No. 21-7398

IN THE SUPREME COURT OF THE UNITED STATES

RICARDO RIZO-RIZO AND EFRAIN CERVANTES-RAMIREZ, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a defendant's knowledge of his own lack of U.S. citizenship is an element of attempted improper entry into the United States, in violation of 8 U.S.C. 1325(a)(1).

RELATED PROCEEDINGS

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

United States v. Rizo-Rizo, No. 20-mj-20210 (June 11, 2020)

United States v. Cervantes-Ramirez, No. 19-mj-23221 (June 16, 2020)

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

United States v. Rizo-Rizo, No. 20-50172 (Oct. 29, 2021)

United States v. Cervantes-Ramirez, No. 20-50176 (Oct. 29, 2021)

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OPINIONS BELOW

The opinion of the court of appeals in petitioner Rizo-Rizo's case (Pet. App. 1a-7a) is reported at 16 F.4th 1292. The opinion of the court of appeals in petitioner Cervantes-Ramirez's case (Pet. App. 8a-9a) is not published in the Federal Reporter but is available at 2021 WL 5027491. The order of the district court in Rizo-Rizo's case is unreported but is available at 2020 WL 3100051. The order of the district court in Cervantes-Ramirez's case is unreported but is available at 2020 WL 3268358.

JURISDICTION

The judgments of the court of appeals in both petitioners' cases were entered on October 29, 2021. The cases were consolidated, and a petition for rehearing was denied on February 4, 2022 (Pet. App. 10a-11a). The petition for a writ of certiorari was filed on March 4, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following guilty pleas in the United States District Court for the Southern District of California, petitioners were each convicted on one count of attempted improper entry into the United States, in violation of 8 U.S.C. 1325(a)(1). Rizo-Rizo Judgment 1; Cervantes-Ramirez Judgment 1. Each was sentenced by a magistrate judge to time served. Ibid. The district court affirmed petitioners' convictions. 20-50172 C.A. E.R. 55-66; 20-50176 C.A. E.R. 46-52. The court of appeals also affirmed. Pet. App. 1a-7a; id. at 8a-9a.

1. On January 25, 2020, a U.S. Border Patrol officer encountered petitioner Rizo-Rizo near Tecate, California, about three miles north of the United States-Mexico border. Pet. App. 2a; 20-50172 C.A. E.R. 2. Rizo-Rizo admitted he was a citizen of Mexico without a legal basis to be present in the United States. Pet. App. 2a. After being arrested and waiving his Miranda rights, Rizo-Rizo again stated that he was a Mexican citizen and that he had illegally entered the United States. Ibid.

Rizo-Rizo was charged by complaint on one misdemeanor count of attempted improper entry into the United States, in violation of 8 U.S.C. 1325(a)(1). 20-50172 C.A. E.R. 1. The case was assigned to a magistrate judge, see 18 U.S.C. 3401(a), and Rizo-Rizo pleaded guilty, Pet. App. 3a. During the plea colloquy, the magistrate judge described the elements of attempted improper entry as (1) "the Defendant was at the time of Defendant's attempted entry into the United States an alien"; (2) "the Defendant had the specific intent to enter the United States at a time and place other than as designated by immigration officers"; (3) "the Defendant also had the specific intent to enter the United States free from official restraint"; and (4) "the Defendant did something that was a substantial step toward committing the crime and that strongly corroborated the Defendant's intent to commit the crime." 20-50172 C.A. E.R. 13. Rizo-Rizo objected, asserting that "an element of the offense is that the Defendant has to know he was an alien." Id. at 13-14. The magistrate judge overruled the objection, accepted the guilty plea, and imposed a sentence of time served. Id. at 14, 17, 19.

Rizo-Rizo appealed to the district court, see 18 U.S.C. 3402, arguing (inter alia) that the magistrate judge had erred during the plea colloquy by omitting knowledge of status as a noncitizen from the list of elements of the offense. 20-50172 C.A. E.R. 27-33; see Fed. R. Crim. P. 11(b)(1)(G) (requiring the court to inform the defendant of "the nature of each charge to which the defendant

is pleading").* The district court rejected his claim and affirmed. 20-50172 C.A. E.R. 57-62, 66.

2. Petitioner Cervantes-Ramirez's case proceeded in a manner identical to Rizo-Rizo's in all material respects. See Pet. 7.

On August 5, 2019, a U.S. Border Patrol officer encountered Cervantes-Ramirez near Tecate, California, about 200 yards north of the United States-Mexico border. 20-50176 C.A. E.R. 2. Cervantes-Ramirez admitted he was a citizen of Mexico without a legal basis to be present in the United States. Ibid. After being arrested and waiving his Miranda rights, Cervantes-Ramirez again stated that he was a Mexican citizen and that he had illegally entered the United States. Ibid.

Cervantes-Ramirez was charged by complaint on one misdemeanor count of attempted improper entry into the United States, in violation of 8 U.S.C. 1325(a)(1). 20-50176 C.A. E.R. 1. He pleaded guilty. Id. at 7. During the plea colloquy, the magistrate judge listed the same elements as during Rizo-Rizo's plea colloquy. Id. at 13-14. Like Rizo-Rizo, Cervantes-Ramirez objected, asserting that knowledge of status as a noncitizen is an element of the offense. Id. at 14. The magistrate judge overruled the objection, id. at 15, and the district court affirmed, id. at 47-52.

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* This brief uses "noncitizen" as equivalent to the statutory term "alien." See Barton v. Barr, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

3. The court of appeals consolidated Rizo-Rizo's and Cervantes-Ramirez's cases for argument and affirmed in both cases. Pet. App. 1a-7a; id. at 8a-9a.

a. In its decision in Rizo-Rizo's case, the court of appeals explained that a defendant's knowledge of his status as a noncitizen is not an element of attempted improper entry under 8 U.S.C. 1325(a)(1). Pet. App. 2a. The court recognized that the attempt crime "incorporates the common law requirement of specific intent to commit the offense." Id. at 3a. But the court emphasized that the intent in this context "goes to the entry, not the status of the person entering." Ibid. (discussing United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1195 (9th Cir. 2000) (en banc)); see Gracidas-Ulibarry, 231 F.3d at 1196; see also Braxton v. United States, 500 U.S. 344, 351 n.* (1991) (stating that the elements "required for an 'attempt' at common law * * * include a specific intent to commit the unlawful act") (emphasis added). And the court stated that unlike in Rehaif v. United States, 139 S. Ct. 2191 (2019), which applied the express statutory knowledge requirement in 18 U.S.C. 924(a)(2) to the status that makes a defendant's firearm possession illegal under 18 U.S.C. 922(g), "[t]here is no such express mens rea requirement" in 8 U.S.C. 1325(a)(1). Pet. App. 4a.

The court of appeals also considered, but ultimately rejected, the contention that a "'presumption' in favor of scienter" required that the defendant's knowledge of his

noncitizen status be an implicit element of a misdemeanor offense under Section 1325(a)(1). Pet. App. 4a (quoting Staples v. United States, 511 U.S. 600, 606 (1994)). Relying on this Court's precedents, the court of appeals reasoned that such a presumption was unnecessary for a "regulatory" or "public welfare" offense like Section 1325(a)(1), which "prohibits conduct that individuals would legitimately expect to be unlawful" and imposes relatively modest penalties (a fine or up to six months of imprisonment for a first offense). Id. at 4a-5a.

b. On the same day, the court of appeals affirmed Cervantes-Ramirez's conviction in an unpublished opinion that cross-referenced its opinion in Rizo-Rizo's case. Pet. App. 8a-9a.

ARGUMENT

Petitioners renew their contention (Pet. 9-17) that a defendant's knowledge of his own status as a noncitizen is an implicit element of attempted improper entry under 8 U.S.C. 1325(a)(1). The court of appeals correctly rejected that argument, and its decisions do not conflict with decisions of this Court or other courts of appeals. In any event, this case is an unsuitable vehicle for addressing petitioners' claim because both petitioners clearly knew of their status as noncitizens when they attempted to enter the United States, rendering any error in their plea colloquies harmless. Further review is unwarranted.

1. Petitioners acknowledge (Pet. 17-18) the absence of any disagreement in the courts of appeals on the question presented.

Instead, they principally contend (Pet. 11) that the court of appeals' decision is inconsistent with Rehaif v. United States, 139 S. Ct. 2191 (2019), in which this Court held that a mens rea of knowledge in 18 U.S.C. 924(a)(2) applies to the status elements of 18 U.S.C. 922(g), which prohibits certain classes of individuals -- including the category of noncitizens who are "illegally or unlawfully in the United States" -- from possessing firearms. Rehaif, 139 S. Ct. at 2194, 2200 (citation omitted). But the language and structure of Section 1325(a)(1) bear little resemblance to the statutory scheme at issue in Rehaif.

a. The improper-entry provision states, in pertinent part, that

> [a]ny alien who * * * enters or attempts to enter the United States at any time or place other than as designated by immigration officers * * * shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.

8 U.S.C. 1325(a). Whereas other penalty provisions of the Immigration and Nationality Act, 8 U.S.C. 1101 et seq., are replete with explicit mens rea requirements, including in relation to a person's status as a noncitizen, Section 1325(a)(1) applies to "[a]ny alien," without regard to knowledge of noncitizenship. 8 U.S.C. 1325(a); see, e.g., 8 U.S.C. 1324(a)(1)(A)(i) (prohibiting any person, "knowing that a person is an alien," from "bring[ing] to or attempt[ing] to bring to the United States in any manner whatsoever such person at a place other than a

designated" location); 8 U.S.C. 1324a(a)(1)(A) (prohibiting a person or entity from hiring "for employment in the United States an alien knowing the alien is an unauthorized alien * * * with respect to such employment"); see also 8 U.S.C. 1325(a)(3) (prohibiting noncitizens from "attempt[ing] to enter or obtain[ing] entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact"); 8 U.S.C. 1325(c) (prohibiting "knowingly enter[ing] into a marriage for the purpose of evading any provision of the immigration laws"); 8 U.S.C. 1325(d) (prohibiting "knowingly establish[ing] a commercial enterprise for the purpose of evading any provision of the immigration laws").

That selective use of mens rea requirements has been a feature of Section 1325 since it was first enacted. See Act of Mar. 4, 1929, ch. 690, § 2, 45 Stat. 1551. When "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Salinas v. United States R.R. Ret. Bd., 141 S. Ct. 691, 698 (2021) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)). And the absence of any foothold in the statutory text distinguishes this case from Rehaif.

In holding that the status elements of 18 U.S.C. 922(g) require a mens rea of knowledge, this Court in Rehaif relied on the express scienter provision of 18 U.S.C. 924(a)(2), which

provides that "[w]hoever knowingly violates" Section 922(g) "shall be fined as provided in this title, imprisoned not more than 10 years, or both." Ibid.; see Rehaif, 139 S. Ct. at 2195-2196. Under a "proper interpretation of the statute," the Court reasoned, a defendant must have knowledge of all the elements of the relevant paragraph of Section 922(g) (except jurisdictional elements, which "normally have nothing to do with the wrongfulness of the defendant's conduct"). Rehaif, 139 S. Ct. at 2195-2196; No such application of an express statutory mens rea requirement is possible in this case.

Nor is a mens rea presumption applicable here. This Court explained in Rehaif that it has "typically declined to apply the presumption in favor of scienter in cases involving statutory provisions that form part of a 'regulatory' or 'public welfare' program and carry only minor penalties." 139 S. Ct. at 2197 (citing Staples, 511 U.S. at 606, and Morissette v. United States, 342 U.S. 246, 255-259 (1952)). The Court has previously described that class of offenses as including offenses that simply "create the danger or probability of [injury] which the law seeks to minimize," Morissette, 342 U.S. at 256, and carry "relatively small" penalties in comparison to offenses that single out serious wrongdoers, ibid. Here, in light of the "extensive and complex" federal regulatory regime governing "immigration and alien status," Arizona v. United States, 567 U.S. 387, 395 (2012) (highlighting 8 U.S.C. 1325 and 1326), a person crossing the United

States' international borders "should be alerted to the probability of strict regulation," a context in which this Court has assumed that "Congress intended to place the burden on the defendant to 'ascertain at his peril whether his conduct comes within the inhibition of the statute.'" Staples, 511 U.S. at 607 (quoting United States v. Balint, 258 U.S. 250, 254 (1922) (brackets omitted)). And befitting an offense designed to "promote the maintenance of law and order in our country," H.R. Rep. No. 70-2418, 70th Cong., 2d Sess. 1 (1929), rather than to spotlight singular culprits, a non-recidivist violation of Section 1325(a)(1) is a misdemeanor, with only a six-month maximum term of imprisonment, and a two-year term for a subsequent offense. 8 U.S.C. 1325(a).

Petitioners' reliance (Pet. i, 2, 13, 15) on a footnote in this Court's decision in Staples v. United States as invariably requiring a mens rea of knowledge for every offense that does not involve "dangerous and deleterious devices," 511 U.S. at 612 n.6, is misplaced. The Staples footnote, which states that "to determine as a threshold matter whether a particular statute defines a public welfare offense, a court must have in view some category of dangerous and deleterious devices that will be assumed to alert an individual that he stands in 'responsible relation to a public danger,'" ibid. (quoting United States v. Dotterweich, 320 U.S. 277, 281 (1943)), does not adopt a hard-and-fast "dangerous devices" test. Instead, Staples "clarifie[s] that

notice, rather than danger, is the touchstone" of the regulatory-offense analysis. United States v. Figueroa, 165 F.3d 111, 116 (2d Cir. 1998) (Sotomayor, J.) (emphasis added). Staples's own application of a mens rea presumption to a machinegun-possession crime turned on the absence of such notice. See 511 U.S. at 610, 612, 620. While Staples suggested, in the context of such a possession crime, that offenses to which the mens rea presumption is inapplicable "[t]ypically" involve "potentially harmful or injurious items," it did not foreclose other categories, and in fact expressly disclaimed any intention "to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not." Id. at 607, 620 (quoting Morissette, 342 U.S. at 260). And decisions of this Court both before and after Staples do not mention a "dangerous and deleterious devices" criterion. See, e.g., United States v. X-Citement Video, Inc., 513 U.S. 64, 71-72 (1994); Morissette, 342 U.S. at 257 (noting that mens rea presumption would not apply to state laws governing the conditions of tenement houses); see also Figueroa, 165 F.3d at 117 (explaining that limiting regulatory offenses to those involving "items that [a]re inherently dangerous * * * [and] noxious substances" "fails to account" for X-Citement Video and other cases); Francis Bowes Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 67 n.45 (1933).

b. In any event, even if improper entry under 8 U.S.C. 1325(a)(1) were subject to a presumption in favor of scienter, that presumption would not apply to the element concerning the defendant's status as a noncitizen. "When interpreting federal criminal statutes that are silent on the required mental state, [courts] read into the statute only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct." Elonis v. United States, 575 U.S. 723, 736 (2015) (citation, emphasis, and internal quotation marks omitted); accord Rehaif, 139 S. Ct. at 2195 (reaffirming that the presumption applies to those "statutory elements that criminalize otherwise innocent conduct") (quoting X-Citement Video, 513 U.S. at 72). In Rehaif, the Court applied the presumption to the status elements of 18 U.S.C. 922(g) because those elements are critical to distinguishing the conduct Congress chose to criminalize from conduct that is otherwise entirely innocent (i.e., possession of a firearm). See 139 S. Ct. at 2197. But unlike the status elements of Section 922(g), the element of Section 1325(a)(1) that concerns a person's citizenship does not distinguish wrongful from innocent conduct.

Whether one is a noncitizen or a citizen, "enter[ing] or attempt[ing] to enter the United States" in a manner inconsistent with federal directives, 8 U.S.C. 1325(a)(1), is not innocent conduct. Even apart from Section 1325(a)(1), Congress has prohibited any "individuals arriving in the United States other

than by vessel, vehicle, or aircraft," citizens included, from entering the country except at designated "border crossing point[s]," so as to ensure that individuals "present themselves, and all articles accompanying them[,] for inspection" to customs officials. 19 U.S.C. 1459(a) and (e)(1); see 19 U.S.C. 1459(f), (g) (providing for civil and criminal penalties). And that is just one of the "numerous laws [that] presuppose the existence of definite points of entry, to allow for lawful travel and commerce and to maintain orderly operations at our borders." United States v. Melgar-Diaz, 2 F.4th 1263, 1269 (9th Cir. 2021) (citing numerous provisions from Titles 6, 8, and 19), cert. denied, 142 S. Ct. 813 (2022). "[T]he conduct prohibited" by Section 1325(a)(1) accordingly "would be wrongful irrespective of the defendant's status" as a noncitizen. Rehaif, 139 S. Ct. at 2197.

2. Further review is unwarranted for the additional reason that any errors in petitioners' plea colloquies were harmless beyond a reasonable doubt. See Fed. R. Crim. P. 11(h), 52(a); Greer v. United States, 141 S. Ct. 2090, 2100 (2021) (holding that the omission of a mens rea element from a plea colloquy is not structural error). Each petitioner admitted, both before his arrest and after receiving Miranda warnings, that he was a citizen of Mexico with no legal basis to be present in the United States. 20-50172 C.A. E.R. 2; 20-50176 C.A. E.R. 2. And neither petitioner has disputed at any time his knowledge of his noncitizen status.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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