No. 99-109

In the Supreme Court of the United States

JOHN F. LONERGAN, A/K/A MARK KOURY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether INS Form I-512, a document that certain aliens returning to the United States are required to present to INS inspectors to show that they have received advance parole from the INS, is a "document prescribed by statute or regulation for entry into * * * the United States" within the meaning of 18 U.S.C. 1546(a), which prohibits the use of any such document knowing it to be false.

2. Whether petitioner, by arranging for aliens to receive false Forms I-512, encouraged or induced those aliens "to come to, enter, or reside in the United States" in violation of 8 U.S.C. 1324(a)(1)(A)(iv).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. I-VIII) is unpublished, but the decision is noted at 172 F.3d 861 (Table).

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1998. A petition for rehearing was denied on April 13, 1999. Pet. App. X-XI. The petition for a writ of certiorari was filed on July 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the District of New

Jersey on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371; one count of accepting bribes, in violation of 18 U.S.C. 201(b)(2); one count of aiding and abetting aliens in obtaining and using documents prescribed by statute and regulation for entry into the United States, knowing those documents to have been procured by false statements and fraud, in violation of 18 U.S.C. 1546(a) and 2; one count of aiding, abetting, encouraging, and inducing aliens to come to, enter, or reside in the United States illegally, in violation of 8 U.S.C. 1324(a)(1)(A)(iv) and 18 U.S.C. 2; and one count of making false statements to federal agents, in violation of 18 U.S.C. 1001. See Pet. C.A. App. A11-A23, A24-A29. Petitioner was sentenced to 41 months' imprisonment, to be followed by three years' supervised release, and was fined $20,000. *Id.* at A26-A28. The court of appeals affirmed. Pet. App. I-VIII.

1. From 1988 through 1995, petitioner was the Assistant District Director for Examinations for the Immigration and Naturalization Service (INS) in New Jersey. As part of his official duties, petitioner was responsible for overseeing the flow of aliens into the United States at Newark International Airport. Gov't C.A. Br. 3.

On June 26, 1994, two Iraqi nationals, Youssef Manuel Sattaam and Wisam M. Sattaam (spelled variously), arrived at Newark Airport and presented to an INS inspector documents that appeared on their face to be INS Forms I-512. See Pet. C.A. App. A178-A203. The INS Form I-512 is issued to an alien who receives "advance parole" from the INS, *i.e.*, authorization from the INS to come into the United States without a visa. See 8 C.F.R. 212.5(e). "Advance parole" may be granted by the INS in a variety of situations, such as when an alien already residing in the United States

without a proper immigrant visa seeks to leave the country temporarily for urgent family reasons and desires to return to the United States. In this case, for example, the Forms I-512 presented by the Sattaams indicated on their face that the Sattaams lived in New Jersey, had applied for immigrant visas, had sought to leave the country temporarily for Jordan because of the illness and death of their father, and had been granted advance parole by the INS. See Pet. C.A. App. A185-A186, A196-A197; Gov't C.A. Br. 4 & n.2, 5.

An INS inspector at the airport became suspicious after noticing that the Sattaams' passports indicated the trip was their first to the United States, and that the Sattaams' Forms I-512 bore the same alien registration number, which in fact was assigned to a third individual. The inspector communicated his concerns to Paul Erdheim, the Supervisory Immigration Inspector, who concluded that the I-512s appeared to be fraudulent and that the Sattaams should not be permitted to enter the country. Gov't C.A. Br. 10-11. Petitioner learned of the Sattaams' detention at Newark Airport, contacted Erdheim, and instructed him to complete the Sattaams' processing and to parole them into the country. Based on petitioner's intervention, the Sattaams were then paroled into the United States. *Id.* at 11.

The evidence at trial showed that petitioner had assisted the Sattaams by issuing the fraudulent Forms I-512 in exchange for $5,000 in roofing materials, which he received from Nagy Khairallah. Khairallah specialized in obtaining false immigration documents, and he admitted to federal officials that he had made several payments to petitioner in exchange for petitioner's assistance in procuring false immigration documents. Gov't C.A. Br. 4-6, 11.

2. Petitioner was convicted on five counts arising out of his acceptance of payments for false immigration documents. On appeal, he challenged his convictions for violating 18 U.S.C. 1546(a), which prohibits the use of any false "document prescribed by statute or regulation for entry into * * * the United States," and 8 U.S.C. 1324(a)(1)(A)(iv), which punishes one who "encourages or induces an alien to come to, enter, or reside in the United States, knowing * * * that such coming to, entry, or residence is or will be in violation of law." Petitioner argued principally that, under immigration law, the INS's grant of parole to an alien does not enable an "entry" by that alien into the United States, and that the Form I-512 (which is evidence of advance parole by the INS) does not authorize an alien to "enter" the United States. Thus, petitioner contended, as a matter of law, he could not have violated any provision based on the Sattaams' alleged use of any false document for "entry" into United States or their unlawful effort to "enter" the country. See Pet. C.A. Br. 12-20.

The court of appeals affirmed. Pet. App. I-VIII. The court first rejected petitioner's argument that Forms I-512 are not documents "prescribed for entry" into the United States. The court observed that the Form I-512 states on its face that "presentation of the original of this document . . . will authorize an immigration officer at a port of entry in the United States to permit the named bearer . . . to enter the United States." *Id.* at V. The court also noted that, at the time petitioner committed his offenses, the Immigration and Nationality Act (INA) defined "entry" to mean "any coming of an alien into the United States, from a foreign port or place or from an outlying possession." *Ibid.* (citing 8 U.S.C. 1101(a)(13) [(1994)]).

The court of appeals acknowledged that, in certain other contexts, this Court has applied a narrower definition of the concept of "entry" that excludes parole, *e.g.*, in determining whether an alien physically present in the United States is entitled to a deportation proceeding or may be removed by the INS pursuant to an exclusion hearing. See Pet. App. V (citing *Leng May Ma* v. *Barber*, 357 U.S. 185, 190 (1958)). The court noted, however, that the purpose of that specific use of "entry" as a "term of art" that excludes parole is to ensure that the parole of an alien into the United States does not alter the alien's status as an excludable alien. See *id.* at V-VI. The court declined to extend that concept of entry to the criminal statutes under which petitioner was convicted, which target fraudulent immigration practices. See *id.* at VI.

The court also relied (Pet. App. VI) on the 1996 amendment to 8 U.S.C. 1101(a)(13) to support its refusal to extend the narrow concept of "entry" beyond the context in which it arose. See Pub. L. No. 104-208, Tit. III, § 301, 110 Stat. 3009-575. That amendment deleted the INA's definition of "entry," and replaced it with definitions of "admission" and "admitted" that include an alien's "lawful entry" into the United States, but that expressly exclude aliens paroled into the United States. *Ibid.* Those definitions, the court observed, suggest "there is some distinction between entry and admission, and that a narrow definition of entry need not apply in other contexts. Significantly, Congress did not amend Section 1546 to restrict it to documents prescribed for 'admission.'" Pet. App. VI.

The court noted that the First Circuit, in *United States* v. *Kavazanjian*, 623 F.2d 730 (1980), had apparently applied the concept of "entry" from the alien-status context in the construction of 8 U.S.C. 1324(a).

Pet. App. VII. The court also observed, however, that the Fifth Circuit, in *United States* v. *Hanna*, 639 F.2d 194, 195-196 (1981), while distinguishing *Kavazanjian*, commented that "[w]e doubt *Kavazanjian* was correctly decided," because "[i]t would be a misuse of the parole concept to conclude" that one who effects the unlawful physical entry of aliens into the United States not otherwise entitled to come here "cannot be guilty under" Section 1324(a). Pet. App. VII. Finally, the court concluded that its construction of "entry" to include parole into the United States is consistent with Congress's 1986 amendment to 18 U.S.C. 1546, which expanded the proscription of that statute. See *ibid.*; Pub. L. No. 99-603, Tit. I, § 103(a), 100 Stat. 3380.

ARGUMENT

Petitioner renews his contention that he could not be convicted of abetting the unlawful entry of the Sattaams into the United States because (he argues) the terms "entry" (as used in 18 U.S.C. 1546(a)) and "enter" (as used in 8 U.S.C. 1324(a)) do not encompass the parole of an alien into the United States. That contention is without merit.[1]

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[1] It is not clear that petitioner has adequately preserved his challenge to his conviction under 8 U.S.C. 1324(a). The great majority of the petition is devoted to challenging petitioner's conviction under 18 U.S.C. 1546(a), and his conviction under Section 1324(a) (referred to in the petition as the "Entry Count") is mentioned only in passing. See Pet. 23, 29. Because petitioner's challenges to both counts concern the definition of "entry" and "enter," however, we have addressed both. Petitioner has also sought to preserve his challenges to his other three counts of conviction by referring this Court to the arguments in his court of appeals brief. See Pet. 9 n.2. Petitioner has not presented any challenge to those other convictions in the questions presented for review, however

1. Section 1546(a) subjects to criminal punishment one who "knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, *border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States.*" 18 U.S.C. 1546(a) (emphasis added). Congress added the underlined language in a 1986 amendment in order to expand the previous prohibition, which had punished the misuse only of those documents "*required* for entry into the United States." 18 U.S.C. 1546 (1982) (emphasis added). The statute now reaches the misuse of any document "prescribed" (*i.e.*, designated) by statute or regulation for entry into, or as evidence of authorized stay in, the United States.[2]

Petitioner contends that INS Form I-512 is not a document "prescribed by statute or regulation for entry into * * * the United States."[3] That contention is

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(see Pet. i), and so any such challenges are waived in this Court. See Sup. Ct. R. 14.1(a).

[2] Under the previous version of the statute, this Court ruled that an alien registration receipt card was not a document "required for entry" into the United States, because the card's primary purpose was not to secure entry, but rather to identify the holder as a lawfully registered alien. See *United States* v. *Campos-Serrano*, 404 U.S. 293, 296-300 (1971). The courts of appeals are in agreement that the 1986 amendment was intended to broaden the scope of Section 1546(a). See *United States* v. *Rahman*, 189 F.3d 88, 118-119 (2d Cir. 1999), petition for cert. pending, No. 99-6486; *United States* v. *Osiemi*, 980 F.2d 344, 346 (5th Cir. 1993); Pet. App. VII.

[3] As noted above, Section 1546(a) also punishes one who knowingly uses any false document "prescribed by statute or regulation * * * as evidence of authorized stay * * * in the United States." Under INS regulations, INS Form I-512 is plainly "evidence of [an

without merit. The Attorney General has authority to admit temporarily into the United States "for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States." 8 U.S.C. 1182(d)(5)(A) (Supp. III 1997). That temporary admission short of legal admission is known as "parole." INS regulations provide that Form I-512 "shall be issued" to an alien "[w]hen parole is authorized [in advance] for an alien who will travel to the United States without a visa." 8 C.F.R. 212.5(e). The INS "also utilizes advance parole to permit aliens to leave the country and to reenter lawfully without jeopardizing pending applications for discretionary relief." *Navarro-Aispura* v. *INS*, 53 F.3d 233, 235 (9th Cir. 1995).

Petitioner argues that, even though INS Form I-512 is a document prescribed by INS regulations for *parole* into the United States, it does not qualify as a docu-

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alien's] authorized stay" in the United States, within the meaning of Section 1546(a). See 8 C.F.R. 212.5(e) (Form I-512 is issued when parole is authorized in advance for alien who will travel to the United States without a visa). Therefore, petitioner could have been charged under Section 1546(a) with aiding and abetting the use of a false "document prescribed by * * * regulation * * * as evidence of authorized stay * * * in the United States." The indictment in this case, however, charged petitioner under Section 1546(a) only with aiding and abetting the use of false "documents prescribed by statute and regulation for *entry* into the United States," see Pet. C.A. App. A20 (emphasis added), and the jury was charged under Section 1546(a) only on that theory, see *id.* at A161. By contrast, with respect to the count charging a violation of 8 U.S.C. 1324(a), petitioner was indicted and the jury was instructed under a broader theory, encompassing petitioner's inducement and encouragement of the Sattaams "to come to, enter and reside in the United States" unlawfully. See Pet. C.A. App. A21, A163; see also pp. 11-12, *infra*.

ment prescribed by regulation for *entry* into the United States, because parole does not constitute "entry" under the immigration laws. As the court of appeals explained, petitioner's claim runs counter to the language of Form I-512 itself, which expressly provides that its presentation to an immigration officer at the port of entry authorizes the officer to permit the alien "to enter the United States." See Pet. App. V (quoting Form I-512). Petitioner's contention is also inconsistent with the definition of "entry" under the INA at the time of his offense, which reached "any coming of an alien into the United States, from a foreign port or place." 8 U.S.C. 1101(a)(13) (1994). The Forms I-512 in this case were expressly intended to enable the Sattaams to come into the United States and stay here, at least temporarily, as putative residents of New Jersey.

Petitioner seeks to import into Section 1546(a) the technical understanding of "entry" that courts have applied in exclusion and deportation cases involving adjudication of an alien's legal status and rights. In *Leng May Ma* v. *Barber*, 357 U.S. 185 (1958), this Court held that an alien who had been paroled into the United States was not entitled to the benefits of a statute authorizing the Attorney General to withhold deportation if the alien would be subject to physical persecution in his country of origin. The Court observed in *Leng May Ma* that it had consistently held that parole "does not legally constitute an entry though the alien is physically within the United States." *Id.* at 188; see also *Yang* v. *Maugans*, 68 F.3d 1540, 1545 (3d Cir. 1995) (to be subject to deportation rather than exclusion proceedings, aliens must satisfy all three elements of "entry" test, including physical presence, inspection and admission by immigration officer or actual and intentional evasion of inspection, and freedom from

official restraint); *Jean* v. *Nelson*, 727 F.2d 957, 969, 971-972 (11th Cir. 1984) (en banc) ("The grant of parole is subject to certain restrictions and is theoretically of a short-term character, but it does permit the physical entry of the alien into the midst of our society[.]"), aff'd, 472 U.S. 846 (1985).

The purpose of that "entry doctrine," however, necessary limits its application to the context in which it arises, namely, distinguishing between the legal rights and status of excludable aliens and those of aliens subject to full deportation proceedings. The entry doctrine permits the Attorney General, for humanitarian reasons, to allow aliens who are detained at the border or a port of entry to come into the United States rather than hold them in detention, without thereby changing the aliens' legal status from excludable to deportable. If the parole of an excludable alien into the United States effectuated a full-scale "entry" into this country in the specific context of distinguishing aliens subject to exclusion proceedings from those who must be placed in more extensive deportation proceedings before being removed from the United States, the Attorney General would be far less likely to exercise her discretion to grant humanitarian parole.

The court of appeals correctly declined to extend that specialized understanding of "entry" to prosecutions of immigration document fraud under Section 1546(a). Applying that doctrine in the context of a criminal prosecution for document fraud would shelter the use of false and fraudulent parole documents to facilitate the evasion of immigration laws, and would thereby frustrate the government's ability to exclude aliens without authority to enter and remain here. The court therefore properly relied on a straightforward understanding of the term "entry" to include physical entry into the

United States by way of parole, an understanding confirmed by the general definition of "entry" in the INA at the time of petitioner's offense. See p. 9, *supra*.

2. Petitioner also seeks to apply the entry doctrine to invalidate his conviction under 8 U.S.C. 1324(a)(1)(A)(iv), which imposes criminal penalties on one who "encourages or induces an alien *to come to, enter, or reside in the United States*, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." (Emphasis added.) That claim is without merit.

First, on the Section 1324(a) count, the government did not have to prove that petitioner encouraged or induced the Sattaams to "enter" the United States, so long as the government proved that petitioner encouraged or induced them either to "come to" the United States or to "reside" here. Petitioner was indicted under all three theories, and the jury was instructed under all three. See p. 8, n.3, *supra*. Furthermore, any jury that found that petitioner encouraged and induced the Sattaams to "enter" the United States necessarily also found all the facts required to prove that he encouraged and induced them to "come to" the United States as well.[4] Because the evidence supports petitioner's conviction on one of the other theories on which he was indicted and the jury was charged, petitioner's Section 1324(a) conviction is necessarily valid even if petitioner is correct that the Forms I-512 did

[4] Petitioner argues in a footnote (Pet. 6 n.1) that the government "presented no evidence" that the Sattaams intended to "come to" or "reside" in the United States, but that is incorrect. The Forms I-512 themselves, which contained the Sattaams' false New Jersey addresses and purportedly authorized them to be paroled into the country, served as proof that the Sattaams intended to "come to" the United States and indeed to reside here.

not establish that the Sattaams intended to "enter" the United States or that he encouraged or induced them to do so. See *Griffin* v. *United States*, 502 U.S. 46, 49 (1991).[5]

Second, even if the government was limited to proving that petitioner encouraged the Sattaams to "enter" the United States, his conviction under Section 1324(a) is nonetheless valid. For the reasons discussed above in the context of petitioner's Section 1546(a) conviction, the Sattaams did seek to "enter" the United States and petitioner did aid and abet their effort to do so. See pp. 9-11, *supra*.

Petitioner argues that the decision below conflicts with *United States* v. *Kavazanjian*, 623 F.2d 730 (1st Cir. 1980), which extended the "entry doctrine" discussed above to a criminal prosecution under a prior version of Section 1324(a). Under the old version of that statute, the government was required to prove that the defendant encouraged or induced the alien's

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[5] Petitioner's challenge to the legal theory of one of the objects of his offense (the "entry" object) does not implicate *Griffin*'s exception for cases in which a jury is charged on a conspiracy with multiple objects, one of those objects is legally invalid, and the general verdict makes it impossible to determine which object the jury selected. See 502 U.S. at 52-56. That exception is inapplicable here because, as explained in the text, the jury necessarily found all the facts required to establish that petitioner induced the Sattaams to "come to" the United States. See *United States* v. *Perkins*, 161 F.3d 66, 74 (D.C. Cir. 1998) (conviction under 18 U.S.C. 924(c) for using or carrying firearm during and in relation to another offense is valid even though jury was incorrectly instructed on "using," because jury necessarily found all facts required to establish that defendant "carried" firearm); *United States* v. *Hudgins*, 120 F.3d 483, 488 (4th Cir. 1997) (same); *United States* v. *Holland*, 116 F.3d 1353, 1358 (10th Cir.) (same), cert. denied, 118 S. Ct. 1353 (1997).

unlawful "entry" into the United States; the alternative theories of encouraging an alien to "come to" or "reside in" the United States unlawfully were not then available. See *Kavazanjian*, 623 F.2d at 736 (quoting 8 U.S.C. 1324(a)(4)(1970)). Relying on *Leng May Ma* and similar cases, the First Circuit ruled that aliens who arrived at a port of entry into the United States pursuant to a transit-without-visa permit (under which an alien is not supposed to seek entry into this country but is rather supposed to proceed to another international destination) but then sought asylum and were granted parole, did not effect an "entry" into the United States, even though they were "obviously entitled to 'reside' here, at least until 'the purposes of [their] parole'" had been served. *Id.* at 739 (quoting 8 U.S.C. 1182(d)(5)(1970)).

The *Kavazanjian* decision is of no continuing importance because in 1986, Congress broadened Section 1324(a) to prohibit encouraging aliens to "come to" or "reside" in the United States, as well as to "enter" the country. See Pub. L. No. 99-603, Tit. I, § 112(a), 100 Stat. 3381. Accordingly, any conflict between the decision below and *Kavazanjian* does not warrant this Court's review. Moreover, even before the 1986 amendment, other courts of appeals had persuasively criticized the First Circuit's decision. See *United States* v. *Hanna*, 639 F.2d 194, 195, 196 (5th Cir. 1981) ("We doubt that *Kavazanjian* was correctly decided" because "[i]t would be a misuse of the parole concept to conclude that one who physically transports into the United States persons not otherwise entitled to come in cannot be guilty under Section 1324(a)(4) if the United States grants parole"); *United States* v. *Pierre*, 688 F.2d 724, 725-726 (11th Cir. 1982) (similar).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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