No. _____

In the
Supreme Court of the United States

Ricardo Rizo-Rizo &
Efrain Cervantes-Ramirez,
Petitioners,

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 Writ of Certiorari


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## QUESTION PRESENTED

Since the founding, courts have presumed that Congress intended a mens rea for every federal criminal offense. *Rehaif v. United States*, 139 S. Ct. 2191, 2195–96 (2019). The Court has identified a "limited" exception to this basic principle for some "'public welfare'" and "'regulatory' offenses'" that deal with "dangerous and deleterious devices." *Staples v. United States*, 511 U.S. 600, 606, 612 n.6 (1994).

The Court of Appeals for the Ninth Circuit has held that the public-welfare/regulatory exception also applies to some immigration statutes, including 8 U.S.C. § 1325(a)(1).That statutory provision makes it a crime for an "alien" to "enter[] or attempt[] to enter the United States at any time or place other than as designated by immigration officers[.]" This provision has no express mens rea, and any scienter would thus need to be implied through the common-law presumption of mens rea.

The question presented is:

> Whether 8 U.S.C. § 1325(a)(1) fits under the public-welfare/regulatory exception to the presumption of mens rea when the statute does not involve "dangerous and deleterious devises."

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## INTRODUCTION

A "basic principle" of U.S. law is that "wrongdoing must be conscious to be criminal[.]" *Elonis v. United States*, 575 U.S. 723, 734 (2015) (quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952)). Since the country's founding, this principle had led federal courts to presume Congress intended a mens rea for each non-jurisdictional element of every federal crime. *Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019).

About twenty years ago, Justice Thomas flagged that some courts of appeal—especially the Ninth Circuit—were undermining this principle by expanding a "narrow" exception for some public-welfare/regulatory offenses. *Hanousek v. United States*, 528 U.S. 1102, 1103–04 (2000) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari). This "limited" exception was not supposed to apply to all regulatory offenses. *Staples v. United States*, 511 U.S. 600, 607 (1994). Instead, the exception was created to apply to statutes that "regulate potentially harmful or injurious items." *Id.* at 607, 612 n.6. Still, as Justice Thomas noted, courts improperly applied the exception to statutes without addressing the "threshold matter": whether the statute regulates a "category of dangerous and deleterious devices" such that an "individual should be "alert[ed]" to the fact that he or she is dealing with something that could be a "public danger." *Hanousek*, 528 U.S. at 1103–04 (quoting *Staples*, 511 U.S. at 612 n.6).

The Ninth Circuit's jurisprudence about the public-welfare/regulatory exception has not improved over the past two decades. That court, as well as other courts of appeal, have continued to rely on an expansive view of the exception and applied it to statutes having nothing to do with regulating dangerous items. This expansive view was on display in the decisions below. The decisions concern the

mens rea for 8 U.S.C. § 1325(a)(1), a statute that makes it a crime for an "alien" to "enter[] or attempt[] to enter the United States at any time or place other than as designated by immigration officers." Even though § 1325(a)(1) has nothing to do with "dangerous and deleterious devices," *Staples*, 511 U.S. at 613 n.6, the court applied the public-welfare/regulatory exception to the statute, exempting it from the presumption of mens rea. *See United States v. Rizo-Rizo*, 16 F.4th 1292, 1296–98 (9th Cir. 2021) (decision in Petitioner Rizo's case); Pet. App. 8a–9a (decision in Petitioner Cervantes's case). To reach that conclusion, the Ninth Circuit built off its precedent that had applied the exception to the illegal-reentry offense, another crime that has nothing to do with regulating dangerous items and instead involves regulating proper entry into the United States. *See Rizo-Rizo*, 16 F.4th at 1297 (citing *Pena-Cabanillas v. United States*, 394 F.2d 785, 788 (9th Cir. 1968)).

This Court should grant review to put an end to the Ninth Circuit's misguided interpretation of the public-welfare/regulatory exception. It has now relied on the exception to exempt the two most charged federal offenses—the improper-entry offense (8 U.S.C. § 1325(a)(1)) and the illegal-reentry offense (8 U.S.C. § 1326)—from the presumption of mens rea. In doing so, the Ninth Circuit has company with the Fifth, Sixth, Seventh, Tenth and Eleventh Circuits, which have similarly exempted statutes that make it a crime for noncitizen to improperly enter the United States from the presumption of mens rea. *See United States v. Morales-Palacios*, 369 F.3d 442, 447 (5th Cir. 2004); *United States v. Carlos-Colmenares*, 253 F.3d 276, 279 (7th Cir. 2001); *United States v. Henry*, 111 F.3d 111, 113–14 (11th Cir. 1997); *United States v. Martinez-Morel*, 118 F.3d 710, 716 (10th Cir. 1997); *United States v. Hussein*, 675 F.2d 114, 115 (6th Cir. 1982).

This Court should also grant review because the question presented raises an important issue with far-reaching implications. Whether a crime has a mens rea strikes at the heart of the legitimacy of criminal law. Indeed, that's why this Court has granted review to resolve how and whether the presumption of mens rea applies to two different statutes in the past few years. *See Ruan v. United States*, 142 S. Ct. 457, 457 (2021) (granted review to resolve the mens rea for 21 U.S.C. § 841(a)); *Kahn v. United States*, 142 S. Ct. 457, 457 (2021) (granted review to resolve the mens rea for 21 U.S.C. § 841(a)); *Rehaif*, 139 S. Ct. at 2194 (granted review to resolve the mens rea for 18 U.S.C. § 922(a)). Moreover, a decision on the scope of the public-welfare/regulatory exception would affect many statutes, including the two most charged statutes in federal court: the improper-entry statute (8 U.S.C. § 1325(a)(1)), the statute charged below, and the illegal-reentry statute (8 U.S.C. § 1326).

This case presents an ideal vehicle to resolve the question presented. The court below squarely rejected Petitioners' argument that the presumption of mens rea applied to § 1325(a)(1) by holding that it fit under the public-welfare/regulatory exception. *See Rizo-Rizo*, 16 F.4th at 1296–98; Pet. App. 8a–9a. Thus, no procedural impediment will prevent this Court from resolving the question presented.

This Court, then, should grant review to stop the misguided expansion of the public-welfare/regulatory exception.

## OPINIONS BELOW

The published opinion of the U.S. Court of Appeals for the Ninth Circuit in Petitioner Rizo's case is reproduced on pages one through seven of the appendix. The unpublished memorandum disposition of that same court in Petitioner Cervantes's case is reproduced on pages eight through nine of the appendix.

## JURISDICTION

The court of appeals entered judgment in each petitioner's case on October 29, 2021. *See* Pet. App. 1a, 8a. The court denied their joint petition for rehearing en banc on February 4, 2022. Pet. App. 10a–11a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

A copy of 8 U.S.C. § 1325 is included on pages twelve through thirteen of the appendix.

## STATEMENT OF THE CASE

### I. Petitioners' convictions for allegedly violating 8 U.S.C. § 1325(a)(1).

Petitioners Efrain Cervantes-Ramirez and Ricardo Rizo-Rizo pleaded guilty to 8 U.S.C. § 1325(a)(1) in separate proceedings before different magistrates. They separately appealed their convictions to the district court, and the same district judge affirmed their convictions. Below are the details of those proceedings.

#### A. Petitioner Cervantes's conviction.

In August 2019, a border-patrol agent arrested Cervantes after he crossed into the United States between ports of entry. The government charged him with misdemeanor attempted entry under 8 U.S.C. § 1325(a)(1).

Four days after his arrest, Cervantes attended a change-of-plea hearing before a magistrate with others. The magistrate said he would "advise" the defendants present "of the elements of the [charged] offense." Recognizing that some defendants had objected the day before about the elements, the magistrate told

counsel who "wishe[d] to object" to "hold" off. With that out of the way, the magistrate articulated what he viewed as the "elements for the charge":

> The defendant at the time of the attempted entry into the United States was an alien[.]
>
> Secondly, that the defendant had the specific intent to enter the United States at a time and place other than those designated by immigration officers.
>
> Third, that the defendant also had the specific intent to enter the United States free from official restraint[.]
>
> And fourth, that the defendant did something that was a substantial step towards committing the crime and that strongly corroborated the defendant's intent to commit the crime.

The magistrate asked Cervantes if he "underst[ood] the elements of the offense as I have described them," and he said, "[y]es."

At that point, the magistrate said he would "accept any objections" about the "recitation" of the elements. Counsel for Cervantes responded that, "in addition to the elements cited by the court," the government also had to prove that the defendant "knew that she or he was not a United States citizen." The magistrate responded that, based on an objection made by a public defender the day before, he had read several cases, including *Rehaif v. United States*, 139 S. Ct. 2191 (2019). The magistrate said he believed those cases did not establish that the government needed to prove that the defendant knew he was an alien. He thus "overrule[d] the objection."

The magistrate then elicited a factual basis for the plea. The magistrate confirmed that Cervantes crossed into the United States outside a port. He asked if Cervantes was "a citizen or national of the United States," to which Cervantes said, "[n]o." Defense counsel clarified: "[J]ust to make clear, Mr. Cervantes is confirming

that, after speaking with [defense counsel], he understands now he was not a U.S. citizen. He is not making any representation about his knowledge at the moment of" his arrest. After "not[ing] for the record" the clarification, the magistrate confirmed that Cervantes intended to cross into the United States outside a port. He confirmed that Cervantes intended to enter the United States "without being detected, apprehended or taken into custody[.]"

The magistrate asked Cervantes's counsel to confirm that there was an "adequate factual basis for the plea as I have set out on the record the elements." Counsel confirmed that, based on the magistrate's view of the elements, a sufficient factual basis existed.

The magistrate then found a sufficient "factual basis" for the plea and found the plea was "made with a full knowledge of the nature of the charge against the defendant[.]" The magistrate thus accepted the guilty plea.

Reflecting Cervantes's lack of criminal history, the magistrate imposed a time-served sentence. The magistrate also confirmed that Cervantes—who had not entered into a plea agreement—reserved his right to appeal.

Cervantes appealed his conviction to the district court. On appeal, he argued that a presumption in favor of mens rea applied to each element of 8 U.S.C. § 1325(a)(1), including the alienage element. And because nothing rebutted that presumption, a mens rea applied to the alienage element. This legal conclusion meant the magistrate had misadvised Cervantes about the charged offense's elements by telling him that knowledge of alienage was not an element of § 1325(a)(1). As a result, the magistrate violated Federal Rule of Criminal Procedure 11(b)(1)(G), which requires court to "inform the defendant of, and

determine that the defendant understands . . . the nature of each charge to which the defendant is pleading guilty."

The district court affirmed. The court agreed with the magistrate that knowledge of alienage was not an element of the charged offense.

### B. Petitioner Rizo's conviction.

Rizo's case is in all relevant respects identical to Cervantes's. In January 2020, a border-patrol agent arrested him after he crossed into the United States between ports of entry. The government then charged him with misdemeanor attempted entry under 8 U.S.C. § 1325(a)(1).

Rizo's guilty-plea hearing went the same as Cervantes's. The magistrate advised Rizo that there were four elements of attempted entry and overruled defense counsel's objection that the intent element required the government to prove that the defendant knew he was an alien.

The magistrate then found that a sufficient factual basis existed to support Rizo's guilty plea and that the plea was knowingly entered into. He imposed a time-served sentence.

Rizo appealed, and the appeal was assigned to the same district judge that resolved Cervantes's appeal. Rizzo raised identical arguments that Cervantes raised, and the district court affirmed for the same reasons it affirmed Cervantes's conviction.

## II. Petitioners' appeals.

Both Cervantes and Rizo separately appealed their convictions to the Court of Appeals for the Ninth Circuit. They reraised the same argument: that the presumption in favor of mens rea applied to each element of 8 U.S.C. § 1325(a)(1),

including the alienage element. The magistrates overseeing their guilty pleas, then, had misadvised them about the elements of the charged offense.

The Ninth Circuit affirmed Rizo's conviction in a published decision. Pet. App. 1a–7a. According to the court, 8 U.S.C. § 1325(a)(1) is "a regulatory offense" and thus "the presumption in favor of scienter does not apply." Pet. App. 4a. The court noted that § 1325(a)(1) "was enacted to control unlawful immigration," which is a "normal regulatory function of the sovereign." Pet. App. 4a. The court added that the statute "prohibits conduct that individuals would legitimately expect to be unlawful," since "'[c]rossing international borders is a type of conduct generally subject to stringent public regulation.'" Pet. App. 4a–5a (quoting *United States v. Martinez-Morel*, 118 F.3d 710, 716 (10th Cir. 1997)). The court also noted that Rizo's conduct amounted to a misdemeanor offense. Pet. App. 5a. Additionally, the court noted that it had held in a prior decision that the improper reentry offense in 8 U.S.C. § 1326 was a strict-liability regulatory offense. Pet. App. 5a (citing *Pena-Cabanillas v. United States*, 394 F.2d 785 (9th Cir. 1968)). As a result, the court held that the magistrate had not misadvised Rizo about the elements of the charged offense. Pet. App. 6a.

The same day the court of appeals issued a published decision in Rizo's case, it issued an unpublished decision in Cervantes's case in which it also affirmed. Pet. App. 8a–9a. In affirming, the court merely cross-referenced its published decision in Rizo's case. Pet. App. 9a.

Petitioners then asked the court of appeals to consolidate their cases. The court granted that motion.

After Petitioners timely filed a consolidated petition for rehearing, the court denied the petition. Pet. App. 10a–11a.

## REASONS FOR GRANTING THE PETITION

This Court should grant review to resolve the scope of the public-welfare/regulatory exception to the presumption of mens rea. The lower court decision about the exception is wildly out of step with this Court's precedent, and it is part of a larger trend in which the lower courts are significantly expanding the exception beyond its initial design. This Court should grant review now because the question presented involves an important, fundamental issue of criminal law, and it will affect several statutes, including the two most charged federal offenses. This petition presents an ideal vehicle to resolve the question presented. The lower court resolved Petitioners' claim on the merits in a published decision. This Court, then, can resolve the question presented by granting review. For these reasons, this Court should grant review.

### I. This Court should grant review to resolve the scope of the public-welfare/regulatory exception to the presumption of mens rea.

This Court has long articulated a robust presumption of mens rea in which courts should presume each non-jurisdictional element contains a mens rea. In a series of dated cases, this Court recognized an exception to this rule for so-called "regulatory" or "public welfare" offenses. But this Court has also continuously sought to limit this exception to statutes regulating dangerous items, reasoning that Congress would be less concerned with subjecting an individual to criminal punishment without a guilty mind when a statute protected the public from danger. Still, the lower federal courts—especially the court below—has blown past that limitation over and over. These courts have held that the exception applies to all sorts of regulatory crimes having nothing to do with dangerous items, including the crime that Petitioners were convicted of violating: a crime regulating the entry of

noncitizens. This Court should grant review to rein in courts' overreliance on what is intended to be a narrow exception to an important, fundamental rule of statutory interpretation.

### A. Following common-law practice, this Court has repeatedly applied a robust presumption in favor of mens rea and has articulated a narrow exception for a small subset of public-welfare/regulatory offenses.

1. This Court has pronounced that courts must apply "an interpretative presumption that mens rea is required" for every element of every federal offense, *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978) (italics removed), except for "jurisdictional elements," *Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019). This "long standing presumption" is "traceable to the common law," *id.* at 2195, though it applies to non-common-law crimes too, *Staples v. United States*, 511 U.S. 600, 620 n.1 (1994). The presumption "reflects the basic principle that 'wrongdoing must be conscious to be criminal[.]'" *Elonis v. United States*, 575 U.S. 723, 734 (2015) (quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952)). The requirement of mens rea "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Rehaif*, 139 S. Ct. at 2196 (quoting *Morissette*, 342 U.S. at 250).

The foundational importance of a guilty mind to criminal law means the presumption in favor of mens rea is strong. This Court will assume that Congress intended a mens rea when the statute does not expressly contain one. *See, e.g.*, *Elonis*, 575 U.S. at 736; *Staples*, 511 U.S. at 605–07; *Posters 'N' Things v. United States*, 511 U.S. 513, 522–23 (1994). "[F]ar more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing

with an intent requirement." *U.S. Gypsum Co.*, 438 U.S. at 438. So strong is the presumption that it applies to elements that lack a mens rea even when Congress expressly included a mens rea elsewhere in the same statute. *See, e.g., Liparota v. United States,* 471 U.S. 419, 420–27 (1985); *Morissette,* 342 U.S. at 248–50. Applying the presumption in those cases follows early practice in this country. When States started "codi[fying] crimes" at the founding, courts assumed that the "omission" of a mens rea for a crime did *not* reflect "disapproval" of this firmly established "principle." *Morissette,* 342 U.S. at 252. Instead, omitting a mens rea "merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation." *Id.*

The Court also recently clarified that the presumption applies to status elements, like alienage, not just act elements. *Rehaif,* 139 S. Ct. at 2195. In *Rehaif,* the Court granted review to determine whether, "in prosecutions under § 922(g) and § 924(a)(2), the Government must prove that a defendant knows of his status as a person barred from a possessing a firearm." 139 S. Ct. at 2195. Though every court to consider the question had held no, this Court held that the government *did* need to prove that the defendant knew his status. *Id.* According to the Court, there was "no convincing reason to depart from the ordinary presumption in favor of scienter." *Id.* at 2195. For that reason, the lower court had erred by not instructing the jury that the government needed to prove that the defendant knew his status (there, that he was an "alien"). *Id.* at 2194.

In short, "[t]he Supreme Court's case law demonstrates that the Court has applied the presumption of mens rea consistently, forcefully, and broadly." *United States v. Burwell*, 690 F.3d 500, 537 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting).

**2.** There are "a few narrowly delineated exceptions" to the presumption. *Dean v. United States*, 556 U.S. 568, 580 (2009). Among them is an exception that applies to "'public welfare'" and "'regulatory' offenses.'" *Staples*, 511 U.S. at 606. These are offenses courts have "understood Congress to impose a form of strict criminal liability through statutes that do not require the defendant to know the facts that make his conduct illegal." *Id.*

This exception was forged during the "industrial revolution" in which workers started to face "injury from increasing powerful and complex machines." *Morissette*, 342 U.S. at 254. In response, legislature passed "numerous and detailed regulations which heightened the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare." *Id.* These duties were backed by criminal sanctions. *Id.* at 254–55. To comply with these laws, an individual "usually" needed to just exercise ordinary, reasonable "care." *Id.* at 256.

In dealing with this subset of criminal prohibitions, courts thought that legislatures were more inclined to impose liability independent of the individual's "intent." *Morissette*, 342 U.S. at 256. As this Court described it, courts thought the legislature "'weighed the possible injustice of subjecting an innocent [person] to a penalty against the evil of exposing innocent [individuals] to danger and concluded that the latter was the result preferably to be avoided.'" *United States v. Freed*, 401 U.S. 601, 610 (1971) (quoting *United States v. Balint*, 258 U.S. 250, 253–54 (1922)). For this reason, this Court held that reading a mens rea into this subset of statutes that seek to prevent "danger" was not warranted. *Morissette*, 342 U.S. at 254–56. If a "person otherwise innocent" acts in "relation to a public danger," the "burden" was on that individual to ensure that he or she was acting lawfully. *Id.* at 260 (quoting *United States Dotterweich*, 320 U.S. 277, 280–81 (1943)).

Given this "limited" exception's purpose, offenses that fit under it generally "regulate potentially harmful or injurious items" involving guns or drugs. *Staples*, 511 U.S. at 607. And while this Court has never comprehensively defined the exception, a "threshold" question is whether the statute deals with "dangerous and deleterious devices" such that an individual should know that their actions might raise a "public danger." *Id.* at 612 n.6 (internal quotation marks omitted). Thus, "[e]ven statutes creating public welfare offenses generally require proof that the defendant had knowledge of sufficient facts to alert him to the probability of regulation of his potentially dangerous conduct." *Posters 'N' Things*, 511 U.S. at 522.

The Court has refused to find that this exception applies to a slew of regulatory offenses over the past sixty years. Among the regulatory statutes that the Court has applied the presumption of mens rea to includes the Sherman Act's prohibition on the restraint of trade, *U.S. Gypsum Co.*, 438 U.S. at 435–36; a statute regulating the unauthorized use of food stamps, *Liparota*, 471 U.S. at 433–34; and a statute regulating misuse of government property, *Morissette*, 342 U.S. at 260–61.

The Court, in fact, has not concluded that an offense fits under the public-welfare/regulatory exception since 1971. *See Freed*, 401 U.S. at 609–10. Twice in the last thirty years the Court has even refused to apply the exception to statutes regulating guns, *see Staples*, 511 U.S. at 614; *Rehaif*, 139 S. Ct. at 2197, thus calling into question what even remains of the exception.[1]

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[1] Although unnecessary to reverse here, Petitioners asks this Court to scrap the public-welfare/regulatory exception altogether, as its nebulous contours can be used to undermine the presumption of mens rea. At a minimum, however, it should be narrowly confined.

### B. The lower federal courts, including the court of appeals below, have misinterpreted the public-welfare/regulatory exception.

Despite the Court's repeated exhortations about the "limited" reach of the public-welfare/regulatory exception to the presumption of mens rea, *Staples*, 511 U.S. at 607, the lower courts have continuously found new, creative ways to expand the exception. In doing so, these decisions weaken a foundational principle of U.S. law: that "wrongdoing must be conscious to be criminal[.]" *Elonis*, 575 U.S. at 734 (quoting *Morissette*, 342 U.S. at 252).

The decision below is one example. This Court should grant review to clarify that the public-welfare/regulatory exception doesn't apply outside the context of statute dealing with dangerous items.

1. Below, the court of appeals addressed 8 U.S.C. § 1325(a)(2), which regulates the entry of noncitizens into the United States. *United States v. Rizo-Rizo*, 16 F.4th 1292, 1296–98 (9th Cir. 2021). The statute makes it a crime for any "alien" to "enter[] or attempt[] to enter the United States at any time or place other than as designated by immigration officers." 8 U.S.C. § 1325(a)(1). A first offense is a misdemeanor, punishable by up to six months in jail; a "subsequent commission" of the offense is a felony, punishable by up to two years in prison. *Id.* § 1325(a). The statute regulates people, not items. And it regulates immigration flow, not danger.

In holding that the statute fit under the public-welfare/regulatory exception, the court pointed to a series of factors that it thought suggested it should fit under the exception. *Rizo-Rizo*, 16 F.4th at 1296–97. The court claimed that the statute regulates "conduct that individuals would legitimately expect to be unlawful" and that "'[c]rosing international borders is a type of conduct generally subject to stringent public regulation.'" *Id.* (quoting *United States v. Martinez-Morel*, 118 F.3d

710, 716 (10th Cir. 1997)). The court also noted the Petitioners were charged with misdemeanors. *Id.*

But the court never addressed the proper "threshold" question of whether the statute deals with "dangerous and deleterious devices" such that an individual should know that their actions might raise a "public danger." *Staples*, 511 U.S. at 612 n.6 (internal quotation marks omitted). And, of course, the statute has nothing to do with seeking to prevent "danger." *Morissette*, 342 U.S. at 254–56. It doesn't "regulate potentially harmful or injurious items," like guns or drugs. *Staples*, 511 U.S. at 607. Thus, the court of appeals incorrectly held that the presumption of mens rea didn't apply to § 1325(a)(1), even though the provision looks nothing like the few statutes this Court has held fit under the exception.

This was not an isolated mistake by the Ninth Circuit. As the panel below noted, the Ninth Circuit had similarly held that the illegal-reentry statute (8 U.S.C. § 1326) fit under the public-welfare/regulatory exception too. *Rizo-Rizo*, 16 F.4th at 1297–98 (citing *Pena-Cabanillas v. United States*, 394 F.2d 785, 789 (9th Cir. 1968)). The court reached this conclusion about the reentry statute even though it has nothing to do with dangerous items. *See* 8 U.S.C. § 1326(a).

Nor has it escaped this Court's attention that the Ninth Circuit has a wayward test for the public-welfare/regulatory exception. Justice Thomas flagged almost two decades ago that the Ninth Circuit was improperly applying the exception. *Hanousek v. United States*, 528 U.S. 1102, 1103–04 (2000) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari). He pointed out that the Ninth Circuit, in a case involving the prosecution of a defendant under the Clean Water Act, had held the exception applies without addressing the proper "threshold matter" in deciding if "a particular statute" fits under the exception: whether the

statute regulates a "category of dangerous and deleterious devices" that a court could assume would "alert an individual that" he or she is dealing with something that could be a "public danger." *Id.* (quoting *Staples*, 511 U.S. at 613 n.6). As the decision below reveals, nothing has changed since.

For these reasons, this Court should grant review to realign the lower court's view about the public-welfare/regulatory exception with the Court's precedent.

**2.** Other sister circuits have joined the Ninth Circuit's overly expansive view of the "limited" public-welfare/regulatory exception. *Staples*, 511 U.S. at 607.

The Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits have relied on *Pena-Cabanillas*—the Ninth Circuit decision that held that the illegal-reentry statute falls under the exception—to hold that the presumption of mens rea does not apply to the illegal-reentry statute (8 U.S.C. § 1326) because it is a regulatory offense. *See United States v. Morales-Palacios*, 369 F.3d 442, 447–48 (5th Cir. 2004) (holding § 1326 lacks a mens rea because it is a "regulatory offense[]"); *United States v. Carlos-Colmenares*, 253 F.3d 276, 279 (7th Cir. 2001) (holding § 1326 contained no mens rea because it was a "[r]egulatory offense[]," which is an offense "that arise[s] out of optional activities" (emphasis removed)); *United States v. Henry*, 111 F.3d 111, 113–14 (11th Cir. 1997) (holding § 1326 contains no mens rea because it is "a regulatory statute enacted to assist in the control of unlawful immigration by aliens"); *United States v. Martinez-Morel*, 118 F.3d 710, 716 (10th Cir. 1997) (holding § 1326 contains no mens rea because, as a "regulatory measure" there was a "presumption of strict liability"); *United States v. Hussein*, 675 F.2d 114, 115 (6th Cir. 1982) (holding § 1326 contained no mens rea because it "was promulgated as a regulatory measure pursuant to Congress' plenary power over aliens").

Similarly, the Fifth and Ninth Circuits had both held that 18 U.S.C. § 922(g)—the statute prohibiting those in certain status from possessing a firearm—was exempt from the presumption of mens rea because they fit under the public-welfare/regulatory exception. *See, e.g., United States v. Schmitt,* 748 F.2d 249, 252 (5th Cir. 1984);*United States v. Pruner*, 606 F.2d 871, 873–74 (9th Cir. 1979). Those results, however, were overturned in *Rehaif*, where this Court summarily claimed that the statute was not "part of a regulatory or public welfare program[.]" 139 S. Ct. at 2197

These cases show that there is widespread misapplication of the public-welfare/regulatory exception. That suggests this Court should grant review to provide more clarification.

## II. This petition presents an important issue with far-reaching implications.

This Court should grant review because the question presented touches on an important issue: the presumption of mens rea. This is a foundational principle of statutory construction that goes to the heart of the legitimacy of criminal law: that "wrongdoing must be conscious to be criminal[.]" *Elonis v. United States*, 575 U.S. 723, 734 (2015) (quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952)). By misapplying an exception to the presumption of mens rea, courts are undermining that basic principle. Indeed, in the last few years, the Court has granted review to determine how the presumption applies to two different statutes. *See Ruan v. United States*, 142 S. Ct. 457, 457 (2021) (granted review to resolve the mens rea for 21 U.S.C. § 841(a)); *Kahn v. United States*, 142 S. Ct. 457, 457 (2021) (granted review to resolve the mens rea for 21 U.S.C. § 841(a)); *Rehaif*, 139 S. Ct. at 2194 (granted review to resolve the mens rea for 18 U.S.C. § 922(a)). One of those cases—

*Rehaif*—involved no circuit split, like this one. *See* 139 S. Ct. at 2201 (Alito, J., dissenting) (noting that the majority had "overturne[d] the long-established interpretation of an important criminal statute, 18 U.S.C. § 922(g), an interpretation that has been adopted by every single Court of Appeals to address the question").

The Court should also grant review here because the scope of the public-welfare/regulatory exception could affect a huge number of statutes. As is, courts have already held the exception applies to the two most charged federal offenses: the improper-entry offense in 8 U.S.C. § 1325 and the illegal-reentry offense in 8 U.S.C. § 1326. Those two offenses alone make *more than half* of all federal prosecutions. *See* Transactional Records Access Clearinghouse, "Federal Criminal Prosecutions Sharply Lower in December," February 20, 2018, *available at* https://trac.syr.edu/tracreports/crim/547/ (documenting that, as of December 2018, prosecutions for illegal entry and reentry made up about 65% of all federal prosecutions for that year). Thus, the lower court's ruling will affect an enormous number of cases.

For these reasons, this Court should grant review now. It should not wait for these issues to further percolate.

## III. This case presents an ideal vehicle to resolve the question presented.

Below, Petitioners argued the public-welfare/regulatory exception should not apply to their statutes of conviction. The Ninth Circuit squarely rejected that argument on the merits, holding the exception applied. *United States v. Rizo-Rizo*, 16 F.4th 1292, 1296–97 (9th Cir. 2021). The circuit court then denied a petition for rehearing en banc in which Petitioners asked the court to realign its caselaw with this Court's. Thus, the question presented was squarely presented below and

thoroughly vetted. This petition, then, will allow the Court to resolve the question presented.

This case is also a good vehicle to resolve the question presented because it is case dispositive. If the public-welfare/regulatory exception to the presumption of mens rea does not apply to § 1325(a)(1), the presumption of mens rea would apply. *See Rehaif v. United States*, 139 S. Ct. 2191, 2917 (2019). And because nothing rebuts that presumption, it would establish that a mens rea attaches to each element of the charged offense, including the alienage element. *See* 8 U.S.C. § 1325(a)(1) (requiring the government to prove defendant was an "alien"). As a result, it would follow that the judges overseeing Petitioners' guilty plea hearings would have affirmatively misadvised them about the elements of the charged offense when they told Petitioners that knowledge of alien was not an element. This misadvisal would be error under Federal Rule of Criminal Procedure 11(b)(1)(G), which requires a judge presiding over a guilty plea to "inform the defendant of, and determine that the defendant understands . . . the nature of each charge to which the defendant is pleading guilty."

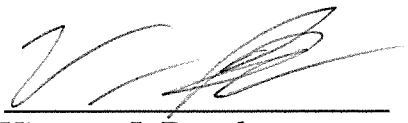
For this reason, if this Court holds that the lower court misapplied the public-welfare/regulatory exception, it would mean the lower court erred, and this Court would need to remand the case for the lower court to conduct a harmless-error analysis in the first instance. *See Rehaif*, 139 S. Ct. at 2200 (remanding for the lower court to address harmless error in the first instance).

## CONCLUSION

The petition for a writ of certiorari should be granted.

March 4, 2022

Respectfully submitted,



Vincent J. Brunkow

# Appendix

16 F.4th 1292
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Ricardo RIZO-RIZO, Defendant-Appellant.

No. 20-50172
|
Argued and Submitted August 3, 2021 Pasadena, California
|
Filed October 29, 2021

**Synopsis**

**Background:** After defendant pled guilty in the United States District Court for the Southern District of California, Barry M. Kurren, United States Magistrate Judge, to attempted illegal reentry, and defendant appealed. The District Court, Marilyn L. Huff, Senior District Judge, 2020 WL 3100051, affirmed, and defendant appealed.

**[Holding:]** The Court of Appeals, Bennett, Circuit Judge, held that as matter of first impression, knowledge of alienage is not element of crime of attempted illegal entry.

Affirmed.

**Procedural Posture(s):** Appellate Review.

West Headnotes (11)

[1] **Aliens, Immigration, and Citizenship** ⇐ Unlawful entry or presence

Attempted illegal entry into United States was regulatory offense, and thus knowledge of alienage was not element; statute was enacted to control unlawful immigration and prohibited conduct that individuals would legitimately expect to be unlawful, and penalty for violating statute was fine or imprisonment of up to six months for first offense.

[2] **Criminal Law** ⇐ Review De Novo

Court of Appeals reviews de novo plea colloquy's adequacy.

[3] **Criminal Law** ⇐ Acts prohibited by statute

In determining what mental state is required to prove violation of criminal statute, court looks to its words and intent of Congress.

[4] **Aliens, Immigration, and Citizenship** ⇐ Unlawful entry or presence

Specific intent of offense of attempted illegal entry into United States is simply that person specifically intended to enter United States at time or place other than as designated by immigration officers. Immigration and Nationality Act § 275, 8 U.S.C.A. § 1325(a)(1).

[5] **Aliens, Immigration, and Citizenship** ⇐ Unlawful entry or presence

Alien has not "entered" United States, for purposes of statute prohibiting illegal reentry after deportation, unless he does so free from official restraint. Immigration and Nationality Act § 276, 8 U.S.C.A. § 1326(a).

[6] **Aliens, Immigration, and Citizenship** ⇐ Unlawful entry or presence

Offense of attempted illegal reentry into United States requires that defendant had purpose, i.e., conscious desire, to reenter United States without Attorney General's express consent. Immigration and Nationality Act § 276, 8 U.S.C.A. § 1326(a).

[7] **Aliens, Immigration, and Citizenship** ⇐ Unlawful entry or presence

Defendant's knowledge of his citizenship status can be relevant to whether defendant believed

he needed Attorney General's permission before attempting reentry, and lack of such knowledge is possible defense that negates required intent in prosecution for attempted illegal reentry. Immigration and Nationality Act § 276, 8 U.S.C.A. § 1326(a).

[8] **Criminal Law** ⇐ Acts prohibited by statute

Silence itself does not necessarily suggest that Congress intended to dispense with conventional mens rea element in criminal statute.

[9] **Criminal Law** ⇐ Criminal Intent and Malice

**Criminal Law** ⇐ Acts prohibited by statute

In determining mental state required to prove violation of criminal statute, courts usually construe statutes in light of background rules of common law, in which requirement of some mens rea for crime is firmly embedded.

[10] **Criminal Law** ⇐ Acts prohibited by statute

Presumption in favor of scienter does not apply when Congress creates certain regulatory or public welfare offenses, which impose form of strict criminal liability through statutes that do not require defendant to know facts that make his conduct illegal.

1 Cases that cite this headnote

[11] **Criminal Law** ⇐ Acts prohibited by statute

In determining whether statute is regulatory offense as to which presumption in favor of scienter does not apply, court looks at offense's peculiar nature and quality, as well as expectations that individuals may legitimately have in dealing with regulated activity.

1 Cases that cite this headnote

*1293 Appeal from the United States District Court for the Southern District of California, Marilyn L. Huff, District Judge, Presiding, D.C. Nos. 3:20-mj-20210-BMK-H-1, 3:20-mj-20210-BMK-H

**Attorneys and Law Firms**

Doug Keller (argued) and Michael Marks, Federal Defenders of San Diego Inc., San Diego, California, for Defendant-Appellant.

David Chu (argued), Assistant United States Attorney; Daniel E. Zipp, Chief, Appellate Section, Criminal Division; Robert S. Brewer, Jr., United States Attorney; United States Attorney's Office, San Diego, California; for Plaintiff-Appellee.

Before: Richard A. Paez, Consuelo M. Callahan, and Mark J. Bennett, Circuit Judges.

## OPINION

BENNETT, Circuit Judge

[1] Defendant Ricardo Rizo-Rizo claims knowledge of alienage is an element of the crime of attempted illegal entry in violation of 8 U.S.C. § 1325(a)(1). The magistrate judge rejected Rizo-Rizo's contention that knowledge of alienage was such an element and so did not recite it as an element during Rizo-Rizo's plea colloquy. Rizo-Rizo nonetheless entered a guilty plea and then appealed to the district court, which also rejected his contention. We have jurisdiction pursuant to 28 U.S.C. § 1291 to consider Rizo-Rizo's appeal of those decisions. We hold that 8 U.S.C. § 1325(a) is a regulatory offense, and thus knowledge of alienage is not an element.

*1294 I.

A border patrol agent found and stopped Rizo-Rizo near the United States/Mexico border. When questioned, Rizo-Rizo admitted that he was a citizen of Mexico without appropriate immigration documents to be legally present in the United States. As a result, the agent arrested him. Rizo-Rizo was then questioned again, waived his Miranda rights, and confirmed that he was a citizen of Mexico who had just "illegally entered the United States ...."

Rizo-Rizo was charged with the misdemeanor of attempted illegal entry, in violation of 8 U.S.C. § 1325(a)(1), and he chose to plead guilty without a plea agreement. During the plea colloquy, the magistrate judge listed these elements of attempted illegal entry:

> First, the Defendant was at the time of Defendant's attempted entry into the United States an alien, that is, a person who is not a natural born or naturalized citizen or a national of the United States.
>
> Second, the Defendant had the specific intent to enter the United States at a time and place other than as designated by immigration officers.
>
> Third, the Defendant also had the specific intent to enter the United States free from official restraint, meaning the Defendant intended to enter without being detected, apprehended, or taken into custody by government authorities so that he or she could roam freely in the United States.
>
> And, fourth, the Defendant did something that was a substantial step toward committing the crime and that strongly corroborated the Defendant's intent to commit the crime.

Defense counsel objected, claiming that "the Defendant ha[d] to know he was an alien" and thus that the magistrate judge had improperly omitted an element of the offense. The magistrate judge overruled the objection, and Rizo-Rizo pled guilty and was sentenced to time served. On appeal, the district court affirmed, holding that knowledge of alienage was not an element of 8 U.S.C. § 1325(a)(1).

II.

[2] We review de novo the adequacy of a plea colloquy. *United States v. Minore*, 292 F.3d 1109, 1115 (9th Cir. 2002). Whether knowledge of alienage is an element of 8 U.S.C. § 1325(a)(1) is an issue of first impression in the Ninth Circuit.

III.

[3] We begin, of course, with the statutory text. "In determining what mental state is required to prove a violation of the statute, we look to its words and the intent of Congress." *United States v. Price*, 980 F.3d 1211, 1218 (9th Cir. 2019) (quoting *I.R. ex rel. E.N. v. L.A. Unified Sch. Dist.*, 805 F.3d 1164, 1167 (9th Cir. 2015)). Section 1325(a)(1) provides that "[a]ny alien who ... enters or attempts to enter the United States at any time or place other than as designated by immigration officers" will be fined, or imprisoned up to six months, or both, for a first offense. 8 U.S.C. § 1325(a)(1).

[4] [5] While subsection (a)(1) contains no express mens rea requirement, that subsection's attempt offense incorporates the common law requirement of specific intent to commit the offense. *Cf. United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000) (en banc) (explaining that attempted illegal reentry is a specific intent crime under common law principles of attempt). But *that* specific intent element does not require the government to prove knowledge of alienage. ***1295** The alienage element precedes the phrase "enters or attempts to enter": "Any alien who ... enters or attempts to enter the United States ...." 8 U.S.C. § 1325(a)(1). So the specific intent goes to the entry, not the status of the person entering. The specific intent of the attempt offense in § 1325 is simply that the person specifically intended to enter the United States at a time or place other than as designated by immigration officers, as correctly recited by the magistrate judge. [1]

[6] [7] Rizo-Rizo argues that our decisions in *Gracidas-Ulibarry*, 231 F.3d 1188, and *United States v. Smith-Baltiher*, 424 F.3d 913 (9th Cir. 2005), foreclose this interpretation. In *Smith-Baltiher*, we held that a defendant charged with attempted illegal reentry, 8 U.S.C. § 1326(a), was entitled to present evidence that he thought he was a United States citizen. 424 F.3d at 925. Section 1326(a) penalizes "any alien who [having been deported] enters, attempts to enter, or is at anytime found in, the United States, *unless ... the Attorney General has expressly consented ...* [*or*] *he was not required to obtain such advance consent.*" 8 U.S.C. § 1326(a) (emphasis added). The attempt offense in § 1326(a) requires that "the defendant had the purpose, i.e. [,] conscious desire, to reenter the United States without the

express consent of the Attorney General." *Smith-Baltiher*, 424 F.3d at 923 (quoting *Gracidas-Ulibarry*, 231 F.3d at 1196). Thus, a defendant's knowledge of his citizenship status can be relevant to whether the defendant believed he needed the Attorney General's permission before attempting reentry. *Id.* at 925. By contrast, the attempt offense in § 1325(a)(1) contains no similar provision for which the defendant's knowledge of his citizenship status would matter. And, in *Smith-Baltiher*, we did not hold that knowledge of alienage is an element of § 1326(a)'s attempt offense. Instead, we decided only that knowledge of alienage was a possible defense that negates the required intent (*that the defendant intended to enter the United States without consent*). *Id.* at 925. *Smith-Baltiher* does not support Rizo-Rizo.

Rizo-Rizo also argues that a knowledge of alienage requirement follows from *Rehaif v. United States*, —— U.S. ——, 139 S. Ct. 2191, 204 L.Ed.2d 594 (2019), in which the Supreme Court decided that a defendant must know of his status as an "alien ... illegally or unlawfully in the United States" to be convicted of firearm possession under 18 U.S.C. § 922(g). *Id.* at 2195. But *Rehaif* concerned an *express* mens rea requirement. "A separate provision, § 924(a)(2), adds that anyone who '*knowingly* violates' [§ 922(g)] shall be fined or imprisoned for up to 10 years." *Id.* at 2194. Thus, the question in *Rehaif* "concern[ed] the scope of the word 'knowingly,' " and the Court determined that it "applie[d] both to the defendant's conduct and to the defendant's status." *Id.* There is no such express mens rea requirement in § 1325(a)(1) that would apply to the defendant's status. Thus, *Rehaif* does not support Rizo-Rizo's reading of § 1325(a)(1). *See United States v. Collazo*, 984 F.3d 1308, 1324 (9th Cir. 2021) (en banc) (explaining that "[w]here a statute includes a mens rea requirement," courts are "not ***1296** faced with the question whether Congress intended to dispense with a mens rea requirement entirely" but must only determine how far a "knowingly" modifier extends into the statute).

**[8]** **[9]** **[10]** Though § 1325(a) is silent on knowledge of alienage, that is not the end of the analysis. Silence itself "does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element." *Staples v. United States*, 511 U.S. 600, 605, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994); *see Rehaif*, 139 S. Ct. at 2195. Rather, we usually construe statutes "in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded." *Staples*, 511 U.S. at 605, 114 S.Ct. 1793 (citation omitted).[2] This "presumption" in favor of scienter, however, does not apply when Congress creates certain regulatory or public welfare offenses, which "impose a form of strict criminal liability through statutes that do not require the defendant to know the facts that make his conduct illegal." *Id.* at 606, 114 S.Ct. 1793; *see also Morissette v. United States*, 342 U.S. 246, 256, 72 S.Ct. 240, 96 L.Ed. 288 (1952). In construing such regulatory offenses, "we have inferred from silence that Congress did not intend to require proof of *mens rea* to establish an offense." *Staples*, 511 U.S. at 606, 114 S.Ct. 1793.

**[11]** So we must decide whether § 1325(a) is a regulatory offense as to which the presumption in favor of scienter does not apply. We look at "the peculiar nature and quality of the offense," *Morissette*, 342 U.S. at 259, 72 S.Ct. 240, as well as "the expectations that individuals may legitimately have in dealing with the regulated [activity]," *Staples*, 511 U.S. at 619, 114 S.Ct. 1793. For example, hand grenades are so dangerous that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act," and so the presumption does not apply. *United States v. Freed*, 401 U.S. 601, 609, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971); *see also United States v. Balint*, 258 U.S. 250, 252–54, 42 S.Ct. 301, 66 L.Ed. 604 (1922) (upholding strict liability for statute prohibiting the sale of certain narcotics). But the Supreme Court did apply the presumption to a statute prohibiting unauthorized possession of food stamps, because unauthorized possession (as defined by the statute) covered a broad range of innocent conduct. *Liparota v. United States*, 471 U.S. 419, 426, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985).

We know that § 1325(a) was enacted to control unlawful immigration. *See United States v. Corrales-Vazquez*, 931 F.3d 944, 947 (9th Cir. 2019); H.R. Rep. No. 70-2418, at 7–8H.R. Rep. No. 70-2418, at 7–8 (1929). This is a normal regulatory function of the sovereign. And § 1325(a)(1)

prohibits conduct that individuals would legitimately expect to be unlawful. "[C]rossing international borders is a type of conduct generally subject to stringent public regulation," *United States v. Martinez-Morel*, 118 F.3d 710, 716 (10th Cir. 1997) (cleaned up), and entering the country ***1297** outside of designated ports of entry is a surreptitious type of international border crossing, *see* H.R. Rep. No. 70-2418, at 3H.R. Rep. No. 70-2418, at 3 (describing entry outside of a port of entry as "surreptitious or unlawful entry"). Thus, this is *not* a case in which interpreting the statute as a regulatory offense would sweep in "a broad range of apparently innocent conduct." *Liparota*, 471 U.S. at 426, 105 S.Ct. 2084.

We also consider the penalties that attach to a violation. In *Staples*, the Supreme Court explained that a statute's potentially harsh penalty of up to ten years' imprisonment conflicts with the concept of a regulatory offense, which originally "involved statutes that provided for only light penalties such as fines or short jail sentences." 511 U.S. at 616, 114 S.Ct. 1793. Thus, "a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement." *Id.* at 618, 114 S.Ct. 1793. The penalty for violating § 1325(a) is a fine or imprisonment of up to six months for the first offense, or both. 8 U.S.C. § 1325(a). While the penalty increases to no more than two years for a subsequent offense, *id.*, an offender should be on notice that a *repeat* entry would be unlawful. Thus, the penalties associated with violating § 1325(a) at least lean toward Congress intending the statute to be a regulatory offense.

And, importantly, we do not write on a blank slate. In *Pena-Cabanillas v. United States*, 394 F.2d 785 (9th Cir. 1968), *abrogated on other grounds by Gracidas-Ulibarry*, 231 F.3d 1188, we held that § 1326(a),[3] the illegal *re*entry statute, which in 1968 imposed a maximum imprisonment term of not more than two years, Immigration and Nationality Act, Pub. L. No. 414, § 276, 66 Stat. 163, 229 (1952) (current version at 8 U.S.C. § 1326), "is a regulatory statute enacted to assist in the control of unlawful immigration." *Id.* at 788.[4] Because § 1326(a) is a regulatory offense, "[t]he government need only prove that the accused is an alien and that he illegally entered [or attempted to illegally enter] the United States after being deported." *Pena-Cabanillas*, 394 F.2d at 789.[5] Given the similarity of §§ 1325 and ***1298** 1326 for regulatory offense purposes (and given that section § 1326 imposes punishments greater or equal to § 1325), we would need a compelling reason to find that § 1325(a) is not a regulatory offense. *Cf. Metro. Life Ins. v. Taylor*, 481 U.S. 58, 65, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987) (noting that a *presumption* that similar language in statutes covering the same subject has a "similar meaning"); *United States v. Novak*, 476 F.3d 1041, 1051 (9th Cir. 2007) (en banc) ("[C]ourts generally interpret similar language in different statutes in a like manner when the two statutes address a similar subject matter."). We could conceivably find such a reason if the legislative history of § 1325 were sufficiently different. But the precursor statutes to both § 1325(a) and § 1326(a), which bear substantially similar language to the modern statutes, were enacted together in 1929 as part of the same bill to regulate unlawful immigration. Act of Mar. 4, 1929, Pub. L. No. 70-1018, § 2, 45 Stat. 1551, 1551; *see* H.R. Rep. No. 70-2418, at 6–8H.R. Rep. No. 70-2418, at 6–8 (1929). Likewise, both § 1325(a) and § 1326(a) were enacted together as part of the Immigration and Nationality Act of 1952. *See* Pub. L. No. 82-414Pub. L. No. 82-414, §§ 275, 276, 66 Stat. 163, 229; *cf. United States v. Nishiie*, 996 F.3d 1013, 1026 (9th Cir. 2021) (noting that when statutes are enacted shortly after one another and address the same subject and use similar language, that demonstrates Congress's intent that they have the same meaning).

Congress has adopted express mens rea requirements in other parts of § 1325. Section 1325(a)(3) punishes "[a]ny alien who ... attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact." 8 U.S.C. § 1325(a)(3).[6] And § 1325(c) prohibits any individual from "knowingly enter[ing] into a marriage for the purpose of evading any provision of the immigration laws." *Id.* § 1325(c). Adjacent statutes also have express mens rea requirements. Section 1324(a)(1)(A) prohibits bringing a person into the country "knowing that a person is an alien," and § 1327 prohibits "knowingly aid[ing] or assist[ing] any [inadmissible] alien ... to enter the

United States." *See* *Pena-Cabanillas*, 394 F.2d at 789 & n.4 (identifying express mens rea provisions in the Immigration and Nationality Act). Congress also did not include express mens rea requirements in the precursor provision to § 1325(a), while including such requirements for other provisions in the same statute. *See* Act. of Mar. 4, 1929, 45 Stat. at 1551 (amending a law to prohibit knowingly bringing into the country a deported alien). And, of course, "where Congress has carefully employed a term in one place and excluded it in another, it should not be implied where excluded." *Pena-Cabanillas*, 394 F.2d at 789.

Our analysis confirms that 8 U.S.C. § 1325(a) is a regulatory offense, and no presumption in favor of scienter applies.[7] ***1299** We thus conclude that Congress's silence as to knowledge of alienage means what such silence in a regulatory offense usually means. We therefore hold that knowledge of alienage is not an element of § 1325(a). Accordingly, Rizo-Rizo's conviction is affirmed.

**AFFIRMED.**

**All Citations**

16 F.4th 1292, 21 Cal. Daily Op. Serv. 11,133

## Footnotes

1 We have recognized that, "for the purposes of § 1326, 'enter' has a narrower meaning than its colloquial usage." *United States v. Lombera-Valdovinos*, 429 F.3d 927, 928 (9th Cir. 2005). "An alien has not entered the United States under § 1326 unless he does so 'free from official restraint.' " *Id.* (quoting *Gracidas-Ulibarry*, 231 F.3d at 1191 n.3). Thus, the attempt offense in § 1325(a)(1) also requires that the person specifically intended to enter without being taken into custody by government authorities, as the magistrate judge correctly recited as an element.

2 According to *Morissette v. United States*, 342 U.S. 246, 262, 72 S.Ct. 240, 96 L.Ed. 288 (1952):

> Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act.

There is no indication that illegal entry by a noncitizen was a common law crime. *Cf.* *Pena-Cabanillas v. United States*, 394 F.2d 785, 788 (9th Cir. 1968) (finding 8 U.S.C. § 1326, which criminalizes illegal reentry, was "not based on any common law crime"), *abrogated on other grounds by* *Gracidas-Ulibarry*, 231 F.3d 1188.

3 In pertinent part, § 1326(a) punishes:

> 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.

8 U.S.C. § 1326(a). The statutory text of the provision does not materially differ from the version considered by the *Pena-Cabanillas* court.

4 Other circuits similarly view § 1326(a) as a regulatory offense. *See, e.g.*, *United States v. Morales-Palacios*, 369 F.3d 442, 448 (5th Cir. 2004), *abrogated on other grounds by* *United States v. Resendiz-Ponce*, 549 U.S. 102, 127 S.Ct. 782, 166 L.Ed.2d 591 (2007); *United States v. Carlos-Colmenares*, 253 F.3d 276, 279 (7th Cir. 2001); *United States v. Martinez-Morel*, 118 F.3d 710, 717 (10th Cir. 1997); *United States v. Henry*, 111 F.3d 111, 114 (11th Cir. 1997); *United States v. Hussein*, 675 F.2d 114, 115–16 (6th Cir. 1982) (per curiam).

5 In *Gracidas-Ulibarry*, we described § 1326(a) as a "general intent" offense. 231 F.3d at 1195 (interpreting our holding in *Pena-Cabanillas*). Rizo-Rizo argues from this that the statute requires a mens rea of "knowledge." But "general intent" can mean several things, *see* *United States v. Bailey*, 444 U.S. 394, 403, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980), and in the context of § 1326(a), it means only that the reentry must be a voluntary act, *Pena-Cabanillas*, 394 F.2d at 788 n.2 ("We refer to [the voluntary act requirement] as 'general intent' to do or not do the act.").

6 It makes sense that Congress would add an express mens rea requirement here. When a noncitizen crosses into the United States at a non-designated entry point, his entry alone is illegal, but when a noncitizen crosses *at* a designated port of entry, only his entry through willful falsity contravenes the law.

7 Rizo-Rizo claims that a regulatory offense is not enough to defeat the presumption, and that we must also find "a 'strong indication' that Congress intended § 1325(a)(1) to be a strict-liability offense." But he misunderstands the regulatory offense exception: regulatory offenses are offenses "which we have understood Congress to impose a form of strict criminal liability through statutes that do not require the defendant to know the facts that make his conduct illegal." *Staples*, 511 U.S. at 606, 114 S.Ct. 1793.

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**NOT FOR PUBLICATION**

FILED

OCT 29 2021

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>EFRAIN CERVANTES-RAMIREZ,<br><br>Defendant-Appellant. | No. 20-50176<br><br>D.C. No.<br>3:19-mj-23221-FAG-H-1<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the Southern District of California
Marilyn L. Huff, District Judge, Presiding

Argued and Submitted August 3, 2021
Pasadena, California

Before: PAEZ, CALLAHAN, and BENNETT, Circuit Judges.

Defendant Efrain Cervantes-Ramirez appeals the district court's decision that affirmed the magistrate judge's acceptance of his guilty plea to the crime of attempted illegal entry in violation of 8 U.S.C. § 1325(a)(1). Cervantes-Ramirez claimed knowledge of alienage was an element of that offense. The magistrate judge rejected Cervantes-Ramirez's contention and so did not recite knowledge of alienage

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

as an element of the offense during the plea colloquy. Cervantes-Ramirez nonetheless entered a guilty plea and then appealed to the district court, which also rejected his contention. We have jurisdiction pursuant to 28 U.S.C. § 1291 to consider Cervantes-Ramirez's appeal of those decisions, and we affirm.

In a case consolidated for argument with this one, we held that 8 U.S.C. § 1325(a) is a regulatory offense, and knowledge of alienage is not an element of the offense. *United States v. Rizo-Rizo*, [1] No. 20-50172, slip op. at 3 (9th Cir. Oct. 29, 2021). As a result, we reject Cervantes-Ramirez's contention here and affirm his conviction.

**AFFIRMED**.

[1] The parties jointly moved to consolidate the cases for argument because they "raise[d] identical legal issues," and the briefs filed by Cervantes-Ramirez and Rizo-Rizo advanced identical arguments.

FILED

FEB 4 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>EFRAIN CERVANTES-RAMIREZ,<br><br>Defendant-Appellant. | No. 20-50176<br><br>D.C. No.<br>3:19-mj-23221-FAG-H-1<br>Southern District of California,<br>San Diego<br><br>ORDER |

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| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>RICARDO RIZO-RIZO,<br><br>Defendant-Appellant. | No. 20-50172<br><br>D.C. Nos.<br>3:20-mj-20210-BMK-H-1<br>3:20-mj-20210-BMK-H |

Before: PAEZ, CALLAHAN, and BENNETT, Circuit Judges.

The panel has voted to deny the consolidated petition for rehearing. Judges Callahan and Bennett have voted to deny the petition for rehearing en banc, and Judge Paez has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

# 8 USCS § 1325

Current through Public Law 117-80, approved December 27, 2021.

*United States Code Service > TITLE 8. ALIENS AND NATIONALITY (Chs. 1 — 15) > CHAPTER 12. IMMIGRATION AND NATIONALITY (§§ 1101 — 1537) > IMMIGRATION (§§ 1151 — 1382) > GENERAL PENALTY PROVISIONS (§§ 1321 — 1330)*

## § 1325. Improper entry by alien

**(a) Improper time or place; avoidance of examination or inspection; misrepresentation and concealment of facts.** Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18, United States Code, or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, United States Code, or imprisoned not more than 2 years, or both.

**(b) Improper time or place; civil penalties.** Any alien who is apprehended while entering (or attempting to enter) the United States at a time or place other than as designated by immigration officers shall be subject to a civil penalty of—

**(1)** at least $50 and not more than $250 for each such entry (or attempted entry); or

**(2)** twice the amount specified in paragraph (1) in the case of an alien who has been previously subject to a civil penalty under this subsection.

Civil penalties under this subsection are in addition to, and not in lieu of, any criminal or other civil penalties that may be imposed.

**(c) Marriage fraud.** Any individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, or fined not more than $250,000, or both.

**(d) Immigration-related entrepreneurship fraud.** Any individual who knowingly establishes a commercial enterprise for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, fined in accordance with title 18, United States Code, or both.

## History

**HISTORY:**

June 27, 1952, ch 477, Title II, Ch 8, § 275, 66 Stat. 229; Nov. 10, 1986, P. L. 99-639, § 2(d), 100 Stat. 3542; Nov. 29, 1990, P. L. 101-649, Title I, Subtitle B, Part 2, § 121(b)(3), Title V, Subtitle D, § 543(b)(2), 104 Stat. 4994, 5059; Dec. 12, 1991, P. L. 102-232, Title III, § 306(c)(3), 105 Stat. 1752; Sept. 30, 1996, P. L. 104-208, Div C, Title I, Subtitle A, § 105(a), 110 Stat. 3009-556.

United States Code Service
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**Pet. App. 13a**