No. _____

In the
Supreme Court of the United States

IGNACIO ARELLANO-BANUELOS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

KEVIN JOEL PAGE
COUNSEL OF RECORD
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS, 75202
(214) 767-2746

Counsel for Petitioner

QUESTIONS PRESENTED

Whether an alien may be "found" within the meaning of 8 U.S.C. §1326 before immigration authorities achieve actual knowledge of his or her actual presence in the United States?

PARTIES TO THE PROCEEDING

Petitioner is Igancio Arellano-Banuelos, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

Miscellaneous

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ignacio Arellano-Banuelos respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The first published opinion of the court of appeals – remanding for factual findings – is reported as *United States v. Arellano-Banuelos*, 912 F.3d 862 (5th Cir. January 14, 2019), and is reprinted as Appendix A. Its second published opinion is reported as *United States v. Arellano-Banuelos*, 927 F.3d 355 (5th Cir. June 17, 2019), Appendix B. Its unpublished order denying a timely Petition for Panel Rehearing is reprinted as Appendix C. Finally, the district court's sentencing decision was documented in a written judgment, reprinted as Appendix D.

JURISDICTION

The order of the court of appeals denying a timely Petition for Panel Rehearing was issued on July 23, 2019. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1326(a) of Title Eight of the United States Code provides in part:

> (a) **In general.** Subject to subsection (b), any alien who—
>
> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act...

STATEMENT OF THE CASE

1. Facts

Petitioner Ignacio Arellano-Banuelos was born in Mexico City in 1981, *see* (Record in the Court of Appeals at 812); a year later, his family crossed the border, raising him in the United States, *see* (Record in the Court of Appeals at 814). He received a single conviction for aggravated robbery when he was a child of 18 years, and suffered deportation from his homeland as a result. *See* (Record in the Court of Appeals at .807-808).

Some time prior to April 11, 2010, likely in 2009, Petitioner re-entered the country. This is clear from his 2009 tax returns filed April 11, 2010, admitting tax liability of more than a thousand dollars. *See* (Record in the Court of Appeals at 234, 237). Between 2010 and 2015, Petitioner lived quite openly in the United States, paying taxes, working at a pizza restaurant, and appearing on his son's birth certificate. *See* (Record in the Court of Appeals at 233-250, 814).

In 2015, he was arrested by Texas state authorities, who received a detainer from ICE. *See* (Record in the Court of Appeals at ROA.492). In August of 2015, an ICE Agent named Norberto Cruz interviewed Petitioner in a state jail, and secured a confession to the elements of illegal re-entry. *See* (Record in the Court of Appeals at 360-387).

On May 25, 2016, the government indicted Mr. Arellano-Banuelos for illegally entering the country without permission. *See* (Record in the Court of Appeals at 12). The defense filed a motion to dismiss the indictment in light of the statute of limitations. *See* (Record in the Court of Appeals at 75-77),

This motion contended that Mr. Arellano-Banuelos had been found when he filed his taxes with the federal government. *See* (Record in the Court of Appeals at 75-77). The offense of illegal re-entry, he maintained, terminated

when the government had reason to know of the defendant's presence, whether or not ICE actually possessed such knowledge. *See* (Record in the Court of Appeals at 75-77). The district court ultimately rejected this position, finding that *United States v. Compian-Torres*, 712 F.3d 203 (5th Cir. 2013), required actual knowledge of the defendant's presence, and only constructive knowledge of the defendant's illegality. *See* (Record in the Court of Appeals at 424-425). Indeed, during a lengthy colloquy, the court forbade the introduction of the defendant's tax returns and the birth certificate of his child, as the following exchange reflects:

> THE COURT: Okay. Name on birth certificate and income tax filings I don't think get you there, and I don't think those are admissible.
>
> MS. DENNIS (defense counsel): They are not admissible because?
>
> THE COURT: They are irrelevant. They are – under Compian-Torres, they're legally irrelevant.

(Record in the Court of Appeals at 426); *see* (Record in the Court of Appeals at 430)("...the evidence that you've talked about I think is legally irrelevant and I'm not going to let that in."). These documents had been attached as exhibits to the defendant's reply in support of the motion. *See* (Record in the Court of Appeals at 233-250). They were not formally offered at the trial itself.

At the conclusion of trial, the defense sought a jury instruction on the statute of limitations. *See* (Record in the Court of Appeals at 617-620). That instruction was denied by the district court, *see* (Record in the Court of Appeals at 621), together with a request that the jury issue a special verdict on when the defendant was found by ICE, *see* (Record in the Court of Appeals at 622). The jury convicted, *see* (Record in the Court of Appeals at 656), and the defendant received 66 months imprisonment, *see* (Record in the Court of Appeals at 335).

3. Proceedings on Appeal

On appeal, Petitioner contended, *inter alia*, that the district court erred in denying the defendant's right to present a statute of limitations defense. Specifically, he argued that it erred first in holding that his evidence of open presence in the United States – tax returns and his child's birth certificate – and then again in denying a jury instruction. In this regard, he contended that he ought to be able to show that he was found when immigration officials should have found him, irrespective of when they actually did so. Had the jury been permitted to consider his open presence, he argued, it might have concluded that he was constructively found more than five years prior to his indictment. Thus, his offense would have terminated more than five years before his indictment, and the statute of limitations would have barred prosecution.

The court of appeals rejected this argument on the ground that a defendant cannot be "found" unless immigration authorities have achieved actual knowledge of his physical presence.[1] *See* [Appendix B, at pp.10-11][citing *United States v. Santana-Castellano*, 74 F.3d 593 (5th Cir. 1996), and *United States v. Compian-Torres*, 712 F.3d 203, 207 (5th Cir. 2013)]. Although it conceded that "constructive knowledge" may suffice as to ICE's knowledge of the defendant's illegal status, it insisted on actual knowledge of an alien's bare physical presence. *See* [Appendix B, at p.11]. Because the defense offered no evidence of actual knowledge, the court of appeals affirmed the evidentiary ruling. *See* [Appendix B, at p.11]. And because no evidence in the record supported the defense, the court of appeals affirmed the denial of a jury instruction. *See* [Appendix B, at p.11].

---

[1] The court's first published opinion remanded to make factual findings in support of a determination under *Miranda v. Arizona*, 384 U.S. 436 (1966).

Petitioner filed a timely Petition for Panel Rehearing on unrelated grounds, which was denied July 23, 2019. *See* [Appendix C].

REASONS FOR GRANTING THE PETITION

The decision below is in conflict with the decision of another United States court of appeals on the important matter of whether an alien may be "found" within the meaning of 8 U.S.C. §1326 before immigration authorities achieve actual knowledge of his or her actual presence in the United States.

Section 1326 of Title Eight provides up to twenty years imprisonment when a previously removed alien is "found" in the United States without authorization. Because the offense terminates when the alien is "found," the moment of "finding" is critical to the resolution of sundry legal questions arising in §1326 litigation. *See United States v. Rivera–Ventura*, 72 F.3d 277, 281-282 (2d Cir.1995); *United States v. Compian-Torres*, 712 F.3d 203 (5th Cir. 2013); *United States v. Herrera-Ordones*, 190 F.3d 504, 510 (7th Cir. 1999); *United States v. Gomez*, 38 F.3d 1031, 1035-1038 (8th Cir. 1994); *United States v. Guzman–Bruno*, 27 F.3d 420 (9th Cir.1994); *United States v. Meraz–Valeta*, 26 F.3d 992, 997 (10th Cir.1994); *United States v. Clarke*, 312 F.3d 1343, 1348 (11th Cir. 2002). These include, as here, the statute of limitations, *see United States v. Gunera*, 479 F.3d 373, 376 (5th Cir. 2007); *United States v. DiSantillo*, 615 F.2d 128, 134-135 (3d Cir.1980); *Gomez*, 38 F.3d at 1035-1038, but also venue, *see United States v. Rodriguez-Rodriguez*, 453 F.3d 458, 460 (7th Cir. 2006); *United States v. Diaz-Diaz*, 135 F.3d 572, 577 (8th Cir. 1998); *United States v. Hernandez*, 189 F.3d 785 (9th Cir. 1999), the propriety of concurrent or consecutive sentences under the Federal Sentencing Guidelines, *see United States v. Santana–Castellano*, 74 F.3d 593, 597 (5th Cir. 1996), whether a defendant commits the offense of illegal re-entry while held against his or her will in a state prison for the purposes of criminal history enhancements under the Guidelines, *see Santana–Castellano*, 74 F.3d at 597, and the application of

the *ex post facto* clause, *see United States v. Garcia*, 770 Fed. Appx. 231 (May 19, 2019)(unpublished); *Guzman–Bruno*, 27 F.3d at 422-423.

The court below has held that an alien is not "found" under §1326 unless immigration authorities achieve actual knowledge of his or her physical presence in the United States. *See* [Appendix B]; *Compian-Torres*, 712 F.3d at 209 ("for an alien to be 'found' under § 1326, immigration authorities must discover and note the alien's physical presence, and the illegality of the alien's presence must be known or reasonably attributable to immigration authorities."); *accord United States v. Santana–Castellano*, 74 F.3d 593, 598 (5th Cir.1996). In the court below, constructive knowledge that an alien's presence is illegal will show a "finding," *see United States v. Gunera*, 479 F.3d 373, 376 (5th Cir. 2007), but as to physical presence, actual knowledge is required, *see Compian-Torres*, 712 F.3d at 208-209.

This conflicts with the decision of the Eighth Circuit in *United States v. Gomez*, 38 F.3d 1031 (8th Cir. 1994). Gomez involved a §1326 prosecution, in which the previously deported defendant voluntarily entered an INS office seeking to change his immigration status. *See Gomez*, 38 F.3d at 1033. Upon entering the office, however, the defendant provided a fake name. *See id.* He also provided his fingerprints, which could have been used to link him to his true name and prior deportation. *See id.* Immigration authorities did not actually discover the prior deportation until a subsequent arrest, after which prosecutors obtained a §1326 indictment. *See id.* The defendant sought dismissal of the indictment on the grounds that the statute of limitation had expired - more than the requisite five years had passed since he entered the INS office and provided his fingerprints. *See id.*

The Eighth Circuit analyzed the statute and held that an alien may be "found" "when immigration authorities could have, through the exercise of diligence typical of law enforcement authorities, discovered the violation" of §1326. *Id*. at 1037. Although it believed that provision of fingerprints may provide constructive knowledge of the violation, it did not think that such knowledge would be attributable to immigration authorities until after a reasonable time for processing the prints. *See id.* at 1038. Nonetheless, its unitary formulation – that constructive knowledge accrues when "the violation" could have been discovered – plainly conflicts with the test applied in the court below. Under the *Gomez* formulation, it is plainly possible to have constructive knowledge of a "violation" even without actual knowledge of an alien's physical presence. By contrast, the court below finds constructive knowledge of physical presence irrelevant. *See Compian-Torres*, 712 F.3d at 208-209.

This conflict is well presented here. ICE's lack of actual knowledge regarding the defendant's physical presence was the sole basis for the court's conclusion that evidence of the defendant's open presence could be excluded. *See* [Appendix B, at p.11].[2] The defendant, moreover, produced evidence that could cause a reasonable jury to think that ICE should have learned of his physical

[2]The court below expressly declined to rule on the government's suggestion that Petitioner forfeited this claim by failing formally to offer the evidence at trial. *See* [Appendix B, at p.11, n.4] Indeed, it impliedly rejected the government's position in this regard when it held that "the district court properly excluded Arellano-Banuelos's proposed evidence as legally irrelevant." [Appendix B, at p.11]. As such, the court below recognized that the district court effectively ruled on the defendant's evidentiary submission. In such a case, error is preserved where "a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context." Fed. R. Evid. 103(a)(2). That is certainly the case here, where the record includes the very document the defense wished to offer. *See* (Record in the Court of Appeals, at 233-250).

presence more than five years before his indictment: tax returns and his child's birth certificate bearing his name.

Reasonable jurors could conclude that an executive agency charged with locating undocumented aliens should be aware of their voluntary disclosures to another executive agency of the same sovereign. As such, reasonable jurors could have concluded that he should have been found by ICE at least when he voluntarily filed his tax returns. Indeed, the view that the IRS should forward tax returns of undocumented aliens to ICE is not an uncommon one in our country. *See* FOX NEWS, *IRS Keeps Tabs on Illegal Immigrant Filers* (April 22, 2003)("But at least one immigration group charges that the ITINs are merely a way for illegals to skirt the law and try to legitimize living inside the country. 'The federal government should not be doing a single thing to help these illegal aliens remain in the United States. They should be focusing their efforts like a laser beam on finding and deporting illegal aliens,' said David Ray of the Federation for American Immigration Reform."), *available at http://www.foxnews.com/story/2003/04/22/irs-keeps-tabs-on-illegal-immigrant-filers.html, last visited October 18, 2019.*

To be sure, not every jury would necessarily find constructive knowledge in these circumstances. But it is the jury's duty – not an appellate court's – to resolve mixed questions of fact and law. *See United States v. Gaudin*, 515 U.S. 506, 512 (1995)("...the application-of-legal-standard-to-fact sort of question ..., commonly called a 'mixed question of law and fact,' has typically been resolved by juries.") And here, the relevant finding of constructive knowledge would necessarily require normative judgments about the proper duties of executive agencies about which reasonable minds could disagree. Accordingly, under Petitioner's view of the statute, he had the right to admit evidence of his open

presence in the United States, and the denial of that right cannot be termed harmless.

The issue that has divided the courts of appeals is well presented by this case. That issue is an important issue of statutory construction affecting all manner of legal questions in illegal re-entry prosecutions. It merits review.

CONCLUSION

For all the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

/S/ KEVIN JOEL PAGE
KEVIN JOEL PAGE
Counsel of Record
Federal Public Defenders Office
Northern District of Texas
525 Griffin Street, Suite 629
Dallas, Texas, 75202
(214) 767-2746
August 9, 2019