No. 15-900

In the Supreme Court of the United States

RAGHUBIR K. GUPTA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly instructed the jury that petitioner could be convicted under 18 U.S.C. 1546(a) for presenting an immigration-related document to the government knowing that the document contained a false statement of a material fact even if the statement was not made under oath or under penalty of perjury.

2. Whether the district court correctly instructed the jury that it could find that petitioner willfully caused a violation of Section 1546(a), in violation of 18 U.S.C. 2(b), if he acted "knowingly and intentionally."

TABLE OF CONTENTS

Page

Opinion below ... 1
Jurisdiction ... 1
Statement ... 1
Argument ... 6
Conclusion ... 17

TABLE OF AUTHORITIES

Cases:

Ajoku v. *United States*, No. 13-7264, 2014 WL 1571930 (2014) ... 13, 14, 15
American Surety Co. v. *Sullivan*, 7 F.2d 605 (2d Cir. 1925) ... 12
Bryan v. *United States*, 524 U.S. 184 (1998) ... 12, 13, 14
Flores-Figueroa v. *United States*, 556 U.S. 646 (2009) ... 2
Rosemond v. *United States*, 134 S. Ct. 1240 (2014) ... 14
United States v. *Ajoku*, 718 F.3d 882 (9th Cir. 2013), vacated and remanded, 134 S. Ct. 1872 (2014) ... 14
United States v. *Ashurov*, 726 F.3d 395 (3d Cir. 2013) ... 10
United States v. *Curran*, 20 F.3d 560 (3d Cir. 1994) ... 13, 15
United States v. *Gabriel*, 125 F.3d 89 (2d Cir. 1997), abrogated on other grounds by *Arthur Anderson LLP* v. *United States*, 544 U.S. 696 (2005) ... 6, 11, 12, 13, 16
United States v. *Khalje*, 658 F.2d 90 (2d Cir. 1981) ... 2, 6, 10

Constitution and statutes:

U.S. Const. Amend. VI ... 4
Act of June 27, 1952, ch. 477, Tit. IV, § 402(a), 66 Stat. 275 ... 9

Statutes—Continued: Page

Immigration Act of 1924, ch. 190, § 22(c), 43 Stat. 165 9
18 U.S.C. 2(a) 14
18 U.S.C. 2(b) .... *passim*
18 U.S.C. 924(a)(1)(D) 13
18 U.S.C. 1001 .... 14, 15
18 U.S.C. 1035 14
18 U.S.C. 1546 .... 2, 7, 9, 11
18 U.S.C. 1546(a) .... *passim*

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is reprinted at 618 Fed. Appx. 21.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 2015. The petition for a writ of certiorari was filed on January 11, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of causing the false subscription to, and the submission of, fraudulent immigration documents, in violation of 18 U.S.C. 1546(a) and 18 U.S.C. 2(b). Pet. App. 2a-3a. He was sentenced to seven months of imprisonment, seven months of home confinement, and one year of super-

vised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-6a.

1. Section 1546(a) of Title 18 of the United States Code criminalizes the misuse of immigration documents. See *Flores-Figueroa* v. *United States*, 556 U.S. 646, 649 (2009). As relevant here, Section 1546(a) makes it a crime to:

> knowingly make[] under oath, or as permitted under penalty of perjury * * * , knowingly subscribe[] as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws * * * or knowingly present[] any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact.

18 U.S.C. 1546(a). Section 1546(a) "proscribes two different courses of conduct * * * : (1) making a false statement under oath or otherwise subject to the penalty of perjury and (2) presenting a false statement." *United States* v. *Khalje*, 658 F.2d 90, 91 (2d Cir. 1981). Petitioner was charged with violating Section 1546 in both ways. See Indictment 1-2; accord C.A. App. A100-A101 (jury instructions noting that "statute can be violated in two ways" and that "[petitioner] has been charged with violating the statute in both of these ways").

2. From May 2004 through December 2005, an immigration amnesty program known as "CSS/Newman" or "LULAC" permitted aliens who were unlawfully present in the United States to qualify for immigration amnesty if they satisfied three requirements: (1) they were in the United States illegally as of January 1, 1982; (2) they had traveled outside the United

States for a short period of time between November 1986 and May 1988; and (3) they had unsuccessfully applied for the amnesty program when it was first enacted in 1986. Gov't C.A. Br. 3-4. During the operative years of the LULAC program, petitioner was an immigration attorney practicing in Brooklyn, New York. Presentence Investigation Report (PSR) ¶ 10.

Petitioner assisted aliens who were unlawfully present in the United States in applying for amnesty under the LULAC program by encouraging them to falsely claim that they satisfied the requirements of the program even though he knew they did not. Gov't C.A. Br. 4. Petitioner gave his clients a one-page questionnaire and then instructed them to complete it with false information indicating that the clients satisfied the requirements of the LULAC program. *Ibid.* For example, tape recordings established that, although Rehab Eldib and her husband (who were both serving as confidential government sources) had truthfully told petitioner that they had come to the United States in 2000, he told them to state in their applications that they had arrived in 1981. *Ibid.*; PSR ¶¶ 20, 22.

Petitioner also directed his clients to sign blank amnesty applications under penalty of perjury. PSR ¶ 14; Gov't C.A. Br. 5. Petitioner's office staff then filled out the applications after the clients had left the office, generally using information provided on the questionnaire. *Ibid.* Petitioner signed some of the applications as the "preparer" underneath a statement declaring that the signer had prepared the application in the name of another "under penalty of perjury." PSR ¶ 15; Gov't C.A. Br. 5. Petitioner then instructed his staff to mail the completed applications to the

United States Citizenship and Immigration Services. PSR ¶ 16; Gov't C.A. Br. 5.

3. Petitioner was charged with one count of causing the false subscription to, and the submission of, fraudulent immigration documents. Pet. App. 2a.[1]

a. At the close of petitioner's trial, the district court charged the jury on the elements of a violation of 18 U.S.C. 1546(a). C.A. App. A99-A103. The court explained that the government first had to prove that petitioner had made a false statement as alleged in the indictment. *Id.* at A102. The court instructed the jury that the government could establish this element in either of two ways: by proving that petitioner had "made a false statement under penalty of perjury" or by proving that petitioner "presented a false statement made by another, whether or not the false statement was made under penalty of perjury." *Ibid.* The court later explained that the government also had to prove that petitioner "knew the statement was false when made." *Id.* at A103.

The district court also instructed the jury that petitioner could be found guilty if he "willfully caused someone else to commit the crime." C.A. App. A103. After stating that "[t]o act willfully means to act knowingly and intentionally," *ibid.*, the court posed and answered a series of questions elucidating the phrase "willfully caused," as used in 18 U.S.C. 2(b), C.A. App. A104. The court explained that the government could prove that petitioner "willfully caused" a crime if it could prove that petitioner took "some

[1] In 2008, petitioner was tried and convicted at a jury trial, but the court of appeals vacated that conviction and remanded for a new trial because of a Sixth Amendment violation in the closure of the courtroom during *voir dire*.

action without which the crime would not have occurred" and "intentionally cause[d] another person to commit an act necessary to the completion of the crime[.]" *Ibid.* In sum, the jury was instructed that it could convict petitioner if it found that he "willfully caused an act * * * that had he performed it directly would be the crime charged." *Ibid.*

b. The jury convicted petitioner. The jury completed a special verdict form indicating that it found petitioner guilty of both willfully causing at least one person to make a false statement under penalty of perjury in an immigration document *and* willfully causing one or more of his employees to present at least one immigration document containing a false statement. Gov't C.A. Br. 6; see Pet. 5 & n.2.

4. As relevant here, petitioner argued on appeal that the trial court committed instructional error by (1) refusing to instruct the jury that both theories of violating Section 1546(a) require proof that a false statement was made under penalty of perjury and (2) improperly defining "willfully" to mean only "knowingly and intentionally." Pet. C.A. Br. 17-29. The court of appeals affirmed. Pet. App. 1a-6a.

The court of appeals rejected petitioner's argument that the "presentment" manner of violating Section 1546(a) incorporates the requirement that the false statement was made under penalty of perjury. Pet. App. 4a. The court noted that petitioner's argument was foreclosed by circuit precedent, *ibid.*, which had explained both that Congress would not have limited its prohibition on the presentment of materially false statements to statements that were made under oath and that the requirement that the presentment be knowing "assures that the presenter is liable only

when he knows the statement is false," *Khalje*, 658 F.2d at 92. The court of appeals also explained that, even if it were not bound by circuit precedent, any error would be harmless here because the jury in its special verdict had also found petitioner guilty of causing another to make a false statement under penalty of perjury and petitioner did not challenge that verdict. Pet. App. 4a.

The court of appeals also rejected petitioner's argument that the district court erred by not defining "willfully" for purposes of 18 U.S.C. 2(b) to mean "with a bad purpose to do something that the law forbids." Pet. App. 5a. Although noting that the term "willfully" sometimes has that meaning, the court observed that the district court faithfully applied circuit precedent, under which a defendant can be liable under Section 2(b) if he acts "with the mental state necessary to violate the underlying" offense and "*intentionally* causes another to commit the requisite act." *Ibid.* (quoting *United States* v. *Gabriel*, 125 F.3d 89, 101 (2d Cir. 1997), abrogated on other grounds by *Arthur Anderson LLP* v. *United States*, 544 U.S. 696, 706-708 (2005)).

ARGUMENT

Petitioner renews (Pet. 8-17) his two challenges to the district court's jury instructions, contending that courts of appeals are divided on each issue. Neither issue warrants this Court's review because the court of appeals correctly rejected both arguments and because, even if petitioner were correct on the merits of his arguments, he could not prevail under harmless-error review. Although a narrow circuit split exists on the first question presented (but not the second), this Court should not resolve that division in a case in

which the petitioner could not benefit from a ruling in his favor.

1. The court of appeals correctly rejected petitioner's argument that the district court erred by instructing the jury that the presentment prong of 18 U.S.C. 1546(a) does not require that the relevant false statement was made under penalty of perjury.

a. As relevant here, Section 1546 prescribes criminal penalties for anyone who:

> knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact.

18 U.S.C. 1546(a). That provision describes two different offenses: (1) knowingly making a materially false statement, under oath or under penalty of perjury, "in any application, affidavit, or other document required by the immigration laws or regulations"; and (2) knowingly presenting "any such application, affidavit, or other document" if the application, affidavit, or other document "contains any such false statement" or "fails to contain any reasonable basis in law or fact." *Ibid.*

In describing the second method of violating this part of Section 1546(a), Congress used the word "such" in two different places. To discern the meaning of that portion of the statute, one must determine which portion of the preceding text Congress intended

to reference with each "such." Petitioner argues (Pet. 8) that the phrase "any such false statement" incorporates not only the requirement that the false statement is material, but also that it was made under oath. The court of appeals correctly rejected that argument.

Congress's first use of the word "such" describes "any such application, affidavit, or other document." 18 U.S.C. 1546(a). That phrase plainly refers back to the phrase "any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder," the only prior reference to those types of documents. That qualifier thus clarifies that the only types of documents at issue are documents required by the immigration laws or regulations.

Congress's second use of the word "such" describes "any such false statement." 18 U.S.C. 1546(a). Because the word "such" is an adjective, it incorporates the features of the previously referenced noun—here, it incorporates the requirement that the false statement is "with respect to a material fact." *Ibid.* The word "such" does not, contrary to petitioner's suggestion, refer back to the requirement (describing the first method of violation) that a statement was made under oath. The under-oath requirement describes the method of making the statement (the verb), not the statement itself (the noun). The presentment prohibition thus criminalizes knowingly presenting a materially false statement in any application, affidavit, or other document required by an immigration law or regulation. That is exactly what the district court instructed the jury.

The court of appeals' correct understanding of Section 1546(a) makes sense because both prongs of the

provision prohibit acts that are likely to induce official reliance on known material falsities. When an individual swears under oath to materially false information in an immigration document, that sworn statement represents to immigration authorities that it may be relied upon as true. Similarly, when an individual knowingly presents a materially false statement as an official part of an immigration proceeding, that person represents to immigration officials that the false statement may be relied upon as true, regardless of whether the statement was made under oath. Congress wanted to criminalize both actions, either one of which is intended to undermine the integrity of the immigration system.

Congress's intent to punish the knowing presentment of materially false statements that are unsworn is confirmed, moreover, by its prohibition on the knowing presentment of any other document that "fails to contain any reasonable basis in law or fact." 18 U.S.C. 1546. It would be strange for Congress to punish the knowing presentment of unsworn material that lacks a reasonable basis, but not to punish the knowing presentment of an unsworn statement that a defendant *knows* is false. Congress's focus in this provision was not on the act of falsely swearing, but on the act of providing materially false or entirely unfounded information.[2]

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[2] The drafting history of Section 1546 also supports the court of appeals' interpretation. The original statute simply made it a crime to knowingly make false statements under oath in immigration documents. See Immigration Act of 1924, ch. 190, § 22(c), 43 Stat. 165. A 1952 amendment added both the materiality requirements for "false statements" and the "presentment" provision. See Act of June 27, 1952, ch. 477, Tit. IV, § 402(a), 66 Stat. 275. It

b. As petitioner notes (Pet. 8-10), the Third Circuit has held, in conflict with the Second Circuit, see *United States* v. *Khalje*, 658 F.2d 90, 92 (2d Cir. 1981), that the presentment prohibition applies only to a materially false statement that was made under oath. *United States* v. *Ashurov*, 726 F.3d 395, 398-402 (3d Cir. 2013). Although the Third Circuit agreed with the interpretation of the text of the statute—and in particular with the interpretation of Congress's use of the word "such"—set forth above, see *id.* at 398-399, that court also consulted other canons of construction and found a "grievous ambiguity" in the meaning of the presentment prohibition, *id.* at 400-402. The Third Circuit therefore relied on the rule of lenity to hold that the presentment prohibition applies only to statements made under oath. For the reasons set forth above, that interpretation of the statute is incorrect.

Although a narrow circuit split (between the Second and Third Circuits) exists on this question, this Court should not grant the petition for a writ of certiorari to resolve that division because, even if the Court were to adopt petitioner's view of the statute, petitioner could not take advantage of that interpretation because he cannot prevail under a harmless-error standard.

Petitioner was charged with violating Section 1546(a) both by causing a person to make a false statement under penalty of perjury in an immigration document and by presenting such a false statement to immigration authorities. Indictment 1-2; C.A. App.

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is reasonable to infer that Congress intended "any such statement" in the presentment clause to refer only to the contemporaneously added materiality requirement.

A100-A101 (jury instructions). The jury indicated through its special verdict that it found petitioner guilty on the single count of the indictment under both theories. See Pet. 5 & n.2. Accordingly, his Section 1546 conviction does not depend on sustaining his liability on a presentment-clause theory.

Petitioner does challenge the validity of his conviction under the theory that he violated Section 1546(a) by causing a person to make a false statement. But that challenge relates only to the second question presented, which is not the subject of a circuit conflict and does not warrant this Court's review. Absent review of that question, even if petitioner were correct that the presentment theory could not support his conviction, that conviction would nonetheless stand under the alternate theory. Because this case thus does not squarely present a need to address the presentment prong of Section 1546, review of that question in this case is not warranted.

2. Petitioner also argues (Pet. 11-17) that the district court erroneously instructed the jury on the meaning of the phrase "willfully caused" in 18 U.S.C. 2(b). Review of that question is not warranted because the court of appeals correctly affirmed the district court's jury instruction and that decision does not conflict with any decision of this Court or of any other court of appeals.

a. Section 2(b) provides that "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." 18 U.S.C. 2(b). In *United States* v. *Gabriel*, 125 F.3d 89 (2d Cir. 1997), abrogated on other grounds by *Arthur Anderson LLP* v. *United States*, 544 U.S. 696, 706-708

(2005), the court of appeals held that the "most natural interpretation of section 2(b) is that a defendant with the mental state necessary to violate the underlying section is guilty of violating that section if he *intentionally* causes another to commit the requisite act." *Id.* at 101; see also *American Surety Co.* v. *Sullivan*, 7 F.2d 605, 606 (2d Cir. 1925) (L. Hand, J.) ("The word 'willful' * * * means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law."). As the court of appeals correctly held, Pet. App. 5a, the district court's jury instruction on the meaning of the phrase "willfully caused" in Section 2(b) was consistent with that holding. See C.A. App. A103-A104.

The Second Circuit's interpretation of the phrase "willfully caused" in Section 2(b) is correct. This Court has acknowledged that the term "willfully" is "a word of many meanings." *Bryan* v. *United States*, 524 U.S. 184, 191 (1998) (citation omitted). "Most obviously," the Court explained, "it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind." *Ibid.* The type of proof necessary to establish that a defendant had a culpable state of mind varies depending on the type of criminal conduct at issue.

The Second Circuit's interpretation of Section 2(b)'s "willfully" requirement correctly construes that term in the particular context at issue: causing the commission of a criminal act. Under the Second Circuit's view, Section 2(b) captures only deliberate (not unwitting) conduct by requiring that a defendant intentionally caused another to commit the relevant criminal act. The statute also ensures that a defend-

ant has a culpable state of mind by requiring that, when he causes the relevant act to be committed, he has "the mental state necessary to violate the underlying" offense. See *Gabriel*, 125 F.3d at 101. As applied in petitioner's case, the jury thus had to conclude that petitioner either intentionally caused another to make a false statement under penalty of perjury or intentionally cause another to present a false statement—and in either situation, the jury had to find that petitioner knew when he committed the relevant act that the sworn or presented statement was materially false. See C.A. App. A103-A104 (jury instructions).

b. Petitioner is incorrect (Pet. 12-14) that the court of appeals' decision conflicts with *Bryan*, with the government's position in its brief in opposition to a petition for a writ of certiorari in *Ajoku* v. *United States*, No. 13-7264, 2014 WL 1571930 (2014), and with the Third Circuit's decision in *United States* v. *Curran*, 20 F.3d 560 (1994).

As explained, the court of appeals' interpretation of Section 2(b)'s "willfully" requirement is consistent with this Court's general statements about that term in *Bryan* and its recognition that the meaning of "willfully" varies with context. *Bryan* involved a statute, 18 U.S.C. 924(a)(1)(D), that makes it illegal to engage in activity (selling firearms) under particular circumstances (without a federal license). See 524 U.S. at 189. The Court noted that adjacent provisions covered other firearms violations when a person acted "knowingly." *Id.* at 193. In those circumstances, the Court required the jury to find that the defendant knew his conduct was unlawful and concluded that "[t]he danger of convicting individuals engaged in apparently innocent activity" was "not present" in

Bryan "because the jury found that [Bryan] knew that his conduct was unlawful." *Id.* at 195. In the instant case, the jury had to find that petitioner intentionally caused another to commit what petitioner knew was a materially dishonest act in direct dealings with the government—and in those circumstances, little danger exists of convicting a defendant who had an innocent mind.[3]

Petitioner's reliance on the government's brief in opposition in *Ajoku*, *supra*, is also misplaced. That brief addressed the meaning of the term "willfully" in 18 U.S.C. 1001 and 1035, both of which require the government to prove that a defendant "knowingly and willfully" made a false statement of a particular type. The government noted that "in some circumstances" the term "willfully" "simply means 'deliberately and with knowledge.'" 2014 WL 1571930, at *14 (quoting *United States* v. *Ajoku*, 718 F.3d 882, 889 (9th Cir. 2013), vacated and remanded, 134 S. Ct. 1872 (2014)). Unlike Section 2(b), however, Sections 1001 and 1035 require the government to prove that the defendant acted "*knowingly and* willfully." 18 U.S.C. 1001, 1035 (emphasis added). The government argued in the brief in opposition that the simultaneous use of the terms "knowingly" and "willfully" suggests that the government must prove something *in addition* to

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[3] Petitioner also relies on court of appeals decisions construing the mental-state requirement in 18 U.S.C. 2(a). This Court recently clarified the mental state required for aiding and abetting under that provision. See *Rosemond* v. *United States*, 134 S. Ct. 1240, 1248 (2014) (requiring that an aider and abettor of a crime "intend[] to facilitate that offense's commission"). In any event, because petitioner was not charged under Section 2(a) and Section 2(a) does not include the same mens rea language as Section 2(b), those cases are not relevant.

proving that a defendant's conduct was deliberate and undertaken with knowledge. In that statutory context, the government conceded that it must prove that a defendant "acted with knowledge that his conduct was unlawful" while maintaining that "[c]ontext and history may support a different interpretation of" the term "willfully" "in other criminal statutes not at issue" there. *Ajoku*, 2014 WL 1571930, at *14-*15 (citation omitted). Because Section 2(b) does not pair a willfulness standard with a knowing standard, the government's concession in *Ajoku* does not apply.

Petitioner also relies (Pet. 12) on the decision in *Curran*, in which the Third Circuit held that, in order to prove that a defendant violated Section 2(b) by willfully causing a violation of 18 U.S.C. 1001, the government had to prove that the defendant knew his conduct was unlawful. 20 F.3d at 569. As explained above, Section 1001 requires proof that a defendant "knowingly and willfully" committed the prohibited act—a standard that the government has conceded requires proof that a defendant knew his conduct was unlawful. The Third Circuit *agrees* with the Second Circuit that, in order to prove that a defendant violated Section 2(b), the government must prove both that a defendant caused another person to commit an unlawful act and that the defendant "possess[ed] the *mens rea* to commit" the substantive offense. *Id.* at 567. Although the Third Circuit in *Curran* did not explicitly rely on the "knowingly and willfully" standard in Section 1001, for the reasons explained above that standard requires proof that a defendant knew his actions were unlawful. Thus, because the substantive offense in *Curran* required proof that a defendant knew his actions were unlawful, proof that a defendant

violated Section 2(b) by causing the underlying violation required such proof as well. Indeed, throughout the Third Circuit's opinion, it purported to discuss the mental-state requirement for a violation of "section 2(b) in tandem with section 1001." *Ibid.* Petitioner does not rely on *any* case purporting to construe the mental-state requirement for a violation of Section 2(b) in tandem with Section 1546(a). Thus, no circuit conflict exists and this Court's review is unwarranted.[4]

c. Whatever the merits of petitioner's argument about the definition of "willfully caused" in Section 2(b), this case is not a suitable vehicle in which to consider that question because any error in the jury instructions on Section 2(b) was harmless. Trial testimony indicated that petitioner, an attorney, was essentially instructing his clients on how to violate the law and assisting them in doing so. Thus, even if the government were required to prove that petitioner intended to break the law, the evidence established precisely that fact. Because petitioner would not benefit from a holding that the district court should have defined "willfully" as acting "with a bad purpose to disobey the law," Pet. 11 (quoting proposed jury instruction), review of that question in this case is not warranted.

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[4] Although the Second Circuit has purported to disagree with the Third Circuit's approach of construing the mental-state requirement in Section 2(b) in conjunction with the mental-state requirement of the associated substantive crime, see *Gabriel*, 125 F.3d at 101-102, that disagreement has no import in light of the court's simultaneous statement that Section 2(b) requires the government to prove that a defendant had "the mental state necessary to violate the underlying section," *id.* at 101 (quoted at Pet. App. 5a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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