No. 11-950

In the Supreme Court of the United States

GUSTAVO DOMINGUEZ, AKA GUS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
WILLIAM C. BROWN
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Section 1324(a)(2) of Title 8, United States Code, subjects to criminal punishment "[a]ny person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien." Section 1324(a)(2)(B) defines several aggravating circumstances in which violations of the statute are subject to enhanced punishment.

The question presented is whether the government must establish, as an element of an aggravated offense under Section 1324(a)(2)(B), that the defendant acted with an intent to violate the immigration laws.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2-121) is reported at 661 F.3d 1051.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1) was entered on October 31, 2011. The petition for a writ of certiorari was filed on January 30, 2012 (a Monday). 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 Florida, petitioner was convicted on five counts of aiding and abetting the bringing of unauthorized aliens to the United States for the purpose of financial gain, in violation of 8 U.S.C.

1324(a)(2)(B)(ii) and 18 U.S.C. 2; five counts of aiding and abetting attempts to commit that offense, also in violation of 8 U.S.C. 1324(a)(2)(B)(ii) and 18 U.S.C. 2; one count of conspiring to bring unauthorized aliens to the United States for the purpose of financial gain, in violation of 18 U.S.C. 371; five counts of transporting an illegal alien within the United States, in violation of 8 U.S.C. 1324(a)(1)(A)(ii); and five counts of harboring an illegal alien, in violation of 8 U.S.C. 1324(a)(1)(A)(iii). Pet. App. 122-125. The district court sentenced petitioner to 60 months of imprisonment. *Id.* at 125. The court of appeals reversed petitioner's convictions on the transportation and harboring counts, but affirmed his convictions for bringing unauthorized aliens to the United States and for attempting and conspiring to commit that offense. *Id.* at 2-121.

1. This case arises from petitioner's role in a scheme to smuggle five Cuban baseball players into the United States for financial gain. Pet. App. 4-10. Petitioner worked as a sports agent and, through his company, Total Sports International (TSI), represented a number of professional baseball players. *Id.* at 4. In 2004, petitioner conspired with others, including Ysbel Medina-Santos (Medina), to smuggle five Cuban baseball players into the United States so that the players could pursue professional baseball careers. *Id.* at 5-6. Petitioner anticipated that he would represent the players as their agent, negotiate contracts on their behalf, and collect a percentage of their earnings as a fee. *Id.* at 5. In a previous scheme, petitioner and Medina had succeeded in smuggling two Cuban baseball players into the United States. *Ibid.* One of those players ultimately signed a $2.8 million baseball contract with the Seattle Mariners,

although the player refused to pay the conspirators' fee. *Ibid.*

Petitioner and Medina initially attempted to smuggle the five players into the United States in July 2004. Pet. App. 5-6. To secure Medina's participation in the scheme, petitioner paid him $100,000 from an account that petitioner managed for another client. *Id.* at 6. After receiving the money, Medina arranged for a "fast boat" to meet the players in Cuba and transport them to the United States. *Ibid.* The smuggling attempt failed, however, when the United States Coast Guard intercepted the conspirators' boat near Key West, Florida. *Ibid.* The driver hired by Medina was arrested; the Cuban players were detained and then returned to Cuba. *Ibid.*

In August 2004, however, the conspirators' second attempt to smuggle the players into the United States succeeded. Pet. App. 7. The five players, along with over a dozen other Cuban nationals, were dropped off in the water off Deer Key, Florida, at approximately 5 a.m. on August 22, 2004. *Ibid.* The players had no papers authorizing their entry into the United States. *Ibid.* Medina brought the players to the Miami home of one of petitioner's former baseball clients, where they were given food, clothing, and shelter. *Id.* at 7-8. Petitioner paid Medina for his role in the smuggling scheme by transferring a total of $125,000 to bank accounts owned by Medina's friends and family, who relayed the money to Medina. *Id.* at 7.

Petitioner's associates transported the Cuban baseball players to Los Angeles, California, where they met with petitioner and signed representation contracts with TSI. Pet. App. 8. Petitioner later arranged for the players to meet with an immigration attorney, and, in No-

vember 2004, petitioner accompanied them to a meeting with federal immigration authorities to help them apply for asylum and parole. *Id.* at 8-9.

2. In October 2006, a federal grand jury in the Southern District of Florida charged petitioner and others with a variety of offenses arising out of the smuggling scheme, including knowingly bringing and attempting to bring unauthorized aliens to the United States for the purpose of financial gain, in violation of 8 U.S.C. 1324(a)(2)(B)(ii); conspiring to bring unauthorized aliens to the United States for the purpose of financial gain, in violation of 18 U.S.C. 371; transporting illegal aliens within the United States, in violation of 8 U.S.C. 1324(a)(1)(A)(ii); and harboring illegal aliens, in violation of 8 U.S.C. 1324(a)(1)(A)(iii). Pet. App. 10-11.

Before trial, the government moved to preclude petitioner from presenting expert testimony or legal argument to the jury concerning the Cuban Refugee Adjustment Act (CAA), Pub. L. No. 89-732, § 1, 80 Stat. 1161 (8 U.S.C. 1255 note), and the so-called "Wet-Foot/Dry-Foot" policy. Pet. App. 11-12. Under the CAA and the Wet-Foot/Dry-Foot policy, Cuban nationals who reach United States soil and are admitted or paroled into the country may apply for permanent resident status after one year, even if they originally entered the United States illegally. See *id.* at 30-31.[1] In its motion, the

[1] Under a 1999 administrative interpretation known as the "Meissner memorandum," Cuban nationals who are physically present in the United States may be paroled into the United States and apply for an adjustment of status under the CAA, regardless whether they have entered through a designated port-of-entry. See Memorandum from Doris Meissner, Comm'r, INS, *Eligibility for Permanent Residence Under the Cuban Adjustment Act Despite Having Arrived at a Place Other than a Designated Port-of-Entry* (Apr. 19, 1999), available at

government explained that neither the CAA nor the Wet-Foot/Dry-Foot policy affects the unlawful status of Cuban aliens who have not been admitted or paroled into the United States, and, consequently, neither would provide a defense to the crimes charged. 4:05-cr-10009 Docket entry (D.E.) No. 163, at 5-10 (Feb. 26, 2007); see, *e.g.*, 8 U.S.C. 1324(a)(2) (prohibiting any person from bringing an unauthorized alien to the United States, "regardless of any official action which may later be taken with respect to such alien"). The district court granted the government's motion, concluding that the statute and policy were "irrelevant to this case." D.E. 177, at 3 (Mar. 14, 2007). The court explained: "The 'Wet-Foot/Dry-Foot' policy and the CAA did not affect the aliens' status at the time of the conduct at issue, and [petitioner's] misperception of that status would not provide a valid defense in this case." *Id.* at 2-3.

At trial, Medina testified against petitioner and described his role in the smuggling scheme. Pet. App. 4-5. Petitioner testified in his own defense and denied having arranged with Medina for the Cuban players to be brought to the United States. *Id.* at 10. The theory of petitioner's defense was that he was unaware that the players had been smuggled illegally from Cuba and that he only became involved after they were already in the United States. *Ibid.*

The jury found petitioner guilty on all 21 counts. Pet. App. 13. The district court imposed a five-year sentence on each count, with the sentences to be served concurrently. *Ibid.*; see 8 U.S.C. 1324(a)(2)(B)(ii) (providing a minimum penalty of five years of imprisonment

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http://www.uscis.gov/files/pressrelease/CubanParole_4Mar08.pdf (Attachment A).

for three or more violations done for the purpose of private financial gain).

3. The court of appeals affirmed in part and reversed in part. Pet. App. 2-121.

a. The court of appeals reversed petitioner's convictions for transporting and harboring illegal aliens in violation of 8 U.S.C. 1324(a)(1)(A)(ii) and (iii). Pet. App. 15-20. The court concluded that the evidence was insufficient to support the jury's finding that petitioner had transported the Cuban players "in furtherance" of their unlawful presence in the United States, *id.* at 15-18, or that petitioner had "knowingly concealed, harbored, or shielded from detection" the players while in the United States, *id.* at 19-20.

But the court of appeals affirmed petitioner's convictions for his role in smuggling the Cuban players into the United States, including the related conspiracy and attempt charges. Pet. App. 20-27. In rejecting petitioner's contention that the evidence was insufficient to support the jury's verdict, the court noted, *inter alia*, that Medina had testified to his longstanding smuggling relationship with petitioner, including a previous successful scheme in 2003; that petitioner had paid Medina $125,000 to bring the five Cuban players to the United States; that petitioner had required the players to sign contracts that obligated them to pay a portion of their baseball earnings to Medina; and that the players had arrived in the United States by a speed boat that dropped them in the water off the Florida Keys at dawn. *Id.* at 23. Based on this and other evidence, the court concluded, the jury was entitled to find that petitioner "knew or recklessly disregarded the fact that the five Cuban players did not have prior official authorization to come to the United States; [and] that [petitioner] will-

fully conspired with Medina." *Ibid.* For similar reasons, the court concluded that the evidence was sufficient to support petitioner's convictions for aiding and abetting the unsuccessful attempt to bring the five Cuban players to the United States in July 2004, and for aiding and abetting their successful smuggling in August 2004. *Id.* at 24-27.[2]

The court of appeals rejected petitioner's contention that, to establish a violation of 8 U.S.C. 1324(a)(2), the government must prove that the defendant acted willfully in bringing an unauthorized alien to the United States—*i.e.*, that the defendant acted with the intent to do something the law forbids. Pet. App. 29-38. The court explained that the statute itself specifies the requisite *mens rea* for the offense. See *id.* at 31-33. Section 1324(a)(2) subjects to criminal punishment any person who "knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien." 8 U.S.C. 1324(a)(2). To require proof that a defendant acted with an intent to violate the law, the court concluded, would be "contrary to the plain language of the statute." Pet. App. 33.

The court of appeals observed that the legislative history of Section 1324(a)(2) "strongly supported" its conclusion that the statute does not require an intent to violate the immigration laws. Pet. App. 34; see *id.* at 34-

[2] The court of appeals also rejected petitioner's challenge to the jury's finding that petitioner acted for the purpose of commercial advantage or private gain, which subjected him to an enhanced penalty under 8 U.S.C. 1324(a)(2)(B)(ii). Pet. App. 27-29.

37. Congress, the court explained, enacted the current version of Section 1324(a)(2) in response to the 1980 Mariel boatlift, in which American boats brought more than 125,000 undocumented Cubans from Mariel Harbor, Cuba to Key West, Florida, and presented them to United States immigration officials. *Id.* at 34-35. When the government indicted boat owners and crew members involved in the Mariel boatlift for bringing unauthorized aliens to the United States under former 8 U.S.C. 1324(a)(1) (1976), the Eleventh Circuit upheld the dismissal of the indictments on the ground that bringing aliens to the United States with the intent to present them to the proper officials did not violate the statute, which the court construed to require an intent "to commit an illegal act." *United States* v. *Zayas-Morales*, 685 F.2d 1272, 1277 (1982). In response to that decision, Congress enacted Section 1324(a)(2) in order to "expand the scope of activities proscribed by federal law to reach the conduct of those participating in such operations as the Mariel boatlift." Pet. App. 36 (quoting *United States* v. *Nguyen*, 73 F.3d 887, 892 (9th Cir. 1995)). The court of appeals explained that, "[u]nder these circumstances, we decline to add a specific criminal intent element when Congress has chosen not to do so," *id.* at 37, and it rejected as unpersuasive a decision of the Ninth Circuit reading a "specific criminal intent" element into the statute, *id.* at 36-37 (citing *United States* v. *Barajas-Montiel*, 185 F.3d 947, 951-953 (1999), cert. denied, 531 U.S. 849 (2000)).

The court of appeals accordingly agreed with the district court that the CAA and the Wet-Foot/Dry-Foot policy were irrelevant. Pet. App. 37-38, 45-47. The CAA and Wet-Foot/Dry-Foot policy, the court explained, pertain only to "official action which may later be taken

with respect to" the five Cuban players. *Id.* at 38. "By the plain language of the statute, the effect of the CAA and the Wet-Foot/Dry-Foot policy on the players' immigration status after they arrive in the United States is not relevant to a conviction for smuggling Cubans into the United States under [Section] 1324(a)(2)." *Ibid.*[3]

b. Judge Tjoflat, concurring in part and dissenting in part, would have reversed all of petitioner's convictions. Pet. App. 49-121. Among other things, he would have held that, to establish a felony violation of Section 1324(a)(2)(B), the government must prove that the defendant acted willfully—that is, with the purpose to disobey the law. *Id.* at 82-110 & n.39. In Judge Tjoflat's view, the district court erred in refusing to give petitioner's proposed instruction on criminal intent, *id.* at 108, and in preventing the jury from hearing about the CAA and the Wet-Foot/Dry-Foot policy, which Judge Tjoflat regarded as relevant to petitioner's claim that he believed he was acting lawfully, *id.* at 109-110.

ARGUMENT

Petitioner renews his contention (Pet. 4-14) that a defendant does not commit the offense of bringing an unauthorized alien to the United States in violation of 8 U.S.C. 1324(a)(2) unless he acts willfully, with the intent "to do something the law forbids" (Pet. 4). The court of appeals correctly rejected that contention. Although petitioner identifies a narrow disagreement between the Ninth Circuit and the court of appeals below concerning the intent required for violations of the felony provisions of Section 1324(a)(2)(B), that disagree-

[3] The court of appeals also rejected a variety of evidentiary claims and challenges to the jury instructions that petitioner does not renew in this Court. Pet. App. 38-45, 47-48.

ment does not warrant this Court's review, nor would this case provide an appropriate vehicle for the Court to address it. Further review is not warranted.

1. a. The court of appeals correctly rejected petitioner's argument that Section 1324(a)(2) requires proof that the defendant acted with the intent to violate the law. See Pet. App. 31-37. As the court explained, *id.* at 31-34, Congress expressly defined the mental state required for the offense of bringing an unauthorized alien to the United States. Section 1324(a)(2) imposes criminal liability on "[a]ny person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien." 8 U.S.C. 1324(a)(2). Congress further provided for an enhanced sentence when, *inter alia*, the defendant commits the offense "for the purpose of commercial advantage or private financial gain." 8 U.S.C. 1324(a)(2)(B)(ii).

Under the plain language of the statute, therefore, a defendant is guilty of the offense defined by Section 1324(a)(2) if the government proves that the defendant brought or attempted to bring an undocumented alien to the United States "in any manner whatsoever," provided that the jury finds that the defendant acted "knowing or in reckless disregard of the fact that [the] alien has not received prior official authorization to come to, enter, or reside in the United States." In addition, the defendant may receive an increased sentence under Section 1324(a)(2)(B)(ii) if, as in this case, the government proves that the defendant acted "for the purpose" of financial gain. The court of appeals properly refused to

engraft onto the statute the additional requirement that the defendant have intended to violate the immigration laws. As the court reasoned, "[h]ad Congress desired to punish only 'willful' conduct, Congress could have drafted the statute to say as much." Pet. App. 33.

Contrary to petitioner's characterization (Pet. 5), the court of appeals did not bar defendants under Section 1324(a)(2) from "adduc[ing] evidence of good faith," nor did the court "emasculate[] any legitimate defense to alien smuggling prosecutions." A defendant could show, for example, that he believed in good faith that the alien whom he brought to the United States had prior official authorization (*e.g.*, a visa) to enter the country, and that the defendant therefore lacked the *mens rea* required under the express terms of the statute.[4] The court of appeals held only that an intent to violate the law is not an element of the offense that Congress defined in Section 1324(a)(2). "[C]ourts obviously must follow Congress' intent as to the required level of mental culpability for any particular offense." Pet. App. 32 (quoting *United States* v. *Bailey*, 444 U.S. 394, 406 (1980)); see *Liparota* v. *United States*, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.").

b. Petitioner's contention that Section 1324(a)(2) requires proof that the defendant intended to violate the law disregards the plain language of the statute. Congress provided, for example, that a defendant may be

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[4] Alternatively, the defendant could show that he did not knowingly bring the alien to the United States—for example, that the alien was a stowaway who boarded the defendant's vessel without his knowledge. See Pet. App. 32 ("[A] defendant must knowingly bring or attempt to bring an alien to the United States.").

guilty under Section 1324(a)(2) if he acts "in reckless disregard" of an alien's undocumented status. As the court of appeals observed, however, petitioner's construction would "functionally eliminate" that language by limiting the offense to circumstances in which the defendant both knows and intends that his conduct will violate the law. Pet. App. 33. Likewise, petitioner argues (Pet. 13) that he did not violate Section 1324(a)(2) because he "intended to present the Cubans to immigration authorities." As a factual matter, that assertion is difficult to reconcile with the evidence before the jury, which established that petitioner paid $125,000 to a smuggler to arrange for a speed boat to drop the Cuban players in the water off the Florida Keys at dawn in August 2004. See Pet. App. 23. But even if petitioner had intended immediately to present the Cuban players to United States immigration authorities, his conduct would still have violated Section 1324(a)(2). Congress made the *failure* immediately to present an undocumented alien to immigration authorities an aggravating factor under the statute. See 8 U.S.C. 1324(a)(2)(B)(iii) (authorizing an enhanced penalty for "an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry"). But it is still "an offense" under Section 1324(a)(2) knowingly to bring an unauthorized alien to the United States even if the defendant intends to bring the alien directly to immigration officials. *Ibid.*

The legislative history of Section 1324(a)(2) reinforces that conclusion. As the court of appeals explained, see Pet. App. 34-37, Congress enacted Section 1324(a)(2) in response to the 1980 Mariel boatlift, in which American boat owners brought tens of thousands

of undocumented Cubans to the United States and presented them immediately to immigration officers in Key West. The government indicted the boat owners and crew members for violating 8 U.S.C. 1324(a)(1) (1976), which at that time did not include an express intent requirement. See Pet. App. 34 n.19 (reprinting the former statute). The Eleventh Circuit affirmed the dismissal of the indictments, however, on the ground that bringing aliens to the United States to present them to the proper officials did not violate the statute, which the court construed to require an intent "to commit an illegal act." *United States* v. *Zayas-Morales*, 685 F.2d 1272, 1277 (1982).

Congress responded to the *Zayas-Morales* ruling by enacting Section 1324(a)(2). See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 112, 100 Stat. 3382. The legislative history makes clear that Congress intended the new provision to abrogate *Zayas-Morales* and "expand the scope of activities proscribed by federal law to reach the conduct of those participating in such operations as the Mariel boatlift." Pet. App. 36 (internal quotation marks and citation omitted); see H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 65-66 (1986) (explaining that Section 1324(a)(2) was "designed to correct the shortcomings and ambiguities in existing law identified in" the Mariel boatlift litigation and to "clarif[y] that a person who knowingly transports an undocumented alien to any place in the United States will be subject to criminal prosecution if that person knew the alien was undocumented or acted with wilful blindness concerning the alien's immigration status"). Particularly against this background, the court of appeals correctly refused to construe Section 1324(a)(2) to require an intent "to commit an illegal act," *Zayas-*

Morales, 685 F.2d at 1277—the very requirement that Congress enacted the statute to reject. Cf. Pet. 13 (asserting that this case is "identical to" *Zayas-Morales*).

2. Petitioner emphasizes (Pet. 7-8) that several courts of appeals have held that proof of the defendant's intent to violate the law is required under 8 U.S.C. 1324(a)(1)(A)(ii), which prohibits the transportation of illegal aliens within the United States. Those decisions, however, turn on the particular language of Section 1324(a)(1)(A)(ii), which prohibits only the transportation of illegal aliens "in furtherance of" their illegal presence in the United States. See, *e.g.*, *United States* v. *Parmelee*, 42 F.3d 387, 391 (7th Cir. 1994) (concluding that "a defendant's guilty knowledge that his transportation activity furthers an alien's illegal presence in the United States is an essential element of the crime"), cert. denied, 516 U.S. 812, and 516 U.S. 813 (1995); *United States* v. *Chavez-Palacios*, 30 F.3d 1290, 1294 (10th Cir. 1994) (similar).[5]

Likewise, petitioner errs in relying (Pet. 7) on *United States* v. *Nguyen*, 73 F.3d 887 (9th Cir. 1995). *Nguyen* held that the offense of bringing an alien to the United States "at a place other than a designated port of entry," 8 U.S.C. 1324(a)(1)(A)(i), requires proof that the defendant acted with the intent to violate the immigra-

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[5] For similar reasons, *United States* v. *You*, 382 F.3d 958 (9th Cir. 2004), cert. denied, 543 U.S. 1076 (2005), does not aid petitioner. See Pet. 8. That case involved an offense under 8 U.S.C. 1324(a)(1)(A)(iii), which imposes criminal liability on any person who "conceals, harbors, or shields from detection" an illegal alien, or attempts to do so. The Ninth Circuit found no error in an instruction that required the jury to find that the defendants had acted "with the purpose of avoiding [the aliens'] detection by immigration authorities." 382 F.3d at 966 (internal quotation marks omitted; brackets in original).

tion laws. See 73 F.3d at 890-893. The government argued in *Nguyen* that Congress had amended the law after the Mariel boatlift to eliminate any such intent requirement. See *ibid.* In rejecting that argument, the Ninth Circuit specifically distinguished between the Section 1324(a)(1) offense at issue in that case and the provision at issue here, reasoning that Congress had accomplished its purpose of abrogating *Zayas-Morales* and criminalizing the conduct in the Mariel boatlift by enacting Section 1324(a)(2). See 73 F.3d at 892-893.

3. The Ninth Circuit subsequently held in *United States* v. *Barajas-Montiel*, 185 F.3d 947 (1999), cert. denied, 531 U.S. 849 (2000), however, that in *felony* prosecutions under Section 1324(a)(2)—that is, prosecutions involving aggravating circumstances under Section 1324(a)(2)(B)—the government must prove that the defendant "intended to violate [the] immigration laws." *Id.* at 953. The Ninth Circuit agreed that no such proof is required for misdemeanor violations of Section 1324(a)(2), see *id.* at 952, but concluded that proof of willfulness is necessary "for conviction of the felony offenses" in Section 1324(a)(2)(B), see *id.* at 952-953. Because petitioner was convicted for felony violations of Section 1324(a)(2)—bringing unauthorized aliens to the United States "for the purpose of commercial advantage or private financial gain," 8 U.S.C. 1324(a)(2)(B)(ii)—petitioner is correct (Pet. 6) that the court of appeals' decision in this case is inconsistent with the Ninth Circuit's decision in *Barajas-Montiel*.

Resolution of that narrow disagreement, however, would be unlikely to affect any significant number of cases. In the ordinary case in which the government proves one of the aggravating circumstances in Section 1324(a)(2)(B) beyond a reasonable doubt, there will be

no question that the defendant acted with an intent to violate the law. That is because the aggravating circumstances in Section 1324(a)(2)(B) themselves generally involve or evince an intent to violate the law: bringing an unauthorized alien to the United States "with the intent or with reason to believe" that the alien will commit a federal offense; acting "for the purpose of" financial gain; and failing to present the alien immediately to immigration officers at a port of entry. See 8 U.S.C. 1324(a)(2)(B)(i)-(iii). In *Barajas-Montiel* itself, the Ninth Circuit held that the lack of a jury instruction on criminal intent was not plain error because the evidence "overwhelmingly demonstrated that the alien smuggling scheme in [the] case was conducted in knowing violation of the immigration laws." 185 F.3d at 953. As the court observed, "[c]ases in which a defendant knowingly transported an alien without permission to enter into the United States, and did so for financial gain, but did not intend to violate the immigration laws, would be rare." *Ibid.*

Even if the question otherwise warranted this Court's review, this case would not provide an appropriate vehicle for the Court to address it. For the same reason that there was no plain error in *Barajas-Montiel*, any error in this case would be harmless. The evidence overwhelmingly demonstrated that, to bring the five undocumented Cuban baseball players to the United States, petitioner "willfully conspired with Medina—that is, acted with the specific intent to do something the law forbids." Pet. App. 22, 23. Petitioner paid a smuggler $125,000 through a series of bank accounts owned by the smuggler's friends and family in order to arrange for a speed boat to deposit the Cuban players in the water off the Florida Keys at 5 a.m. *Id.* at 23. And petitioner had

previously arranged to smuggle other Cuban baseball players into the United States for financial gain. See *id.* at 5.

Indeed, petitioner did not contend at trial that he brought the Cuban players to the United States in the good-faith belief that their entry would be lawful. To the contrary, petitioner denied having *any* advance knowledge of, or role in, the players' arrival in the United States. See Pet. App. 10. Petitioner's defense at trial was that "he was unaware the players were smuggled from Cuba and only found out they were in Miami after their arrival." *Ibid.* (quoting Pet. C.A. Br. 55). Nor, contrary to his arguments in this Court (Pet. 9-10), did petitioner seek to rely on the Wet-Foot/Dry-Foot policy to establish any good-faith defense to the smuggling charges. As the court of appeals noted, petitioner himself recognized that the Wet-Foot/Dry-Foot policy—which concerns the eligibility of Cuban aliens *after* their arrival in the United States to apply for an adjustment to lawful permanent resident status, see Pet. App. 30-31—has no relevance under Section 1324(a)(2), which expressly provides that a defendant may be guilty of bringing an undocumented alien to the United States "regardless of any official action which may later be taken with respect to such alien." See *id.* at 46.

Rather, petitioner sought to rely on the special immigration policies governing Cuban aliens only to establish his good-faith belief that, once the Cuban players were *already* in the United States, he could lawfully transport and harbor them because there was no reason for him to suppose their presence was illegal. See Pet. App. 45-47. Petitioner did not suggest that it would have been legal for him to bring the Cuban players to the United States in the first instance without prior official authorization.

Indeed, in arguing for the admission of expert testimony by an immigration judge on the federal policies applicable to Cuban aliens, petitioner's counsel told the district court that the immigration judge would testify that "[y]ou can't put a foreign national on a boat and bring them to the United States without permission. That's just not allowed, doesn't matter, Cuban national or anybody else, you can't do that." *Id.* at 46. This case consequently would not provide a suitable vehicle to resolve the question whether a felony violation of Section 1324(a)(2) requires proof that the defendant intended to violate the law, because petitioner never contended that he believed he could bring the Cuban players to the United States lawfully.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

LANNY A. BREUER
Assistant Attorney General

WILLIAM C. BROWN
Attorney

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