreeing with *Pena-Cabanillas* that "only general intent must be proved by the government" and that the absence of "willful" or "knowing" language means that Congress did not intend mens rea for the status elements of § 1326); *United States v. Trevino-Martinez,* 86 F.3d 65, 68-69 (5th Cir. 1996) (agreeing with majority of circuits "that § 1326 does not require the government to prove specific intent nor does it provide an alien who reenters this country illegally with a defense of reasonable mistake"; "express statutory language" precludes mens rea for status elements); *United States v. Hussein*, 675 F.2d 114, 115-116 (6th Cir. 1982) (agreeing with *Pena-Cabanillas* that "the Government need not prove specific intent" and that § 1326 is a regulatory statute exempt from ordinary mens rea presumption); *United States v. Gonzalez-Chavez*, 122 F.3d 15, 16 (8th Cir. 1997) (agreeing with *Pena-Cabanillas* and majority of courts following it that "specific intent is not an element of the offense in § 1326 prosecutions"); *United States v. Hernandez,* 693 F.2d 996, 1000 (10th Cir. 1982) (following *Pena-Cabanillas*'s conclusion that Congress did not require "specific intent as an element of the crime"); *United States v. Henry,* 111 F.3d 111, 113-14 (11th Cir. 1997) (briefly recounting and endorsing *Pena-Cabanillas*'s reasoning; concluding that "specific intent is not an element of the offense of illegal reentry" and that § 1326 is a regulatory statute exempt from the usual mens rea requirements).

however, from the general/specific-intent dichotomy so common in the other circuits, asking instead whether, in addition "to having to prove that the alien was deported and knowingly returned and did not have the express consent of the Attorney General to return," the government also had to "prove that" the defendant "*knew* he didn't have that consent, or, alternatively, whether the alien may try to prove that he didn't know." *Id. at* 279. The Seventh Circuit now answered "no." Section 1326(a), it held, does not require the government to prove a defendant's knowledge of his prohibited status; rather, it "'simply, and logically, makes the presumption of unlawful intent conclusive.'" *Id.* at 278 (quoting *United States v. Torres-Echavarria,* 129 F.3d 692, 698 (2d Cir. 1997)).

The Seventh Circuit so concluded primarily for policy reasons. It thought that, as with statutory-rape laws that "do not recognize even a reasonable mistake concerning the victim's age as a defense," strict liability for the status elements of § 1326 would "make deported aliens very cautious about reentering the United States without permission—in other words, give them a strong incentive to steer well clear of the forbidden zone." *Id.* at 278. Requiring mens rea for the status elements of the offense, by contrast, would make § 1326 convictions more difficult to obtain which, the court feared, would make the statutory prohibition "porous." *Id.* at 279. "Recognizing in the teeth of the statute a defense of mistaken belief," as to

one's status, the court thought, "would greatly complicate the administration of the national policy of excluding illegal—especially, previously deported—aliens." *Id.*[4]

The Seventh Circuit provided two legal reasons for its change of mind as well. First, following *Pena-Cabanillas*, the court observed that "Congress knew very well how to make clear its intention that the alien be proved to have acted willfully," but Congress nonetheless did not do so in § 1326. *Id.* at 279. Second, the court acknowledged that for "'traditional crimes,'" the absence of a mens rea requirement for every element of the offense would indeed be troubling. *Id*. at 279. But that was not so for "'regulatory' offenses"—and in the Seventh Circuit's view, as in the Ninth's, § 1326 was a regulatory offense. The Seventh Circuit distinguished "traditional crimes" from "'regulatory' offenses" this way: unlike traditional crimes ("ones that anyone might be accused of committing, such as murder or robbery or selling illegal substances or evading taxes"), regulatory offenses "arise out of *optional* activities, such as having sex with very young women (who may be minors), or engaging in business activities that can cause great harm (such as the manufacture of foods or drugs)—or coming back to the United States after having been deported." *Id.* The risk of committing a regulatory offense, the court stated, can "be eliminated simply by not engaging in the regulated activity." *Id.*

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[4] *Compare Morissette v. United States*, 342 U.S. 246, 263 (1952) ("The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries.")

More recently, the Tenth Circuit has come to recognize the difficulty with, indeed the incoherence of, the general-/specific-intent distinction that lay at the core of the Ninth Circuit's approach in *Pena-Cabanillas* and that of the other circuits that have followed its lead. But the Tenth Circuit has not changed its ultimate view that § 1326(a)'s status elements remain strict-liability elements. The Tenth Circuit noted in 2008 that "[i]n the past, we admit, the mental elements associated with Section 1326 were sometimes shrouded by reference to vague concepts like 'general' and 'specific' intent." *United States v. Hernandez-Hernandez*, 519 F.3d 1236, 1239 (10th Cir. 2008).[5] Going forward, the Tenth Circuit indicated that it would instead seek "to follow the thrust of modern American jurisprudence and clarify the required *mens rea,* often by reference to the Model Penal Code's helpfully defined terms, rather than persist in employing opaque common law labels that sometimes blur the line between distinct mental elements." *Id.*

And so, having abandoned the conclusion that three of the four elements of § 1326(a) lacked any mens rea requirement just because unlawful reentry could be classified as a general-intent crime, the Tenth Circuit fell back on a different justification for its longstanding no-mens-rea view. It noted that § 1326 is "nearly. . . 'strict liability'" because it is an immigration crime—and circuit

[5] *Cf. United States v. Bailey*, 444 U.S. 394, 403 (1980) ("At common law, crimes generally were classified as requiring either 'general intent' or 'specific intent.' This venerable distinction, however, has been the source of a good deal of confusion.").

precedent[6] had classified such crimes as "regulatory" offenses exempt from the ordinary rule that the defendant must "'know the facts that make his conduct fit the definition of the offense.'" *Id.* at 1240 (quoting *Staples v. United States*, 511 U.S. 600, 607 n. 3 (1994)). Circuit precedent had also noted the structural parallels between § 922(g) and § 1326(a), holding that strict liability was particularly appropriate in § 1326 cases because "requiring a mens rea for the status element for being a deportee would be inconsistent with our treatment of status elements in other crimes," such as the felon-in-possession statute, 18 U.S.C. § 922(g)(1). *Martinez-Morel*, 118 F.3d at 717 (citing *United States v. Capps*, 77 F.3d 350, 352 (10th Cir. 1996)).

B. The Ninth Circuit's decision to continue distinguishing between conduct and status elements, and to continue imposing strict liability on § 1326's three status elements, is wrong.

Because the Ninth Circuit held, notwithstanding *Rehaif*, that its prior half-century of § 1326 mens rea case law remains binding, this Court should grant the petition for a writ of certiorari and reverse. The Ninth Circuit was mistaken in believing that its longstanding precedent survives *Rehaif*. Indeed, every premise and conclusion at the root of the Ninth Circuit's approach is fundamentally incompatible with *Rehaif*'s clarification of the law and with the larger thrust of this Court's mens rea jurisprudence.

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[6] *United States v. Martinez-Morel*, 118 F.3d 710, 716 (10th Cir. 1997) (stating that "crossing international borders *is* a type of conduct" that falls within the regulatory exception); *Hernandez*, 693 F.2d at 1000.

1. *The conduct-status distinction.* Most fundamentally, the Ninth Circuit reaffirmed in this case the very thing that *Rehaif* rejected: that the government need not prove mens rea for any element that concerns a defendant's own status.

This Court has insisted repeatedly that punishment must be carefully calibrated to culpability, and it has done so by "infer[ring], absent an express indication to the contrary, that Congress intended such a mental-state requirement." *Torres v. Lynch*, 136 S.Ct. 1619, 1631 (2016); *Morissette v. United States*, 342 U.S. 246, 250–51 (1952) ("A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.")

The circuit courts for years resisted the plain import of this principle in § 922(g) cases, creating seemingly ingenious carve-outs. *See United States v. Rehaif*, 888 F.3d 1138, 1146 (11th Cir. 2018), *rev'd and remanded*, 139 S.Ct. 2191 (explaining that the law uniformly made clear that one need not know one's "*own status*" to violate § 922(g) because this Court's expansive mens rea cases "require only that the government prove mens rea for elements of an offense that concern the characteristics of *other people* and *things*").

Rehaif put an end to that.

It eliminated the conduct-status distinction, decimating the lines of circuit-court authority that exempted elements involving one's own status "from the

normal presumption of scienter" elaborated in the long line of cases from *Morissette* to *Elonis*. *Rehaif*, 139 S.Ct. at 2197. *Rehaif* teaches that, absent a contrary congressional intent, the government must now prove a defendant's scienter for *both* the conduct *and* the status elements of a crime—for to pick and choose which material elements of a criminal statute carry mens rea is simply arbitrary. *Id.* at 2196-98. That few individuals are likely, in the end, to be ignorant of their status, *Rehaif* held, did not matter in the least; what mattered instead was the *possibility* that even one such unlucky individual could be convicted. *Id.* at 2197-98 (noting that if this Court were to construe the provisions of § 922(g) "to require no knowledge of status, they might well apply to an alien who was brought into the United States unlawfully as a small child and was therefore unaware of his unlawful status.")

Rehaif should have signaled to the Ninth Circuit that requiring mens rea for conduct elements but not for the status elements in § 1326 was as wrong as doing so in § 922(g) cases. It should have signaled to the Ninth Circuit that the Seventh Circuit's critique, in the 1982 *Anton* case, had the better of the inter-circuit argument. But it did not, necessitating this Court's intervention.

2. *The general-specific intent distinction. Rehaif* also made clear that the specific-intent/general-intent distinction that permeates the Ninth Circuit's § 1326 mens rea cases, and those of most other courts of appeals, has no bearing at all on whether a particular element of a crime carries strict liability. After all, like most parts of the criminal code, § 922(g) *also* establishes a general-intent crime. And yet

Rehaif emphatically rejected the notion that permeates cases such as *Pena-Cabanillas* and those that follow it: that a defendant's lack of knowledge of his own status is entirely beside the point if a crime is not one of specific intent. Specific intent or general intent, *Rehaif* showed—that just doesn't matter when it comes to whether each non-jurisdictional element should carry a mental-state requirement.

The proper approach turns, rather, on whether the defendant "'has the requisite mental state in respect to the elements of the crime'"—here, whether he knew that he was not a citizen, that had been deported before, and that he lacked permission from the Attorney General to return. *Rehaif*, 139 S.Ct. at 2198 (quoting LaFave & Scott*, Substantive Criminal Law* §5.1(a) (1986)). Indeed, in *Rehaif*, the government, like the Ninth and other circuits in § 1326 cases, asserted that the status elements ought not carry mens rea because they are legal categories, and "mistake of law," like ignorance of the law, provides no excuse. *Id.* This Court disagreed. *Id.* True, when a defendant merely says he did not know of the criminal prohibition he has violated, *that's* no excuse; but that is a far cry from having a mistaken understanding of what *Rehaif* calls "a 'collateral' question of law" that is an element of the offense. *Id.* In *that* quite distinct circumstance, a defendant's lack of knowledge of the collateral legal matter (i.e., that he is an alien or had been deported previously) "negat[es] an element of the offense" because it "'results in his misunderstanding of the full significance of his conduct.'" *Id. (*quoting LaFave & Scott*, Substantive Criminal Law* §5.1(a) (1986)).

The Ninth Circuit, in cases such as *Pena-Cabanillas* and *Flores-Villar*, takes a contrary position. Like nearly every circuit that has embraced *Pena-Cabanillas,* it fixates on whether the offense can be classified as one of specific or general intent. That, *Rehaif* shows, is fundamentally incorrect.

3. Statutory silence. The Ninth Circuit and the other courts of appeals have insisted that silence as to mental state in § 1326(a) means that mens rea does not apply to the three status elements. That, *Rehaif* and *Elonis* make clear, is precisely backwards.

Rehaif emphasized not only that a scienter-creating word (such as "knowingly") used in one part of a statutory scheme travels throughout, but also that the Court will "apply the presumption in favor of scienter even when Congress does not specify any scienter in the statutory text." 139 S.Ct. at 2195. Indeed, that has long been the law.[7] In fact, this Court recently held that even when a scienter-silent statute is surrounded by other statutes containing express scienter

[7] *Staples v. United States*, 511 U.S. at 605 (1994) ("we must construe" statutory silence "in light of the background rules of the common law [citation] in which the requirement of some *mens rea* for a crime is firmly embedded"); *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 522 (1994) ("Neither our conclusion that Congress intended an objective construction of the" relevant statutory language, "nor the fact that Congress did not include the word "knowingly" in the text of [the statute] justifies the conclusion that Congress intended to dispense entirely with a scienter requirement."); *United States v. Bailey*, 444 U.S. at 406 n. 6; *United States v. United States Gypsum Co.*, 438 U.S. at 438 (1978) ("Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement."); *Morissette,* 342 U.S. at 263 ("[M]ere omission . . . of any mention of intent will not be construed as eliminating that element from the crimes denounced.").

requirements, that *still* does not indicate congressional intent to omit the mental-state requirement. *Elonis*, 135 S.Ct. at 2008-09; *see also Burwell*, 690 F.3d at 550 (Kavanaugh, J., dissenting); *compare Pena-Cabanillas*, 394 F.2d at 789 & n. 4. This is because mens rea is the rule—not, as the Ninth Circuit's foundational *Pena-Cabanillas* case thought, the exception—which Congress must disclaim if it wishes to create strict-liability for a material elements of an offense.

4. *The regulatory/public-welfare exception*. The words "regulatory" and "public welfare" are interchangeable terms of art in mens rea cases, denoting a narrow category of offenses for which the presumption of scienter does *not* apply and statutory silence *does* give rise to strict liability. The Ninth Circuit's *Pena-Cabanillas* decision and the decisions of many of the courts of appeals following it have classified § 1326 as a "regulatory statute" exempt from the usual rule that mens rea applies to each non-jurisdictional element of a crime. *Pena-Cabanillas,* 394 F.2d at 788-89; *Hussein*, 675 F.2d at 115 (6th Cir.); *United States v. Carlos-Colmenares*, 253 F.3d at 279-80 (7th Cir.); *United States v. Hernandez-Hernandez*, 519 F.3d at 1240 (10th Cir.); *United States v. Henry,* 111 F.3d at 114 (11th Cir.).

Pena-Cabanuillas classified any "mala prohibita" offense as regulatory, and it also thought any immigration crime fell into this broad regulatory bucket because of the government's plenary power over immigration matters. 394 F.2d at 188-89. Such reasoning constitutes a remarkably expansive interpretation of a narrow, and ever-narrowing, exception to the usual rule that mens rea applies to all the non-jurisdictional elements of an offense.

This Court's cases have emphasized the quite limited scope of the exception. *See Morissette*, 342 U.S. at 255 ("Many of these offenses are not in the nature of positive aggressions or invasions, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty"). In *U.S. Gypsum Co.*, 438 U.S. at 437, this Court indicated that it "has recognized such offenses" only in "limited circumstances" because of "their generally disfavored status"—and so declined to apply the category to the *malum prohibitum* Sherman Act. In *Liparota v. United States*, 471 U.S. 419, 432-33 (1985), similarly, this Court emphasized that the exception does not include statutes designed to prevent even abuses of public welfare programs such as food stamps. Instead, this Court emphasized that the exception applied only to items which "may seriously threaten the community's health or safety," such as adulterated drugs or hand grenades. *Id.* And in *Staples*, this Court added that regulatory or public welfare offenses typically "regulate potentially harmful or injurious *items*." 511 U.S. at 607 (emphasis added). Only when that is the case, and the "'penalties commonly are relatively small and conviction does no grave damage to an offender's reputation,'" is the category in play. *Id.* (quoting *Morissette*, 342 U.S. at 256). For "fines and short jail sentences" traditionally marked the category's outer bounds. *Id.* at 616. For that reason, *Staples* held that even a statute regulating machine guns, that made no mention of mens rea, nonetheless did not fall into the exempt "regulatory" category.

Because § 922(g) regulated potentially dangerous people possessing dangerous guns, lower courts had long treated § 922(g) as regulatory. *See, e.g.,*

United States v. Pruner, 606 F.2d 871, 874 (9th Cir. 1979) ("It is clear that the Gun Control Act of 1968, of which section 922(h)(1) is a part, is a regulatory measure" because "Congress' intended goal in enacting the 1968 Act was to combat violence and thereby promote public safety by removing guns from possession by persons felt by Congress to be dangerous."); *United States v. Capps*, 77 F.3d at 352 ("[A] person convicted of a felony cannot reasonably expect to be free from regulation when possessing a firearm."). But *Rehaif* brusquely dismissed that argument, indicating in just four sentences that the regulatory/public-welfare exception is indeed now vanishingly small. *Rehaif*, 139 S.Ct. at 2197. Even firearm restrictions, it held, are not part of a regulatory program, and § 922(g)'s felony penalties further precluded making an exception to the strong mens rea presumption. *Id.*

The same is true for § 1326. Section 1326 imposes far more than "minor penalties"—up to two years in some cases and up to ten and twenty in others. And §1326 has nothing to do with the regulation of potentially harmful or dangerous *items*; it concerns *people* and their physical movements. The criminalization of an alien's reentry can be no more a regulatory offense than, as in *Rehaif*, being a felon, or an alien in the United States unlawfully, who possesses a firearm.

In this respect, too, *Rehaif* undermines a critical foundation of the Ninth Circuit's decision in this case. Yet the Ninth Circuit saw no need to alter its approach to § 1326 because *Rehaif* "addressed [a] different statute[] than the one charged in this case." App. 3a.

5. *Separating criminal and non-criminal conduct*. In a single sentence, the Ninth Circuit asserted that § 1326(a)'s status elements carry strict liability for an additional reason: because an undocumented alien's presence in the United States is not otherwise innocent conduct. App. at 3a. The implication is that while possessing a gun is not criminal *unless* one falls into a § 922(g)-prohibited category (by being, for instance, a felon or an alien in the U.S. unlawfully), being an alien in the United States without permission *necessarily* involves committing a crime, and so the ordinary presumption of mens rea should not apply to the status elements of § 1326(a).

But that's wrong, for two reasons: the premise is incorrect, and even if it were accurate, the conclusion does not follow from it.

First, the Ninth Circuit's premise, that simply being an undocumented alien in the United States is not otherwise innocent conduct, is overbroad and therefore incorrect. If §1326's status elements lack a mens rea requirement, then §1326 will ensnare some otherwise innocent people who did not "know the facts that make [their] conduct fit the definition of the offense." *Elonis*, 135 U.S. at 2009 (2015) (internal quotation marks and citation omitted).

Consider the case of a person who, as a young child, was deported and then reentered the country with his parents, and who mistakenly believes that he was born here. *Cf. Rehaif,* 139 S. Ct. at 2197-98 (expressing concern that, absent a mens rea requirement, § 922(g) "might well apply to an alien who was brought into the United States unlawfully as a small child and was therefore unaware of her

unlawful status"). Or consider the circumstances of the defendant in *United States v. Flores-Villar,* 536 F.3d at 999, who, born abroad out of wedlock, misunderstood how citizenship was transmitted and mistakenly thought himself a citizen entitled to be in the United States. In these cases, it is the "defendant's *status*, and not his conduct alone, that makes the difference. Without knowledge of that status, the defendant may well lack the intent needed to make his behavior wrongful. His behavior may instead be an innocent mistake to which criminal sanctions normally do not attach." *Rehaif*, 139 S. Ct. at 2197.

Consider also the case of an alien "found in" the United States without permission. He may be subject to deportation, but he has not committed a criminal offense *unless* he has been previously deported. *See Arizona v. United States*, 567 U.S. 387, 407 (2012) ("it is not a crime for a removable alien to remain present in the United States"). To be sure, a companion statute to §1326, 8 U.S.C. §1325, makes unlawful *entry* a misdemeanor, but it does not criminalize simply being an unauthorized alien *found in* the United States. And so it is the prior-deportation element that, in "found in" §1326 cases such as this, makes an individual an offender. Showing the defendant's knowledge of the prior deportation in this situation, consequently, is necessary to demonstrate a criminally culpable mind.

Second, the Ninth Circuit incorrectly assumed that if a defendant's conduct is not entirely innocent, then a material element of an enhanced crime can carry strict liability. But this Court "has never drawn such a distinction when employing the presumption of mens rea." *Burwell*, 690 F.3d at 543 (Kavanaugh, J., dissenting)

Rehaif did not so hold. And *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), rejected that very argument.

Rehaif expressly declined, as unnecessary, to address the otherwise-innocent-conduct objection that the government had made. 139 S. Ct. at 2197 ("We need not decide whether we agree or disagree with the Government" that one must know his status if the conduct is otherwise illegal, as in the case of an officer of the United States who misappropriates classified information, a person eighteen or older who solicits a minor to help evade detection for drug crimes, or a parent or guardian who facilitates his minor child being to be used in child pornography production.)

Moreover, even if being an alien found in the United States were itself a misdemeanor violation of §1325, the substantially heightened, felony penalties attached to §1326 matter greatly. In *Flores-Figueroa*, this Court held that to convict a defendant, *already* guilty of a predicate fraud crime, of a more severe aggravated identity-theft crime, the government must show not just that defendant used another's identification, but also that he also knew it belonged to someone else. 556 U.S. at 647. The government had argued that mens rea was unnecessary for the additional element that gave rise to the aggravated crime, because dispensing with it would not result in the "criminalization of any 'apparently innocent conduct.'" *See* Brief for the United States at 34, *Flores-Figueroa v. United States*, 556 U.S. 646 (2009) (No. 08-108), 2009 WL 191837 (quoting *Liparota v. United States*, 471 U.S. 419, 426 (1985)); *id.* at 33-38. But this Court disagreed. *Flores-Figueroa* thus indicates that even the presence of underlying criminal conduct does not make the

need for mens rea disappear. To the contrary, what matters is not simply the existence of criminal or wrongful conduct, but also the increased penalty. *See also Burwell*, 690 F.3d at 543 (Kavanaugh, J., dissenting) (showing in some detail that "the presumption [of mens rea] applies *both* when necessary to avoid criminalizing apparently innocent conduct *and* when necessary to avoid convicting of a more serious offense for apparently less serious criminal conduct").

C. The question presented is an exceptionally important and recurring one that warrants this Court's review.

This Court's intervention is especially necessary because unlawful reentry is the most frequently prosecuted federal crime. *See* United States Courts, *Criminal Federal Judicial Caseload Statistics 2020*, Tbl. D3 (Sept. 30, 2019), https://www.uscourts.gov/statistics/table/d-3/judicial-business/2020/09/30. From October 1, 2019 through September 30, 2020, 73,730 total criminal prosecutions were brought in federal court; of those, 19,233, or 26 percent, were for alien improper-reentry offenses. *Id.* Over twenty percent of those prosecutions took place in districts courts within the Ninth Circuit. *Id.* Yet it is far from settled, after *Rehaif*, whether the government must prove a mental state for the crime's status elements.

When defendants go to trial, it is vital that district courts properly instruct juries on the mens rea that properly applies to each element of the offense. And when district courts accept guilty pleas, they must advise defendants accurately as to the elements of the offense, including the proper mens rea standard.

Despite the number of § 1326 prosecutions and the stakes, there remains a vast chasm between the mens rea analysis this Court undertook in *Rehaif* and that in which the Ninth Circuit continues to engage. The Ninth Circuit remains fixated on the wholly irrelevant question of whether § 1326 creates a general- or a specific-intent offense; and it has expanded beyond all recognition the regulatory/public-welfare exception to the ordinary rule that mens rea attaches to each non-jurisdictional element of an offense. So too have the other courts of appeals that have, over the years, chosen to follow the Ninth Circuit's lead. These grounds are plainly inconsistent with *Rehaif* and this Court's modern mens rea jurisprudence.

Rehaif afforded the Ninth Circuit the chance to correct and update its skewed jurisprudence, but the Ninth Circuit declined that opportunity in this case. Indeed, despite thinking that petitioner had "present[ed] a substantial argument" that the Ninth Circuit's outdated case law did not survive *Rehaif*, the Ninth Circuit nonetheless declared itself bound by past circuit precedent simply because *Rehaif* involved a different statute. App 3a. This Court's intervention is needed to ensure that federal courts do not continue to instruct juries and advise those entering guilty pleas in illegal reentry cases erroneously—indeed, on the basis of premises that bear scant relation to, and conclusions that contradict, this Court's now-clarified mens rea jurisprudence.

D. This case presents an excellent vehicle for answering the question presented.

This case is also an excellent vehicle for considering this important question. The issue was preserved in district court. App. 6a. And it was fully litigated in the Ninth Circuit. App. 1a.

Moreover, the record makes clear that the jury instruction petitioner had requested and was refused could have made a difference in the outcome of the trial. To be sure, the Ninth Circuit held, in the alternative, that if the failure to give the requested jury instruction were error, it was harmless. App. 3a-4a. But that conclusion is flatly incorrect, indeed implausible, and thus should not preclude this Court's review.

Neder v. United States, 527 U.S. 1, 7-15 (1999), holds that a missing jury finding on an essential element is subject to harmless error analysis—but only when it appears "beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence." 527 U.S. at 17. For only if the omitted element "is supported by uncontroverted evidence" is there "an appropriate balance between 'society's interest in punishing the guilty [and] the method by which decisions of guilt are to be made.'" *Id.* at 18 (quoting *Connecticut v. Johnson*, 460 U.S. 73, 86 (1983)). In *Neder* itself, the defendant was prosecuted for tax fraud because he understated his income by $5 million. *Id.* at 15. The district court did not instruct the jury on materiality, erroneously believing that the court alone could find that element. *Id.* at 14. But that omission was harmless, *Neder* held, because the "defendant did not, *and apparently could not*, bring forth facts

contesting the omitted element." *Id.* at 19 (emphasis added). Indeed, the jury's verdict "necessarily included a finding" on materiality, so it was not possible for the omitted jury finding to have made a difference. *Id. at 26.* (Stevens, J., concurring in part and concurring in the judgment). *See also Hurst v. Florida*, 577 U.S. 92, 102 (2016) (noting that under *Neder*, "failure to submit an uncontested element of an offense to a jury may be harmless").

Here, by contrast, the defense *did* bring forth facts contesting petitioner's mens rea. Had the jury been instructed that it had to find that petitioner knew he had been deported, the jury could have rationally found in his favor. Immigration law is "complex" and a "a legal specialty of its own." *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010). Unauthorized immigrants may be formally removed, but they may also be given voluntary departures.[8] And in this case, the question whether petitioner knew he had been deported/removed (which is required to trigger § 1326), or instead thought he had been given a voluntary departure (which is outside the statute's ambit) was contested—vigorously.

But how can one measure the effect of evidence that the district court would not permit the defense to introduce? Since the district court declined to give the jury instruction the defense had requested, it also ruled that the defense could not develop its theory that petitioner did not know he had been deported. In fact, as

[8] 8 U.S.C. § 1229c and 8 C.F.R § 240.25(a) provide for voluntary departures, which are informal returns that do not legally qualify as removal orders for purposes of § 1326(a).

soon as defense counsel began pursuing that theory in a cross-examination, the government objected, contending that the entire line of inquiry was irrelevant. ER 485. That prompted the district court to decide whether to give the requested instruction; after entertaining argument, doing overnight research, preparing a tentative opinion, and finally hearing additional argument, the district court decided that the knowledge instruction was not appropriate, and it then precluded as irrelevant this entire line of defense. *See* ER 485-508; App. 6a-26a.

The district court was well aware of the potential harmless-error problem this evidentiary ruling could pose for appeal. That's why, as it deliberated over whether to give the defense's requested knowledge instruction, it stated that even if it "rule[d] against the defendant, that [mens rea on the prior-deportation element is] not a requirement, I should at least allow the defendant to lay the factual foundation for it," because if the "Ninth Circuit in its wisdom elects to find that it is part of the mens rea in that regard, then … we would have already done the factual foundation one way or the other." ER 494. Defense counsel agreed and asked to spell out for the record what its precluded line of defense would have looked like. ER 504 ("Well, Your Honor, can I just briefly be heard on that? Like Your Honor said, if this goes to an appeal, in order for the Ninth Circuit to deal with it, they have to see the whole facts of the case.")

The district court also noted that it had received from the defense "an in camera request" for witness subpoenas going to the knowledge-of-deportation issue (ER 495), and the defense reminded the court that it had also submitted, along with

several witness subpoena requests, a trial memorandum and declaration of counsel showing "the facts that [the defense] seek[s] to elicit from its witnesses" in order to show reasonable doubt on whether petitioner knew he had been deported. (ER 507).[9]

And as soon as the district court made final its decision not to give the jury instruction the defense had requested, it permitted, as it had promised, the defense to make an offer of proof—just as Federal Rule of Evidence 103(a)(2) provides when evidence is excluded. App 22a. Defense counsel then made his offer of proof, explaining how the confusing and quite irregular circumstances of petitioner's removal proceedings could have caused petitioner to think he had been given a voluntary departure in lieu of a formal deportation. App. 22a-24a. The district court soon interjected, "Let me not let you go too far," adding that none of this evidence would be admitted. App. 24a. The offer of proof was only for appellate preservation purposes, the district court indicated: "it is an offer of proof, and we understand that for purposes of the record, if this matter goes on appeal." App. 24a. And then once more the district court noted that because of its decision not to instruct the jury on knowledge of prior deportation, there was no way the defense could introduce the facts showing lack of knowledge at trial, stating that "obviously . . . defendant's

[9] The defense's subpoena applications and detailed factual plan for disputing petitioner's knowledge of the prior deportation, contained in the declaration of counsel, appear in Supp. ER 1-13, C.A. Doc. 54. The district court acknowledged receiving this submission and, because of its decision not to give the requested defense instruction, declared it moot. ER 642.

planned presentation is going to be different," to which defense counsel responded, "Your Honor, … I will not be arguing those facts that I just put in evidence" through the offer of proof and "will not be crossing the agents on those facts." App. 25a.

Despite all this, the Ninth Circuit concluded that the potential error was harmless because "[t]hough his attorney argued that Aceves might not have understood that he was being deported, no declaration or other cognizable evidence was submitted to establish that Aceves lacked the requisite knowledge." App. 3a. Given the offer of proof, the subpoena requests, and the declaration of counsel outlining the lines of proof the defense would pursue if given the requested jury instruction requiring the government to prove knowledge of the deportation, the Ninth Circuit's conclusion cannot be right. It is difficult to imagine what more the defense could have done, given that it was entirely precluded from pursuing this line of evidence and argument. What is clear is that, had the defense been permitted to introduce the evidence it outlined and argue reasonable doubt as to whether petitioner knew his departure was in fact a deportation, the jury certainly could have acquitted. The Ninth Circuit mistook the existence of evidence on the government's side of the ledger for the far more substantial showing that *Neder* requires if an error of this type is to be harmless: that the omitted element or jury finding be "supported by uncontroverted evidence." 527 U.S. at 18. *See also Games-Perez*, 667 F.3d at 1145 (Gorsuch, J., concurring in the judgment) (noting in analogous § 922(g) case that similarly conflicting evidence concerning whether defendant knew his status as a felon precludes the error from being harmless.)

In short, the Ninth Circuit's poorly explained and wholly unjustified alternative holding that any instructional error would have been harmless does not undermine the need for this Court to grant review. To the contrary, the circumstances the defense outlined in its offer of proof show just how live an issue petitioner's knowledge of his prior deportation remains. The mens rea question this case presents is a pressing one, and the jury instruction the district court refused to give could have changed the verdict.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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