No. 21-851

In the Supreme Court of the United States

RICHA NARANG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly exercised jurisdiction over petitioner's criminal trial, following the dismissal of the indictment in connection with her guilty plea to a substituted criminal information and petitioner's subsequent withdrawal of her guilty plea and election to proceed to trial.

2. Whether the court of appeals correctly determined that petitioner's convictions for visa fraud, in violation of 18 U.S.C. 1546(a), and conspiring to commit visa fraud, in violation of 18 U.S.C. 371, based on false statements that were material to the approval of the visa applications that contained them, did not violate the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3.

3. Whether the court of appeals correctly determined that the district court did not improperly shift to petitioner the burden to disprove the mens rea specified for her offense.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is not published in the Federal Reporter but is available at 2021 WL 3484683. The order of the district court (Pet. App. A25-A75) is unreported but is available at 2019 WL 3949308.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2021. A petition for rehearing was denied on September 7, 2021 (Pet. App. A83). The petition for a writ of certiorari was filed on December 6, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Eastern District of Virginia, petitioner

was convicted on one count of conspiring to commit visa fraud, in violation of 18 U.S.C. 371; and two counts of committing visa fraud, in violation of 18 U.S.C. 1546(a). Judgment 1. She was sentenced to six months of imprisonment, to be followed by two years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A23.

1. Petitioner was the Senior Business Development Manager at EcomNets, a Virginia company that purportedly provided information-technology services. Pet. App. A2, A41. In actuality, EcomNets's business model depended on the submission of fraudulent H-1B worker-visa applications. *Id.* at A2.

a. The H-1B visa program is a temporary worker program available to foreign applicants to work in the United States in specialty occupations requiring a bachelor's degree or its equivalent. Pet. App. A2-A3; see 8 U.S.C. 1101(a)(15)(H)(i)(B). Under the H-1B program, United States-based employers file petitions with U.S. Citizenship and Immigration Services (USCIS) in the Department of Homeland Security on behalf of noncitizen workers (beneficiaries), who seek U.S. approval to work for the employer. Pet. App. A3. Before filing a petition with USCIS, employers first file a labor-condition application (LCA) with the Department of Labor promising to pay the beneficiary the prevailing wage for his or her occupational classification. *Ibid.* Once an LCA is approved, the employer files a Form I-129 and supporting documentation with the USCIS for adjudication. *Ibid.* A USCIS adjudicator will then determine whether a genuine employer-employee relationship exists between the U.S. employer and the beneficiary and whether the beneficiary's employment will begin at the

time indicated in the petition and will conform to applicable wage and location specifications. *Ibid.*

Although third-party staffing companies, such as EcomNets, are not prohibited from filing H-1B petitions, USCIS reviews petitions filed by such entities particularly closely. Pet. App. A3. If USCIS discovers that documents were signed using fake names, that a staffing company would not be seeking placement until after a visa was granted, or that the listed job did not or would not exist at the time that the visa was approved, USCIS will deny the petition—and therefore decline to authorize the issuance of an H-1B visa to the foreign worker. *Ibid.*; see *id.* at A37.

b. EcomNets employees prepared LCAs and I-129 petitions on behalf of foreign beneficiaries. Pet. App. A4. Although the petitions listed EcomNets as the ultimate work location for the beneficiaries, the listed jobs were fictitious. *Ibid.* EcomNets did not intend for the beneficiaries to work for EcomNets, and EcomNets did not begin looking for third-party placements for beneficiaries until after the H-1B visas had been approved. *Ibid.*

EcomNets took several steps to conceal its scheme from USCIS adjudicators. It incorporated a series of shell companies that served as the applicants on EcomNets's H-1B applications, but were not actually independent from EcomNets. Pet. App. A4. And to create the appearance of independence, EcomNets falsified information about the shell companies in its visa applications. *Ibid.* For example, one EcomNets employee used different pseudonyms to sign applications from different shell companies. *Ibid.* EcomNets also included falsified leases for its shell companies in its visa applications. *Ibid.*

In addition, EcomNets's applications falsely represented that the shell companies had contracted to place H-1B beneficiaries at a "Green Technology Center" owned by EcomNets in Danville, Virginia, and included fictitious contracts and purchase orders between the shell companies and EcomNets to support that assertion. Pet. App. A4. In reality, no jobs were available at the Danville facility, which was "an essentially empty warehouse," and EcomNets did not intend for any H-1B beneficiary to work directly for EcomNets. *Id.* at A4; see *id.* at A4-A5, A39. Instead, once H-1B petitions were approved by USCIS, EcomNets required beneficiaries to sign voluntary leave letters, in order to avoid the company's obligation to pay beneficiaries who had been issued H-1B visas but had not yet begun working at other companies—whom EcomNets referred to as "benched" beneficiaries. *Id.* at A5, A41.

EcomNets would seek a job for that beneficiary with a third-party business only after one of the shell companies had secured an H-1B visa for that beneficiary. Pet. App. A39. Any such third-party business would then pay EcomNets for the beneficiary's services. *Ibid.* EcomNets retained a portion of that payment as profit and funneled the remainder to the beneficiary. *Ibid.* And EcomNets would also falsify signatures of beneficiaries on documents submitted to USCIS. *Id.* at A5.

c. Petitioner was involved in all aspects of the scheme. Pet. App. A5, A42. One of her primary responsibilities was to find job placements for approved H-1B beneficiaries at third-party businesses, and she maintained a list of the "benched" beneficiaries still looking for such jobs. *Id.* at A5, A42. She also played a key role in preparing fraudulent documents in support of the

scheme. *Id.* at A5. For example, petitioner requested that other employees use pseudonyms to sign and prepare documents, purportedly on behalf of the shell companies, and she participated in forging beneficiary signatures on offer letters submitted with H-1B applications. *Id.* at A5-A6. Petitioner also signed contractor agreements and purchase orders in which EcomNets agreed to host a beneficiary at its nonexistent Green Technology Center, and which were then included in the shell companies' H-1B applications. *Ibid.*

2. A grand jury in the Eastern District of Virginia returned an indictment against petitioner and other EcomNets employees. Indictment 1-26; see Pet. App. A6. Petitioner was charged with one count of conspiring to commit visa fraud, in violation of 18 U.S.C. 371, and two counts of committing visa fraud, in violation of 18 U.S.C. 1546(a). Indictment 5-12; Pet. App. A6.

Petitioner and the government reached a plea agreement in which petitioner agreed both to plead guilty to a one-count information charging her with wire fraud, in violation of 18 U.S.C. 1343, and to cooperate with the prosecution. Pet. App. A27. In exchange, the government agreed to dismiss the indictment with respect to petitioner. *Ibid.* Following a hearing, the district court accepted petitioner's guilty plea, found her guilty of wire fraud, and dismissed the indictment with respect to her. *Ibid.*

Several of petitioner's co-defendants also reached plea agreements, but two others did not. Pet. App. A27-A28. A grand jury returned a superseding indictment against those two remaining defendants, and they proceeded to trial. *Id.* at A28. During the trial, the district court concluded that the government had violated

its discovery obligations, and the court dismissed the indictment against those two defendants. *Id.* at A29.

Petitioner and her other co-defendants who had pleaded guilty moved to dismiss the charges against them as well based on the discovery violations the district court had found. Pet. App. A6-A7. The court declined to dismiss the charges on that basis but allowed petitioner and her co-defendants to withdraw their guilty pleas or to renegotiate their plea agreements with the government. *Id.* at A7.

At a status conference, petitioner's counsel argued that the district court could not "restore the indictment" and that the government had to seek a new indictment from the grand jury. C.A. App. 169. The court invited briefing on the issue but noted its tentative view that "there's no reason why the Court cannot reinstate the grand jury indictment," and that it would entail "a terrible waste of resources to have to have the grand jury look at it again." *Ibid.* The court advised petitioner's counsel that, "if you are formally telling the Court that your client wishes to withdraw her guilty plea, then I am going to vacate the plea colloquy and the findings connected to the plea, [and] reinstate the indictment." *Id.* at 171. The court explained that the reinstated indictment would provide "the legal structure of the case," and that "[t]hose then are the charges that [petitioner] is facing." *Ibid.*

Petitioner thereafter filed a second motion to dismiss the information, but she did not challenge the district court's ability to reinstate the earlier indictment. Pet. App. A7; see D. Ct. Doc. 250 (Aug. 25, 2017). In response, the government contended that the district court should deny petitioner's motion to dismiss, "vacate the defendant's guilty plea to the information,

reinstate the indictment against her, and schedule the case for trial." D. Ct. Doc. 254, at 8-9 (Sept. 8, 2017); see Pet. App. A7. At a hearing four days after the government's response was filed, the court denied petitioner's motion to dismiss, but it initially declined to grant the government's request to "reinstate the indictment, and set the case for trial." C.A. App. 180. The court stated that it was "not prepared to do that yet * * * unless" petitioner's counsel was "certain as to how [counsel's] client want[ed] to proceed at th[at] time." *Ibid.* Petitioner's counsel, however, "immediately indicated that [petitioner] was withdrawing her guilty plea and would like to proceed to trial," and "[t]he parties and court then discussed potential trial dates with no further discussion of the indictment." Pet. App. A8; see C.A. App. 180-181. Although the court did not at that time "enter[] a formal order reinstating the indictment, * * * the issue was never raised again by either party," and the parties and the court "all appear to have proceeded on the clear understanding that the indictment had been reinstated." Pet. App. A8.

Petitioner proceeded to a bench trial on the original charges alleged in the indictment, for conspiring to commit and committing visa fraud. Pet. App. A8. During closing argument, petitioner's counsel specifically referred to those counts of the indictment, and at the conclusion of the trial petitioner moved to dismiss the indictment based on the asserted insufficiency of the evidence without addressing any putative error in the reinstatement of the indictment itself. *Ibid.*

Following the trial, the district court issued a memorandum opinion setting forth its findings of fact and conclusions of law. Pet. App. A25-A75. The court's order observed that the court had "reinstated the original

indictment that had charged [petitioner] with one count of conspiracy to commit visa fraud and two counts of visa fraud." *Id.* at A31; see *id.* at A46. The court denied petitioner's motion to dismiss on insufficiency grounds and found her guilty on each of the charges on which she was tried. *Id.* at A46-A75. The court sentenced petitioner to six months of imprisonment. *Ibid.*

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A1-A24.

a. The court of appeals rejected petitioner's threshold contention that the district court had lacked jurisdiction over her trial, which was premised on the theory that the indictment had been dismissed with respect to petitioner and not properly reinstated pursuant to 18 U.S.C. 3296. Pet. App. A10-A15. Section 3296 provides that "any counts of an indictment or information that are dismissed pursuant to a plea agreement shall be reinstated by the District Court if" four conditions are met: "(1) the counts sought to be reinstated were originally filed within the applicable limitations period; (2) the counts were dismissed pursuant to a plea agreement approved by the District Court under which the defendant pled guilty to other charges; (3) the guilty plea was subsequently vacated on the motion of the defendant; and (4) the United States moves to reinstate the dismissed counts within 60 days of the date on which the order vacating the plea becomes final." 18 U.S.C. 3296(a). Petitioner contended that Section 3296's requirements impose jurisdictional limitations on a district court's authority to reinstate an indictment and that the government and the district court had not timely satisfied those requirements in petitioner's case. Pet. App. A11.

The court of appeals reserved judgment on the government's contention that Section 3296's requirements

were satisfied, finding that any error would not, in any event, be jurisdictional, and that petitioner's unpreserved claim of error did not warrant relief under plain-error review. Pet. App. A11. The court observed that, under this Court's precedent, "a federal court's jurisdiction over criminal cases turns entirely on the 'statutory or constitutional *power* to adjudicate the case.'" *Ibid.* (quoting *United States* v. *Cotton*, 535 U.S. 625, 630 (2002)). The court of appeals further observed that a district court's "power to hear criminal prosecutions stems from [18 U.S.C.] 3231, which confers" on district courts "subject-matter jurisdiction over all crimes against the United States." *Id.* at A12; see *id.* at A10 (noting that "§ 3231 gives district courts 'original jurisdiction . . . of all offenses against the laws of the United States.'" (quoting 18 U.S.C. 3231)). And the court observed that the "constitutional grand jury right * * * does not involve subject-matter jurisdiction" because it is "waivable," and that courts "have declined to read jurisdictional import into indictment defects." *Id.* at A12 (brackets and citation omitted).

The court of appeals found that "[s]everal unique facts compel[led] the conclusion" that petitioner "was being tried for crimes against the United States" and that the district court therefore "retained subject-matter jurisdiction." Pet. App. A12. The court noted that petitioner undisputedly was "originally charged pursuant to a valid indictment" alleging various "federal offenses" and that, although those charges had been dismissed, petitioner's "criminal case continued pursuant to a substituted charge" of a different federal offense. *Ibid.* The court explained that Section 3296 not only "permitted reinstatement of th[e] dismissed charges as part of an ongoing criminal case," but "appear[ed] to make that

reinstatement *mandatory* when timely requested," showing that "reinstatement was clearly a ministerial step," not a "discretionary" one. *Id.* at A13. And the court observed that the government and the district court "clearly attempted to and believed they had reinstated the charges," and the "case was retried by all parties on the basis of the original charges." *Ibid.*

The court of appeals accordingly recognized that "any technical failure to comply with § 3296 does not call into question the subject-matter jurisdiction of the [district] court" under Section 3231, "which does not condition the court's jurisdiction on compliance with the reinstatement provision." Pet. App. A13-A14. The court rejected petitioner's contention that the statutory deadline for the government to appeal the dismissal of an indictment, set forth in 18 U.S.C. 3731, shows that Section 3296's requirements are jurisdictional. *Id.* at A13 n.2. The court explained that, "[e]ven if § 3731 imposes a jurisdictional limit on a district court's authority to reconsider the merits of an indictment dismissal, § 3296 does not permit *reconsideration* of that previous order" and instead "serves an entirely different function": it "mandates the reinstatement of previously dismissed charges as part of an ongoing case following a defendant's withdrawal of a guilty plea to substituted charges." *Ibid.* And reviewing petitioner's unpreserved challenge on the merits for plain error, and assuming arguendo that petitioner could satisfy the other plain-error requirements, the court of appeals declined to "exercise [its] discretion to correct" the asserted error "because it did not seriously affect the fairness, integrity, or public reputation of [petitioner's] trial." *Id.* at A14.

b. The court of appeals also rejected petitioner's contention that a federal law or regulation directly

prohibiting EcomNets's third-party staffing practices was necessary for the indictment to allege a federal offense. Pet. App. A15. The court explained that, whether or not EcomNets's practices themselves comported with immigration law, petitioner's conspiracy and visa-fraud "charges relate to *fraud* in the visa application process" and so did not depend on whether EcomNets's practices were lawful. *Id.* at A16.

Finally, the court of appeals rejected petitioner's contention that the trial evidence was insufficient to show that she possessed the mens rea to commit visa fraud. Pet. App. A19-A20. Specifically, petitioner contended that the district court had improperly treated her advice-of-counsel defense as an affirmative defense—as opposed to a defense that negates a required mens rea, on which the government bears the burden of proof. *Id.* at A19. The court reserved judgment on that issue because it determined that, "[r]egardless of whether the defense is technically an affirmative one," petitioner's defense was refuted by the record. *Ibid.* The court explained that "advice of counsel rebuts mens rea only when (1) a defendant fully discloses pertinent facts to an attorney; and (2) relies in good faith on that advice." *Ibid.* And the court of appeals determined that the "evidence at trial [wa]s entirely inconsistent with a good-faith reliance on any advice received," and the district court, in its "thorough analysis" of petitioner's intent, "did not impermissibly shift the burden of proof to the defense." *Id.* at A19-A20.

ARGUMENT

Petitioner renews her contentions (Pet. 11-17, 22-29) that the district court lacked jurisdiction over her trial; that her convictions violate the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3, unless an immigration law

or regulation in effect at the time of her offense conduct specifically prohibited EcomNets's staffing practices; and that the district court improperly shifted to petitioner the burden to disprove that she acted with the required mens rea. The court of appeals correctly rejected each of those contentions, and its fact-specific decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. Petitioner's contention (Pet. 11-17) that the district court lacked jurisdiction over her trial is unsound. Pet. App. A10-A15.

a. The term "jurisdiction" refers to "the courts' statutory or constitutional *power* to adjudicate the case." *United States* v. *Cotton*, 535 U.S. 625, 630 (2002) (citation omitted). The court of appeals correctly determined that the district court had subject-matter jurisdiction over petitioner's prosecution under 18 U.S.C. 3231, which confers on district courts "original jurisdiction * * * of all offenses against the laws of the United States." *Ibid.* It was undisputed that petitioner was charged with, tried for, and convicted of offenses against the laws of the United States—namely, conspiring to commit visa fraud, in violation of 18 U.S.C. 371, and committing visa fraud, in violation of 18 U.S.C. 1546(a). Pet. App. A12-A13. The case thus lay squarely within the district court's power.

Petitioner nevertheless contends (Pet. 13-17) that the district court lacked jurisdiction because of a procedural defect concerning the indictment: the original indictment was dismissed when petitioner pleaded guilty to a substitute charge in an information, and petitioner asserts (*ibid.*) that the original indictment was not properly reinstated after she withdrew her guilty plea.

But as this Court recognized in *United States* v. *Cotton*, *supra*, "defects in an indictment" do not deprive a court of its jurisdiction, because such defects "do not deprive a court of its power to adjudicate a case." 535 U.S. at 630; see *id.* at 630-631. Unlike limitations on a court's subject-matter jurisdiction, which cannot be waived, "the grand jury right [to an indictment] can be." *Id.* at 630 (citing Fed. R. Crim. P. 7(b)). Accordingly, "[t]he holding of *Cotton* makes clear that jurisdiction is not inherently tied to indictments," but rather depends on stating "'offenses against the laws of the United States.'" *United States* v. *McIntosh*, 704 F.3d 894, 902-903 (11th Cir.) (quoting 18 U.S.C. 3231) (holding that district court retained jurisdiction over sentencing following guilty plea to subsequently dismissed indictment), cert. denied, 571 U.S. 973 (2013).

Petitioner's reliance on pre-*Cotton* decisions for the proposition "that a felony trial without an indictment 'exceed[s a court's] jurisdiction,'" Pet. 12 (quoting *Ex parte Wilson*, 114 U.S. 417, 429 (1885)) (brackets in original), cannot be squared with *Cotton*. *Cotton* expressly overruled another decision, *Ex parte Bain*, 121 U.S. 1 (1887), that had relied on the decision petitioner cites for that principle. See *Cotton*, 535 U.S. at 631 ("Insofar as it held that a defective indictment deprives a court of jurisdiction, *Bain* is overruled."); *Bain*, 121 U.S. at 13-14 (relying on *Ex parte Wilson*, *supra*, in concluding that trial court lacked jurisdiction following court's improper amendment of the indictment, even if the court had "possession of the person, and would have jurisdiction of the crime, if it were properly presented by an indictment"). The Court explained that *Bain* had applied an "elastic concept of jurisdiction" that was "'more a fiction than anything else,'" and "is not what

the term 'jurisdiction' means today." *Cotton*, 535 U.S at 630 (citation omitted). That explanation necessarily forecloses petitioner's reliance on the very decision from which *Bain* drew the "elastic concept of jurisdiction," *ibid.*, that *Cotton* repudiates.

Petitioner attempts (Pet. 20) to distinguish *Cotton* on the ground that the indictment there omitted an element of the charged offense, whereas in this case the indictment, according to petitioner, was "omitted in its entirety." That purported distinction is flawed. Petitioner does not dispute that the grand jury returned an indictment that apprised her of all the offenses (and elements of them) for which she was tried, convicted, and sentenced. Petitioner does not challenge the substance of that indictment, but only whether the district court observed certain procedures in reinstating it after petitioner withdrew her guilty plea. The court of appeals therefore correctly observed that "[a]ny technical issues with the reinstatement of [petitioner's] indictment are less significant than other procedural errors courts have declined to treat as jurisdictional," including the defect in *Cotton*. Pet. App. A13-A14; see *United States* v. *Hartwell*, 448 F.3d 707, 717 (4th Cir.) (determining that the district court had jurisdiction where government improperly proceeded by information, rather than indictment, in a capital offense), cert. denied, 549 U.S. 548 (2006).

Indeed, *Cotton*'s conclusion applies with particular force where, as here, a grand jury has returned an undisputedly valid indictment that is dismissed when the defendant pleads guilty to a substitute offense but later withdraws that guilty plea. At no point has the district court lost jurisdiction over the case as a whole, and the grand jury's finding of probable cause for the specifically

indicted counts remains sound. Accordingly, as the court of appeals observed, Congress has not only authorized, but required, district courts to reinstate an indictment in that circumstance so long as certain conditions are satisfied. Pet. App. A12-A13; see 18 U.S.C. 3296(a). Section 3296 states that "any counts of an indictment or information that are dismissed pursuant to a plea agreement shall be reinstated by the District Court if" (1) the original counts were timely brought, (2) they were dismissed pursuant to a plea agreement that the court approved, under which the defendant pleaded guilty, (3) the guilty plea was subsequently vacated at the defendant's request, and (4) the government moves to reinstate the counts within 60 days of the vacatur of the guilty plea. 18 U.S.C. 3296(a). Reinstatement in that context is "*mandatory*" and "ministerial, not discretionary." Pet. App. A13.

Section 3296 thus presupposes that the dismissal of an indictment in those circumstances does not divest a district court of jurisdiction unless new grand-jury proceedings are held. To the extent petitioner suggests (Pet. 2-3, 5-6, 13-15) that the conditions that trigger a district court's obligation to reinstate a previously dismissed indictment are themselves jurisdictional prerequisites to reinstatement, that contention lacks merit. Under this Court's precedent, a requirement affects a court's subject-matter jurisdiction only "[i]f the Legislature clearly states that [the] prescription counts as jurisdictional"; otherwise, "courts should treat the restriction as nonjurisdictional in character." *Fort Bend Cnty.* v. *Davis*, 139 S. Ct. 1843, 1850 (2019) (brackets and citation omitted). Nothing in Section 3296's text or context suggests, much less reflects a clear statement by Congress, that the procedural conditions it specifies that

trigger mandatory reinstatement "count[] as jurisdictional." *Ibid.* (citation omitted); see 18 U.S.C. 3296(a).

In the court of appeals, petitioner contended that Section 3296's requirements for reinstatement must be jurisdictional because that provision "operates as a limited exception" to 18 U.S.C. 3731, which prescribes a 30-day period in which the government may appeal the dismissal of an indictment. Pet. App. A11. Petitioner notes (Pet. 6, 14) that lower courts have described Section 3731's deadline as "jurisdictional," and she appears to reason that Section 3296 must be jurisdictional as well. That reasoning is unsound. Unlike Section 3231, Section 3731 does not address a district court's jurisdiction in criminal cases; it speaks to appellate jurisdiction over certain district-court orders, including the dismissal of an indictment. 18 U.S.C. 3731. As the court of appeals explained, "[e]ven if § 3731 imposes a jurisdictional limit on a district court's authority to reconsider the merits of an indictment dismissal," that has no bearing on reinstatement under Section 3296. Pet. App. A13 n.2. In "mandat[ing] the reinstatement" of an indictment where the dismissal has been overtaken by certain events—in particular, the defendant's withdrawal of a prior guilty plea to other charges, on which the dismissal of the original charges was based—the reinstatement does not call into question the merits of the original dismissal but merely restores the status quo ante when the predicate for the dismissal of the indictment disappears. *Ibid.*

Here, the government did not seek to appeal the merits of the district court's dismissal of the original indictment with respect to petitioner. Instead, it requested that the indictment be reinstated after petitioner sought to undo her guilty plea to the substitute

charge. Pet. App. A7-A8. The district court indicated that it would grant the government's request if, and only if, petitioner made clear that she was withdrawing her guilty plea. *Id.* at A8. Petitioner (through counsel) did so. *Ibid.* The court of appeals thus appropriately reviewed petitioner's nonjurisdictional Section 3296 claim for (at most) plain error and explained that, even assuming petitioner could satisfy the other plain-error elements, the court "would not exercise [its] discretion to correct the error because it did not seriously affect the fairness, integrity, or public reputation of [petitioner's] trial." *Id.* at A14.

b. Petitioner errs in asserting that the court of appeals' unpublished decision in this case conflicts with decisions of the Seventh and Ninth Circuits. Pet. 6 (citing *United States* v. *McCarthy*, 445 F.2d 587, 592 (7th Cir. 1971), and *United States* v. *Foumai*, 910 F.2d 617, 620 (9th Cir. 1992)). Neither of those decisions addresses the question presented here; indeed, both long predated the enactment of Section 3296 in 2002. See 21st Century Department of Justice Appropriations Authorization Act (2002 Act), Pub. L. No. 107-273, Div. B, Tit. III, § 3003(a), 116 Stat. 1805.

In *United States* v. *McCarthy*, *supra*, the Seventh Circuit concluded that the government could not reprosecute the defendant on a count that had been dismissed in connection with the defendant's guilty plea, pursuant to a plea agreement that he later "breach[ed]," where "the Government postpone[d] its request for reinstatement for a period of three years and until after the statute of limitations ha[d] run." 445 F.2d at 591. But the court did not conclude that the district court lacked jurisdiction over that count or frame its reasoning in jurisdictional terms. Instead, the court

reasoned that, "in a situation of this kind, the government must proceed with diligence," and its "right to prosecute will be lost unless the record is protected by filing a timely motion to reinstate the dismissed counts." *Id.* at 592. The court further observed that, "in view of the age of this litigation, and the fact that a retrial on [the dismissed count] is unlikely to have a significant practical effect on its ultimate disposition," the "scales should be tipped in favor of the defendant." *Ibid.*

Petitioner has not contended that the government engaged in any similar delay here. As the court of appeals recounted, in response to petitioner's motion to dismiss the information to which she had pleaded guilty, the government argued that her guilty plea should be vacated and the indictment reinstated. Pet. App. A7-A8.

In *United States* v. *Foumai*, *supra*, a magistrate judge convicted the defendant on two misdemeanor counts, but the district court, "sitting as a court of appeals pursuant to 18 U.S.C. § 3401," reversed the second count. 910 F.2d at 620. Forty-eight days later—after the applicable period for appealing the district court's decision had expired—the court withdrew its decision *sua sponte* and directed the parties to submit additional briefing on the second count. *Id.* at 619. The defendant appealed, contending that the court's withdrawal order violated the Double Jeopardy Clause because the court's judgment affirming the dismissal of the second count had become final and unreviewable. *Ibid.* The Ninth Circuit agreed with the defendant that he had a "legitimate expectation of finality in his reversed conviction that barred the district court's subsequent withdrawal" of its judgment under double-jeopardy principles. *Id.* at 621. The Ninth Circuit did

not address the effect of the dismissal on the district court's jurisdiction over the case.

The "unique facts" of this case, Pet. App. A12, do not create a situation analogous to *Foumai*. Among other things, petitioner here had no reasonable expectation of finality in the dismissal of the indictment that was predicated on her guilty plea. Section 3296(a) authorized the district court to reinstate the indictment when petitioner withdrew her guilty plea. See p. 15, *supra*. And the district court made clear that it was prepared to reinstate the original charges if petitioner made clear that she was withdrawing her guilty plea, which petitioner then did. Pet. App. A8.

c. Even if the first question presented otherwise warranted review, this case would be a poor vehicle to address it. Not only is the case unusual and highly fact-dependent, but, as the government argued below, the government and the district court complied with Section 3296's requirements for reinstatement of the indictment.

Section 3296 requires a district court to reinstate any counts that were dismissed "pursuant to a plea agreement * * * under which the defendant pled guilty to other charges," if the "guilty plea [i]s subsequently vacated on the motion of the defendant" and the government seeks reinstatement within 60 days. 18 U.S.C. 3296(a). Here, at a hearing on August 11, 2017, the district court informed petitioner that it would "reinstate the indictment against" her if she withdrew her guilty plea to the information. C.A. App. 171. On September 8, only 28 days later, in response to petitioner's renewed motion to dismiss the information, the government expressly requested that, if petitioner "withdr[ew] her plea," the district court should "vacate the defendant's

guilty plea to the information, reinstate the indictment against her, and schedule the case for trial." D. Ct. Doc. 254, at 1, 8-9. At a further hearing 14 days later, the court informed petitioner's counsel that it would reinstate the indictment if petitioner was "certain" that she wished to withdraw her guilty plea to the information. C.A. App. 180. Petitioner's counsel confirmed that petitioner "would like to withdraw her plea," and the parties proceeded to trial. *Ibid.*; see Pet. App. A8.

The government thus moved to reinstate the dismissed counts well before the expiration of 60 days from "the date on which the order vacating the plea becomes final," 18 U.S.C. 3296(a)(4); indeed, it preemptively requested reinstatement of the dismissed counts before petitioner withdrew her guilty plea, in anticipation of that possibility. Petitioner identifies no reason why the government should have been required to reiterate that request. And although the district court did not enter a separate, contemporaneous order reinstating the indictment, it later observed that it had "reinstated the original indictment" against her before finding her guilty on each count of the indictment. Pet. App. A31; see *id.* at A46. Notably, Section 3296 does not impose a temporal limitation on the district court's entry of a reinstatement order upon a timely request by the government. To the extent petitioner contends that the reinstatement was invalid because the district court failed adequately to memorialize the mandatory, ministerial act of reinstatement at the time she withdrew her plea, that contention lacks merit.

2. Petitioner separately contends (Pet. 22-25) that her convictions violate the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3, on the theory that no law in force at the time of her offenses prohibited EcomNets's third-

party staffing practices. In petitioner's view (Pet. 23), the indictment did not allege, and the government at trial did not prove, that EcomNets's staffing practices violated any "specific statutes or regulations forbidding" those practices, and that the "specific conduct of EcomNets for which [she] was convicted" was not clearly prohibited until 2018, after the period relevant to her offenses. The court of appeals correctly rejected that contention. Pet. App. A15-A16.

As the court of appeals explained, irrespective of whether immigration laws and regulations in force at the time of petitioner's offense prohibited EcomNets's underlying staffing model, petitioner's "charges relate to *fraud* in the visa application process." Pet. App. A16. "[T]he indictment charged both substantive violations of and conspiracy to violate 18 U.S.C. 1546(a), which does not criminalize a staffing model, but" instead prohibits "making materially *false statements* in an immigration application." *Ibid.* Petitioner does not dispute that Section 1546(a)'s prohibition on making materially false statements and the relevant federal conspiracy statute, 18 U.S.C. 371, were in force throughout the period of the conspiracy. See Indictment 5, 12 (alleging that petitioners and her co-defendants conspired to commit visa fraud from 2001 to 2016, and that petitioner committed visa fraud in 2014); see 18 U.S.C. 371, 1546(a); 18 U.S.C. 371, 1546(a) (2000). Nor does she identify any relevant change in those provisions since her offense conduct commenced. Cf. 2002 Act, Div. B, Tit. IV, § 4002(a)(3), 116 Stat. 1806 (fixing a typographical error in Section 1546(a)'s penalty provision).

Petitioner contends (Pet. 23) that the court of appeals "simply repeat[ed] the district court's finding as to the materiality of the misstatements alleged, without

identifying a proscribing regulation." But as the court of appeals explained, a "statement made to public officials is material when 'it has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed.'" Pet. App. A18 (quoting *Kungys* v. *United States*, 485 U.S. 759, 770 (1988)). The government introduced testimony of a USCIS adjudicator that the false statements that petitioner made or caused to be made on the I-129 forms that were submitted to USCIS "would be considered material when considering whether to accept an H-1B petition, particularly for staffing companies, which the agency more carefully scrutinizes." *Id.* at A19. And petitioner fails to identify any sound reason why the materiality of those statements would depend on an independent and formal substantive prohibition on particular substantive practices.

The court of appeals properly determined that the district court "did not err in finding that the false representations made to USCIS were material." Pet. App. A19. Petitioner does not seek review of that factbound determination, which would not warrant this Court's review in any event. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (explaining that his Court "do[es] not grant a certiorari to review evidence and discuss specific facts"). And she does not contend that the court of appeals' conclusion conflicts with any decision of another court of appeals. Further review is not warranted.

3. Finally, petitioner contends (Pet. 26-29) that the district court improperly shifted to her the burden of proof on mens rea, by treating her contention that she relied on the advice of counsel as an affirmative defense, rather than as negating mens rea as an element of the

offense. The court of appeals correctly rejected that contention. Pet. App. A19-A20.

The court of appeals has long recognized that a defense of reliance on the advice of counsel "is designed to refute the government's proof that the defendant intended to commit the offense." *United States* v. *Miller*, 658 F.2d 235, 237 (4th Cir. 1981). But the court has further recognized, and reiterated in the decision below, that a defendant's purported reliance on the "advice of counsel rebuts mens rea only when" two essential predicates are established: (1) the "defendant fully disclose[d] pertinent facts to an attorney," and (2) the defendant "relie[d] in good faith on that advice." Pet. App. A19 (citing *Miller*, 658 F.2d at 237). And the court found that the trial evidence undermined those predicates here because "[t]he evidence at trial [wa]s entirely inconsistent with a good-faith reliance on any advice received." *Id.* at A20.

The court of appeals specifically determined that the district court had not "impermissibly shift[ed] the burden of proof to the defense" during the bench trial, but had instead conducted a "thorough analysis of [petitioner's] intent to make and knowledge of false information provided to USCIS" and found that it established her guilt. Pet. App. A20; see *id.* at A60 ("Extensive witness testimony and documentary evidence confirm that [petitioner] was well aware of the unlawful nature of the scheme."); *id.* at A66 ("[T]he evidence suggests only that the attorneys working for EcomNets were either unaware of the true nature of the fraudulent scheme or else actively participated in that scheme alongside the other conspirators and as such does not preclude a finding that [petitioner] knowingly and willfully participated in the conspiracy."); *id.* at A66-A67

("[T]he government has satisfied its burden of proof with respect to this element.").

The court of appeals' case-specific conclusion affirming the district court's record-dependent findings following a bench trial does not conflict with any decision of another court of appeals. Petitioner cites (Pet. 26) decisions from various courts for the proposition that defendants do not bear the burden of disproving mens rea. But as the court of appeals explained, the district court here did not impose that burden on petitioner. Pet. App. A20. Moreover, among the decisions petitioner cites is the Fourth Circuit's decision in *United States* v. *Miller*, *supra*, on which the panel relied in identifying the predicates necessary for an advice-of-counsel argument to rebut a defendant's mens rea. Pet. 26; see Pet. App. A19. To the extent petitioner contends that the court of appeals' unpublished decision below failed to adhere to the court's precedential decision in *Miller*, any such intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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