No. 15-1047

In the Supreme Court of the United States

JOSE JESUS ARANDA-GALVAN, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, on the facts of this case, petitioner failed to carry his burden of showing that he was not inadmissible for having knowingly "encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States." 8 U.S.C. 1182(a)(6)(E)(i).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the *Federal Reporter* but is reprinted at 623 Fed. Appx. 217. The decision of the Board of Immigration Appeals (Pet. App. 6-14) is unreported. The decision of the immigration judge (Pet. App. 15-21) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 2015. The petition for a writ of certiorari was filed on February 17, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Mexico. Pet. App. 1. On October 17, 2013, he was convicted in federal district court of conspiracy to transport illegal aliens within the United States for the purpose of

commercial advantage and private financial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(ii), (v)(I), and (B)(i). Pet. App. 6-7, 17. He was placed in removal proceedings before an immigration judge (IJ). See 8 U.S.C. 1101(a)(43)(N), 1227(a)(2)(A)(iii).

Petitioner conceded he was removable as charged. Pet. App. 2, 7; Administrative Record (A.R.) 101. As relief from removal, however, petitioner sought to adjust his status to that of a lawful permanent resident based upon a visa petition filed by his wife, who is a U.S. citizen. A.R. 101; see 8 U.S.C. 1151(b)(2)(A)(i). An alien seeking relief from removal "has the burden of proof to establish" that he "satisfies the applicable eligibility requirements." 8 U.S.C. 1229a(c)(4)(A)(i); see 8 C.F.R. 1240.8(d). To be eligible to adjust status to that of a lawful permanent resident, an alien must, among other things, be "admissible." 8 U.S.C. 1255(a). And "[a]ny alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible." 8 U.S.C. 1182(a)(6)(E)(i).[1]

2. On January 2, 2014, the IJ concluded that petitioner "has not carried his burden" of demonstrating that he was eligible to adjust his status, and in particular of proving that he was not inadmissible under Section 1182(a)(6)(E)(i). Pet. App. 17, 20; see *id.* at 15-21. The IJ explained that petitioner had been convicted of knowingly conspiring "to transport undocumented aliens within the United States" knowing or in reckless disregard of the fact that they had

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[1] An alien who "knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States" illegally is also deportable. 8 U.S.C. 1227(a)(1)(E)(i).

entered the United States unlawfully. *Id.* at 17. The IJ further explained that inadmissibility under Section 1182(a)(6)(E)(i) "is a fact-based inquiry and is not wholly grounded in the record of conviction." *Id.* at 18.

The IJ noted that the indictment charged that petitioner "smuggled and transported 21 undocumented aliens *into* and throughout the United States including Victoria and Houston, Texas." Pet. App. 17 (emphasis added). And the IJ found that petitioner's testimony further called into question whether he was admissible. Petitioner testified that he was recruited into the conspiracy by a man named "El Gordo," and that his role was to drive from Falfurrias, Texas, to Houston, Texas, "approximately seven miles ahead of the vehicles that were transporting the aliens who had been smuggled in from outside the United States." *Id.* at 18-19; see A.R. 126. Petitioner testified that Falfurrias is "120 to 130 miles north of the Mexican border," Pet. App. 18; Houston is further inland.[2]

Petitioner testified that he was paid approximately $3000 to $4000 to make this trip three or four times. Pet. App. 18. The IJ found that petitioner "essentially served as a lookout during the drive." *Id.* at 19. Petitioner admitted "that he knew that the aliens who were following in back of him were crossed illegally from outside the United States." *Id.* at 20. "Importantly," the IJ stated, petitioner "admitted that he

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[2] Falfurrias is actually "70 miles north of the Rio Grande River," on the highway corridor that "remains the heaviest area of alien and narcotic traffic" in the Rio Grande Valley. U.S. Customs & Border Patrol, *Falfurrias Station,* https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/rio-grande-valley-sector-texas/falfurrias-station (last visited June 30, 2016).

knew that El Gordo wanted him to drive his car because they had smuggled aliens into the United States." *Id.* at 19. The IJ thus refused to "credit [petitioner's] testimony that he did not know what the purpose of him driving seven miles ahead of the others was." *Ibid.* "His lack of knowledge is simply implausible." *Ibid.*

The IJ further observed that "there was no other documentary evidence submitted in this case that would shed light on [petitioner's] role in the conspiracy." Pet. App. 19-20. The IJ noted in this regard that, although petitioner's presentence investigation report (PSR) and other documents appeared to be sealed by court order, that did not change petitioner's burden of proof. *Id.* at 20.

The IJ ultimately found that petitioner "was clearly part of a much larger scheme to smuggle these aliens into the United States." Pet. App. 20. Relying on *Soriano* v. *Gonzales*, 484 F.3d 318 (5th Cir. 2007), the IJ found the evidence sufficient, taken as a whole, "to call into question whether or not [petitioner] is inadmissible under" Section 1182(a)(6)(E)(i). Pet. App. 20. The IJ thus concluded that petitioner "ha[d] not me[t] his burden of proving that he is not inadmissible." *Ibid.*

On February 11, 2014, the IJ ordered petitioner removed. Pet. App. 6; see A.R. 68-69.

3. Petitioner appealed, and the Board of Immigration Appeals (BIA) dismissed petitioner's appeal. Pet. App. 6-14. The BIA explained that "[a] person who conspires with others to transport undocumented aliens within the United States after entry is inadmissible under section [1182(a)(6)(E)(i)] if he participated in the conspiracy with knowledge that the transportation

activity was a prearranged component of a broader alien smuggling scheme." *Id.* at 8 (citing *Soriano*, 484 F.3d at 321, and *Santos-Sanchez* v. *Holder*, 744 F.3d 391, 394 (5th Cir. 2014)). The BIA found "no clear error" in the IJ's finding that petitioner "participated in the transportation scheme on several separate occasions with knowledge that his contact in the conspiracy ('El Gordo') had smuggled the undocumented individuals into the United States." *Id.* at 9. The BIA thus agreed with the IJ that petitioner had failed to sustain his burden of proving that he was not inadmissible under Section 1182(a)(6)(E)(i), and that petitioner's application for adjustment of status was therefore properly denied. *Ibid.*

4. The court of appeals denied a petition for review in an unpublished per curiam opinion. Pet. App. 1-5. The court concluded that the BIA had correctly determined that Section 1182(a)(6)(E)(i) "applied notwithstanding that [petitioner] was not present at the border and did not assist in the actual crossing." *Id.* at 3. It further concluded that "substantial evidence supports the BIA's determination that [petitioner] failed to carry his burden of proving his admissibility." *Id.* at 4.

ARGUMENT

The court of appeals' unpublished decision in this case is correct, does not conflict with any decision of any other circuit court, and is highly factbound. Further review is unwarranted.

1. The BIA correctly concluded that "[a] person who conspires with others to transport undocumented aliens within the United States after entry is inadmissible" under Section 1182(a)(6)(E)(i) "if he participated in the conspiracy with knowledge that the trans-

portation activity was a prearranged component of a broader alien smuggling scheme." Pet. App. 8.

Section 1182(a)(6)(E)(i) provides that "[a]ny alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible." 8 U.S.C. 1182(a)(6)(E)(i). Every court of appeals to address this provision has held that it requires some "affirmative act" of assistance in an alien's illicit entry into the United States. *Dimova* v. *Holder*, 783 F.3d 30, 40 (1st Cir. 2015) (citation omitted); see *Altamirano* v. *Gonzales*, 427 F.3d 586, 592 (9th Cir. 2005); *Tapucu* v. *Gonzales,* 399 F.3d 736, 740 (6th Cir. 2005).

For purposes of the alien-smuggling provisions in 8 U.S.C. 1182(a)(6)(E)(i) and 1227(a)(1)(E)(i), the BIA interprets an "entry" into the United States to require "(1) a crossing into the territorial limits of the United States, i.e., physical presence; (2)(a) an inspection and admission by an immigration officer, or (b) evasion of inspection at the nearest inspection point; and (3) freedom from official restraint." *In re Martinez-Serrano,* 25 I. & N. Dec. 151, 153 (B.I.A. 2009) (emphasis omitted) (quoting *In re Z-*, 20 I. & N. Dec. 707, 708 (B.I.A. 1993)). Section 1182(a)(6)(E)(i) is not limited to providing assistance at the same time as the border crossing itself. As the BIA has explained, it "may include other related acts that occurred either before, during, *or after a border crossing,* so long as those acts are in furtherance of, and may be considered to be part of, the act of securing and accomplishing the entry." *Id.* at 154 (emphasis added); see *Dimova*, 783 F.3d at 38.

Every court of appeals to address the question in turn agrees that a person "need not be physically present at the time and place of the illegal crossing to have assisted an illegal entry." *Dimova*, 783 F.3d at 40; *Parra-Rojas* v. *Attorney Gen. U.S.*, 747 F.3d 164, 170 (3d Cir. 2014); *Ramos* v. *Holder*, 660 F.3d 200, 205 (4th Cir. 2011); *Urzua Covarrubias* v. *Gonzales*, 487 F.3d 742, 748 (9th Cir. 2007); *Soriano* v. *Gonzales*, 484 F.3d 318, 321 (5th Cir. 2007); see *Sanchez-Marquez* v. *United States INS,* 725 F.2d 61, 62-63 (7th Cir.) (per curiam) (finding that an individual who promised to meet and transport individuals after their illegal entry was deportable for assisting the unlawful entry), cert. denied, 469 U.S. 835 (1984); see also Pet. App. 3. The BIA long ago reached the same result. See *In re Vargas-Banuelos*, 13 I. & N. Dec. 810, 811 (B.I.A. 1971) ("The language of the statute is not that narrow.").

These decisions reflect the commonsense point that smuggling "does not end at the instant the alien sets foot across the border." *United States* v. *Aslam*, 936 F.2d 751, 755 (2d Cir. 1991). To successfully smuggle aliens into the United States, it is often insufficient merely to get them across the border and then to leave them immediately on the other side; a smuggler often needs to get his human cargo to some safe interior destination beyond the border. Accordingly, an alien can "encourage[], induce[], assist[], abet[], or aid[]" the unlawful entry by providing transportation within the United States after the border crossing, including by knowingly providing such transportation to aliens as a "prearranged component of a broader" conspiracy to successfully smuggle the aliens into the United States. Pet. App. 8. Conversely, the mere

transportation of an undocumented alien inside the United States does not qualify as an affirmative act assisting entry when that participation is wholly disconnected from an effort to successfully bring the alien into the country in the first place, and instead begins solely after the successful entry has been effectuated. *E.g.*, *Parra-Rojas*, 747 F.3d at 170 (alien's conduct "strictly limited to picking up the aliens once they had already crossed the border," and took place "several days" after the unlawful entry); *In re I-M-*, 7 I. & N. Dec. 389, 390-391 (B.I.A. 1957) (similar).

As the courts of appeals have recognized, the line between knowingly assisting an unlawful entry through the transportation of aliens within the United States after the border crossing (*i.e.*, providing transportation within the United States in furtherance of securing and accomplishing the unlawful entry itself), on one hand, and transportation after the entire process of entry is complete, on the other, is highly fact-dependent. See *Dimova*, 783 F.3d at 39 n.9 (explaining that the term "entry," "as used in the alien smuggling act," "can only be given concrete meaning through a process of case-by-case adjudication") (citation omitted).

For example, in *Dimova*, the First Circuit rejected an alien's argument that she had not knowingly assisted an unlawful entry, where she transported a family within the United States toward a safe location after they had illegally crossed the border independently and without "any assurance of [her] help." 783 F.3d at 35; see *id.* at 33-35, 41. The court explained that the alien picked up the family "mere hours" after they crossed, that she did so at a prearranged meeting spot, that the location was "just a walk from the border," and that the family "did not

exercise their free will in any meaningful way after their physical crossing" beyond waiting to be picked up. *Id.* at 39. The court found the Fifth Circuit's decision in *Soriano* comparable. In that case, an alien "met and picked up [other] aliens at a McDonald's parking lot within hours of their physical crossing into the United States." *Id.* at 40. And it distinguished *Parra-Rojas* as "involv[ing] a passage of time on the order of days, or even weeks, between the illegal crossing and the act of assistance, leading to the conclusion that the illegal entry had been completed." *Id.* at 39; see *id.* at 39 n.10 ("[W]e find *Parra-Rojas* distinguishable on the facts.").

2. The court of appeals ruling here is both correct and in line with these precedents. Indeed, petitioner agrees (Pet. 10) that the court "correctly relied on *Soriano* to the extent it held that an alien need not be physically present at the border crossing in order to be inadmissible under § 1182(a)(6)(E)(i)." Petitioner instead challenges the court's application of that settled legal rule to the facts of this case, asserting (Pet. i) that this Court should review whether an alien may be inadmissible under Section 1182(a)(6)(E)(i) where he "never had any contact with smuggled aliens nor provided any financial or other support or affirmative act in furtherance of a border-crossing scheme but rather served as a 'lookout' in aiding their transportation within the United States."

That question is not presented here, however. The BIA's decision rested on the proposition that an alien who conspires with others to transport aliens within the United States is inadmissible if he participated with knowledge that the transportation "was a prearranged component of a broader alien smuggling

scheme." Pet. App. 8. Where the transportation within the United States is a prearranged component of the overall smuggling operation or undertaking, the BIA can reasonably conclude that the alien's participation in that component knowingly "encouraged, induced, assisted, abetted, or aided" the smuggled aliens to enter. 8 U.S.C. 1182(a)(6)(E)(i); see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999).

Here, the IJ found that petitioner's role "was clearly part of a much larger scheme to smuggle these aliens into the United States." Pet. App. 20. Petitioner ultimately pleaded guilty to participating in a conspiracy to transport aliens inside the United States. But the determination under Section 1182(a)(6)(E)(i) is not limited to the elements of a criminal conviction. The indictment specifically alleged that petitioner participated in the scheme by "smuggl[ing] and transport[ing] 21 undocumented aliens *into* and throughout the United States." *Id.* at 17 (emphasis added); A.R. 338 (same); see A.R. 335 ("The defendants * * * obtain[ed] profits transporting illegal aliens from Mexico into and throughout the United States."). Petitioner admitted that he knowingly participated in this alien-smuggling conspiracy by driving a lookout car "on one or two more occasions" *after* he claims to have first "learned that the aliens were being transported from outside the United States." Pet. App. 19. And petitioner further "admitted that he knew that El Gordo wanted him to drive his car because they had smuggled aliens into the United States." *Ibid.* Petitioner thus "participated in the transportation scheme on several separate occasions with knowledge that his contact in the conspiracy ('El Gordo') had smuggled the undocumented individuals into the United States."

Id. at 9. On the basis of these circumstances indicating that petitioner knowingly played a substantial role in an underlying smuggling conspiracy, which petitioner did not refute, the BIA agreed with the IJ that petitioner "did not carry his burden of proving that he is admissible to the United States for permanent residence." *Ibid.* Those findings in turn amply support the judgment below, as the court of appeals found substantial evidence supported the BIA's determination that petitioner had not carried his burden of proving that he was admissible. *Id.* at 3-4.

Petitioner does not explain why knowingly providing transportation assistance within the United States as a prearranged component of a broader alien-smuggling conspiracy does not qualify as knowingly assisting the unlawful entry itself. To the extent petitioner challenges the factual underpinnings of the BIA's ruling, those arguments are highly factbound, lack merit, and do not warrant this Court's review. Indeed, this Court would lack jurisdiction to review them in any event, as 8 U.S.C. 1252(a)(2)(C) generally bars judicial review of a final order of removal entered against an alien, like petitioner, who was found removable under 8 U.S.C. 1227(a)(2)(A)(iii) for having been convicted of an aggravated felony. That bar does not preclude judicial review of constitutional questions and questions of law, 8 U.S.C. 1252(a)(2)(D), but arguments about particular factual findings in a case do not fall within that exception.

3. Contrary to petitioner's assertion (Pet. 2), the court of appeals' unpublished decision here does not create a conflict with the Third Circuit's decision in *Parra-Rojas*, much less create a circuit conflict warranting this Court's review. The two cases are similar

in certain respects, but their different outcomes can be explained by the legal rule that the burden of proof is on the alien to establish that he is not inadmissible and on differences in the underlying record.

The record in *Parra-Rojas* contained the alien's PSR, see 747 F.3d at 169-170 (discussing the PSR), and the PSR in turn "indicate[d] that [the aliens] had each been in the United States for several days at the time [the alien] picked them up," *id.* at 170. In this case, however, petitioner's PSR was not in the record, and there is no indication that petitioner sought to have it unsealed. Pet. App. 19-20 (noting the absence of a PSR). Petitioner did present testimony, but the IJ found significant portions of it to be "simply implausible." *Id.* at 19. Furthermore, the alien in *Parra-Rojas* was not charged with or convicted of conspiracy. See 747 F.3d at 165-166, 169. Here, by contrast, petitioner was charged with participating in a conspiracy in which he helped to "smuggle[] and transport[] 21 undocumented aliens *into* and throughout the United States," Pet. App. 17 (emphasis added), and the BIA concluded that the transportation "was a prearranged component of a broader alien smuggling scheme," *id.* at 8. The court of appeals thus properly found on this record that substantial evidence supported the BIA's conclusion that petitioner had failed to carry his burden of proving that he was not inadmissible under Section 1182(a)(6)(E)(i).

In any event, the court of appeals' decision here is unpublished and "is not precedent." Pet. App. 1 n.*; see 5th Cir. R. 47.5.4. It therefore could not create a conflict of the sort that would warrant this Court's review.

4. There is also no conflict between *Parra-Rojas* and the Fifth Circuit's precedential decision in *Soriano*. In *Soriano*, the internal transportation of the smuggled aliens occurred "within hours of their physical crossing into the United States," whereas in *Parra-Rojas* it was "several days" after the illegal crossing, "leading to the conclusion that the illegal entry had been completed." *Dimova*, 783 F.3d at 39-40 (citation omitted).

To be sure, some language in *Parra-Rojas* can be read broadly to suggest that "personal involvement with the smuggled aliens prior to their entry" into the United States is required to make an alien inadmissible. 747 F.3d at 170. But that language is best understood more modestly as relevant where (unlike here) the basis for the ruling was not that the alien knowingly participated in a prearranged component of a smuggling conspiracy, but rather that the alien directly provided assistance only some significant period of time after the border crossing. Otherwise, knowing participants in an alien-smuggling conspiracy could evade the inadmissibility bar by dividing up their tasks, with some participants providing "encourage-[ment], induce[ment], assist[ance]," or "aid[]" in furtherance of the successful entry, but doing so only after the physical entry itself. Pet. App. 8.

As set forth above, Section 1182(a)(6)(E)(i) is not so restricted. Rather, one may encourage, induce, assist, or aid "entry" through acts committed before, during, or after the physical entry—including through agreements to perform such acts—that are "in furtherance of, and may be considered to be part of, the act of securing and accomplishing the entry" itself. *Martinez-Serrano*, 25 I. & N. Dec. at 154. The BIA

correctly concluded that petitioner's conduct fits within that definition, no circuit conflict exists, and no further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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