United States Court of Appeals
for the Ninth Circuit

No. 20-50172

United States of America,

Plaintiff-Appellee,

v.

Ricardo Rizo-Rizo,

Defendant-Appellant.

Appeal from the U.S. District Court
for the Southern District of California
Honorable Marilyn L. Huff Presiding

Appellant's Opening Brief

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INTRODUCTION

The government charged Ricardo Rizo-Rizo with attempted entry, a misdemeanor under 8 U.S.C. § 1325(a)(1). At issue on appeal is the scope of the crime's intent element. Before he pleaded guilty, the magistrate judge told Mr. Rizo (over objection) that the intent element did *not* require the government to prove that he knew his status as an "alien." 8 U.S.C. § 1325(a)(1). But the magistrate judge got it wrong. Knowledge of alienage *is* an element of attempted entry. This follows from basic federal attempt principles—as set out in cases like *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020)—and it follows from the presumption of mens rea—as set out in cases like *Rehaif v. United States*, 139 S. Ct. 2191 (2019). Thus, the magistrate judge misadvised Mr. Rizo, and he pleaded guilty without accurately understanding the charged offense's intent element. As a result, his guilty plea was not knowing, voluntary, or intelligent. That means his guilty plea is void, and this Court must vacate his conviction and remand.

STATEMENT OF JURISDICTION AND BAIL STATUS

Mr. Rizo appeals his conviction for attempted entry under 8 U.S.C. § 1325(a)(1). The magistrate judge had jurisdiction under 18 U.S.C. § 3401(a). Final judgment was entered on January 30, 2020. ER22. Mr. Rizo filed a notice of appeal to the district court seven days later, ER23, within the fourteen-day deadline, *see* Fed. R. Crim. P. 58(g)(2)(B). The district court had jurisdiction over the appeal under 18 U.S.C. § 3231.

The court entered final judgment on June 11, 2020. ER55. Mr. Rizo filed a notice of appeal to this Court eight days later, ER67, within the fourteen-day deadline, *see* Fed. R. App. P. 4(b)(1)(A)(i). This Court has jurisdiction under 28 U.S.C. § 1291.

Mr. Rizo received a time-served sentence, and he is therefore no longer in custody. ER22.

ISSUE PRESENTED

Did the magistrate judge commit reversible error by misadvising Mr. Rizo about the intent element of the charged offense by stating that knowledge of alienage is not an element of attempted entry?

PERTINENT STATUTES AND RULES

Copies of 8 U.S.C. § 1325 and Federal Rule of Criminal Procedure 11 are in an addendum.

STATEMENT OF THE CASE

I. Before Mr. Rizo pleaded guilty to attempted entry, the magistrate judge advised him that knowledge of alienage is not part of the offense's intent element.

In January 2020, a Border Patrol agent arrested Mr. Rizo after he crossed into the United States between ports of entry. ER2. The government charged him with attempted entry, a misdemeanor under 8 U.S.C. § 1325(a)(1). ER1.

Four days after his arrest, Mr. Rizo attended a hearing with other defendants before a magistrate judge. ER4. The magistrate judge advised Mr. Rizo of the rights he

would give up if he chose to plead guilty. ER9–10. The magistrate judge confirmed that no one unfairly pressured him into pleading guilty. ER12.

The magistrate judge then said he would "advise" Mr. Rizo "of the elements of the [charged] offense." ER13. The magistrate judge then articulated what he viewed as the elements:

> First, the Defendant was at the time of Defendant's attempted entry into the United States an alien, that is, a person who is not a natural born or naturalized citizen or a national of the United States.
>
> Second, the Defendant had the specific intent to enter the United States at a time and place other than as designated by immigration officers.
>
> Third, the Defendant also had the specific intent to enter the United States free from official restraint, meaning the Defendant intended to enter without being detected, apprehended, or taken into custody by government authorities so that he or she could roam freely in the United
> States.
>
> And, fourth, 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.

ER13. The magistrate judge next asked if Mr. Rizo understood these elements. ER13.

Counsel for Mr. Rizo interjected, "I believe an element of the offense is that the Defendant has to know he was an alien." ER 14. But the magistrate judge overruled the objection, explaining, "I believe I have correctly stated the elements for this—this offense." ER 14.

The magistrate judge then elicited a factual basis for the plea. The magistrate judge confirmed that Mr. Rizo crossed into the United States outside a port of entry. ER14. He asked if Mr. Rizo, at the time he crossed, was a citizen or national of the United States, to which Mr. Rizo said, "[n]o." ER14. He also asked if Mr. Rizo intended to enter the United States "at a place other than a designated port of entry" and "without being detected, apprehended[,] or taken into custody[.]" ER14. Mr. Rizo confirmed that he had. ER 14–15.

The magistrate judge asked defense counsel to confirm that there was an "adequate factual basis for the plea based on the elements that I have recited." ER15. Counsel responded, "Yes." ER15.

The magistrate judge then found a sufficient "factual basis" for the plea and found that the plea was "made knowingly and voluntarily, with a full understanding of the nature of the charge[.]" ER17. The magistrate judge thus accepted the guilty plea. ER17.

The magistrate judge immediately proceeded to sentencing and imposed a time-served sentence. ER19. The magistrate judge also confirmed that Mr. Rizo—who had not entered into a plea agreement—reserved his right to appeal. ER20.

II. The district court affirmed Mr. Rizo's conviction on appeal by holding that knowledge of alienage is not an element of attempted entry.

Mr. Rizo appealed his conviction to the district court. ER23. On appeal, he argued that an element of attempted entry is that the defendant knew his status as an

"alien." ER27–33. This followed from "basic attempt principles" and from cases like *Rehaif*. ER27–33. He contended that the magistrate judge's failure to advise him of the proper elements of the charged offense violated Federal Rule of Criminal Procedure 11. ER27–28. He also argued that the government could not prove that this error was harmless. ER34–36.

The district court affirmed. ER55–66. The court agreed with the magistrate judge that knowledge of alienage was not an element of the attempted-entry offense. ER57–62. The court did not reach the issue of harmlessness.

Mr. Rizo appealed to this Court. ER67.

SUMMARY OF ARGUMENT

Under 8 U.S.C. § 1325(a)(1), Congress has made it a crime for an "alien" to "enter[] or attempt[] to enter the United States" at a non-designated time or place. The government charged Mr. Rizo with the attempt portion of that statute. Federal Rule of Criminal Procedure 11 required the magistrate judge to accurately advise him of the offense's elements before he pleaded guilty. But the magistrate judge affirmatively misadvised Mr. Rizo by telling him that knowledge of alienage was not part of the intent element. The government cannot prove that this error was harmless.

The magistrate judge violated Rule 11 by advising Mr. Rizo that knowledge of alienage is not an element of attempted entry. First, under basic federal attempt principles, a defendant can *attempt* to commit a completed crime only if he *intends* to

commit that completed crime. As this Court recently put it: to commit an attempt, "a defendant must intend to commit every element of the completed crime." *United States v. Dominguez*, 954 F.3d 1251, 1261 (9th Cir. 2020). Thus, a defendant can commit attempted entry only if he intends to commit "*every* element of the completed [entry] crime." *Id.* (emphasis added). One element of the completed-entry crime is that the defendant is an "alien." 8 U.S.C. § 1325(a)(1). As a result, unless a defendant believes he is a noncitizen, he cannot intend to commit the completed-entry crime and he is innocent of attempted entry.

Setting aside those basic attempt principles, knowledge of alienage is an element for *both* the completed-entry crime and the attempted-entry crime under the presumption of mens rea. A mens rea presumptively applies to every element of a criminal offense that separates innocent from wrongful conduct. Moreover, following *Rehaif v. United States*, 139 S. Ct. 2191 (2019), this presumption applies to status elements, like alienage. As a result, under *Rehaif*, applying the presumption establishes that the alienage element of the *completed-entry offense* must have a mens rea attached to it. That is because, when Congress enacted the completed-entry offense in 1929, the alienage element is what separated innocent from wrongful conduct. In 1929, it was entirely lawful (and normal) for U.S. citizens to cross back and forth across the border outside a port of entry (which were for noncitizens). In fact, to this day, there are various ways in which someone who genuinely (but incorrectly) believes they are a U.S. citizen might violate § 1325(a)(1) by doing something as seemingly innocuous as driving to a port of

entry, if that port is not right at the border. Moreover, the mens rea of an attempt must be at least that of the completed offense. Thus, if a mens rea attaches to the alienage element of the completed-entry offense, it must attach to the alienage element of the attempted-entry offense too.

The government cannot prove that the magistrate judge's affirmative misadvisal about an element in violation of Rule 11 was harmless error. First, the Fourth Circuit, in *United States v. Gary*, 954 F.3d 194 (4th Cir. 2020), recently held that a failure to advise about an element of an offense during a guilty plea qualifies as structural error. This Court could adopt *Gary*'s reasoning and hold that the error was not harmless for that reason alone.

But this Court need not go as far as *Gary* to find the error at issue prejudicial. Following settled precedent from this Court and the Supreme Court, the error at issue is prejudicial. To prove that an error was harmless, the government carries the burden to prove that, despite the error, the guilty plea was still knowing, voluntary, and intelligent. The government can't do that in this case. If a defendant pleads guilty without an accurate understanding of the elements of the charged offense, the guilty plea is not knowing, voluntary, or intelligent. Here, because the magistrate judge affirmatively misadvised Mr. Rizo about the elements of the charged offense, his guilty plea was not knowing, voluntary, or intelligent. The guilty plea was void and invalid. Thus, the magistrate judge's error affected Mr. Rizo's substantial rights. Indeed, neither

this Court nor the Supreme Court have *ever* held that an error (preserved or not) that caused a guilty plea to be not knowing, voluntary, or intelligent was harmless.

In sum, the magistrate judge misadvised Mr. Rizo, and the result is an invalid guilty plea. This Court must therefore vacate his conviction and remand.

STANDARD OF REVIEW

This Court reviews de novo the "adequacy of a Rule 11 plea hearing[.]" *United States v. Seesing*, 234 F.3d 456, 459 (9th Cir. 2000). With "*de novo* review," "no form of appellate deference is acceptable." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991). A defendant who raises a Rule 11 objection does not waive or withdraw the objection by pleading guilty after the court overrules the objection. *United States v. Arqueta-Ramos*, 730 F.3d 1133, 1139 n.10 (9th Cir. 2013).

ARGUMENT

The entry of a guilty plea that is not knowing, voluntary, and intelligent violates the Constitution's Due Process Clause. *McCarthy v. United States*, 394 U.S. 459, 466 (1969). The Supreme Court has "long held that a plea does not qualify as intelligent unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Bousley v. United States*, 523 U.S. 614, 618 (1998) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). Likewise, a guilty plea cannot be "voluntary and knowing" unless the defendant received "notice of the nature of the charges against him, including the

elements of" the charged offense. *Tanner v. McDaniel*, 493 F.3d 1135, 1146–47 (9th Cir. 2007) (citing *Boykin v. Alabama*, 395 U.S. 238, 243–44 (1969)); *accord Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976). Thus, if a defendant pleads guilty without an accurate understanding of the charged offense's elements, the guilty plea is not knowing, voluntary, or intelligent. *See Tanner*, 493 F.3d at 1146–47; *Bousley*, 523 U.S. at 618.

Federal Rule of Criminal Procedure 11 "is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea" complies with due process. *McCarthy*, 394 U.S. at 465. Rule 11 does so by requiring a judge to (among other things) "address the defendant personally in open court" and "inform the defendant of, and determine that the defendant understands . . . the nature of each charge to which the defendant is pleading guilty." Fed. R. Crim. P. 11(b)(1)(G). In other words, Rule 11 requires the judge to "make the minor investment of time and effort necessary to set forth the meaning of the charges and to demonstrate on the record that the defendant understands." *United States v. Bruce*, 976 F.2d 552, 559 (9th Cir. 1992). To fulfill this requirement, the judge must accurately advise the defendant of the "elements of the crime[.]" *United States v. Covian-Sandoval*, 462 F.3d 1090, 1095 (9th Cir. 2006) (internal quotation marks omitted); *United States v. Villalobos*, 333 F.3d 1070, 1073 (9th Cir. 2003). This requirement "exists to ensure that guilty pleas are knowing and voluntary," and thus is a "core" requirement of Rule 11. *United States v. Pena*, 314 F.3d 1152, 1157 (9th Cir. 2003) (internal quotation marks omitted).

The magistrate judge conducting Mr. Rizo's guilty-plea colloquy violated this core requirement of Rule 11. To convict a defendant of attempting to enter the United States—the crime Mr. Rizo pleaded guilty to—the government must prove that the defendant knew that he was an "alien." 8 U.S.C. § 1325(a)(1). The magistrate, however, expressly told Mr. Rizo the opposite: that knowledge of alienage did *not* qualify as an element of the offense. Thus, when he pleaded guilty, Mr. Rizo did not understand the elements of the charged offense. The government cannot prove that this error is harmless. The error was not harmless under conventional harmless-error principles, and the error qualifies as structural error in any event. This Court must therefore vacate Mr. Rizo's guilty plea and remand.

I. The magistrate judge conducting Mr. Rizo's guilty-plea colloquy violated Rule 11 by affirmatively misadvising him about the intent element of attempted entry.

Under 8 U.S.C. § 1325(a)(1), Congress has made it a crime for an "alien" to "enter[] or attempt[] to enter the United States at any time or place other than as designated by immigration officers[.]" Mr. Rizo pleaded guilty to the attempt portion of § 1325(a)(1). ER13–17. During his guilty-plea colloquy, the magistrate judge explicitly advised him that he was guilty if (among other things) he "had the specific intent to enter the United States at a time and place other than as designated by immigration officers" and "the specific intent to enter free from official restraint[.]" ER13. The intent element, then, included nothing about alienage. After that advisal, the magistrate judge made his view explicit in overruling an objection from defense counsel: the

charged offense's intent element did *not* require the government to prove that the defendant knew his status as an "alien." ER13–14.

As explained below, two independent arguments establish that the intent element of attempted entry requires the government to prove that the defendant knew that he was a noncitizen when he attempted to enter the country.

- First, under settled attempt principles, the intent element of attempted entry requires the defendant to know his status as a noncitizen.

- Second, the presumption of mens rea attaching to all elements—including status elements, as explained in *Rehaif v. United States*, 139 S. Ct. 2191 (2019)—establishes that a defendant convicted of either crime under § 1325(a)(1) must know his status as a noncitizen.

As a result, the magistrate judge affirmatively misadvised Mr. Rizo of the "elements of the [charged] crime" in violation of Rule 11(b)(1)(G). *Covian-Sandoval*, 462 F.3d at 1095 (internal quotation marks omitted).

A. Under federal attempt principles, a defendant does not commit attempted entry unless he believes that he is a noncitizen.

Resolving the scope of the intent element of the attempted-entry offense requires applying basic federal attempt principles to that offense. As explained below, under federal attempt principles, a defendant has not committed an attempt unless he has the specific intent to commit *every* element of the completed crime. The completed-entry crime requires the government to prove that the defendant was an "alien." 8 U.S.C. § 1325(a)(1). Thus, unless a defendant believes he is a noncitizen, he will not intend to

commit the completed-entry offense. The magistrate judge thus erred by telling Mr. Rizo that knowledge of alienage is not an element of the charged offense.

1. A defendant must have the specific intent to commit every element of the completed crime to commit an attempt.

A defendant commits an attempt offense under federal law if he (1) "intended to commit the completed offense" and (2) took "a substantial step toward completing the offense." *United States v. Resendiz-Ponce*, 549 U.S. 102, 106 (2007) (discussing attempted reentry) (internal quotation marks omitted). Thus, to commit an attempt, "[i]t is not enough that [the defendant] may have intended *some* crime[.]" *United States v. Sneezer*, 900 F.2d 177, 180 (9th Cir. 1990) (emphasis in original). Instead, as this Court recently reaffirmed, to commit an attempt under federal law, "a defendant must intend to commit *every element of the completed crime*." *United States v. Dominguez*, 954 F.3d 1251, 1261 (9th Cir. 2020) (emphasis added) (discussing generic federal attempt principles).

The intent required to commit every element is specific intent. "[A]ttempt crimes," after all, "*always* require specific intent." *United States v. Berckmann*, 971 F.3d 999, 1003 (9th Cir. 2020) (emphasis added); *accord Sneezer*, 900 F.2d at 179; *see also United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1192–95 (9th Cir. 2000) (en banc) (holding that attempted reentry is a specific-intent crime). Because attempt crimes are specific-intent offenses, a "subjective mistake of fact[]" can provide a defense. *Gracidas-Ulibarry*, 231 F.3d at 1196. That is because a "[f]actual mistake" defense can "negate culpability . . . for specific intent crimes[.]" *United States v. Lamott*, 831 F.3d 1153, 1156 (9th Cir. 2016).

A simple set of examples makes these points more concrete. It is a crime to buy cocaine. If Ted buys a powdery substance believing it to be cocaine, he is guilty of attempting to buy cocaine, even if the substance is sugar. Ted intended to commit the elements of the completed offense. On the other hand, if Ted buys a substance he thinks is sugar but is actually cocaine, he is not guilty of attempting to buy cocaine. Ted had a mistake of fact about what he was buying and so he lacked the specific intent to buy cocaine. Put differently, he did not have the intent "to commit every element of the completed crime." *Dominguez*, 954 F.3d at 1261.

2. Because a defendant cannot commit the completed-entry crime without being a noncitizen, a defendant cannot commit attempted entry without believing he is a noncitizen.

Under these basic federal attempt principles, a defendant has not committed attempted entry unless he has the specific intent "to commit *every* element of the completed [entry] crime." *Dominguez*, 954 F.3d at 1261 (emphasis added). To commit the *completed-entry crime*, the defendant must be an "alien" who "enters . . . the United States" at a non-designated time or place. 8 U.S.C. § 1325(a)(1). Thus, to commit *attempted* entry, the defendant must specifically intend to be a noncitizen who enters the United States at a non-designated time or place. *Dominguez*, 954 F.3d at 1261. A defendant who does not think he is a noncitizen will not have the intent to be an "alien" who enters the United States at a non-designated time or place. 8 U.S.C. § 1325(a)(1). A defendant who doesn't believe he is a noncitizen, then, does not have the required intent to commit attempted entry. Put differently, even if a defendant is actually a

noncitizen, he will not have committed attempted entry if he has a "subjective mistake of fact[]" about his status as a noncitizen. *Gracidas-Ulibarry*, 231 F.3d at 1196. For this reason, the intent element of attempted entry requires the government to prove that the defendant knew his status as a noncitizen.

This conclusion fits with how this Court has treated attempted *reentry* under 8 U.S.C. § 1326. In *United States v. Smith-Baltiher*, 424 F.3d 913, 923–25 (9th Cir. 2005), this Court held that a defendant does not commit attempted reentry unless he knew he was a noncitizen. There, the defendant—charged with attempted reentry—argued that his belief that he was not an "alien" established that he did not have the specific intent to commit the completed reentry offense. *Id.* The defendant did not tie his argument to the alienage element. Instead, the defendant contended that, if he believed he were a U.S. citizen and not an "alien," he would not have the "conscious desire[] to reenter the United States without the express consent of the Attorney General," a requirement specific to a reentry offense. *Id.* at 923 (internal quotation marks omitted). This Court agreed. This Court held that attempted reentry qualified as a "specific intent" crime, and a "mistake of fact" could negate the culpability for that sort of offense. *Id.* at 923–24. Thus, if the defendant believed he was not an "alien," it would negate the specific-intent element of the offense. *Id.* at 923–25; *see also United States v. Hernandez*, 504 F. App'x 647, 648–49 (9th Cir. 2013) (holding that *Smith-Baltiher* requires government to prove beyond reasonable doubt that defendant knew he was a noncitizen).

This same basic framework, applied to the attempted-entry offense, leads to the same conclusion. Attempted entry, like attempted reentry, is a "specific intent" offense. *Smith-Baltiher*, 424 F.3d at 923–24. That means a mistake of fact negating one of the underlying elements could provide a defense to the intent element. *See id.* Focusing on the alienage element (rather than on the consent element of reentry) establishes that a defendant must know he is an "alien" to commit attempted entry. 8 U.S.C. § 1325(a)(1). That is, an element of attempted entry, like attempted reentry, is that the government must prove that the defendant believed he was an "alien." 8 U.S.C. § 1325(a)(1).

The district court below disagreed. ER59–60. The court, however, did not grapple with the well-settled federal attempt principles articulated above—principles that have governed attempt law in this circuit for decades. Instead, the court mostly rejected Mr. Rizo's argument by reasoning that "[a] defense of mistake of fact is not at issue here as Defendant did not raise this defense below or on appeal." ER60.

But this response reflects a fundamental misunderstanding of Mr. Rizo's position. The mistake-of-fact defense "negate[s] culpability" because it negates the mens rea element. *Gracidas-Ulibarry*, 231 F.3d at 1196; *accord Lamott*, 831 F.3d at 1156. That means it helps define the mens rea element. And because a mistake of fact about alienage negates the intent element, it follows that the intent element must require the defendant to know he is a noncitizen. Accordingly, when the magistrate judge below defined the intent element as just having the "specific intent to enter the United States at a time and place other than as designated by immigration officers," he misadvised

Mr. Rizo because he omitted the alienage requirement. ER13. This error by omission became an error by commission when the magistrate judge overruled Mr. Rizo's objection, confirming that the charged offense did not require the government to prove that he knew he was an "alien." ER13–14.

This misadvisal has nothing to do with whether Mr. Rizo "raised" a defense of mistake of fact. ER60. A defendant doesn't "raise" a defense at all during a guilty-plea colloquy. Instead, the misadvisal has to do with the magistrate judge's failure to *define* the intent element correctly. Put another way, under a properly defined intent element, a mistake-of-fact defense to the intent element is available. But under the way the magistrate judge defined the element, it wasn't. Thus, the magistrate judge defined the element incorrectly.

In any event, the district court's fixation on whether a mistake-of-fact defense was available misses the straightforward syllogism that establishes Mr. Rizo's point:

- To commit an attempt, a defendant must intend to commit the completed offense. *Dominguez*, 954 F.3d at 1261.
- An element of the completed-entry crime is that the defendant is an "alien." 8 U.S.C. § 1325(a)(1).
- Thus, a defendant does not intend to commit the completed-entry offense, and thus is not guilty of attempt, unless he believes he is a noncitizen.

In sum, applying settled attempt principles to § 1325(a)(1) establishes that a defendant does not commit the attempt offense without having the specific intent *to be a noncitizen* who enters the United States at a time and place other than as designated by

immigration officers. Thus, the magistrate judge affirmatively misadvised Mr. Rizo by expressly telling him to the contrary. *See* ER13–14. This violated Rule 11(b)(1)(G). *Covian-Sandoval*, 462 F.3d at 1095.

B. Under the presumption of mens rea, a defendant does not commit attempted entry unless he believes that he is a noncitizen.

The presumption of mens rea provides a second independent path to establishing the magistrate judge's error in this case. The *completed-entry crime* has as an element that the defendant must know he is an "alien." 8 U.S.C. § 1325(a)(1). This follows from *Rehaif v. United States*, 139 S. Ct. 2191 (2019), in which the Court affirmed that the presumption of mens rea applies to status elements, like alienage. Moreover, an attempt crime has *at least* the mens rea of the completed crime. As a result, if knowledge of alienage is an element of the *completed-entry crime*, it is an element of *attempted* entry too. The magistrate judge thus erred by telling Mr. Rizo to the contrary.

1. Courts must presume that every element of a criminal offense—including a status element, like alienage—has a mens rea if it separates innocent from wrongful conduct.

Whether a mens rea applies to an element of a criminal offense is "a question of statutory construction." *Staples v. United States*, 511 U.S. 600, 604 (1994). To answer this question, courts must "start from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding '*each* of the statutory elements that criminalize otherwise innocent

conduct.'" *Rehaif*, 139 S. Ct. at 2195 (emphasis added) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)).

This presumption "reflects the basic [principle] that wrongdoing must be conscious to be criminal[.]" *United States v. Olson*, 856 F.3d 1216, 1220 (9th Cir. 2017) (internal quotation marks omitted). This goes back to a founding-era principle that a crime requires "an evil-meaning mind." *Morissette v. United States*, 342 U.S. 246, 251 (1952). In fact, when States started "codi[fying] crimes" at the founding, courts assumed that the "omission" of a mens rea attaching to each element of a crime did *not* reflect "disapproval" of this firmly established "principle." *Id.* Instead, omitting a mens rea "merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation." *Id.*

Courts have continued to follow this founding-era principle. The mens rea presumption applies "even when Congress does not specify *any* scienter in the statutory text." *Rehaif*, 139 S. Ct. at 2195 (emphasis added). For example, in *Staples*, the Court addressed 26 U.S.C. § 5861(d), where Congress made it a crime to "receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record[.]" 511 U.S. at 605. This provision "is silent concerning the *mens rea* required for a violation." *Id.* The Court, however, held that "silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element[.]" *Id.* Instead, the Court interpreted the elements of the crime "in light of the background rules of the common law," including the presumption

in favor of mens rea. *Id.* In doing so, the Court read into the statute a *knowing* mens rea, meaning a defendant did not violate the statute unless he *knew* that the gun he received or possessed was not registered properly. *Id.* at 605–07.

This presumption is so primally important that the Supreme Court applies it to all elements even when Congress includes an express mens rea for one element but omits it for other elements. *See, e.g.*, *Liparota v. United States,* 471 U.S. 419, 420–27 (1985); *Morissette*, 342 U.S. at 248–50. For example, in *Liparota*, the Court dealt with a statute about food stamps that made it a crime to "knowingly use[] . . . or possess[] coupons or authorization cards in any manner not authorized by [the statute] or the regulations[.]" 471 U.S. at 420. Though the word "knowingly" modified the various verbs in the statute only, the Court held that a knowing mens rea should attach to the element that required the government to prove that the coupons or cards were not authorized by statute or regulation. *Id.* at 423–33. A failure to read a knowing mens rea into this latter element was required because failing to do so would "criminalize a broad range of apparently innocent conduct." *Id.* at 425. Thus, the presumption in favor of mens rea applying to all elements overcame the fact that Congress had used a mens rea for one element but not another.

In *Rehaif*, the Court addressed an exception a lower court had created for status elements, like alienage. There, the Court examined 18 U.S.C. § 922(g), which made it a crime "for certain individuals to possess firearms." 139 S. Ct. at 2194. "The provision lists nine categories of individuals subject to the prohibition, including felons and aliens

who are 'illegally or unlawfully in the United States.'" *Id.* (quoting 18 U.S.C. § 922(g)). The statute made it a crime for these individuals to "knowingly violate" the firearm prohibition, and the question was whether a defendant had to know his status as an unauthorized "alien" to commit the crime. *Id.* The lower court (relying on the decisions of most other circuits) had refused to apply the mens rea presumption to status elements—elements that concern whether the "defendant knew a specific fact or detail about himself." *United States v. Rehaif*, 888 F.3d 1138, 1146 (11th Cir. 2018).

The Supreme Court reversed and held that the presumption *did* apply to status elements, like alienage. In doing so, the Court reaffirmed that the presumption in favor of mens rea applied to "each of the statutory elements that criminalize otherwise innocent conduct." *Rehaif*, 130 S. Ct. at 2195 (quoting *X-Citement Video*, 513 U.S. at 72). The Court explained that applying a mens rea to the status element in 18 U.S.C. § 922(g) helped separate "wrongful from innocent acts." *Id.* at 2196–97. Under federal law, someone could normally own a firearm; the thing that prevented them from lawfully owning a firearm was their status as a felon, an unauthorized "alien," and so on. *Id.* If a person didn't know their status, then, they would have no reason to think their actions were wrongful. This conclusion about § 922(g)'s status element, the Supreme Court observed, overruled the contrary conclusion from "most lower courts," including from this Court. *Id.* at 2199 (citing *United States v. Pruner*, 606 F.2d 871, 874 (9th Cir. 1979)).

2. The alienage element of the completed-entry crime is what separates innocent from wrongful conduct, and thus a mens rea attaches to that element.

Under the above principles, whether the alienage element of the completed-entry crime has a mens rea attached to it is "a question of statutory construction." *Staples*, 511 U.S. at 604. With the entry crime, Congress failed to "specify any scienter in the statutory text[.]" *Rehaif*, 139 S. Ct. at 2195. But this silence does not mean that "Congress intended to dispense with a conventional *mens rea* element[.]" *Staples*, 511 U.S. at 605. Instead, to determine congressional intent, this Court must "start from a longstanding presumption . . . that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" *Rehaif*, 139 S. Ct. at 2195 (quoting *X-Citement Video,* 513 U.S. at 72). This presumption applies to status elements too. *Id.* at 2195–99.

In determining congressional intent, this Court should examine the meaning of the relevant text "at the time Congress enacted" it. *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 910 (9th Cir. 2020); *accord Williams v. King*, 875 F.3d 500, 502 (9th Cir. 2017); *Perrin v. United States*, 444 U.S. 37, 43 (1979). Congress passed the original version of § 1325 in 1929. *United States v. Corrales-Vazquez*, 931 F.3d 944, 947 (9th Cir. 2019) (citing Act of Mar. 4, 1929, Pub. L. No. 70-1018, § 2, 45 Stat. 1551, 1551). It was the first time Congress had made a noncitizen's bare act of crossing into the United States outside a port of entry a crime. *United States v. Aldana*, 878 F.3d 877, 880 (9th Cir. 2017). With the 1929 legislation, Congress made it a crime for "'[a]ny alien [to] enter[] the United States

at any time or place other than as designated by immigration officials[.]'" *Id.* (quoting 45 Stat. 1551, 1551). "This language closely tracks the current version of § 1325(a)(1)." *Id.* at 880–81. This Court, in fact, has continually looked to the 1929 legislation to determine congressional intent to define § 1325's scope. *See Aldana*, 878 F.3d at 880–81. This is because the "relevant" language "'has remained unchanged' since it was first used in 1929" and thus "presumptively retains its original meaning." *Corrales-Vazquez*, 931 F.3d at 948 (quoting *Whitfield v. United States*, 574 U.S. 265, 267 (2015)).

By its terms, the 1929 statute—like its successor statute today—applied to "aliens" only. 45 Stat. 1551, 1551. It did not apply to U.S. citizens. During this time, the United States essentially had open borders, and nothing required *U.S. citizens* to enter at any particular place along the border.[1] This did not go unnoticed by law enforcement. In fact, the Secretary of Treasury wrote President Hoover in 1930 and asked him to support "[a] statutory prohibition of entry into the United States, *of either aliens or citizens*, in any manner and with or without merchandise, excepted at designated points[.]" A.W. Mellon, Proposals to Improve Enforcement of Criminal Laws of the United States,

[1] *See*, *e.g.*, How crossing the U.S.-Mexico Border became a crime, *available at* https://theconversation.com/how-crossing-the-us-mexico-border-became-a-crime-74604 (explaining that, in 1920s, "U.S. and Mexican citizens" had been crossing into United States outside for "decades"); In Rural West Texas, Illegal Border Crossings are Routine for U.S. Citizens, *available at* https://www.npr.org/2019/05/25/726128023/in-rural-west-texas-illegal-border-crossings-are-routine-for-u-s-citizens (explaining that, "[i]nformal, unregulated crossings have been a fixture of life for generations in rural communities along the U.S.-Mexico border" and discussing U.S. citizens crossing back from Mexico outside physical ports).

H.R. Doc. No. 71-252, at *27 (2d Sess. 1930) (emphasis added). This request, however, went essentially ignored for over 50 years, until Congress in 1986 provided a limited prohibition on U.S. citizens entering the United States. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 3114, 100 Stat. 3207, 3207-82–3207-083.

Thus, when Congress made it a crime for a noncitizen to enter the United States outside a port of entry in 1929 (and when Congress recodified the prohibition in 1952 in 8 U.S.C. § 1325), an individual's immigration "status, and not his conduct alone," is what "separate[s] wrongful from innocent acts." *Rehaif*, 139 S. Ct. at 2197 (emphasis removed). Put concretely, a U.S. citizen crossing into the United States in 1929 outside an immigration port would not have thought that he or she was doing anything wrong—and, in fact, his actions would have been entirely lawful. Thus, without requiring the defendant to actually know he is a noncitizen, the illegal-entry statute would "criminalize a broad range of apparently innocent conduct" in conflict with the presumption of mens rea. *Liparota*, 471 U.S. at 426.

As a result, to convict a defendant of committing the completed-entry offense, the government must prove that the defendant knew that he had "engaged in the relevant conduct" (that he entered the United States outside a port) and that he knew "that he fell within the relevant status" (that he was a noncitizen). *Rehaif*, 139 S. Ct. at 2194. This means that, under *Rehaif*, the government cannot convict a defendant of committing the completed-entry crime without proving that the defendant knew he was an "alien." 8 U.S.C. § 1325(a)(1).

Below, the district court tried to distinguish § 1325(a)(1) from the statute at issue in *Rehaif*, 18 U.S.C. § 922(g). ER60–61. The court pointed out that § 922(g) contained the word "knowingly," while § 1325(a)(1) does not. ER61. But this is a distinction without a difference and conflicts with several Supreme Court decisions. The presumption of mens rea applies even if the statute "is silent concerning the mens rea[.]" *Staples*, 511 U.S. at 605; *see also United States v. Burwell*, 690 F.3d 500, 537 (D.C. Cir. 2012) (Kavanaugh, J., dissenting) (cataloguing many Supreme Court opinions reading a mens rea into a statute that had none). In fact, *Rehaif* itself made this very point: the presumption applies to each element "even when Congress does not specify *any* scienter in the statutory text." *Rehaif*, 139 S. Ct. at 2195 (emphasis added). Given that, the lower court's claim that *Rehiaf* was somehow distinguishable on this basis is unsupportable. Put differently, *Rehaif* didn't change the more general mens rea principles; instead, it merely held that status elements were not exempt from those general principles.

In any event, the district court's point proves too much. If the court were right that the lack of an explicit knowing mens rea in the statute meant no mens rea attached to the alienage element, it should follow that a knowing mens rea shouldn't apply to *any* element. But even the government does not think that the crime of illegal entry is a strict-liability offense. *See* ER45.

The district court also claimed that the element of alienage is not what separates criminal from innocent conduct because, since 1986, "[a]ny person, whether a U.S.

citizen or an alien, who attempts to cross the border outside a designated port of entry violates the law." ER61 (citing 19 U.S.C. § 1459).

This response is misguided for two reasons. First, as explained above, the proper historical moment to determine the entry crime's meaning is 1929. That is the "time Congress enacted" the original version of the crime, *Rittmann*, 971 F.3d at 910, a version that replicated in relevant part all the same statutory language present in the current version of the entry crime, *Aldana*, 878 F.3d at 880–81. Indeed, this Court previously disagreed with the government's interpretation of another provision in § 1325—subsection (a)(2) of the statute—when that interpretation conflicted with legal materials from around the time Congress passed the 1929 legislation. *See Corrales-Vazquez*, 931 F.3d at 948.

Second, the district court misunderstood modern law. Under 8 U.S.C. § 1325(a)(1), Congress has made it a crime for any "alien" to "enter[] or attempt[] to enter the United States at any time or place other than as designated by immigration officers[.]" This Court has clarified that the places designated for entry are the physical port facilities themselves, not the geographic areas surrounding the port. *Aldana*, 878 F.3d at 880–82. Thus, Congress has made it a crime for a noncitizen to enter the country outside a physical port. *Id.*

But a U.S. citizen does not commit a crime by just crossing into the country outside a physical port. The court below misunderstood the reach of 19 U.S.C. § 1459, the statute it cited. ER61. Under that statute, any "individual[]"—including a U.S.

citizen—commits a crime by "intentionally" failing to "enter the United States . . . at a border crossing point designated by the Secretary" of Treasury and not "immediately . . . report[ing] the arrival" and "present[ing] themselves, and all articles accompanying them[,] for inspection. 19 U.S.C. § 1459(a), (e), (g). The Secretary of Treasury (unlike "immigration officers") have exercised their authority to designate geographic areas, not physical port facilities. For example, one designated area is "San Diego," 19 C.F.R. § 101.3(b)(1), which is defined as a geographic area, *see* Change in the Customs Service Field Organization; San Diego, CA, 50 Fed. Reg. 4504-01 (Jan. 21, 1985) (providing geographic boundaries for "port of San Diego" by referring to highways, the Pacific Ocean, and the international border). In fact, the regulation listing the "limits" of the customs ports of entry—19 C.F.R. § 101.3—refers to documents that lay outside the geographic boundaries of various ports.

Put simply, to this day, a U.S. citizen *can* lawfully cross into the United States outside a physical port facility without committing a crime as long as he crosses in a designated geographic area and promptly reports to the nearest customs officer. 19 U.S.C. § 1459(a). Thus, a defendant who genuinely believes he is a U.S. citizen is doing nothing wrong by committing the bare act of crossing into the country outside a port of entry.

This is not just a hypothetical concern. Some physical ports of entry are not literally right at the border. The "Skagway, AK" port facility, for example, is not right at the border. 8 C.F.R. § 100.4(a). It is nearly eight miles from it, "making it the farthest

[port] offset from the border of any US land border station." Wikipedia, Skagway - Fraser Border Crossing, *available at* https://en.wikipedia.org/wiki/Skagway_-_Fraser_Border_Crossing. Thus, "alien[s]" cannot enter the United States at this port of entry under 8 U.S.C. § 1325(a)(1) without entering at a geographic place that is not designated. That is, noncitizens can't go to these ports of entry because they can't get to them without crossing through miles of road that are not designated for entry under § 1325(a)(1). By contrast, U.S. citizens *can* enter at this port without violating 19 U.S.C. § 1459 as long as they travel "immediately" to the port facility and present themselves for inspection. Unless a mens rea of knowing attaches to the alienage element of § 1325, individuals who incorrectly believe that they are a U.S. citizen will have violated § 1325(a)(1) by doing the innocuous act of trying to return to the United States at the Skagway port of entry as well as every other port not right at the border.

A realistic example makes this point clearer. Carlos was born in Mexico and brought to the United States as an infant. His parents told him he was born in the United States, and Carlos (understandably) believed them. He thus genuinely believes he is a U.S. citizen, though he isn't one. As an adult, Carlos visits Canada. He returns by driving eight miles into the United States to the Skagway port of entry. He then presents himself at the port of entry for inspection. If a mens rea does not attach to the alienage element of 8 U.S.C. § 1325(a)(1), Carlos is guilty of both the completed-entry offense and the attempted-entry offense. Carlos is an "alien," and he "enter[ed] [and] attempt[ed] to enter the United States at any time or place other than as designated"

the moment he crossed into the United States and started his eight-mile journey to the port of entry. 8 U.S.C. § 1325(a)(1). The eight miles of highway is not "designated" for purposes of § 1325(a)(1). *See Aldana*, 878 F.3d at 880–82. He did not, however, violate 19 U.S.C. § 1459, assuming he "immediately" proceeded to the port of entry.

For this reason, even considering the state of law in 2020, an individual's immigration "status" is what can "separate wrongful from innocent acts" when it comes to the bare act of crossing into the United States outside a port. *Rehaif*, 139 S. Ct. at 2197 (emphasis removed). As a result, the presumption of mens rea applies to the alienage element of the entry crime. *See id.* That means an element of the completed-entry crime is that the defendant knew he was an "alien." 8 U.S.C. § 1325(a)(1).

3. If a mens rea attaches to the alienage element of the completed-entry crime, it must attach to the alienage element of attempted entry as well.

As just explained, the *completed-entry crime* requires the government to prove that the defendant knew he was an "alien." 8 U.S.C. § 1325(a)(1). And for an attempt crime, a defendant must have been at a minimum "acting with the kind of culpability otherwise required for the commission of the crime . . . he is charged with attempting." *United States v. Ward*, 914 F.2d 1340, 1345 (9th Cir. 1990) (quoting *United States v. Mandujano*, 499 F.2d 370, 376 (5th Cir. 1974)); *accord United States v. Anderson*, 932 F.3d 344, 350 (5th Cir. 2019). That is, to convict a defendant of attempt, the government must at least show the defendant had the same (if not a higher) mens rea than the completed crime. *Ward*, 914 F.2d at 1345. Thus, if the completed-entry crime requires the government to

prove that the defendant knew he was an "alien," the attempted-entry crime requires the government to prove that the defendant knew he was an "alien" too. *See id.*

In short, a defendant does not commit attempted entry unless he knows he is an "alien." 8 U.S.C. § 1325(a)(1). As a result, the magistrate judge affirmatively misadvised Mr. Rizo before he pleaded guilty about the elements of the charged offense. *See* ER13–14. The magistrate judge, then, violated Rule 11(b)(1)(G). *Covian-Sandoval*, 462 F.3d at 1095.

II. The government cannot prove that the Rule 11 error was harmless.

A preserved Rule 11 violation warrants reversal if the error affected the defendant's "'substantial rights.'" *United States v. Arqueta-Ramos*, 730 F.3d 1133, 1139 (9th Cir. 2013) (quoting Fed. R. Crim. P. 11(h)). This requires the government to prove that the error was harmless. *Id.* (citing *United States v. Aguilar-Vera*, 698 F.3d 1196, 1201 (9th Cir. 2012)). The district court did not reach the harmlessness issue. This Court should address this issue in the first instance and hold that the government cannot meet its burden.

A. The error at issue qualifies as structural, and thus the error automatically requires a remand.

To begin with, the Fourth Circuit, in *United States v. Gary*, 954 F.3d 194, 202–08 (4th Cir. 2020), *cert. petition filed*, recently held that failing to advise a defendant of an element of an offense during a guilty-plea colloquy constitutes structural error that meets all four prongs of plain-error review, including the prejudice prong. The court

explained how each of the three rationales the Supreme Court has used to determine whether an error is structural establish that a misadvisal on an element of an offense during a guilty plea qualifies as structural error. *Id.* at 202–08. This Court can adopt *Gary*'s reasoning, and that would necessarily mean the error at issue is not harmless. Structural errors require "automatic reversal." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910 (2017) (internal quotation marks omitted).

But this Court need not resolve whether the error at issue qualifies as structural, including whether such an error satisfies all four prongs of plain-error review. This case is not on plain-error review. Nor is this a case in which the magistrate judge merely *omitted* an element during a guilty-plea colloquy. Instead, over objection, the magistrate judge affirmatively misadvised Mr. Rizo about the charged offense's intent element. ER13–14. Thus—as explained in the next section—Mr. Rizo can establish that the specific error here was not harmless following settled precedent from this Court and the Supreme Court under conventional harmless-error analysis.

B. The government cannot establish that the Rule 11 error did not affect Mr. Rizo's substantial rights because the error rendered his guilty plea not knowing, voluntary, or intelligent.

The substantial-rights inquiry requires a reviewing court to determine whether the error at issue "undermine[d] confidence in the outcome of the proceeding." *United States v. Bain*, 925 F.3d 1172, 1178 (9th Cir. 2019). If, following a Rule 11 error, the government cannot "identify[] evidence in the record that [the] guilty plea was, in fact,

both knowing and voluntary," as well as intelligent, the error will have undermined the guilty plea and affected the defendant's substantial rights. *Aguilar-Vera*, 698 F.3d at 1201.

That conclusion follows from the fact that, if a guilty plea is not knowing, voluntary, or intelligent, it is not "valid." *Bradshaw v. Stumpf*, 545 U.S. 175, 182–83 (2005); *see also United States v. Garcia*, 401 F.3d 1008, 1012 (9th Cir. 2005) (stating that "a plea that is involuntary, unintelligent, or uninformed is an invalid plea" (citing *Brady v. United States*, 397 U.S. 742, 748 (1970)); *Puckett v. United States*, 556 U.S. 129, 136 (2009) (same). Instead, such a guilty plea is "void." *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969) (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)); *see also United States v. Yong*, 926 F.3d 582, 590–91 (9th Cir. 2019) (involuntary guilty plea is "void"); *Machibroda v. United States*, 368 U.S. 487, 493 (1962) (same). That is, an error that results in a guilty plea that is not knowing, voluntary, or intelligent will lead to an invalid and void guilty plea. Such an error is not harmless, as this Court has repeatedly held.[2]

[2] *See, e.g.*, *United States v. Fuentes-Galvez*, 969 F.3d 912, 917 (9th Cir. 2020) (holding that a Rule 11 error that led the judge to not sufficiently "ensur[ing] that [the] plea was knowing and voluntary" affected the defendant's substantial rights); *United States v. Garduno-Diaz*, 816 F. App'x 229, 229 (9th Cir. 2020) (concluding that a "court's failure to establish on the record that a plea is voluntary and not the product of force, threats, or promises is inherently prejudicial"); *United States v. Benz*, 472 F.3d 657, 660 (9th Cir. 2006) (holding that misadvising the defendant of "the mandatory minimum jail term during the plea colloquy prior to its acceptance of the plea" had "affect[ed] the defendant's substantial rights 'to enter a knowing, voluntary, and intelligent plea'"); *United States v. Arellano-Gallegos*, 387 F.3d 794, 796–97 (9th Cir. 2004) (holding that the lower court's failure to ensure that an appellate waiver "was knowing and voluntary" violated Rule 11 and "affected" the defendant's "substantial rights"); *United States v.*

Under this mountain of authority, the government cannot establish that the Rule 11 error did not affect Mr. Rizo's substantial rights. If a defendant pleads guilty with an incorrect understanding of the elements of the offense, the guilty plea is not "intelligent," *Bousley*, 523 U.S. at 618, nor is it "voluntary and knowing," *Tanner*, 493 F.3d at 1146–47. As the Supreme Court has explained:

> [A defendant's] guilty plea would . . . be invalid if he had not been aware of the nature of the charges against him, including the elements of [the charge] to which he pleaded guilty. A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, with sufficient awareness of the relevance circumstances and likely consequences. Where a defendant pleads guilty to a crime without having been informed of the crime's elements, this standard is not met and the plea is invalid.

Bradshaw, 545 U.S. at 182–83 (internal citations and quotation marks omitted). Indeed, the Supreme Court has made this point over and over. *See, e.g.*, *Henderson,* 426 U.S. at 645 n.13; *Boykin*, 395 U.S. at 243–44. This Court has repeatedly made these points too. *See*, *e.g.*, *United States v. Pena*, 314 F.3d 1152, 1156–57 (9th Cir. 2003) (holding that the defendant's guilty plea was not knowing or voluntary because he had not be informed of the elements of the offense); *United States v. Villalobos*, 333 F.3d 1070, 1076 (9th Cir.

Pena, 314 F.3d 1152, 1157 (9th Cir. 2003) (holding that that the magistrate violated the "defendant's right to be informed of the charges against him," a right that "exists to ensure that guilty pleas are knowing and voluntary," and thus the defendant's substantial rights were affected) (internal quotation marks omitted)); *see also United States v. Dominguez-Benitez,* 542 U.S. 74, 76 (2004) (holding that an error that leads to "question[s] [about] whether a defendant's guilty plea was knowing and voluntary" could not "could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless").

2003) (holding that the defendant's "guilty plea was not knowing, intelligent[,] or voluntary because he was not informed" about "an element" of the charged offense).

Mr. Rizo's guilty plea was not knowing, voluntary, or intelligent. The magistrate judge here didn't merely fail to advise—he affirmatively misadvised. ER13–14. As a result, this Court can be confident that Mr. Rizo did not know the charged offense's elements given that misadvisal. Nothing in the record suggests that Mr. Rizo ignored the magistrate judge's advisal or otherwise pleaded guilty only after correctly understanding that knowledge of alienage is an element. The plea, then, had *none* of the ingredients necessary for a valid plea. His plea was therefore invalid, *see Bradshaw*, 545 U.S. at 182–83; *Garcia*, 401 F.3d at 1012; and "void," *see Yong*, 926 F.3d at 590–91; *Boykin*, 395 U.S. at 243 n.5; *McCarthy*, 394 U.S. at 466.

For this reason, the government cannot meet its burden to prove that the error did not cause an unknowing, involuntary, or unintelligent plea. *Aguilar-Vera*, 698 F.3d at 1201. In fact, the evidence is *conclusively* to the contrary since the magistrate judge affirmatively misadvised him. Thus, by showing that "his plea was . . . unknowing or involuntary," Mr. Rizo can "prove prejudice"—even though it is the *government's burden* to prove harmlessness. *United States v. Luna-Orozco*, 321 F.3d 857, 860 (9th Cir. 2003). This Court should therefore remand so proceedings can start anew with everyone having a proper understanding of the charged offense's elements.

CONCLUSION

This Court should vacate Mr. Rizo's guilty plea to 8 U.S.C. § 1325(a)(1) and remand.

November 16, 2020

Respectfully submitted,

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CERTIFICATES

Certificate of related cases. The defendant in *United States v. Cervantes* (9th Cir. 20-50175) is raising the same issue as Mr. Rizo. This Court has ordered these cases batched together for purposes of oral argument.

Certificate of compliance. I certify that this brief is proportionately spaced, has a 14-point typeface, and contains 9,081 words, which does not exceed the 14,000 words the rules allow.

s/ Michael Marks
Michael Marks