No. 15-267

In the Supreme Court of the United States

FATIH SONMEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in a prosecution for marriage fraud under 8 U.S.C. 1325(c), the district court abused its discretion in declining to instruct the jury that the government had to prove that, at the time of his marriage, petitioner did not intend to establish a life together with his spouse.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A2-A20) is reported at 777 F.3d 684.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2015. The petition for a writ of certiorari was filed on May 4, 2015 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of marriage fraud, in violation of 8 U.S.C. 1325(c). Pet. App. A21-A22. The district court sentenced petitioner to time served, to be followed by one year of supervised release. *Id.* at A23. The court of appeals affirmed. *Id.* at A2-A20.

1. Petitioner is a Turkish national. Pet. App. A4. In November 2000, he entered the United States on a tourist visa that permitted him to remain in the United States until May 2001. *Ibid.* Without authorization, petitioner remained in the United States beyond that period. *Ibid.* In November 2008, petitioner married Tina Eckloff, a United States citizen. *Ibid.* Following his marriage to Eckloff, petitioner applied to the United States Citizenship and Immigration Services (USCIS) for adjustment of status to that of a permanent resident, also known as a "green card." *Id.* at A4-A5 & n.1. In June 2010, USCIS issued a Notice of Intent to Deny petitioner's application on the basis that the agency "suspected that the marriage was entered into for the purpose of evading the immigration laws." *Id.* at A5.

Around that time, the federal government was investigating an alleged scheme of U.S. citizens marrying persons from the Middle East, in exchange for money, for purposes of improving their immigration status. Pet. App. A5-A6. A friend of Eckloff's, Tina Albrecht, later admitted that she had accepted money to marry a Turkish national so he could "get [his] green card," Supp. C.A. App. 3, and that she had recruited Eckloff to enter into a similar "arranged marriage" with petitioner, *ibid.*; see *id.* at 6-7. Petitioner paid Albrecht to arrange a meeting with Eckloff, and Albrecht explicitly told Eckloff that petitioner "need[ed] to marry somebody to get [his] green card." *Id.* at 15; see *id.* at 6-7.

Eckloff subsequently pleaded guilty to marriage fraud and admitted that she married petitioner only two weeks after meeting him "because [she] needed financial help." Supp. C.A. App. 22; see *id.* at 14-15,

19-22, 28. Petitioner paid Eckloff to marry him and to "[h]elp[] him get his * * * green card" by, among other things, signing documents for submission to USCIS. *Id.* at 22; see *id.* at 15, 22-23. The two did not have a sexual relationship, and Eckloff "didn't know [petitioner]" at the time of the marriage. Pet. App. A7; Supp. C.A. App. 24-26. Petitioner and Eckloff only moved in together after USCIS interviewed Eckloff about her marriage to petitioner: the night of this interview, petitioner "went home and moved his family out so he could move [Eckloff] in the next day in case they came looking." Supp. C.A. App. 24.

2. On December 20, 2012, a federal grand jury charged petitioner with a single count of marriage fraud, in violation of 8 U.S.C. 1325(c). Pet. App. A6; Indictment 1. Section 1325(c) makes it a crime to "knowingly enter[] into a marriage for the purpose of evading any provision of the immigration laws." 8 U.S.C. 1325(c). Petitioner proceeded to trial.

The district court instructed the jury that, in order to find petitioner guilty of marriage fraud, it had to find that the government proved (1) "[t]hat the defendant . . . knowingly entered into a marriage with a United States citizen"; (2) "that the marriage was entered into for the purpose of evading a provision of the United States immigration laws"; and (3) "that the defendant knew of said purpose of the marriage[,] [a]nd had reason to know that his conduct was unlawful." Pet. App. A9 (emphasis omitted; brackets in original).

Petitioner requested several additional instructions. Pet. App. A8-A9. As relevant here, he would have required the jury also to find "that the defendant and his US citizen spouse had no intent to establish a

life together." *Id.* at A8 (emphasis omitted). The district court denied that request. *Id.* at A9.

The jury convicted petitioner of marriage fraud. Pet. App. A21-A22. The district court sentenced petitioner to time served, to be followed by one year of supervised release. *Id.* at A23.

3. The court of appeals affirmed. Pet. App. A2-A20. It rejected petitioner's claim that the district court should have given the jury petitioner's proposed "intend to establish a life" instruction. *Id.* at A15. The court of appeals concluded that this proposed instruction was "an incorrect statement of law." *Ibid.* "[T]he text of Section 1325(c) does not provide any support for such a requirement," and, "[i]n the absence of such a statutory requirement, [petitioner's] proposed instruction would have changed the elements of the offense for which he was being tried." *Id.* at A15-A16.

ARGUMENT

Petitioner contends (Pet. 7-15) that the district court erred by not charging the jury that the government had to prove that the defendant did not intend to establish a life together with his spouse. The court of appeals correctly rejected this contention; no conflict among the courts of appeals exists on this jury-instruction question; it is unclear whether any disagreement would have practical significance; and, in any event, this would be a poor vehicle for addressing the question because any error would have been harmless.

1. Congress has made it a crime to "knowingly enter[] into a marriage for the purpose of evading any provision of the immigration laws." 8 U.S.C. 1325(c). The district court correctly charged the jury on the

statutory elements of the offense: that the defendant (1) knowingly (2) entered into a marriage (3) for the purpose of evading any provision of the immigration laws. Pet. App. A9.

Petitioner contends (Pet. 12) that the district court nonetheless erred by failing to instruct the jury on a fourth non-statutory element: that he did not intend to establish a life together with his spouse. As the court of appeals correctly held, the district court did not abuse its discretion in refusing to give that proposed instruction, because it is an incorrect statement of law. Pet. App. A15. The instruction petitioner requested would "impose a requirement completely apart from the statutory language" and thus "would have changed the elements of the offense for which he was being tried." *Id.* at A16; accord *United States* v. *Ortiz-Mendez*, 634 F.3d 837, 840 (5th Cir. 2011) ("No aspect of the statute requires the government to show that Ortiz-Mendez lacked an intent to establish a life with Rosales; rather, the government need only show that she entered into the marriage with the purpose of evading immigration laws. That is the only intent-based aspect of the statute."); *United States* v. *Darif*, 446 F.3d 701, 710 (7th Cir.) ("the government is not required to show that Defendant lacked intent to establish a life with Kirklin; it need only show that Defendant entered into the marriage with Kirklin for the purpose of evading immigration laws"), cert. denied, 549 U.S. 1055 (2006); see *United States* v. *Islam*, 418 F.3d 1125, 1129 n.4 (10th Cir. 2005) ("The plain language of § 1325(c) merely requires proof that an alien enter a marriage for the purpose of evading the federal immigration laws.") (emphasis omitted); *United States* v. *Chowdhury*, 169 F.3d 402, 407 (6th

Cir. 1999) ("reject[ing] the defendant's argument that the government must prove that the defendant knew the specific law being violated," and noting that "marriage fraud statute is not so technical that it requires such specific knowledge"; "it is enough that the government prove that 'the defendant acted with an evil-meaning mind, that is to say that he acted with knowledge that his conduct was unlawful'") (citation omitted).

Petitioner contends (Pet. 12) that failing to instruct juries on the "establish a life together" standard "effectively remove[s] from consideration" evidence that the defendant intended to establish a life together with his or her spouse. That is incorrect. As the court of appeals recognized, "the intent to establish a life with one's spouse is a relevant consideration in determining whether a defendant's purpose in entering into a marriage was to evade the immigration laws." Pet. App. A18. Indeed, evidence that a defendant actually intended to establish a life with his or her spouse could persuade a jury that the defendant did not marry in order to evade the immigration laws, and thus is not guilty. Accordingly, "defendants charged with violating Section 1325(c) are free to present evidence at trial that they entered into the marriage at issue for the purpose of establishing a life with their spouse." *Ibid.* For example, the district court here allowed petitioner to introduce evidence of his intent to establish a life with Eckloff, and petitioner's counsel relied on that evidence in closing arguments to the jury. *Id.* at A19. "However, the relevance of this concept does not transform that consideration into an element of the offense, as [petitioner's] proposed jury instructions would have done." *Id.* at A18; see *Ortiz-*

Mendez, 634 F.3d at 840 (similar); *Islam*, 418 F.3d at 1128 n.3, 1130 n.5 (similar).

2. The courts of appeals are not in conflict on this jury-instruction question, and, in any event, it is doubtful the difference between the two instructions has practical significance. Even without petitioner's proposed instruction, a defendant may introduce evidence showing that he intended to establish a life together with his spouse, and a jury may rely on that evidence to render a verdict of not guilty.

a. As noted above, at least five circuits have affirmed jury instructions that are materially identical to those here. See pp. 5-6, *supra*. No court of appeals has reached the contrary result, holding that a jury must be instructed on an additional "establish a life together" element in order to convict a defendant of marriage fraud. Although the court of appeals below stated that the Ninth Circuit requires "the government to prove under Section 1325(c) that the defendant lacked any intent to establish a life with his spouse," Pet. App. A16 (citing *United States* v. *Orellana-Blanco*, 294 F.3d 1143 (9th Cir. 2002), and *United States* v. *Tagalicud*, 84 F.3d 1180 (9th Cir. 1996)), that is inaccurate, as the Ninth Circuit has not squarely addressed the jury-instruction question here.

The only issue on appeal in *Orellana-Blanco* was the "admission of an exhibit that the government used to prove [that the defendant] lied under oath about his marriage." 294 F.3d at 1145; see *id.* at 1148 ("This appeal challenges one thing, admission of this damning exhibit."). In finding that the erroneous admission of the exhibit was not harmless, the Ninth Circuit stated that a "marriage is a sham 'if the bride and groom did not intend to establish a life together at the

time they were married.'" *Id.* at 1151 (quoting *Bark* v. *INS*, 511 F.2d 1200, 1201 (9th Cir. 1975)). But as noted above, evidence that the spouses "did not intend to establish a life together" is relevant under the instructions given below. It would follow that the same evidence would be relevant on a harmless-error analysis if, for example, other evidence were improperly admitted. And *Orellana-Blanco* expressly "d[id] not reach" the question whether the jury instruction in that case (which did not refer to intent to establish a life together) was erroneous, "because that question [was] not raised." *Id.* at 1151 n.36.

Tagalicud also did not resolve the question. In *Tagalicud*, the district court instructed the jury that "the government must prove beyond a reasonable doubt that a person knowingly entered into a marriage without intending to live together as husband and wife." 84 F.3d at 1184. But the correctness of that instruction was not an issue on appeal. As the Ninth Circuit explained, the defendant "d[id] not challenge the correctness of the instructions," but argued that the district court "erred by instructing only as to her," and not as to her three co-defendants, who were also charged with marriage fraud. *Id.* at 1183. The court of appeals reversed "because there were no instructions telling the jury what it had to find in order to convict" the other defendants. *Ibid.* *Tagalicud*, like *Orellana-Blanco*, cited *Bark* for the proposition that "a marriage [i]s a sham 'if the bride and groom did not intend to establish a life together at the time they were married.'" *Id.* at 1185 (quoting *Bark*, 511 F.2d at 1201). But the court was not asked to address, and did not address, the question whether a jury must be instructed that the government must

prove that the defendant did not intend to establish a life together with her spouse.

Moreover, in both *Orellana-Blanco* and *Tagalicud*, the Ninth Circuit relied on its concern that the jury may not have considered both spouses separately, and may have convicted one spouse based on the other's guilt. See *Orellana-Blanco*, 294 F.3d at 1152 ("The jury could have concluded from the evidence that, although Boehm never intended a genuine marriage, Orellana-Blanco did."); *Tagalicud*, 84 F.3d at 1185 ("The instruction did not say whether Francisco could be innocent if Linda was guilty, and incorrectly implied that if the marriage was a sham, it was a sham for both."). Petitioner was tried alone, and thus this concern is absent here.

Petitioner also relies (Pet. 11) on *United States* v. *Yang*, 603 F.3d 1024 (8th Cir. 2010), but that case is inapposite. The defendant in *Yang* admitted that his wife and a third-party facilitator conspired to commit marriage fraud, but he contended that he "genuinely intend[ed] to marry" and that the government's evidence that he married to evade the immigration laws was insufficient to support the jury verdict. *Id.* at 1026. The Eighth Circuit affirmed the conviction, finding that the circumstantial evidence of his evasive intent was sufficient. *Id.* at 1027. Notably, the instructions in *Yang* did not contain petitioner's proposed "establish a life" instruction. See *id.* at 1026 ("The substantive offense of marriage fraud required proof that Yang knowingly entered into a marriage with a United States citizen, did so for the purpose of evading the immigration laws, and knew or had reason to know of the immigration laws."). The court of appeals here thus correctly identified *Yang* as having

"set forth the elements of th[e] offense in accord with the district court's instructions to the jury in this case." Pet. App. A13; see *id.* at A13 n.4.

b. Petitioner also contends (Pet. 11) that *Monter* v. *Gonzales*, 430 F.3d 546 (2d Cir. 2005), and *Cho* v. *Gonzales*, 404 F.3d 96 (1st Cir. 2005), elevate "establish a life" evidence "to quasi-requirement status." It is unclear what that means, but those cases involve deferential judicial review of Board of Immigration Appeals (BIA) decisions, and thus do not address the propriety of jury instructions in a criminal prosecution under Section 1325(c). See *Monter*, 430 F.3d at 552-553; *Cho*, 404 F.3d at 102-103. Moreover, *Monter* and *Cho* involved different statutory standards. The underlying question in *Monter* was whether the alien had procured immigration relief by "willfully misrepresenting a material fact." 430 F.3d at 553 (quoting 8 U.S.C. 1182(a)(6)(C)(i)); see *id.* at 553-555 (discussing misrepresentation, willfulness, materiality, and causation). And the underlying question in *Cho* was whether the alien had made a showing that "the qualifying marriage was entered into in good faith by the alien spouse." 404 F.3d at 98 (quoting 8 U.S.C. 1186a(c)(4)(B)).

Similarly, *Bark*—the case quoted in *Orellana-Blanco* and *Tagalicud*—was decided before the Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537, and it considered the propriety of the BIA's decision to deny a petition by a spouse for permanent residency on the grounds that the marriage was a "sham" and thus the two were not "spouse[s]" within the meaning of the statute. *Bark*, 511 F.2d at 1201; see *In re Bark*, 14 I. & N. Dec. 237, 240 (B.I.A. 1972) (not "*bona fide*"); see also *Lutwak* v.

United States, 344 U.S. 604, 611 (1953) ("The common understanding of a marriage, which Congress must have had in mind when it made provision for 'alien *spouses*' in the War Brides Act, is that the two parties have undertaken to establish a life together and assume certain duties and obligations.").

In the Immigration Marriage Fraud Amendments of 1986, Congress addressed marriage fraud directly, including by making it a crime to "knowingly enter[] into a marriage for the purpose of evading any provision of the immigration laws." 8 U.S.C. 1325(c); see 8 U.S.C. 1227(a)(1)(G)(i) (similar fraud may trigger removability). The BIA continues to describe the "establish a life together" standard as the "central question" when deciding whether a person has entered into a marriage for purposes of evading the immigration laws. *E.g.*, *In re Mendes*, 20 I. & N. Dec. 833, 839 n.3 (B.I.A. 1994). Circuit courts in turn have echoed the BIA, describing the "substantive question" in civil immigration cases involving marriage fraud as whether there was an "inten[t] to establish a life together," *Rodriguez* v. *INS*, 204 F.3d 25, 27 (1st Cir. 2000) (citation omitted; brackets in original), and stated that they "consider" the "life together" standard, *Malik* v. *Attorney Gen. of U.S.*, 659 F.3d 253, 258 (3d Cir. 2011). But no conflict exists between those decisions and the court of appeals decision here, because they involve judicial review of immigration matters, not the propriety of jury instructions in a criminal case under Section 1325(c).

It is also doubtful that the different formulation would make any practical difference. On one formulation, the "central question" in assessing whether a person has entered into a marriage for purposes of

evading the immigration laws is whether he intended to establish a life together with his spouse. On the other, a defendant is "free to present" precisely the same evidence that he intended to establish a life together with his spouse in order to show that he did not enter into a marriage for purposes of evading the immigration laws. Pet. App. A18. The two formulations are strikingly similar and will lead to the same outcome in all or virtually all cases. Indeed, this case illustrates the point: USCIS denied petitioner's application for adjustment of status on the grounds that he entered into his marriage for purposes of evading the immigration laws, *id.* at A5, and the jury below reached the same conclusion, *id.* at A10.

3. For similar reasons, this would be a poor vehicle for addressing any question about the difference between the two jury instructions, because any error in the jury instructions was harmless beyond a reasonable doubt. As the court of appeals noted, petitioner introduced evidence at trial to the effect that he entered into the marriage "for the purpose of establishing a life with [his] spouse," and his counsel relied on that evidence in closing arguments. Pet App. A18. The government presented ample evidence to refute that claim, however, and the jury clearly disbelieved petitioner in finding him guilty.

Petitioner testified at trial that he lacked the requisite intent because he intended to enter into a *bona fide* marriage with Eckloff. Petitioner testified that he and Eckloff dated for many months before entering into marriage, they had a sexual relationship during this period, they lived together before their marriage, and petitioner considered their marriage "real." Pet. App. A7-A8. Eckloff, however, testified that she mar-

ried petitioner only two weeks after meeting him; that petitioner agreed to pay her money if she married him and helped him obtain a green card, and that she only agreed to the marriage on these terms; that she and petitioner had no sexual or romantic relationship; and that they began living together only after USCIS interviewed Eckloff and petitioner became concerned that government agents might come "looking" for him. *Id.* at A6-A7; see Supp. C.A. App. 14-27. Albrecht corroborated Eckloff's testimony by explaining that she had approached Eckloff after Albrecht's own sham husband indicated that he had "a friend" (petitioner) "that need[ed] to marry somebody to get [his] green card." Supp. C.A. App. 15. Petitioner paid Albrecht to introduce him to Eckloff for this purpose. *Id.* at 6-7.

In finding petitioner guilty, the jury plainly credited the extensive testimony and other evidence that petitioner married Eckloff in order to evade the immigration laws—and plainly disbelieved petitioner's self-serving testimony that they actually intended to establish a life together. Thus, any instructional error here would have been harmless beyond a reasonable doubt. It is clear on this record that, even on petitioner's proposed instruction, the jury would have concluded that petitioner married Eckloff to evade immigration laws and that the parties did not intend to establish a life together. See *Neder* v. *United States*, 527 U.S. 1, 15-18 (1999).[*]

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[*] The court of appeals also affirmed the district court's rejection of petitioner's request to instruct the jury that "the only reason the marriage was entered into was to obtain an immigration benefit." Pet. App. A8 (emphasis omitted); see *id.* at A11-A15. Petitioner

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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does not challenge that portion of the court of appeals' decision in his petition.

Petitioner additionally asserts (Pet. 13-15) that this Court should grant certiorari to "prevent undue State influence over the exercise of [the] fundamental right" to marriage. To the extent that petitioner is suggesting that the statutory definition of marriage fraud in Section 1325(c), under which petitioner was convicted, is unconstitutional, that contention lacks merit. See, *e.g.*, *Bangura* v. *Hansen*, 434 F.3d 487, 495 (6th Cir. 2006) (similar definition of marriage fraud in 8 U.S.C. 1154(c) "easily withstands th[e] deferential standard of review" applicable in immigration). It was also not identified as a question presented here, see Pet. i, and it was neither passed upon nor presented below, see Pet. App. A2-A20; Pet. C.A. Br. 1-46; Pet. C.A. Reply Br. 1-15.