No. _____

In the
Supreme Court of the United States

HUGO ISLAS-HERNANDEZ,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether immigration officials "designate[d]" geographic areas or physical port facilities for "entry" in 8 C.F.R. § 100.4(a) for purposes of 8 U.S.C. § 1325(a)(1).

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OPINION BELOW

The United States Court of Appeals for the Ninth Circuit affirmed Petitioner's conviction in *United States v. Islas-Hernandez*, 723 F. App'x 511 (9th Cir. 2018). A copy of the Ninth Circuit's memorandum disposition is included as Appendix A to this petition.

JURISDICTION

The court of appeals entered final judgment on May 22, 2018. *See* App'x A. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

8 U.S.C. § 1325, Improper Entry by an Alien

8 C.F.R. § 100.4, DHS Regulation, Field Offices

Copies of these provisions are attached to this Petition at App'x B.

STATEMENT OF THE CASE

I. Statutory and regulatory background.

Originally enacted in 1952, 8 U.S.C. § 1325 creates three immigration crimes that govern different ways in which a non-citizen might illegally cross into the United States:

- Under subsection (a)(1), the statute makes 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[.]" 8 U.S.C. § 1325(a)(1).

- Under subsection (a)(2), the statute makes it a crime for an "alien" to "elude[] examination or inspection by immigration officers[.]" *Id.* § 1325(a)(2).

- Under subsection (a)(3), the statutes make it a crime for an "alien" to "attempt[] to enter or obtain[] entry to the United States by a willfully or misleading representation or the willful concealment of a material fact[.]" *Id.* § 1325(a)(3).

A first violation of the statute is a misdemeanor punishable by six months in jail; a subsequent violation constitutes a felony punishable by up to two years in prison. *Id.* § 1325(a). In fiscal year 2016, the government brought over 35,000 cases in which a defendant was charged with violating 8 U.S.C. § 1325. *See* TRAC Reports, "Immigration Now 52 Percent of All Federal Criminal Prosecution," *available at* http://trac.syr.edu/tracreports/crim/446/ (last visited August 14, 2018). The most frequently recorded lead charge in a federal criminal case in 2016, in fact, was § 1325. *Id*.

At issue in this case is subsection (a)(1)—the crime of "enter[ing] or attempt[ing] to enter the United States at any time or place other than as designated by immigration officers." 8 U.S.C. § 1325(a)(1). The term "enter" in immigration law has a technical meaning. "Since 1908, federal courts have recognized that 'entering' the United States requires more than mere physical presence within the country." *United States v. Gonzalez-Torres*, 309 F.3d 594, 598 (9th Cir. 2002). Instead, to "enter" the country, "an alien must cross the United States border free from official restraint." *Id.* (internal quotation marks omitted). "Restraint" in this context

includes "'surveillance'" by immigration authorities. *United States v. Ruiz-Lopez*, 234 F.3d 445, 448 (9th Cir. 2000) (quoting *Matter of Pierre*, 14 I. & N. Dec. 467, 469 (BIA 1973)). "When under surveillance, the alien 'has still not made an entry despite having crossed the border with the intention of evading inspection, because he lacks the freedom to go at large and mix with the population.'" *Gonzalez-Torres*, 309 F.3d at 598 (quoting *United States v. Martin-Plascencia*, 532 F.2d 1316, 1317 (9th Cir. 1976)). Thus, "enter" in immigration law is distinct from lawful admission or a lawful entry.

The places for "entry" that immigration officers have "designated" for purposes of § 1325(a)(1) can be found in 8 C.F.R. § 100.4. "[F]or aliens arriving by aircraft," immigration officials designated places for entry in subsection (b) of 8 C.F.R. § 100.4. Subsection (a) of the regulation covers aliens arriving in any other way; that subsection begins as follows:

> Subject to the limitations prescribed in this paragraph, **the following places are hereby designated as Ports–of–Entry for aliens arriving by any means of travel other than aircraft**. The designation of such a Port–of–Entry may be withdrawn whenever, in the judgment of the Commissioner, such action is warranted. The ports are listed according to location by districts and are designated either Class A, B, or C.

8 C.F.R. § 100.4(a) (emphasis added); *accord* Pet. App. 10a. Immediately thereafter, the regulation explains that a Class A port is designated "for all aliens," whereas Class B and Class C ports are designated for a subset of aliens. *See id.* After 8 C.F.R.

§ 100.4(a)'s introductory paragraph (quoted above), the regulation lists 38 districts by number. The section concerning District 11, for example, looks like this:

District No. 11—Kansas City, Missouri

Kansas City, MO	Class A
Wichita, KS	Class B

8 C.F.R. § 100.4(a); *accord* Pet. App. 17a. Other districts list specific port facilities. For example, District 2 looks (in part) like this:

District No. 2—Boston, Massachusetts

	Class A
Boston, MA	(the port of Boston includes, among others, the **port facilities** at Beverly, Braintree, Chelsea, Everett, Hingham, Lynn, Manchester, Marblehead, Milton, Quincy, Revere, Salem, Saugus, and Weymouth, MA)
Gloucester, MA	
Hartford, CT	(the port at Hartford includes, among others, the **port facilities** at Bridgeport, Groton, New Haven, and New London, CT)
Providence, RI	(the port of Providence includes, among others, the **port facilities** at Davisville, Melville, Newport, Portsmouth, Quonset Point, Saunderstown, Tiverton, and Warwick, RI; and at Fall River, New Bedford, and Somerset, MA)

8 C.F.R. § 100.4(a) (emphasis added); *accord* Pet. App. 10a.

II. Factual background.

Border Patrol agents discovered Petitioner near Dulzura, California. After his arrest on suspicion of entering the United States illegally, the government indicted Petitioner for felony unlawful entry by an alien. The indictment alleged that he had "entered the United States at a time and place other than as designated by immigration officers, having previously committed the offense of illegal entry. . ." The case proceeded to trial.

Much of the trial centered on whether the government could prove that Petitioner had previously been convicted of misdemeanor improper entry under § 1325(a). That question was important, because the government was required to prove that prior conviction beyond a reasonable doubt to convict Petitioner of a *felony*. *See United States v. Arambula-Alvarado*, 677 F.2d 51 (9th Cir. 1982) (holding that a defendant may not be convicted of felony improper reentry unless the government offers proof of a former conviction under § 1325). The defense argued that there was insufficient evidence to show that the conviction documents the government offered into evidence actually corresponded to Petitioner. The jury ultimately concluded that the government's evidence of the prior conviction was sufficient.

Important here, Border Patrol agents testified about the location of Petitioner's apprehension, and the government admitted a video recording of his post-arrest questioning. The government would rely on this evidence to prove that Petitioner

had "entered the United States at a time and place other than as designated by immigration officers."

One agent testified that the spot where he found Petitioner was five miles north of the United States-Mexico border. He said there were two ports of entry "close by": the Otay Mesa Port of Entry was ten miles to the west, and the Tecate Port of Entry was over ten miles to the east. He further testified that the area where he apprehended Petitioner was not a designated port of entry. The government also played clips from a video-recorded interrogation. In that video, Petitioner said he had entered the United States two days before. He said he entered in the hills near Tijuana, Mexico, and that he did not jump over a fence.

Petitioner moved for a judgment of acquittal, arguing that the government had not presented evidence that his point of entry was not "designated" by immigration officials. Although the government had proven that he entered outside a port of entry, the designated area for entry was not limited to the physical port facility. The district court denied the motion and sent the case to the jury.

After deliberations, the jury found Petitioner guilty of felony improper entry.

III. Appeal

Petitioner timely appealed to the Ninth Circuit. He argued that immigration officials had generally designated *geographic areas* for entry, not merely physical ports of entry. The government, however, had not introduced any evidence that where Petitioner entered was not one of those designated areas. It had only proven

that he did not enter at a port of entry. Thus, Petitioner contended, the government had introduced insufficient evidence to sustain his conviction.

Prior to deciding Petitioner's case, the Ninth Circuit affirmed a conviction in a related case raising the same issue. *See United States v. Aldana*, 878 F.3d 877 (9th Cir. 2017). In addressing § 1325, the court in *Aldana* stated that the phrase "other than as designated by immigration officers" must be read "in its historical context." *Id.* at 880. In reviewing the historical context, the court noted that various regulations over time "required aliens to make an in-person application to an immigration officer at a port of entry, and did not differentiate between ports of entry listed in § 100.4 that named a specific facility and those that named a geographic area"; according to the court, this "confirms that [immigration officials] used the term 'port of entry' to refer to specific facilities." *Id.* at 881 . The court continued: "We read the current version of § 1325(a)(1) in light of this historical context. Because an alien who wants to enter the United States lawfully must submit an application at a designated port of entry when it is open for inspection per 8 C.F.R. § 235.1(a), a 'port of entry' necessarily includes a physical facility that is staffed by immigration officials who can accept these application." *Id.* at 882. Thus, the court determined that immigration officials designated physical port facilities, not geographic areas, for "entry" for purposes of § 1325(a)(1). *Id.*

The court then went on to hold that interpreting § 100.4(a) to designate geographic areas for entry would result in an "'absurd and irrational result[.]'" *Id.*

(quoting *United States v. LKAV*, 712 F.3d 436, 550 (9th Cir. 2013)). According to the court, "an alien could enter anywhere in the United States that was not a large city, including along the entire San Diego border, without facing criminal penalties under § 1325(a)(1)." *Id.*

Petitioner conceded in his reply brief that *Aldana* controlled the disposition of his case, but preserved the issue for appeal to this Court. Based solely on *Aldana* and Petitioner's concession, the Ninth Circuit affirmed Petitioner's conviction. *See* App'x A.

REASONS FOR GRANTING THE PETITION

This Court should grant review in this case. In *Aldana*, the court of appeals interpreted 8 C.F.R. § 100.4 as designating specific port facilities—rather than geographic areas—for entry for purposes of 8 U.S.C. § 1325. In doing so, however, the lower court ignored this Court's repeated admonishment that courts must interpret regulations according to their plain meaning, if possible. Instead of interpreting the implementing regulation according to its plain meaning, however, the court of appeals relied on "historical context" to interpret the regulation. Not only was it error to ignore the regulation's plain language, the "historical context" is consistent with interpreting the regulation to mean what its plain language says: that the regulation generally designates geographic areas for entry for purposes of 8 U.S.C. § 1325(a)(1). Nor does interpreting § 100.4 according to its plain meaning result in an absurdity, as the lower court claimed. Anyone who tries to sneak into

the United States at a geographic area that has technically been designated but that does not contain a port facility will still be guilty of a crime— eluding examination, a crime under 8 U.S.C. § 1325(a)(2)—just not entering at a non-designated place. Thus, the lower court had no basis to ignore 8 C.F.R. § 100.4's plain meaning.

Moreover, granting review now is important because the lower court's decision results in the criminalization of entirely innocuous conduct. At least some port-of-entry facilities are not right at the border. That means aliens with lawful permission to reside in the United States who try to obtain admission at these port facilities will have to first cross into the United States and then travel a short ways before arriving at the port. Under the lower court's view of 8 C.F.R. § 100.4, however, those aliens will all have committed a crime: they will have crossed into the United States at a place that was not designated for entry. Interpreting § 100.4 according to its plain language, however, avoids this problem: the geographic area outside of the port *will* be designated for entry. Thus, the alien who crosses into the United States and travels directly to a port facility to be lawfully admitted will not have committed a crime.

Finally, this case presents an ideal vehicle to resolve the question presented. The meaning of 8 C.F.R. § 100.4 was litigated at each stage of the proceedings below, and the lower court affirmed Petitioners' conviction only after holding that § 100.4 designates physical port facilities. The question presented, then, is properly preserved and squarely raised by this petition.

I. The decision below conflicts with this Court's precedent and was wrongly decided.

To convict a defendant of violating 8 U.S.C. § 1325(a)(1), the government must prove that immigration officials did not "designate[]" the "place" where the defendant "entered or attempted to enter" the United States. The places designated for entry can be found in 8 C.F.R. § 100.4. In *Aldana*, the Ninth Circuit interpreted § 100.4 such that it only designated physical port facilities. *See* 878 F.3d at 882. Thus, the court affirmed Aldana's conviction, since there was no dispute that he did not attempt to enter the United States at a physical port facility. *See id.* The court of appeals interpretation of 8 C.F.R. § 100.4, however, relied on purported "historical context," not the regulation's plain language. *See id.* at 880-81. That mode of analysis is inconsistent with this Court's decisions on interpreting regulations. Moreover, contrary to the court of appeals decision, no absurdity follows if the regulation is interpreted according to its plain meaning. The panel's decision in Petitioner's case repeats these errors by relying exclusively on *Aldana* to reject Petitioner's arguments.[1] *See* App'x A. This Court, then, should grant review and reverse the court of appeals.

[1] Because the Ninth Circuit relied on *Aldana* without any further explanation, this Petition discuss the reasoning the Ninth Circuit advanced in *Aldana* as it was incorporated into the affirmance of Petitioner's conviction.

A. The court below erred by interpreting 8 C.F.R. § 100.4 according to its purported "historical context" rather than consistent with its plain meaning.

1. In rejecting the Petitioners' reading of 8 C.F.R. § 100.4, the Court of Appeals for the Ninth Circuit relied solely on "historical context" to determine that the regulation designated specific port facilities for purposes of "entry." The court did not grapple with the regulation's plain language. But nothing in this Court's precedent allows a court to ignore a regulation's plain language because of "historical context." To the contrary, a basic principle of statutory construction is that "[t]he plain meaning of legislation should be conclusive, except in the 'rare case [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). That principle applies equally to regulations—indeed, a "regulation's plain language" controls, even in the face of a contrary agency interpretation of the regulation. *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994); *accord K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 292 (1988). And applying that plain-meaning cannon here requires interpreting 8 C.F.R. § 100.4 to mean what it says: that it generally designated geographic areas for entry, not specific physical port facilities.

To begin, the introductory paragraph to 8 C.F.R. § 100.4(a) provides that the "the following places are hereby designated as Ports–of–Entry for aliens arriving by

any means of travel other than aircraft." Following this introductory paragraph, the regulation lists 38 districts by number and by headquarters location. It then designates particular geographic areas that constitute a "Port[]-of-Entry." For example, District 11 looks like this:

District No. 11—Kansas City, Missouri

Kansas City, MO	Class A
Wichita, KS	Class B

8 C.F.R. § 100.4(a). Thus, immigration officials designated "Kansas City, MO" and "Wichita, KS" as "Ports-of-Entry" for District 11. That means the "'plain meaning'" of § 100.4(a) is that immigration officials have designated geographic areas for entry—here, the cities of Kansas City and Wichita—not specific port facilities. *See Ron Pair Enterprises, Inc.*, 489 U.S. at 242. Simply put, "Kansas City, MO" means "Kansas City, MO," not the "port facilities located in Kansas City, MO."

This plain-language reading of § 100.4 is confirmed by the rest of the regulation. A small number of districts *do* list specific physical port facilities. For example, District 2 looks (in part) like this:

District No. 2—Boston, Massachusetts

	Class A
Boston, MA	(the port of Boston includes, among others, the **port facilities** at Beverly, Braintree, Chelsea, Everett, Hingham, Lynn, Manchester, Marblehead, Milton, Quincy, Revere, Salem, Saugus, and Weymouth, MA)

8 C.F.R. § 100.4(a) (emphasis added). Thus, for District 2, immigration officials expanded the port of "Boston, MA" to include particular "port facilities" in the surrounding areas, such as the port facilities in Beverly. Likewise, in subsection (b) of 8 C.F.R. § 100.4—the subsection concerning "aliens arriving by aircraft"—immigration officials designated particular facilities, such as "Logan International Airport" in "Boston, MA" and "LaGuardia Airport" in "Queens, NY." 8 C.F.R. § 100.4(b). By implication, because immigration officials "knew how to" designate particular facilities in 8 C.F.R. § 100.4 by using the phrase "port facility," when they did not mention a particular facility and instead mentioned a geographic area, they just intended to designate that area. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987).

Accordingly, if the Ninth Circuit had applied the plain-meaning cannon, it would have rejected the government's contention that 8 C.F.R. § 100.4 only designates specific port facilities. By following a supposed "historical context" cannon, the Court of Appeals for the Ninth Circuit—a circuit that contains numerous border districts—has misinterpreted the most commonly charged crime in federal court.

2. In any event, the decision in *Aldana* fails on its own terms. Nothing about the "historical context" indicates that 8 C.F.R. § 100.4(a) must be interpreted to designate physical port facilities only. The Ninth Circuit merely documents that, before someone can lawfully enter (that is, be admitted) in the United States, they

must make an "in-person application to an immigration officer," something that usually takes place at a physical port facility. *See Aldana*, 878 F.3d at 881. From this, the decision claims that "[s]ection 1325(a)(1) imposes penalties on an alien who fails to follow the procedure for lawful entry," and thus physical port facilities must be designated, not geographic areas. *Id.* at 882.

But § 1325(a)(1) has *nothing* to do with the admission process. As noted above, in immigration law, an alien has "entered" the United States for purposes of 8 U.S.C. § 1325(a)(1) when the alien is "free from official restraint." *United States v. Oscar*, 496 F.2d 492, 494 (9th Cir. 1974); *see also United States v. Argueta-Rosales*, 819 F.3d 1149, 1156–57 (9th Cir. 2016). That means aliens who physically cross into the United States (even in the middle of the desert) will have actually "entered" the United States if immigration authorities are not surveilling them. On the other hand, an alien can cross into the United States in the middle of the desert and still *not* have "entered" the country if immigration officials have been watching the alien the entire time, *see Gonzalez-Torres*, 309 F.3d at 598–99, and not have attempted to enter the United States if the alien didn't intend to be free from official restraint, *Argueta-Rosales*, 819 F.3d at 1156–57. Thus, an alien can absolutely fail to follow the proper procedure for "lawful entry"—that is, admission—and not violate § 1325(a)(1) when coming into the United States. Instead, that alien will have eluded examination in violation of § 1325(a)(2), the subsection of the statute that deals with the admission

process. *See United States v. Rincon-Jimenez,* 595 F.2d 1192, 1193–94 (9th Cir. 1979)).

B. The *Aldana* court erred when it determined that interpreting 8 C.F.R. § 100.4 consistent with its plain meaning resulted in an absurdity.

It is true that a court may ignore the plain-language cannon in the "'rare case [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.'" *Ron Pair Enterprises, Inc.*, 489 U.S. at 242 (quoting *Griffin*, 458 U.S. at 571). This can occur when the plain language leads to an "absurd" result. *Sebelius v. Cloer*, 569 U.S. 369, 381 (2013) (internal quotation marks omitted). The court of appeals below invoked this exception in rejecting Petitioner's interpretation of 8 C.F.R. § 100.4. According to the court, if § 100.4 were interpreted to generally designate geographic areas, "an alien could enter anywhere in the United States that was not a large city, including along the entire San Diego border, without facing criminal penalties under § 1325(a)(1)." *Aldana*, 878 F.3d at 882.

Under Petitioner's reading of 8 C.F.R. § 100.4(a), it is true that an alien could "enter" the United States at a place that is technically designated for entry, but that does not contain a port facility. For example, an alien could hop the border fence and cross into the United States at "San Ysidro, CA," a place that 8 C.F.R. § 100.4 has technically designated for entry. That defendant could not "fac[e] criminal penalties under § 1325(a)(1)." *See Aldana*, 878 F.3d at 882.

But that same defendant *will* face criminal penalties under subsection (a)(2) of § 1325. Under that subsection, Congress criminalized "elude[ing] examination or inspection by immigration officers[.]" 8 U.S.C. § 1325(a)(2). "[E]luding 'examination or inspection[]' has specific reference to immigration procedures conducted at the time of entry,'" meaning eluding examination "is consummated at the time an alien gains entry" to the United States and does not "submit to [the required] examinations." *Rincon-Jimenez*, 595 F.2d at 1193–94 (citing 8 U.S.C. §§ 1224, 1225). That means aliens who cross into the United States in areas that are technically designated but where there is no port facility will have violated § 1325(a)(2): these individuals will have crossed into the country without submitting to an examination, and a fact finder (absent unusual circumstances) could certainly infer beyond a reasonable doubt that they did not intend to submit. And there is nothing absurd about requiring the government to charge defendants who cross into the United States at a designated place that does not contain a port-of-entry facility with violating subsection (a)(2) of § 1325 rather than (a)(1).

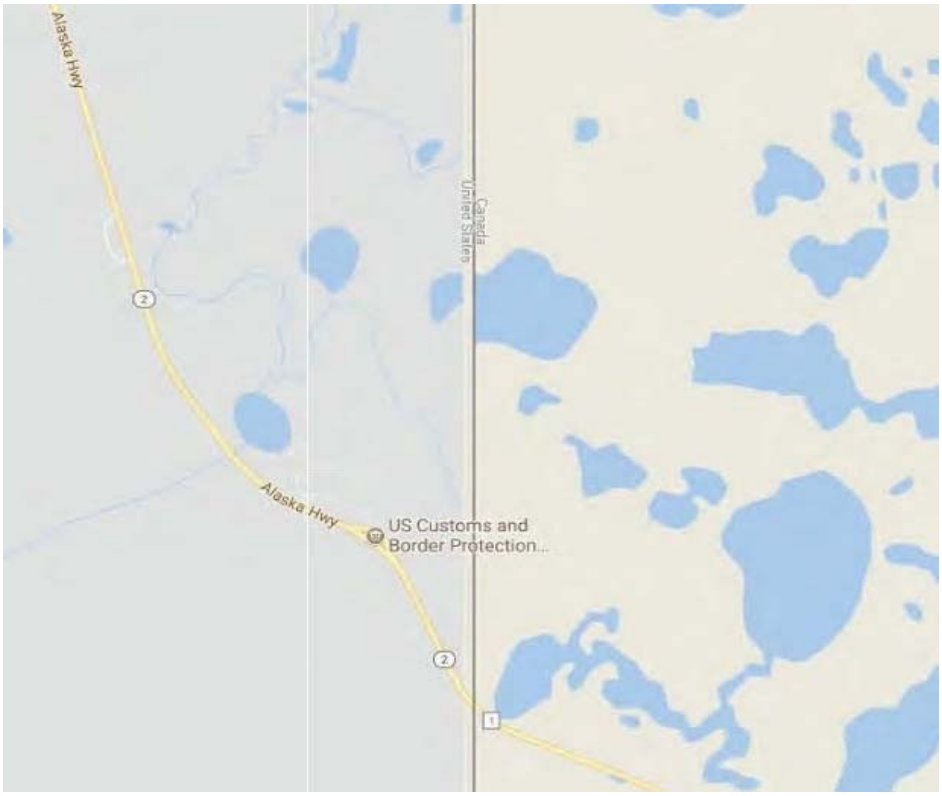
* * *

In sum, the court of appeals failed to follow the basic cannon of interpretation that the plain meaning of a regulation controls. Applying that cannon to 8 C.F.R. § 100.4 establishes that immigration officials generally designated geographic areas, not physical port facilities, for entry. By coming to the opposite conclusion, the court of appeals below erred.

II. Resolving the question presented is critically important because the decision below results in the criminalization of innocuous conduct.

It is critical that this Court grant review in this case now because the court's decision below will result in the criminalization of entirely innocuous conduct: aliens with lawful permission to be in the United States will have violated 8 U.S.C. § 1325(a)(1) merely for trying to enter the United States at some ports of entry.

The decision below criminalizes innocuous conduct because not all port facilities are right at the border; some are in fact far inland. *See United States v. Zavala-Mendez*, 411 F.3d 1116, 1117 (9th Cir. 2005) (discussing a port facility located a mile from the international border). For example, the Alcan-Beaver Creek Border Crossing in Alaska is 17.8 miles from the U.S.-Canadian border:



See Wikipedia, Alcan – Beaver Creek Border Crossing, *available at* https://en.wikipedia.org/wiki/Alcan_-_Beaver_Creek_Border_Crossing. That means an alien who wants to be lawfully admitted at the Alcan-Beaver Creek Border Crossing must travel 18 miles into the United States before reaching the physical port facilities. Under the decision below, however, that alien is now a criminal: he or she has crossed into the United States at a non-designated place. On the other hand, under Petitioners' plain-meaning reading of 8 C.F.R. § 100.4, these aliens would have committed no crime. Immigration officials have designated the geographic region of "Alcan, AK" for entry. *See* 8 C.F.R. § 100.4(a). As a result, because the aliens would have crossed into the United States at Alcan, AK, they would have committed no crime. (Of course, if the alien then did not proceed to the port facility to gain admission, the alien will have violated 8 U.S.C. § 1325(a)(2) by eluding examination.)

Aldana does not address this pernicious aspect of its opinion. Nevertheless, this absurdity caused by ignoring the plain-meaning of § 100.4 suggests that immigration officials designated geographic areas for a reason.

III. This case presents an ideal vehicle to resolve the question presented.

By granting review in this case, this Court will be able to resolve the question presented. Petitioner has properly preserved the issue. He litigated the issue in district court and on appeal. Moreover, the question presented is dispositive to the Petitioner's sufficiency claim. The court's affirmance below hinges entirely on its view that § 100.4 designates physical port facilities, not geographic areas. If the court

had determined that § 100.4 designated geographic areas, it would have been forced to reverse. Thus, this case is an ideal vehicle to resolve the meaning of 8 C.F.R. § 100.4.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

August 16, 2018

Respectfully submitted,

s/ Michael Marks

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