

No. 25-6714

IN THE SUPREME COURT OF THE UNITED STATES

IVAN GRANILLO

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

PETITIONER'S REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

It is a felony to “transport or move” an undocumented noncitizen within the United States if the transport is “in furtherance of such violation of law.” 8 U.S.C. § 1324(a)(1)(A)(ii). The courts of appeals are divided as to which mens rea applies to the statute’s “in furtherance” requirement. The courts have taken roughly four different approaches. The Fifth Circuit and Sixth Circuit require a specific intent or purpose to violate immigration law. The First Circuit, Third Circuit, Eighth Circuit, and Tenth Circuit require a mens rea of “willfully” but do not agree about what that means. The Seventh Circuit requires knowledge that transportation furthers the person’s illegal presence. The Eleventh Circuit does not require any particular mens rea. The Ninth Circuit has alternately required a specific intent or knowledge. This Court’s help is needed to distinguish innocent from guilty conduct for this widely prosecuted offense, and this is a good vehicle to decide the issue.

The government agrees that the courts of appeals have taken different approaches to identifying and describing the elements of a § 1324(a)(1)(A)(ii) offense through opinions and model instructions. The government also seems to agree that the Fifth Circuit, Sixth Circuit, and decisions of the Ninth Circuit require a mens rea that the defendant “intended to further” the noncitizen’s illegal presence or transported the noncitizen “in order to help him remain in the United States illegally.” Br. in Opp. 9–11.

The government still argues against the Court’s review, however, claiming that “there does not appear to be a meaningful difference between the mens rea

requirement in [other] circuits and the standard employed in the Ninth Circuit.” Br. in Opp. 12. The government further contends that the Ninth Circuit’s model jury instruction given here, which has no reference to an “intent to further” and omits the “in order to” language from caselaw, conveys the requisite mens rea. Finally, the government claims this case presents a poor vehicle for review because the appellate court found that the evidence at trial “overwhelmingly established” that Mr. Granillo “knew his passenger was illegal and intended to transport him.” Br. in Opp. 14–15 (quoting Pet. App. 5a).

The government’s opposition actually demonstrates the need for the Court’s intervention. There is a meaningful difference between what is required in the Fifth and Sixth Circuits—an intent to further illegal presence—and what is required under the Ninth Circuit’s model instruction and other circuits—only knowledge that the transportation would help the person remain in the country illegally or just a substantial relationship between the transportation and furtherance of illegal presence. Under the former view, giving a ride to someone knowing it will help them remain in the country illegally is not a crime. But under the latter view, simple knowledge (or even no knowledge) of furtherance of illegal presence is a felony. And regardless of the quantum of evidence of knowledge and intent to transport in this case, the jury could have acquitted Mr. Granillo had they been properly instructed.

I. The circuit courts are divided as to the essential elements of § 1324(a)(1)(A)(ii).

The government now agrees that the circuit courts define the elements of § 1324(a)(1)(A)(ii) differently. The government even agrees that these different approaches range from a specific intent to violate the law (e.g., the Fifth Circuit) to not requiring any mens rea at all (e.g., the Eleventh Circuit’s model instruction), where only “a direct and substantial relationship between the Defendant’s act of transportation and the furthering of the alien’s presence in the United States” is needed. *See* Br. in Opp. 9–14. However, the government urges the Court to deny certiorari because “there does not appear to be a meaningful difference in those circuits and the standard employed in the Ninth Circuit.” Br. in Opp. 12. But the varying mens rea standards are meaningfully different from each other because the same conduct leads to materially different results in different circuits.

A. The Fifth Circuit, Sixth Circuit, and Ninth Circuit require a specific intent to violate immigration law, which is materially different than merely knowing transportation will further illegal presence.

The Fifth Circuit requires that the defendant have “transported the alien within the United States *with intent* to further the alien’s unlawful presence.” *United States v. Nolasco-Rosas*, 286 F.3d 762, 765 (5th Cir. 2002) (emphasis added). In other words, the defendant’s “*intentional* furtherance of the violation of the law by the alien” is an “essential element” of a transportation offense. *United States v. Diaz*, 936 F.2d 786, 788 (5th Cir. 1991) (emphasis added). The “intentional furtherance of the violation of law” means that a defendant who “asserts that she never intended to further the aliens’ illegal presence in this country, but sought only

to assist them in reaching” their destination so that they could “apply[] there for political asylum” has a defense to the “intent” element. *United States v. Merkt*, 764 F.2d 266, 270 (5th Cir. 1985). Put simply, a defendant who intends “to comply with, not violate, the immigration laws” is not guilty in the Fifth Circuit. *Id.* See also *United States v. Irias-Romero*, 82 F.4th 422, 425 (5th Cir. 2023) (requiring that “an alien illegally entered or remained in the United States” and that the defendant “transported the alien within the United States intending to further that unlawful purpose”).

Similarly, the Sixth Circuit requires that the defendant “transported the illegal aliens with the *purpose* of furthering their illegal presence in the United States.” *United States v. Stonefish*, 402 F.3d 691, 699 (6th Cir. 2005) (emphasis added). In other words, the defendant must have a “*specific intent* ... ‘to *deliberately assist* an alien in maintaining his illegal presence’ in this country.” *Id.* at 695 (quoting *United States v. 1982 Ford Pick-Up*, 873 F.2d 947, 950 (6th Cir. 1989)) (emphases added). And like the Fifth Circuit, a defendant in the Sixth Circuit whose transportation “acts ... are incidental or merely permit an individual to maintain his existence” has a defense to this specific intent element. *Id.* “Accordingly, a person who knowingly gives an alien a ride to a homeless shelter may not be prosecuted under the above statute for transporting an illegal alien.” *Id.* at 696. “In contrast, a person who knowingly smuggles illegal aliens across the country may properly be convicted thereunder.” *Id.*

The government agrees that the “Ninth Circuit ... has already held that a conviction for an attempt to transport an illegal alien in violation of Section 1324(a)(1)(A)(ii) requires a showing that the defendant ‘intended to further the alien’s illegal presence in the United States.’” Br. in Opp. 11 (quoting *United States v. Barajas-Montiel*, 185 F.3d 947, 953 (9th Cir. 1999)). However, the Ninth Circuit’s model instruction requires that “the defendant *knowingly* attempted to transport the alien to help him remain in the United States illegally.” Br. in Opp. 9 (emphasis added). And the government concedes that the current model instruction is not an exact match to the “prior instruction” upheld in *Barajas-Montiel*, 185 F.3d at 954 (affirming instruction requiring that “the defendant knowingly transported or moved or attempted to transport or move the alien in order to help the alien remain in the United States illegally”). Br. in Opp. 9, 11.

This case illustrates how the Ninth Circuit’s model jury instruction is “materially different” from the instruction approved of in *Barajas-Montiel* and the law in the Fifth and Sixth Circuits. *Contra* Br. in Opp. 11 (insisting the two different instructions are “not materially different”). First, the removal of the phrase “in order to” matters; it effectively deleted the specific intent element. Courts have recognized that the phrase “in order to” requires that something “be undertaken for a purpose” and is synonymous with purpose or intent. *United States v. Fei Lin*, 139 F.3d 1303, 1306 (9th Cir. 1998).

Second, the Ninth Circuit’s harmless error analysis in this case shows how the omission of “in order to” can lead to a misunderstanding of the necessary intent.

The Ninth Circuit found that the “evidence introduced at trial ... overwhelmingly established that [Mr. Granillo] knew his passenger was unlawfully present and intended to transport him.” Pet. App. 5a.

Knowledge and a mere intent to transport, however, are insufficient in the Fifth and Six Circuits. In those circuits, the defendant must have the “*specific intent* ... to *deliberately assist* an alien in maintaining his illegal presence in this country.” *Stonefish*, 402 F.3d at 695. So there, “a person who knowingly gives an alien a ride” for some other purpose “may not be prosecuted under the ... statute for transporting an illegal alien.” *Id.* But here, the panel apparently believed that just knowingly and intentionally providing transportation was enough to sustain the conviction.¹ Thus, there exists a “material difference” between the instruction given here (and any other based just on knowledge) and the instruction given in the Fifth and Sixth Circuits because the same conduct is a crime in the former but not the latter.²

B. The First, Third, Eighth, and Tenth Circuits’ mens rea of “willfully” is materially different than the specific intent required in the Fifth and Sixth Circuits.

The government does not dispute that the First, Third, Eighth, and Tenth Circuits require that a defendant must act “willfully” in furtherance of a violation of

¹ The same would be true in the Seventh Circuit where the government concedes that it need only prove “that the defendant knew the alien he transported had entered the country in violation of immigration law, but also that the defendant knowingly transported the alien to further that violation.” Br. in Opp. 13–14 (quoting *United States v. Parmelee*, 42 F.3d 387, 390 (7th Cir. 1994)).

² This also shows why Mr. Granillo’s case remains a good vehicle for this issue. The panel’s comments on the evidence presented at trial did not speak to whether Mr. Granillo could have had the intent to transport his passenger for a purpose other than to further his illegal presence.

immigration law. Br. in Opp. 12. The government also seems to agree that there is a “good reason” for not using a “willfully” standard: the “statute does not contain the term ‘willfully,’” and that term is “typically understood to require proof that the defendant knew that his conduct was unlawful.” *Id.* (citing *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994)). However, as noted in the case cited by the government for this proposition, “[w]illful,’ this Court has recognized, is a ‘word of many meanings,’ and ‘its construction [is] often ... influenced by its context.’” *Ratzlaf*, 510 U.S. at 141 (quoting *Spies v. United States*, 317 U.S. 492, 497 (1943)).

Despite agreeing that “willfully” generally only requires knowledge of unlawful conduct, rather than an intent to commit unlawful conduct, the government claims a “willfully” standard does not “result in materially different outcomes.” Br. in Opp. 12. The government’s own cases from within the “willfully” circuits, however, do show materially different outcomes from the “intent to further” standard of the Fifth and Sixth Circuits.

For example, the government cites the Eighth Circuit case of *United States v. Velasquez-Cruz*, 336 F.3d 929 (8th Cir. 1991). Br. in Opp. 12. In *Velasquez-Cruz*, however, the Eighth Circuit rejected the use of the standard from the Sixth Circuit that “the government must prove that the defendant transported an alien with the purpose of supporting or promoting his or her illegal presence.” *Id.* at 422 (quoting *United States v. 1982 Ford Pick-up*, 873 F.2d 947, 951 (6th Cir.1989)). Instead, the court applied an outdated standard from the Ninth Circuit that determines “in furtherance,” not by an individual’s mens rea, but rather by whether

the transportation was “more than “merely ‘incidental’ to the presence” of the noncitizens. The court noted how under this standard an employer could violate the statute simply by using “his truck to transport several illegal aliens to and from work.” *Id.*³ This of course is a materially different outcome from the Fifth and Sixth Circuits, where knowingly driving a noncitizen for the purpose of getting to and from work would not be a crime.

The government also cites the Third Circuit case of *United States v. Silveus*, 542 F.3d 993, 1002 (3d Cir. 2008). In *Silveus*, the Third Circuit affirmed the conviction even though the defendant “was in the business of filing asylum papers and translating for Haitian aliens.” 542 F.3d 993, 1002 (3d Cir. 2008). The defendant’s actions supported an inference that she was trying to help the passengers comply with, rather than violate, immigration law. A defendant who intends “to comply with, not violate, the immigration laws” in the Fifth Circuit does not have the requisite mens rea for conviction. *United States v. Merkt*, 764 F.2d 266, 270 (5th Cir. 1985). But the same person is guilty under Third Circuit caselaw. This is a materially different outcome than the Fifth Circuit, where the defendant has a defense that she did not have the purpose to further an immigration law violation.

An additional example cited by the government is the Tenth Circuit case of *United States v. Barajas-Chavez*, 162 F.3d 1285 (10th Cir. 1999) (en banc). There,

³ The government concedes that the Eleventh Circuit’s pattern jury instructions similarly only require the government to prove “a direct and substantial relationship between the Defendant’s act of transportation and the furthering of the alien’s presence in the United States.” Br. in Opp. 14.

the Tenth Circuit affirmed the conviction of an undocumented defendant who was traveling from Arizona to Colorado “so that he and the two illegal aliens he was charged with transporting could look for work.” *Id.* at 1289. The court declined to adopt the Sixth Circuit’s approach, which considered “whether the illegal aliens were friends, co-workers, or companions of the defendant.” *Id.* at 1289 (quoting *United States v. 1982 Ford Pick-Up*, 873 F.2d 947, 951 (6th Cir.1989)). The en banc court expressly rejected the Sixth Circuit’s ‘intent-based’ approach, which would have afforded that defendant an “intent-based defense.” *Id.* at 1288–89. Here too, a person transporting undocumented people searching for work would have no defense in the Tenth Circuit but would have a defense in the Sixth Circuit; the same defendant would face materially different verdicts in different circuits.

C. The Seventh Circuit and the Ninth Circuit’s current model instructions require mere knowledge, and no specific intent.

The Seventh Circuit “hold[s] that a defendant’s guilty knowledge that his transportation activity furthers an illegal alien’s presence in the United States is an essential element.” *United States v. Parmelee*, 42 F.3d 387, 391 (7th Cir. 1994). The Court “decline[d] to adopt a special test for determining guilty knowledge,” while acknowledging that other courts had adopted “‘direct or substantial’ relationship and ‘intent-based’ approaches.” *Id.* “Relevant considerations bearing on this [knowledge] issue include whether the defendant received compensation for his transportation activity, whether the defendant took precautionary efforts to conceal the illegal aliens, and whether the illegal aliens were the defendant’s friends or coworkers or merely human cargo.” *Id.* A “proper jury instruction” provides that

“the defendants had to know ... that they were furthering the [noncitizens’] illegal entry by transporting them.” *Id.*

The text of the Ninth Circuit instruction given at Mr. Granillo’s trial required that he “knowingly attempted to transport or move [the noncitizen] to help him remain in the United States illegally.” Br. in Opp. 5 (citing record). The operative word is “knowingly.” The government claims the model instruction given in this case “is not materially different from the descriptions of the mens rea . . . in the Fifth Circuit.” Br. in Opp. 11. But this is incorrect. The Fifth Circuit requires that “an alien illegally entered or remained in the United States” and that the defendant “transported the alien within the United States *intending* to further that unlawful purpose.” *United States v. Irias-Romero*, 82 F.4th 422, 425 (5th Cir. 2023) (affirming model instruction) (emphasis added). The operative word is “intending.” However, the word “intent” or “intending” is absent from the Ninth Circuit’s instruction, and the word “knowingly” is absent from the Fifth Circuit’s instruction.

D. The Eleventh Circuit does not require any mens rea for the “in furtherance” element.

The Eleventh Circuit requires that “the Defendant transported the alien within the United States to further the alien’s unlawful presence,” but does not specify whether that transportation must be done negligently, recklessly, knowingly or purposefully. 11th Cir. Crim. Pattern Jury Instr. O96.2 (2025), available at: <https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructionsRevisedDEC2025.pdf> (also providing that “[t]he act of transportation must be something more than merely incidental to furthering the

alien's presence"). The government seems to admit as much, stating that the Eleventh Circuit's "pattern jury instructions require[s] the government to prove 'a direct and substantial relationship between the Defendant's act of transportation and the furthering of the alien's presence in the United States.'" Br. in Opp. 14 (quoting 11th Cir. Crim. Pattern Jury Instr. O96.2 (2025)).

Like the model instruction, the Eleventh Circuit's case law does not require any mens rea for the defendant's act of transportation; instead, the court focuses on the nature of the conduct. For example, in a challenge for insufficient evidence, the offense conduct consisted of the defendant "transporting the players from Miami to Los Angeles." *United States v. Dominguez*, 661 F.3d 1051,1056 (11th Cir. 2011). The defendant had the passengers "taken to an experienced immigration attorney shortly after arriving in Los Angeles for the purpose of processing the players through immigration." *Id.* at 1062. The Eleventh Circuit found insufficient evidence to support a conviction because the transportation did not have a direct and substantial relationship to "further[ing] their illegal status." *Id.* Just the opposite; the players "were paroled three months later," showing that the defendant's transportation helped them to legalize their status. *Id.* The Tenth Circuit found that "the evidence failed to prove that [the defendant] transported the Cuban players within the United States to further the players' unlawful presence." *Id.* at 1061. The court rejected "[r]equiring willful conduct" because it was "contrary to the plain language of the statute and its legislative history... Congress was not silent as to mental culpability in § 1324(a)[1]." *Id.* at 1067. As these cases demonstrate, the

courts of appeal take different approaches that result in the same conduct triggering culpability in certain circuits but not others.

II. This case is a proper vehicle to determine the elements of felony transportation offenses under § 1324(a)(1)(A)(ii).

The government casts the Ninth Circuit’s decision affirming its model instruction as a “poor vehicle” to address the circuit split. Br. in Opp. 14. However, this case squarely presents the question of what mens rea is required for the “transportation” to be “in furtherance of such violation of law” under § 1324(a)(1)(A)(ii). The Ninth Circuit recently amended its as to the mens rea element, and that element was disputed in this case. There is no other Ninth Circuit case addressing the language in the newest model instruction.

The Ninth Circuit’s model instruction and its decision here permit conviction upon mere knowledge that the transportation would “help [the noncitizen] remain in the United States illegally.” And the government essentially admits as much, saying the model instruction requires that “the defendant *knowingly* attempted to transport the alien to help him remain in the United States illegally.” See Br. in Opp. 9 (emphasis added). This is not consistent with prior Ninth Circuit decisions requiring a specific intent, and this inconsistency is meaningful and material.

The Court’s decision will be outcome determinative, because the instructional error was not harmless. Pet. App. 5a. The government points to the Ninth Circuit’s finding that “evidence introduced at trial ... overwhelmingly established that [Mr. Granillo] knew his passenger was unlawfully present and intended to transport him.” Br. in Opp. 14–15 (quoting Pet. App. 5a). However, the Ninth Circuit did not

analyze whether the evidence overwhelmingly established that Mr. Granillo had the specific intent to violate immigration law. *See* Pet. App. 5a. In fact, the evidence was not overwhelming on this issue. Mr. Granillo testified that he was trying to get through the port of entry line to check his mail and run errands in San Diego, and the government did not introduce any evidence to the contrary. The evidence that Mr. Granillo intended to quickly get through the port of entry and move on with his day was undisputed. The Ninth Circuit’s decision has the same error as its model instruction; both omit the specific intent element.

Additionally, this decision is highly consequential. Countless people transport the millions of undocumented people in the United States daily. The range of conduct is broad, from a bus driver who merely knows that a passenger is undocumented but is simply doing his job, to paid “alien smugglers” who pick up noncitizens close to the border, shortly after their illegal entry, intending to help them evade immigration authorities and remain in the United States illegally.

The Court has narrowly read the elements of federal criminal statutes “both out of deference to the prerogatives of Congress and out of concern [of] a fair warning ... of what the law intends to do if a certain line is passed.” *United States v. Aguilar*, 515 U.S. 593, 600 (1995) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). The countless people who transport undocumented individuals, either paid or unpaid, for humanitarian or other reasons, deserve to know if their conduct has crossed that line.

Concerningly, the government disregards the fact that the split in authority sweeps in vast amounts of conduct that Congress likely never intended to criminalize, let alone make a felony. Under the government's interpretation, a bus driver who is simply doing his job but knowingly transports an undocumented person within the United States can be convicted of committing a felony offense with a punishment of up to five years of imprisonment. Due process demands clear lines so law-abiding citizens can know when they have incurred criminal liability by transporting an undocumented person in the United States.

CONCLUSION

For these reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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