No. 23-_____

In the
Supreme Court of the United States

Rafael Espino,

Petitioner,

-v-

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The majority of federal statutes require a defendant to act "knowingly" to incur criminal liability, meaning that the defendant must have actual knowledge of some relevant fact. Courts have developed a common-law alternative to actual knowledge called "willful blindness." As the Court explained in *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011), a defendant may be deemed to have knowledge, even in the absence of actual knowledge, where "(1) [t]he defendant [] subjectively believe[s] that there is a high probability that a fact exists and (2) the defendant [] take[s] deliberate actions to avoid learning of that fact." Willful blindness "surpasses recklessness and negligence," encompassing only those "who can almost be said to have actually known the critical facts." *Id.*

Nonetheless, the circuits remain divided over when "willful blindness" can be used to establish knowledge. The question presented is whether "knowing" federal criminal liability based on "willful blindness" requires a defendant to "subjectively" believe there is a "high probability" of a fact and take "deliberate actions" to avoid learning that fact—as this Court opined in *Global-Tech* and as several circuits hold—or whether it merely requires the defendant to "fail[] to question" "suspicious circumstances," as the Second Circuit holds.

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The Second Circuit's decision is available at 2022 WL 4112679 and appended at A.1.[1] The district court's oral decision overruling petitioner's objections to the willful blindness jury instruction appears at A.14.

JURISDICTION

The court of appeals issued its decision on September 9, 2022, A.1, and denied the petition for panel rehearing or rehearing en banc on November 17, 2022, A.21. This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction under 28 U.S.C. § 1291. The district court had jurisdiction under 18 U.S.C. § 3231.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

No constitutional or statutory provision is at issue in this case.

STATEMENT OF THE CASE

A. Introduction

The Court should resolve an entrenched circuit split regarding the *mens rea* requirements for federal criminal liability based on "willful blindness."[2] In *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 75, 769-70 (2011), this

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[1] The appendix to this petition is cited "A."

[2] This doctrine is variously referred to as "willful blindness," "willful ignorance," "conscious avoidance," "deliberate ignorance," or an "ostrich instruction." This petition uses the term "willful blindness" because the Court used that term in *Global-Tech*.

Court stated that the willful-blindness doctrine permits a factfinder to conclude a defendant acted "knowingly" if the defendant (1) "subjectively believe[d]" there was a "high probability that a fact exist[ed]" and (2) took "deliberate actions," meaning made "active efforts," to avoid confirming the fact—a requirement that "surpasses recklessness and negligence."

Before and after *Global-Tech*, several circuits recognized that, to establish willful blindness, the government must prove that a defendant "subjectively" believed there was a high probability of some relevant fact and took "deliberate actions" to avoid confirming that fact. This is the rule in the Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits.

In contrast, the Second Circuit holds that a defendant can incur criminal liability under a willful blindness theory when he merely "fail[s] to question" "suspicious circumstances." A.12-13.

The Second Circuit's position conflicts with other federal circuits and diverges from this Court's articulation of the willful-blindness doctrine by permitting liability based on an objective, rather than a subjective perspective; by failing to require deliberate action or active efforts; and by predicating "knowing" criminal liability on something akin to negligence or recklessness.

This case is an excellent vehicle to resolve this longstanding split and clarify the requirements of "willful blindness." The question presented is a legal issue preserved in the district court and squarely addressed by the Second

Circuit. And a decision is likely outcome determinative here because the government admitted at petitioner's trial that it had no evidence he took "deliberate actions" to avoid knowledge and there was no evidence that he had the relevant subjective belief.

The proper application of the willful-blindness doctrine is also an important and frequently recurring question in federal criminal cases.

Finally, review is warranted because the Second Circuit's position is wrong. Its expansive application of willful blindness obliterates this Court's careful distinction between willful blindness versus recklessness or negligence, and improperly dilutes *mens rea* requirements for federal criminal liability.

B. Petitioner's Arrest and Trial

On May 30, 2018, a man named Oscar Garcia-Diaz was stopped by state police while driving through Indiana. A.3. Police searched his car and found heroin secreted in two duffel bags. *Id.* Garcia-Diaz confessed that he had been driving these drugs across the country to New York, following instructions from his coconspirator brother in Mexico. He agreed to help police make a controlled delivery of a "sham" substance in New York. *Id.*

The next day, following his brother's directions, Garcia-Diaz went to a hotel in the Bronx. *Id.* A few hours after he arrived, petitioner Rafael Espino showed up to meet him. After a brief conversation with Garcia-Diaz, Espino helped him load the two duffel bags into a livery cab, along with a suitcase

Espino had brought. A.3-4. Espino then began walking away—and was arrested. *Id.*

At the time of his arrest, Espino was 38 years old and employed full time as a sous chef at STK Steakhouse in Manhattan. He had no prior criminal convictions. He is a legal permanent resident who has lived and worked legally in the United States for over 25 years. He has three children.

Espino was charged with one count of conspiring to distribute heroin, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A). A.2. He asserted his innocence and was tried by a jury in September 2019.

Garcia-Diaz stopped cooperating before Espino's trial, so the government's trial evidence comprised only the testimony of the law enforcement officers who stopped Garcia-Diaz and those who later participated in the controlled delivery.

No evidence showed that Espino had any prior contacts with Garcia-Diaz or another identified coconspirator. He was not party to any conversations with them or, more generally, any conversations about drugs. During their brief exchange at the hotel, Garcia-Diaz did not tell Espino he was carrying drugs.

Nonetheless, the government argued that Espino's specific intent to join a drug conspiracy, and the requisite knowledge that Garcia-Diaz carried drugs, could be inferred from the fact that Espino met Garcia-Diaz, and the suspicious

circumstances of the meeting. In contrast, Espino's counsel contended that Espino was not a knowing participant in a drug deal, as required for conviction.

The government requested a "conscious avoidance" instruction to the jury.[3] A.15. The defense objected on several grounds, including that there was no factual basis for the charge because there was no evidence that Espino subjectively believed that there was a high probability that Garcia-Diaz was carrying drugs, and took "deliberate actions" to avoid confirming this, citing *Global-Tech*. A.16.

The government claimed that *Global-Tech* "is not good law" and that "our circuit has looked very carefully at that case and has not applied it to conscious avoidance." A.16-17. The trial judge agreed that he could not "imagine" *Global-Tech*'s requirements "being applied in criminal cases," and that he did not think that the defendant would "have to do something." A.17. The district court instructed the jury that it could find Espino acted knowingly if he was "aware of a high probability that drugs were in the duffel bags and deliberately avoided learning the truth." A.5.

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[3] "Conscious avoidance" is the phrase used in the Second Circuit for willful blindness.

The jury convicted Espino on the single conspiracy count. A.2. The court sentenced him to 48 months in prison and three years of supervised release. Espino is scheduled to be released in February 2023.

C. Petitioner's Appeal

Espino appealed, arguing that the evidence was insufficient as a matter of law and that the district court committed instructional errors, including by giving a willful blindness charge. He argued that the Second Circuit should adhere to the requirements articulated by *Global-Tech* by requiring that a defendant both have a subjective belief in the high probability of a fact and take deliberate actions, meaning active efforts, to avoid confirming that fact. A new trial was required because the government had shown neither in his case and thus there was not a sufficient factual basis for a willful blindness charge.

By order dated September 9, 2022, the Second Circuit affirmed Espino's conviction. A.2. It rejected Espino's arguments that willful blindness requires evidence of a defendant's subjective belief or deliberate actions to avoid learning a relevant fact. Rather, the circuit held such a charge is proper whenever the circumstances "were sufficiently suspicious" and defendant "fail[ed] to question or investigate them." A.12-13.

Espino moved for panel and *en banc* rehearing, arguing, *inter alia*, that the Second Circuit's definition of willful blindness was contrary to Supreme

Court and other circuits' precedent. The Second Circuit denied the petition on November 17, 2022. A.21.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for four reasons.

First, willful-blindness instructions, critical to separating the guilty from the innocent, are common in federal criminal cases today. Thus, what the government must prove to establish willful blindness is an important and frequently recurring question of federal criminal law.

Second, there is an entrenched circuit split regarding the scope of willful blindness, creating varying *mens rea* standards for federal criminal liability throughout the circuits. *Global-Tech* articulated rigorous requirements for willful blindness, but these have not been consistently followed within the circuits, reducing and diluting the *mens rea* requirements for federal criminal liability.

Third, this case is an excellent vehicle for resolving this conflict and clarifying the law.

And finally, the Second Circuit's definition of willful blindness liability is wrong. It is inconsistent with *Global-Tech* and with basic principles of federal criminal law. And it is fundamentally unfair to persons like Espino, who may have been negligent or reckless but who did not knowingly participate in the charged criminal activity, as required for liability under the statute.

I. The question presented is important and recurring.

"The deeply rooted presumption of *mens rea* generally requires the Government to prove the defendant's *mens rea* with respect to each element of a federal offense, unless Congress plainly provides otherwise." *Wooden v. United States*, 142 S. Ct. 1063, 1076 (2022) (Kavanaugh, J., concurring). This Court has insisted for decades that the *mens rea* elements of federal criminal statutes be strictly enforced. It has not hesitated to review and reverse lower court decisions that dilute the knowledge and intent elements of criminal statutes. *See, e.g.*, *Ruan v. United States*, 142 S. Ct. 2370 (2022); *Rehaif v. United States*, 139 S. Ct. 2191 (2019); *McFadden v. United States*, 576 U.S. 186 (2015); *Flores-Figueroa v. United States*, 556 U.S. 646 (2009); *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005); *Staples v. United States*, 511 U.S. 600 (1994); *Ratzlaf v. United States*, 510 U.S. 135 (1994); *Morissette v. United States*, 342 U.S. 246 (1952).

The Court's careful policing of *mens rea* recognizes that in the federal system the requisite mental state is often what separates the guilty from the innocent.

Willful blindness is a common-law doctrine that has the potential to dilute and reduce *mens rea* requirements. Improperly applied, it permits a finding of criminal liability based on something less than actual knowledge, even where this is required. And while willful blindness instructions were once

"rare," *e.g.*, *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990), they are now routine in cases where knowledge is an element of the offense, *see, e.g.*, *United States v. Heredia*, 483 F.3d 913, 924 n.16 (9th Cir. 2007) (en banc) (disavowing statements in past cases that a willful blindness instruction should rarely be given). This "problematic" instruction is "now commonly given and commonly upheld" for "a wide range of criminal offenses, although the courts' rationales vary, as do the wording of the instruction[] and the limits on the doctrine's proper use." *United States v. Alston-Graves*, 435 F.3d 331, 337-38 (D.C. Cir. 2006).

The Court should ensure that the widespread use of this doctrine does not undercut rigorous *mens rea* requirements for federal criminal liability. *Global-Tech* cabined the willful-blindness doctrine to reduce the risk that it would undermine the knowledge element of federal civil and criminal statutes. This Court should ensure that lower courts do not feel free to depart from *Global-Tech*'s rigorous requirements, even if they believe those requirements are "mistaken." *United States v. Fofanah*, 765 F.3d 141, 151 n.2 (2d Cir. 2014) (Leval, J., concurring).

II. There is an entrenched circuit split over the use of willful blindness.

Despite the frequency of willful blindness instructions, there is longstanding and continuing division among the circuits regarding what the

doctrine requires. Several circuits have adhered to this Court's articulation of the doctrine in *Global-Tech*, requiring the government to show that a defendant (1) subjectively believed there was a high probability of a particular fact, and (2) took affirmative "deliberate actions" or "active steps" to avoid actual knowledge. But the Second Circuit has refused to follow *Global-Tech*, sanctioning willful blindness charges where the defendant merely disregarded suspicious circumstances. Further, even where courts require "deliberate actions," they are divided over when a defendant's failure to act can constitute such "action." The Court should resolve this split and clarify the law.

Global-Tech stated the basic requirements of willful blindness: "(1) [t]he defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." 563 U.S. at 769.[4] The Court emphasized that "these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts." *Id.*

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[4] *Global-Tech* was a patent infringement case, but the Court stated it was summarizing the requirements for willful blindness for purposes of criminal liability as well. *Id.* at 769-70.

Global-Tech held that the Federal Circuit erred by requiring only "deliberate indifference" to a known risk: "in demanding only 'deliberate indifference,'" the circuit failed to "require active efforts … to avoid knowing" the relevant fact. *Id.* at 770.

Despite *Global-Tech*'s clear articulation of these requirements, the courts of appeals remain divided over what willful blindness requires. The Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits have applied *Global-Tech* to criminal cases and held that it requires the defendant to "subjectively" believe in a high probability of the relevant fact and take deliberate actions, meaning make active efforts, to avoid confirming the fact. *See United States v. Miller*, 41 F.4th 302, 314 (4th Cir. 2022) (willful blindness requires defendant have subjective belief in high probability of some fact and take "deliberate actions to avoid learning" fact); *United States v. Hale*, 857 F.3d 158, 168 (4th Cir. 2017) (same); *United States v. Lee*, 966 F.3d 310, 325-26 (5th Cir. 2020) (explaining instruction is not appropriate where defendant merely "should have been aware" of crime and that the "key is whether there is evidence showing the defendant took proactive steps to ensure his ignorance"); *United States v. Macias*, 786 F.3d 1060, 1061-63 (7th Cir. 2015) (doctrine requires "active measure" to avoid knowledge); *United States v. Burns*, 990 F.3d 622, 627-28 (8th Cir. 2021) (willful blindness requires "deliberate actions" to avoid learning relevant fact; mere "fail[ure] to investigate" is insufficient); *United*

States v. Yi, 704 F.3d 800, 805 (9th Cir. 2013) (requiring subjective belief in high probability of fact and "deliberate action" to avoid learning fact); *United States v. Sorensen*, 801 F.3d 1217, 1233-34 (10th Cir. 2015) (same); *United States v. Hillman*, 642 F.3d 929, 939 (10th Cir. 2011) (instruction is only appropriate where defendant "engaged in deliberate acts to avoid actual knowledge" or "purposely contrived to avoid learning all of the facts in order to have a defense in the event of prosecution").[5]

In contrast, the Second Circuit holds that the defendant does not need to take any "deliberate actions" or make any "active efforts" to avoid knowledge—it is enough for a defendant to fail to question suspicious circumstances. *See* A.12-13; *United States v. Dambelly*, 714 F. App'x 87, 88-89 (2d Cir. 2018) (instruction may be given based on defendant's "failure to question" "overwhelmingly suspicious" circumstances "even when the defendant has taken no active measures to avoid learning of criminal activity") (citing *United States v. Svoboda*, 347 F.3d 471 (2d Cir. 2003)); *United States v. Whitman*, 555 F. App'x 98, 104-05 (2d Cir. 2014) (same); *United States v. Ghailani*, 733 F.3d 29, 54 n.20 (2d Cir. 2013) (stating circuit has "specifically rejected" claim that

[5] Even among these circuits, it is not clear when a failure to act constitutes a sufficient "deliberate action." *Compare, e.g.*, *United States v. Ramos-Atondo*, 732 F.3d 1113, 1120 (9th Cir. 2013) (stating "a failure to investigate can be a deliberate action"), *with Burns*, 990 F.3d at 627-28 (8th Cir. 2021) ("simple failure to investigate" is not "deliberate action[]").

defendant must take "deliberate actions to avoid learning" fact); *United States v. Kozeny*, 667 F.3d 122, 133-34 (2d Cir. 2011) (charge is appropriate where defendant "fail[ed] to question suspicious circumstances"); *see also Fofanah*, 765 F.3d at 149 (Level, J., concurring) (Second Circuit has "consistently adhered" to standard that does not require "affirmative steps to avoid knowing incriminating facts").

These divisions are not a matter of semantics or phrasing: they embody doctrinal differences that yield inconsistent outcomes across materially identical cases. Compare petitioner's case with the Seventh Circuit's decision in *United States v. Macias*. In *Macias*, a former smuggler of illegal immigrants was recruited to smuggle drug profits from the United States to Mexico. *See* 786 F.3d at 1060-61. He was indicted for participating in a drug-distribution conspiracy. *Id.* His defense was that he thought the money came from immigrant smuggling and did not know it represented drug proceeds, and thus did not have the requisite knowledge to be guilty of participating in a drug conspiracy. *Id.* The government obtained a willful blindness instruction that, like the instruction here, allowed the jury to find the defendant acted knowingly if he "deliberately avoided the truth." *Id.*

On appeal, the Seventh Circuit held that no willful blindness instruction should have been given and reversed the defendant's conviction, because there was no evidence "that suspecting he might be working for a drug cartel Macias

took active steps to avoid having his suspicions confirmed." *Id.* at 1062; *see also, e.g.*, *United States v. L.E. Myers Co.*, 562 F.3d 845, 854 (7th Cir. 2009) ("Failing to display curiosity is not enough; the defendant must affirmatively *act* to avoid learning the truth.").

If Espino's case were in the Seventh Circuit, no willful blindness instruction would have been given. There was no evidence he took "active steps" to avoid learning that the person he met carried drugs. At most, he displayed a lack of curiosity. But because he was prosecuted in the Second Circuit, rather than the Seventh, this was no bar to a willful blindness instruction.

Mens rea standards for federal crimes should not depend on the geographical happenstance of where a defendant is prosecuted. Thus, the Court should grant review of this issue.

III. This case presents an excellent vehicle for resolving this split and clarifying willful blindness.

This case is a clean opportunity to resolve this circuit split and clarify the law. First, the issue presented was preserved below for this Court's review. Petitioner objected at trial to any willful blindness instruction on the ground that the district court should follow *Global-Tech*, and there was no evidence that he had the requisite subjective belief or took "deliberate" or "affirmative steps" to avoid actual knowledge. The district court considered and rejected

this objection based on the government's assertion, and the court's finding, that affirmative steps were not required.

Second, this issue was fully considered by the Second Circuit, which held, based on longstanding circuit precedent, that no deliberate or affirmative steps were required.

Third, the issue is outcome determinative. If, as *Global-Tech* and other circuits hold, "deliberate action" to avoid knowledge is necessary for willful blindness, this instruction should not have been given in petitioner's case. And because the government presented no evidence that petitioner had actual knowledge that he was involving himself in a drug transaction, this instruction was likely the basis for petitioner's conviction.

IV. The Second Circuit's position is wrong.

Finally, this Court should grant review because the Second Circuit's position is erroneous. It dilutes the *mens rea* requirement in many prosecutions and permits innocent defendants to be convicted for reckless or negligent conduct where Congress set a higher standard for criminal liability.

To start, the Second Circuit's rule contravenes the language and holding of *Global-Tech*. As this Court stated, "the defendant must take deliberate actions to avoid learning" the suspected fact. 563 U.S. at 769. This was not dictum or a casual summary. On the contrary, the Court held that the Federal Circuit erred precisely because it failed to "require active efforts" to avoid

culpable knowledge. *Id.* at 770. *Global-Tech*'s "deliberate actions" or "active efforts" requirement was necessary to the Court's holding.

Next, the Second Circuit's rule eviscerates the careful distinction this Court drew between recklessness and negligence, on one hand, and willful blindness on the other. *Global-Tech* specified that willful blindness must have "an appropriately limited scope that surpasses recklessness and negligence." 563 U.S. at 769. There are two critical components to this heightened standard. First, the defendant must have a "subjective" belief in the likelihood of some fact. Second, the defendant must take "deliberate actions" to avoid confirming the fact. These requirements distinguish willful blindness from both negligence—which is based on an objective perspective, or something the defendant "should" know—and recklessness—which is satisfied where the defendant deliberately disregards or is indifferent to some risk. *See, e.g.*, Model Penal Code § 2.02(2) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. … A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct."); *Farmer v. Brennan*, 511 U.S. 825, 839 (1994) (to act recklessly, person must "consciously disregard a substantial risk of serious harm").

The Second Circuit disregards these components that elevate willful blindness above mere negligence or recklessness—the very components that make willful blindness a permissible alternative for the statutory requirement of actual knowledge. The Second Circuit's rule adopts an objective, rather than subjective perspective: it is sufficient for the government to show that the surrounding "circumstances" were "suspicious." And it collapses the distinction between recklessness and willful blindness. Any defendant who fails to question or investigate suspicious circumstances—*i.e.*, deliberately or consciously disregards a substantial risk of wrongdoing, by definition *every* reckless defendant—is also willfully blind.

This is plainly wrong because, as *Global-Tech* ruled, willful blindness "surpasses" even recklessness.

This is why the Seventh Circuit, among others, has recognized that it should not be enough for a defendant to consciously, but passively, ignore suspicious circumstances. As the Seventh Circuit has stated:

> The most powerful criticism of the ostrich instruction is, precisely, that its tendency is to allow juries to convict upon a finding of negligence for crimes that require intent . . . . The criticism can be deflected by thinking carefully about just what it is that real ostriches do (or at least are popularly supposed to do). They do not just fail to follow through on their suspicions of bad things. They are not merely careless birds. They bury their heads in the sand so that they will not see or hear bad things. They deliberately avoid acquiring unpleasant knowledge. The ostrich instruction is designed for cases in which there is evidence that the defendant …

takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings.

United States v. Giovanetti, 919 F.2d 1223, 1227-28 (7th Cir. 1990).

The Second Circuit's standard invites the very danger the Seventh Circuit warns against, and which *Global-Tech* sought to eliminate: allowing a jury to find that a defendant acted with (the equivalent of) actual, culpable knowledge simply because he or she disregarded or failed to investigate a known or suspected risk of wrongdoing, *i.e.*, was negligent or reckless. This improper dilution of a *mens rea* requirement critical to separating the innocent from the guilty necessitates this Court's review.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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