No. 24-_____

IN THE
SUPREME COURT OF THE UNITED STATES

MARK JONES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, who was convicted under 8 U.S.C. § 1324(a)(1)(A)(ii) for transporting an undocumented immigrant in a manner that "furthered" her "violation of law," transported such an immigrant three days after her initial unlawful entry into the country. At the guilty-plea hearing, the judge informed petitioner of what the judge described as the elements of § 1324(a)(1)(A)(ii), including that petitioner had knowingly transported the immigrant "in order to help her remain in the United States illegally." On appeal to the Ninth Circuit, petitioner challenged the voluntariness of his guilty plea on the ground that, at most, he only furthered the immigrant's *civil* immigration violation – because she was in the country for less than 30 days (which is not a criminal law violation) – and that "in violation of law" in § 1324(a)(1)(A)(ii) means *criminal* law violations. The Ninth Circuit rejected petitioner's involuntariness claim on the ground that, at his guilty-plea proceeding, petitioner acknowledged that he had discussed the elements of the charge with his attorney and stated that he understood the elements – even though the undisputed facts are that the immigrant had been present in the country for only three days when petitioner transported her.

The questions presented are:

1. Whether "in violation of law" in 8 U.S.C. § 1324(a)(1)(A)(ii) is limited to *criminal* immigration violations (and does not include *civil* immigration violations).

2. Whether this Court should vacate and remand for the Ninth Circuit to address the merits of petitioner's substantial challenge to the voluntariness of his guilty plea because the Ninth Circuit erroneously assumed that petitioner's counsel in the district court had explained to petitioner before he pleaded guilty that "violation of law" in § 1324(a)(1)(A)(ii) means *criminal* immigration violations (when the undisputed facts show at most that petitioner transported the immigrant in furtherance of a *civil* immigration violation).

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Mark Jones*, No. 2:22-cr-01228-DMF-1, United States District Court for the District of Arizona. Judgment was entered on October 31, 2023.

- *United States v. Mark Jones*, No. 23-3503, United States Court of Appeals for the Ninth Circuit. Judgment was entered on September 17, 2024. Rehearing *en banc* was denied on January 10, 2025.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mark Jones petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

ORDERS BELOW

The Court of Appeals' order dismissing petitioner's direct criminal appeal (App. A) is unreported. The Court of Appeals' order denying reconsideration *en banc* (App. B) is unreported.

JURISDICTION

The Court of Appeals entered a final order dismissing petitioner's appeal on September 17, 2024. The Court of Appeals denied petitioner's timely motion for reconsideration *en banc* on January 10, 2025. This petition has been filed within 90 days of the latter date. *See* Sup. Ct. R. 13.1 & 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The Fifth Amendment to the U.S. Constitution provides in relevant part: "[N]or shall any person be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

Section 1324(a)(1)(A)(ii) of Title 8 of the United States Code provides:

> Any person who . . . knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law [commits a felony offense].

8 U.S.C. § 1324(a)(1)(A)(ii).

STATEMENT OF THE CASE

I. Procedural Background

On March 29, 2023, a criminal information was filed in the U.S. District Court for the District of Arizona, charging petitioner with transporting a noncitizen, Amanda Pedro Mateo, in a violation of 8 U.S.C. § 1324(a)(1)(A)(ii). (ER-146.)[1] On March 29, 2023, petitioner pleaded guilty to that offense pursuant to a written plea agreement. (ER-142.) On October 30, 2023, the district

[1] "ER" refers to the excerpts of record filed in the Court of Appeals. "PSR" refers to the presentence report, which the district court adopted (and which was filed in the Court of Appeals as a separate part of the record on appeal).

court sentenced petitioner to six months in prison, to be followed by a three-year term of supervised release, and also a $100 special assessment. (ER-57-58.)

II. Statement of the Facts

The criminal information charges that:

> On or about August 21, 2022, in the District of Arizona, the defendant, Mark Jones, knowing and in reckless disregard of the fact that a certain alien, Amanda Pedro Mateo, had come to, entered, and remained in the United States in violation of law, did knowingly transport and move said alien within the United States by means of transportation and otherwise in furtherance of such violation of law[,] [i]n violation of Title 8, United States Code, Sections l324(a)(l)(A)(ii) and (a)(l)(B)(ii).

(ER-146-147.)

The undisputed facts are as follows. On August 21, 2022, police officers in Phoenix, Arizona, stopped a vehicle being driven by petitioner. Inside the car was Mateo, who informed immigration officials that:

> . . . [S]he travelled from Guatemala to Mexico after she paid human smugglers $4,500, to cross her into the United States. She also had to pay an additional $7,000, once she successfully crossed into the United States. She crossed into the United States with Hernandez Rodas, and after walking across the desert for three days, they were instructed via her cellphone to enter a vehicle which would arrive at their location. Once the vehicle arrived, which was occupied by two black males [one of whom was appellant] and a black female, one of the males instructed them to enter the back seat, surrender their cellphones, and "duck" down. They were in the vehicle for several hours before they arrived at [a] hotel. They

> spent the night at the hotel, and the next morning she noticed Hernandez Rodas was not present. She then accompanied the defendants back into the vehicle, and they were subsequently stopped by the police [on a public road in Phoenix].

PSR ¶ 12.

After petitioner was arrested, he told immigration officials that:

> [He and two codefendants] drove to an unknown location near Tucson, Arizona, where they picked up the two aliens. They drove them to an unknown public space/area, where they were met by a Hispanic male, who was supposed to further transport the two aliens. However, when this individual did not have the money that was owed to them, [petitioner and his two associates] did not make the transfer and drove the two aliens to their hotel. When they woke up, the male subject was gone. Mark Jones stated they were driving the female subject [Mateo] back to the same transfer location, but they were stopped by police.

PSR ¶ 15.

On November 29, 2022, petitioner and the prosecution entered into a written plea agreement. It listed the "elements" of § 1324(a)(1)(A)(ii) as follows:

> **Transportation of an Illegal Alien**
>
> On or about August 21, 2022, in the District of Arizona:
>
> 1. Amanda Pedro Mateo was an alien;
> 2. Amanda Pedro Mateo was not lawfully in the United States;
> 3. The defendant knew or acted in reckless disregard of the fact that Amanda Pedro Mateo was not lawfully in the United States; and
> 4. The defendant knowingly transported or moved Amanda Pedro Mateo in order to help her remain in the United States illegally.

(ER-74.)

The plea agreement also contained the following "factual basis" for appellant's guilty plea:

> On August 21, 2022, I, Mark Jones, was driving a vehicle near Tempe, in the District of Arizona. The vehicle I was driving was pulled over by law enforcement. At the time the vehicle I was driving was pulled over, it contained passengers, one of whom was an illegal alien. Amanda Pedro Mateo was among the passengers and was an illegal alien. I knew the passenger was illegal alien, and I intended to assist her in remaining in the United States unlawfully.

(ER-74.). The plea agreement also contained a provision waiving petitioner's right to appeal his conviction and sentence. (ER-71).

At the change-of-plea hearing, the court and petitioner had the following exchange:

> THE COURT: The elements of the offense in the information, transportation of illegal alien, are in section 8 of page 7 of your plea agreement. On or about August 21st, 2022, in the District of Arizona, Amanda Pedro Mateo was an alien. Amanda Pedro Mateo was not lawfully in the United States. That you knew or acted in reckless disregard of the fact that Amanda Pedro Mateo was not lawfully in the United States, and you knowingly transported or moved Amanda Pedro Mateo in order to help her remain in the United States illegally; do you understand?
>
> THE DEFENDANT: Yes, Your Honor.
>
> . . .

> THE COURT: Okay. At the time did you know she was an illegal alien and intend to assist her in remaining in the United States unlawfully?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And now, Mr. Berardoni [defense counsel], looks like, coached you a little bit there. So you are the one who is pleading guilty. You are the one who is under oath.
>
> THE DEFENDANT: Yes, yeah.
>
> THE COURT: And an element of the crime is that you knew at that time, or you acted in reckless disregard at that time that that woman was not lawfully in the United States.
>
> THE DEFENDANT: Yes.
> . . .
>
> THE COURT: . . . And did you intend to assist the woman who was an illegal alien in remaining in the United States unlawfully?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And as part of that, you knowingly transported her?
>
> THE DEFENDANT: Yes, Your Honor.

(ER-136, 140-141.)

In his opening brief filed in the U.S. Court of Appeals for the Ninth Circuit, petitioner, represented by new counsel, contended that his guilty plea to the charged § 1324(a)(1)(A)(ii) offense was involuntary in violation of the Due Process Clause. In particular, petitioner contended that, based on undisputed facts presented in the district court, Mateo was not violating any *criminal* law

at the time that petitioner transported her and, thus, that petitioner could not have "furthered" a "violation of law" within the meaning of § 1324(a)(1)(A)(ii). *See* Appellant's Opening Brief (Ninth Circuit Docket Number 14, filed Apr. 24, 2024), at 6-12. Petitioner further contended that:

> . . . [A]ppellant's guilty plea was invalid because he did not "receive[] real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (citation and internal quotation marks omitted)[.] . . . When a defendant who pleads guilty was led to believe that legally innocent conduct is criminal, the defendant's plea was not a "voluntary and intelligent choice." *Bousley v. United States*, 523 U.S. 614, 618-19 (1998) ("[P]etitioner contends that the record reveals that neither he, nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged. Were this contention proved, petitioner's plea would be . . . constitutionally invalid.").

Appellant's Opening Brief, *supra*, at 7.

In response to petitioner's opening brief, the government moved to dismiss appellant's appeal pursuant to the provision in petitioner's plea agreement that waived his right to challenge his conviction and sentence. *See* Appellee's Motion to Dismiss Appeal Based on Appellate Waiver in Plea Agreement (Ninth Circuit Docket Number 27, filed Aug. 5, 2024). The government contended that petitioner could not challenge his guilty plea as involuntary because he had acknowledged at the guilty-plea hearing that "he ha[d] read the indictment and fully discussed the charges with his attorney." *Id.* at 12

(citing *United States v. Peterson*, 995 F.3d 1061, 1066 (9th Cir. 2021), for the proposition that a defendant cannot challenge the voluntariness of his guilty plea on appeal when the defendant in the court below acknowledged that he "read the charges contained in the indictment and that those charges had been fully explained to him by his attorney . . . [and that] the defendant acknowledged he understood the elements of the offense").

Petitioner filed a response to the motion to dismiss his appeal. He contended that the waiver provision in his plea agreement did not apply to his claim appeal that his guilty plea was involuntary. *See* Appellant's Response in Opposition to Appellee's Motion to Dismiss the Appeal (Ninth Circuit Docket Number 28, filed Aug. 6, 2024), at 3-4 & 7 (citing *United States v. Portillo-Cano*, 192 F.3d 1246, 1250 (9th Cir. 1999)).[2] Petitioner urged the motions panel not to resolve petitioner's substantial claim that his guilty plea was involuntary and, instead, allow a merits panel to "decide that issue after plenary consideration – and thus order appellee to file a regular brief, and then conduct oral argument." Appellant's Response in Opposition to Appellee's Motion to Dismiss the Appeal, at 4.

[2] *See Portillo-Cano*, 192 F.3d at 1250 ("'If the agreement is voluntary, and taken in compliance with Rule 11, then the waiver of appeal must be honored. If the agreement is involuntary or otherwise unenforceable, then the defendant is entitled to appeal.'") (quoting *United States v. Wenger*, 58 F.3d 280, 282 (7th Cir. 1995)).

Without requiring the government to file a merits brief or conducting an oral argument, the motions panel of the Ninth Circuit granted the government's motion to dismiss the appeal pursuant to the waiver provision of the plea agreement. *See* App. A. In its brief order, the Ninth Circuit did not address the merits of petitioner's substantial due-process claim that his guilty plea was involuntary because he was led to believe that he was guilty of violating 8 U.S.C. § 1324(a)(1)(A)(ii) when, at most, he "furthered" an undocumented immigrant's *civil* immigration law violation when he transported her. Regarding petitioner's claim that the waiver provision did not apply to his claim that his guilty plea was involuntary, the motions panel stated that, "Contrary to appellant's contention, the record shows that appellant knowingly and voluntarily pled guilty. App. A, at 1 (citing *United States v. Peterson*, 995 F.3d 1061, 1065-67 (9th Cir. 2021) – which the government had cited in its motion to dismiss petitioner's appeal).[3]

[3] In *Peterson*, the Ninth Circuit held that the defendant's challenge to his guilty plea as involuntary was foreclosed by (1) the defendant's admission at his guilty-plea hearing that he understood the elements of the charged offense and (2) the fact that the evidence clearly showed that the defendant was guilty as charged. *Peterson*, 995 F.3d at 1064-66. As discussed *infra*, *Peterson* is readily distinguishable from petitioner's case because the undisputed facts show that petitioner did not violate the charged offense but was led to believe that he had done so when he pleaded guilty.

Petitioner filed a timely motion for reconsideration *en banc* of the panel's order dismissing his appeal.[4] After the motion had been pending for nearly four months, the same motions panel, on January 10, 2025, denied petitioner's motion "on behalf of the court" without offering any reasons. App. B, at 1.

REASONS FOR GRANTING THE PETITION

I.

The phrase "in violation of law" in 8 U.S.C. § 1324(a)(1)(A) refers solely to federal *criminal* law violations (and does not include *civil* immigration law violations).

Section 1324(a)(1)(A)(ii) provides that a person commits a felony offense if he "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States *in violation of law*, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, *in furtherance of such violation of law* . . . ." 8 U.S.C. § 1324(a)(1)(A)(ii) (emphasis added). The phrase "violation of law" is not defined in the statute.

Based on the undisputed facts in this case, the undocumented immigrant whom petitioner transported, Amanda Pedro Mateo, was not in the process of

[4] Petitioner's motion for *en banc* reconsideration was filed in accordance of Ninth Circuit General Order 6.11 (Rev. 9/17/14), which provides in pertinent part: "Any motion or petition seeking en banc review of an order issued by a motions or oral screening panel shall be processed as a motion for reconsideration en banc."

violating any criminal law at the point that petitioner transported her. Although, three days before petitioner transported her, Mateo had entered the United States without inspection – in violation of 8 U.S.C. § 1325(a), a misdemeanor criminal statute[5] – petitioner could not have "furthered" that offense, which was completed at the moment that she entered the United States without inspection. *See United States v. Rincon-Jimenez*, 595 F.2d 1192, 1193-94 (9th Cir. 1979) (holding that § 1325(a) is not a "continuing offense"); *United States v. DiSantillo*, 615 F.2d 128, 136 (3d Cir. 1980) (same); *see also United States v. Cores*, 356 U.S. 405, 408 n.6 (1958) (stating the same in dicta).

Mateo's subsequent act of remaining in the United States without permission of the immigration authorities was, at most, a *civil* violation of the immigration laws.[6] *See United States v. Hansen*, 599 U.S. 762, 784 (2023) ("[R]esiding in the United States without lawful status is subject to the hefty penalty

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[5] There is no evidence in the record – and no allegation by the government in the courts below – that Mateo had ever been removed, deported, or excluded from, or even previously been present inside, when she entered the United States three days before petitioner transported her. Therefore, petitioner could not have "furthered" any criminal "illegal *reentry*" offense by Mateo in violation of 8 U.S.C. § 1326.

[6] In his Ninth Circuit brief, petitioner also contended that Mateo's presence in the United States was not even a *civil* immigration law violation:

> Section 1182(a)(6) [of 8 U.S.C.] refers to "Illegal Entrants and Immigration Violators." As an initial matter, it is significant that the caption of subsection (a)(6) distinguishes between mere "illegal entrants" and "immigration violators." That is, the caption of subsection (a)(6) itself indicates that a mere unlawful entrant such as Mateo is not an "immigration violator." Instead, "immigration violators" include those noncitizens who are "smugglers" or who

of removal, but it generally does not carry a criminal sentence."); *Arizona v. United States*, 567 U.S. 387, 407 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States.").

> "willfully misrepresent[] a material fact [when] seek[ing] to procure . . . a visa, other documentation, or admission into the United States" or who "falsely represent[]" that he or she is a United States citizen. 8 U.S.C. § 1182(a)(6)(B)-(G).
>
> Also relevant is the clear difference between § 1182(a)(6) and § 1182(a)(9). Subsection (a)(9), captioned "Aliens Previously Removed," deems such noncitizens "unlawfully present" based on their continued presence following their unlawful *reentry* into the United States (after having been removed or after their departure from the United States following their unauthorized presence for at least 180 days). . . . In contrast, "unlawfully" does not appear alongside "present" in §1182(a)(6). Therefore, because Congress deemed one class of noncitizens who are present in the United States without authorization to be "unlawfully present" (i.e., those covered by subsection (a)(9)) but did not include that designation in subsection (a)(6), this Court should assume that Congress did not deem noncitizens covered by subsection (a)(6), such as Mateo, to be "unlawfully" present. *See Bittner v. United States*, 598 U.S. 85, 94 (2023) ("When Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*).").
>
> The bottom line is that § 1182(a)(9)(B)(ii) creates the status of "unlawful presence" only for certain noncitizens present in the United States without authorization. Such an "unlawful" status is not created by § 1182(a)(6) for noncitizens who merely unlawfully *enter* the United States and stay for less than 30 days without registering but who do not remain more than 30 days. Therefore, such noncitizens, although removable based on a ground of "ineligibility" under the INA, are neither "immigration violators" nor "unlawfully present" under the plain language of the INA.
>
> . . . When a noncitizen (like Mateo) merely entered the country unlawfully, her presence in the country thereafter is not civilly "unlawful" until at least 30 days has passed without her registering with immigration authorities. Therefore, even if "violation of law" in § 1324(a)(1)(A)(ii) includes civil as well as criminal violations, the statute does not apply to appellant's conduct in this case.

Appellant's Opening Brief, *supra*, at 17-21.

An undocumented noncitizen who willfully remains in the United States without permission of the immigration authorities for more than 30 days violates the criminal law. *See* 8 U.S.C. § 1302 ("It shall be the duty of every alien now or hereafter in the United States, [who] remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days."); *see also* 8 U.S.C. § 1306(a) (providing that a "willful" violation of § 1302 is a misdemeanor offense). Because only three days had passed since Mateo had entered the United States when petitioner transported her (over the course of two days), petitioner could not have "furthered" a violation of 8 U.S.C. § 1306(a) when he transported her.

As Justice White noted – in a dissenting opinion addressing a point not disputed by the majority[7] – "for the first 30 days failure to register is not a crime." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1058 (1984) (White, J., dissenting); *see also id.* at 1058 (stating that unregistered presence in this country, without more, "does not constitute a crime; rather, unregistered presence plus willfulness must be shown"). As a matter of law, petitioner thus could not have "furthered" any criminal law violation by Mateo when he transported her.

[7] The majority in *Lopez-Mendoza* noted that an undocumented immigrant who willfully remains in the United States without registering *for more than 30 days* violates the law. *Lopez-Mendoza*, 468 U.S. at 1047 n.3 (citing 8 U.S.C. §§ 1302 & 1306).

Therefore, the key question is whether petitioner's furtherance of what was at most a *civil* immigration law violation by Mateo constituted an offense under 8 U.S.C. § 1324(a)(1)(A)(ii). As Tenth Circuit Judge Baldock correctly has stated – in interpreting the same statutory language in another provision in § 1324(a)(1)(A) – "violation of law" must be interpreted only to mean *criminal* violations as opposed to mere *civil* violations of the immigration law:

> According to the [majority], § 1324(a)(1)(A)(iv) makes it a crime to encourage or induce both civil and criminal violations of immigration law. . . . Based on this conclusion, the Court reasons that the statute cannot be a solicitation statute because, as a general matter, solicitation statutes only make it a crime to encourage or induce criminal violations. . . . But once again, the Court ignores its obligation to consider a reasonable limiting construction that could avoid this issue entirely. . . . As Professor Eugene Volokh persuasively argued in an amicus brief, the statute's phrase "in violation of law" refers to criminal violations of immigration law such as illegal entry into the United States in violation of 8 U.S.C. § 1325(a), and residing in the United States after having been deported in violation of 8 U.S.C. § 1326(c). Br. of Prof. Eugene Volokh as Amicus Curiae in Supp. of Plaintiff-Appellee at 3-6, [*United States v. Sineneng-Smith I*, 910 F.3d 461 (9th Cir. 2018)] (No. 15-10614).

United States v. Hernandez-Calvillo, 39 F.4th 1297, 1318 (10th Cir. 2022) (Baldock, J., dissenting), *vacated and remanded*, 143 S. Ct. 2687 (2023), on remand, Nos. 19-3210 & 19-3211, 2023 WL 4994505 (10th Cir. Aug. 4, 2023) (unpublished).

Although Judge Baldock referred to § 1324(a)(1)(A)(iv), the same inter-

pretation is required with respect to § 1324(a)(1)(A)(ii) – and all other subsections in § 1324(a)(1)(A) that use the same phrase – under the *in pari materia* canon of statutory interpretation. *See Wachovia Bank v. Schmidt*, 546 U.S. 303, 315-16 (2006) ("[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read as if they were one law."); *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) ("[I]ndividual sections of a single statute should be construed together."). In interpreting § 1324(a)(1)(A), this Court has treated the different subsections as "next-door neighbors" that should be considered together. *See Hansen*, 599 U.S. at 774.

The rule of lenity fully supports petitioner's interpretation of "violation of law." That phrase, which is not defined in the statute, is clearly ambiguous. *See United States v. Gordon*, 464 F.2d 357, 358 (9th Cir. 1972). In *Gordon*, the Ninth Circuit held that very similar statutory language – "illegal gambling business," which was defined by statute as meaning "a gambling business which . . . is a *violation of the law* of a State or political subdivision in which it is conducted"[8] – was ambiguous:

> As used in § 1955, the pivotal words, "the law of a State," suffer from ambiguity. Those words can reasonably be construed to cover

[8] 18 U.S.C. § 1955 (emphasis added).

> gambling businesses that are only in violation of state penal laws, or to embrace gambling businesses that are in violation of any state law – criminal or civil. In *United States v. Bass*, 404 U.S. 336 (1971) the Supreme Court said: "Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." That principle applies here. Therefore, we affirm the district court's dismissal of the indictments.

Gordon, 464 F.2d at 358; *accord United States v. Bala*, 489 F.3d 334, 338 (8th Cir. 2007) (agreeing with *Gordon*).[9]

Because "violation of law" in § 1324(a)(1)(A)(ii) is similarly ambiguous, this Court should resolve any doubts about the statutory language in petitioner's favor and limit it to criminal law violations. *See United States v. Granderson*, 511 U.S. 39, 54 (1994) (applying rule of lenity); *see also United States v. Moreno*, 561 F.2d 1321, 1323 (9th Cir. 1977) ("As a penal statute, [§ 1324(a)] must be strictly construed.").

Because the record reflects that, when he pleaded guilty, petitioner was not informed, and clearly did not understand, that he only could be guilty of violating § 1324(a)(1)(A)(ii) if he had intended to "further" a *criminal* immigration law violation by Mateo when he transported her (which he could not have

[9] Nothing in the statute's legislative history provides sufficient evidence of congressional intent concerning the meaning of "violation of law" – either the original 1952 version of the statute or its 1986 revision. *See* H.R. Rep. No. 1377, 82nd Cong., 2nd Sess. 1952, 1952 U.S.C.C.A.N. 1358, 1952 WL 3016; H.R. Rep. No. 682(I), 99th Cong., 2nd Sess. 1986, 1986 U.S.C.C.A.N. 5649, 1986 WL 31950.

done because she then was committing no criminal law violation), petitioner's plea was not a "voluntary and intelligent choice." *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). When a defendant who pleads guilty was led to believe that legally innocent conduct is criminal, the defendant's plea was not a "voluntary and intelligent choice." *Bousley v. United States*, 523 U.S. 614, 618-19 (1998) ("Petitioner . . . maintains that his guilty plea was unintelligent because the District Court subsequently misinformed him as to the elements of a [18 U.S.C.] § 924(c)(1) offense. In other words, petitioner contends that the record reveals that neither he, nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged. Were this contention proved, petitioner's plea would be . . . constitutionally invalid.").

Based on the undisputed facts known to everyone in the district court, petitioner clearly was erroneously led to believe that transporting an undocumented noncitizen who was present in the country for only three days was a violation of § 1324(a)(1)(A)(ii). Everyone at petitioner's guilty-plea proceeding – petitioner, his attorney, the prosecutor, and the presiding judge – all proceeded on the incorrect assumption that petitioner had violated § 1324(a)(1)(A) by transporting a noncitizen, Amanda Mateo, who had illegally entered the United States but who indisputably had only been present for three days before petitioner transported her over the course of two days – over three weeks before

her presence would have begun violating the criminal immigration law (assuming she acted "willfully" at that juncture). In view of this shared misunderstanding of the "violation of law" element, petitioner's guilty plea was involuntary.

II.

This Court should vacate the Ninth Circuit's judgment and remand with instructions for the Ninth Circuit to afford plenary consideration to petitioner's substantial challenge to the voluntariness of his guilty plea in view of the fact that the motions panel erroneously assumed that petitioner's counsel in the district court had explained to him before he pleaded guilty that 8 U.S.C. § 1324(a)(1)(A)(ii) is limited to *criminal* immigration violations.

The Ninth Circuit's motion panel erroneously assumed that petitioner's guilty plea was voluntary because his former attorney must have properly advised about the elements of § 1324(a)(1)(A) – including that "in violation of law" is limited to *criminal* immigration violations. *See* App. A. Despite its one-sentence, cursory treatment of petitioner's substantial involuntariness claim, the panel's erroneous assumption is clearly reflected in its citation to *United States v. Peterson*, 995 F.3d 1061, 1065-67 (9th Cir. 2021) – a case cited by the government in its motion to dismiss petitioner's appeal for the proposition that petitioner's statement at the guilty-plea hearing that he understood the elements of the charged offense and had discussed the charge with his attorney

foreclosed petitioner's involuntariness claim on appeal. In *Peterson*, another panel of the Ninth Circuit held that:

> . . . Peterson asserts that the district court failed to explain the Government's burden to prove that he knew the visual depiction was of a minor and that he knew the visual depiction showed the minor engaged in sexually explicit conduct. . . . Contrary to Peterson's contention, he was fully informed of the essential elements of the crime of receipt of child pornography [under] 18 U.S.C. § 2252 . . . . *Peterson affirmed in his plea agreement and to the court that he "ha[d] read the charges against him contained in the Indictment," discussed them with his attorney, who "fully explained" the charges, and that he "fully underst[ood] the nature and elements of the crime charged." The district court was entitled to rely upon Peterson's assurance that he understood the element of the crime to which he entered a guilty plea.*

Peterson, 995 F.3d at 1064-66 (emphasis added).

Peterson is readily distinguishable from petitioner's case. Unlike in *Peterson*, in which there was no indication in the record that the defendant was actually innocent of the element that (he contended) was not explained to him when he pleaded guilty,[10] the record in petitioner's case affirmatively reflects that he is actually innocent of the "in violation of law" element because Mateo was present in the country for only three days when petitioner transported her. The motions panel thus erred by assuming that petitioner's former counsel had

[10] Indeed, the record reflected that the defendant in *Peterson* admitted to knowingly possessing child pornography depicting *prepubescent* minors. *See* Answering Brief of the United States, *United States v. Peterson*, No. 19-10246, 2020 WL 4004741, at *5*6 (9th Cir., filed July 6, 2020).

explained to him that "in violation of law" § 1324(a)(1)(A)(ii) is limited to criminal immigration violations. Indeed, the record permits only one logical conclusion: petitioner's former counsel did *not* explain to appellant that he did not violate § 1324(a)(1)(A)(ii) because Mateo was present in the United States for less than 30 days when he transported her. Otherwise, petitioner's former counsel would not have permitted petitioner to plead guilty (because he is innocent based on the undisputed facts). And it is not as if petitioner entered an *Alford* plea, asserting his innocence but nevertheless pleading guilty.[11]

Although in *Bradshaw v. Stumpf*, 545 U.S. 175 (2005), this Court held that a criminal defense attorney may advise a defendant of the elements of the charged offense (and that the judge need not do so) in order to satisfy due process, this Court so held in a case in which the evidence clearly showed that the defendant was guilty of all the elements set forth in his defense counsel's explanation. As this Court stated:

> . . . [T]he Court of Appeals erred in finding that Stumpf had not been properly informed [of the elements] before pleading guilty. In Stumpf's plea hearing, his attorneys represented on the record that they had explained to their client the elements of the aggravated murder charge; Stumpf himself then confirmed that this representation was true. . . . [T]he constitutional prerequisites of a

[11] Even assuming *arguendo* that petitioner had entered an *Alford* plea, there would be an insufficient factual basis since Mateo was only in the country for three days when appellant transported her. *See Alford v. North Carolina*, 400 U.S. 25, 37-38 (1970) (for an *Alford* plea to be constitutionally valid, there must be a factual basis supporting the defendant's guilt).

> valid [guilty] plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel. . . . Where a defendant is represented by competent counsel, the court usually may rely on that counsel's assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty.
>
> Seeking to counter this natural inference, Stumpf argues, in essence, that his choice to plead guilty to the aggravated murder charge was so inconsistent with his denial of having shot the victim that he could only have pleaded guilty out of ignorance of the charge's specific intent requirement. But Stumpf's asserted inconsistency is illusory. The aggravated murder charge's intent element did not require any showing that Stumpf had himself shot Mrs. Stout. Rather, Ohio law considers aiders and abettors equally in violation of the aggravated murder statute, so long as the aiding and abetting is done with the specific intent to cause death. *See In re Washington*, 81 Ohio St.3d 337, 691 N.E.2d 285 (1998); *State v. Scott*, 61 Ohio St.2d 155, 165, 400 N.E.2d 375, 382 (1980). As a result, Stumpf's steadfast assertion that he had not shot Mrs. Stout would not necessarily have precluded him from admitting his specific intent under the statute.
>
> That is particularly so given the other evidence in this case. Stumpf and Wesley had gone to the Stouts' home together, carrying guns and intending to commit armed robbery. Stumpf, by his own admission, shot Mr. Stout in the head at close range. Taken together, these facts could show that Wesley and Stumpf had together agreed to kill both of the Stouts in order to leave no witnesses to the crime. And that, in turn, could make both men guilty of aggravated murder regardless of who actually killed Mrs. Stout. *See ibid*.

Bradshaw, 545 U.S. at 183-84.

In stark contrast to *Bradshaw*, the record in petitioner's case shows that "his choice to plead guilty to the [§ 1324(a)(1)(A)(ii)] charge was so inconsistent

with [the undisputed facts about his transportation of Mateo three days after her entry into the United States] that he could only have pleaded guilty out of ignorance of the charge's ['violation of law'] requirement." *Id.* at 183; *see also id.* at 182-83 ("Stumpf's guilty plea would indeed be invalid if he had not been aware of the nature of the charges against him, including the elements of the . . . charge to which he pleaded guilty.").

The Ninth Circuit motions panel's unfounded assumption about petitioner's understanding of the "violation of law" element conflicts with *Bradshaw*.[12] Certiorari should be granted because the Ninth Circuit motions panel "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). This Court should vacate the Ninth Circuit's judgment and remand with instructions to afford plenary consideration to the substantial arguments raised in petitioner's opening brief.

[12] The treatment of the substantial issues raised in petitioner's opening brief by the motions panel was "summary in character" and "not entitled to the weight of a decision made after plenary submission." *Johnson v. Burken*, 930 F.2d 1202, 1205 (7th Cir. 1991) (discussing the difference between a decision of a motions panel and a decision of a merits panel); *accord Stifel, Nicolaus & Co., Inc. v. Woolsey & Co., Inc.*, 81 F.3d 1540, 1544 (10th Cir. 1996) (quoting *Johnson*, *supra*).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari, vacate the Ninth Circuit's judgment, and remand for further proceedings.

Respectfully submitted,

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