No. 19-8733

IN THE SUPREME COURT OF THE UNITED STATES

PETRONA GASPAR-MIGUEL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in order to convict petitioner of improperly entering the United States in violation of 8 U.S.C. 1325(a)(1), the government was required to establish that petitioner was free from continuous government surveillance from the time she crossed the border until she was apprehended.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.N.M.):

United States v. Gaspar-Miguel, No. 18-po-2441 (Jan. 25, 2019)

United States Court of Appeals (10th Cir.):

United States v. Gaspar-Miguel, No. 19-2020 (Jan. 16, 2020), petition for reh'g denied (Feb. 14, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 947 F.3d 632. The opinion of the district court is reported at 362 F. Supp. 3d 1104.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2020. A petition for rehearing was denied on February 14, 2020 (Pet. App. B1). The petition for a writ of certiorari was filed on June 9, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the District of New Mexico, petitioner was convicted on one misdemeanor count of improperly entering the United States, in violation of 8 U.S.C. 1325(a)(1). A magistrate judge imposed a time-served sentence. D. Ct. Doc. 34 (Sept. 14, 2018). The district court affirmed petitioner's conviction. 362 F. Supp. 3d 1104. The court of appeals also affirmed. Pet. App. A1-A8.

1. On June 17, 2018, a U.S. Border Patrol agent was on "line watch duties" in Sunland Park, New Mexico. D. Ct. Doc. 40-1, at 13-14 (Oct. 12, 2018). At around 12:20 p.m., the agent "observed some movement moving northbound from the international boundary line." Id. at 14-15. This movement occurred at "the end of the fence," id. at 16 -- the location where the border fence terminates due to mountainous terrain and where human smuggling often occurs, id. at 15, 19. The agent relayed this information to other Border Patrol units in the area. Id. at 20-21. The agent also continued his observation of the location. Id. at 21. Once the "silhouette" moved "a little bit further north of the fence," the agent "could tell they were people," but he "wasn't sure" how many individuals were present. Id. at 22.

A second Border Patrol agent drove to the area and encountered three individuals, including petitioner, about 50 to 75 yards north of the border fence. D. Ct. Doc. 40-1, at 29-31, 45. The

individuals were calm and did not run. Id. at 32, 40. They informed the agent that they were citizens of Guatemala and had just crossed the border illegally. Id. at 31–32. A third agent transported petitioner and the other individuals to the Santa Teresa Border Patrol Station for processing. Id. at 46-47.

2. The government charged petitioner with one count of improperly entering the United States, in violation of 8 U.S.C. 1325(a)(1). Compl. That provision subjects "[a]ny alien who * * * enters or attempts to enter the United States at any time or place other than as designated by immigration officers" to a misdemeanor penalty. 8 U.S.C. 1325(a)(1). After a bench trial, a magistrate judge found petitioner guilty and imposed a time-served sentence. D. Ct. Doc. 40-1, at 118-120.

The district court affirmed the conviction. 362 F. Supp. 3d 1104. The court rejected petitioner's contention that she had not "enter[ed]" the United States within the meaning of Section 1325(a)(1) because she was under continuous surveillance from the moment she crossed the border. Id. at 1107. The court recognized that the term "enters" in immigration statutes has long been interpreted to require both an alien's physical presence in the country and freedom from official restraint. Id. at 1111-1116. But, even accepting the applicability of the official-restraint doctrine, the court refused to accept the proposition that merely being under continuous surveillance constitutes the kind of

official restraint that would be sufficient to negate an unlawful entry under Section 1325(a)(1). Id. at 1117-1120. The court observed that "[i]n no other scenario would being surveilled continuously by law enforcement during the commission of a crime negate a defendant's actus reus in completing that crime and absolve him of liability." Id. at 1118. It explained that, if the presence of contemporaneous surveillance prevented an alien from making an unlawful entry, that would create strange complications associated with charges of attempted entry at an improper time or place, which is also a misdemeanor under Section 1325(a)(1). Id. at 1119-1120. And the court noted that the answer to the question would affect neither the procedures for, nor the merits of, petitioner's civil asylum claim. Id. at 1120-1121.

3. The court of appeals affirmed. Pet. App. A1-A8. It first explained the origins of the "doctrine of freedom from official restraint," under which an alien has not made an "entry" into the United States unless and until she is "free from official restraint and can move freely within the country." Id. at A3-A4. The court observed that the doctrine arose in the civil context, where -- before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 -- the scope of an alien's rights often turned on whether or not she had entered the United States. Pet. App. A3-A4. Courts adopted the view that entry

required freedom from official restraint as a means to "align the rights of aliens who had technically crossed the border but were not free to move within the general population with the rights of those aliens turned away at the border." Id. at A3.

The court of appeals further explained that IIRIRA amended the immigration laws, such that the scope of an alien's rights generally turns on whether she was "admitted" rather than whether she made an "entry." Pet. App. A4. But it observed that many courts have continued to apply the doctrine of official restraint in immigration cases that require a determination as to whether an alien entered the United States. Id. at A5.

The court of appeals stated, however, that "[f]or the purposes of this appeal," it did not need to "address the broader question of whether 'entry' under [Section] 1325(a) requires freedom from official restraint." Pet. App. A5. Instead, the court concluded that the district court's decision could be affirmed because "as pertinent here," "continuous surveillance by border patrol agents, by itself, does not constitute official restraint." Id. at A5-A6. The court of appeals explained that Congress had not used the term "official restraint" in Section 1325(a), meaning that the court need not import any settled meaning regarding that term into the statute. Id. at A6. The court further observed that "the notion that continuous surveillance alone can amount to official restraint has only recently been applied in the criminal context,"

in several cases in the Ninth Circuit. Ibid. And the court characterized the position as "illogical" because "[i]f the alien does not know that he is under surveillance, it is difficult to perceive how that surveillance can be said to have prevented that alien from moving at large and at will within the United States." Ibid. (citation and internal quotation marks omitted).

In addition, the court of appeals observed that "as seen in the Ninth Circuit case law, parsing what should or should not qualify" as continuous surveillance "can lead to distinctions so fine as to become meaningless, if not arbitrary." Pet. App. A6-A7 (citing, e.g., United States v. Hernandez-Herrera, 273 F.3d 1213, 1218-1219 (9th Cir. 2001) (holding that continuous surveillance is official restraint but "persistent tracking" is not), cert. denied, 537 U.S. 868 (2002)). And the court observed that treating continuous surveillance as official restraint "treats aliens who take exactly the same actions with exactly the same intent as committing different versions of a crime: attempted entry, versus entry," and has "the potential" to create "perverse incentives for law enforcement agents to 'look away'" from an alien to keep surveillance from being continuous and thus allowing the alien to be prosecuted for unlawful entry. Id. at A7.

4. The court of appeals denied petitioner's petition for rehearing en banc. Pet. App. B1.

ARGUMENT

Petitioner renews (Pet. 5-16) the contention that she did not "enter[]" the United States, within the meaning of 8 U.S.C. 1325(a)(1), because she was under continuous surveillance by law enforcement after she crossed the border. The court of appeals correctly affirmed petitioner's conviction, and -- although the Ninth Circuit has adopted a different interpretation of the term "enters" in Section 1325 and another criminal provision -- this case would not be an appropriate vehicle in which to resolve that shallow disagreement. Further review is therefore unwarranted.

1. a. The court of appeals correctly affirmed petitioner's conviction under 8 U.S.C. 1325(a)(1), a criminal provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq. The case law regarding when an alien has "entered" the United States for various purposes under the INA developed largely in the context of civil proceedings because -- before the 1996 enactment of IIRIRA -- the government used different immigration procedures depending on whether an alien had already entered the United States or was deemed to be seeking admission. An alien who had entered the United States received a deportation hearing, whereas an alien who had not effectuated an entry but was stopped at the border (or examined by an immigration officer and paroled into the United States) was placed in an exclusion hearing, which was more summary. See generally Landon v. Plasencia, 459

U.S. 21, 25-27 (1982); Leng May Ma v. Barber, 357 U.S. 185, 187-188 (1958).

Under that civil immigration framework, courts and the Board of Immigration Appeals (BIA) concluded that an alien did not "enter" the United States merely by effectuating physical presence in this country. Rather, in order to be subject to deportation rather than exclusion proceedings, an alien had to have been in the country while free from official restraint and thus allowed to go at large and mix with the general population. See Yang v. Maugans, 68 F.3d 1540, 1545 (3d Cir. 1995); Correa v. Thornburgh, 901 F.2d 1166, 1171-1172 (2d Cir. 1990); see also In re Pierre, 14 I. & N. Dec. 467, 468 (B.I.A. 1973). For example, in Correa, the Second Circuit held that an alien had not "entered" the United States (and thus was properly placed in exclusion proceedings) when, after disembarking from an international flight, she was allowed to pass by the primary inspection station but was referred to another area for agriculture inspection, where she was apprehended. 901 F.2d at 1171-1172. Similarly in Yang, the Third Circuit concluded that aliens who came ashore after a shipwreck "could not have effected an 'entry,'" where "[n]one of the petitioners ever left the beach area, which was teeming with law enforcement activity soon after the [ship] ran aground." 68 F.3d at 1550. And in Pierre, the BIA observed that an alien was properly placed in exclusion rather than deportation proceedings where the

alien crossed the border while subject to "official restraint" in "the form of surveillance." 14 I. & N. Dec. at 469.

The distinction between exclusion and deportation proceedings was abolished by IIRIRA, which created a "unified procedure, known as 'removal,' for both exclusion and deportation." Kawashima v. Holder, 565 U.S. 478, 481 n.2 (2012); see 8 U.S.C. 1229(a)(1), 1229a. Accordingly, after IIRIRA, the type of proceeding an alien receives no longer turns on whether she has "entered" the United States. The INA still distinguishes in some respects between "inadmissible" and "deportable" aliens, but that distinction generally turns on whether the alien has been lawfully admitted into the United States, not whether the alien has effectuated a physical entry into the United States. See Ngo v. INS, 192 F.3d 390, 394 n.4 (3d Cir. 1999) (summarizing related changes made by IIRIRA); In re Collado, 21 I. & N. Dec. 1061, 1063-1064 (B.I.A. 1998) (en banc) (noting that IIRIRA "supplant[ed] the definition of 'entry' with definitions for the terms 'admission' and 'admitted'").

b. As the court of appeals correctly recognized, even after IIRIRA was enacted, "courts and the [BIA] have continued to interpret 'enter,' in a variety of contexts, as only completed once an individual is 'free from official restraint.'" Pet. App. A5 (citing, e.g., Lopez v. Sessions, 851 F.3d 626, 631 (6th Cir. 2017) (finding that "entry" under the Nicaraguan Adjustment and

Central American Relief Act, Pub. L. No. 105-100, Tit. II, 111 Stat. 2193, requires freedom from official restraint); United States v. Macias, 740 F.3d 96, 100 (2d Cir. 2014) (holding that alien brought across the border in handcuffs by Canadian border security officers would not be treated as having "entered" the United States and therefore could not be "found in" the United States for purposes of criminal prosecution for unlawful reentry)).

The court of appeals' opinion in this case did nothing to disturb the potential applicability of the doctrine of official restraint in the criminal context. Pet. App. A5-A6. Rather, the court expressly found it unnecessary to address "whether 'entry' under [Section] 1325(a) requires freedom from official restraint." Id. at A5. Instead, it reasonably concluded that -- at least "as pertinent here" -- petitioner's "continuous surveillance by border patrol agents" did not "by itself" "constitute official restraint." Ibid.[1]

[1] Nor did the decision below decide whether variants of the term "entry" might be construed differently for criminal purposes than for those that dictate what procedures will govern an alien's civil immigration proceeding. Cf. Department of Homeland Security v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020) (concluding that "an alien who is detained shortly after unlawful entry cannot be said to have 'effected an entry'" for purposes of the "century-old rule regarding the due process rights of an alien seeking initial entry") (emphasis added; quoting Zadvydas v. Davis, 533 U.S. 678, 693 (2001)); Zadvydas, 533 U.S. at 703-704 (Scalia, J., dissenting) (recognizing that immigration law distinguishes

2. Petitioner correctly observes (Pet. 10, 13) that the Ninth Circuit has held that an alien who is under continuous surveillance from the time she crosses the border until her apprehension is under "official restraint" and, accordingly, has not "entered" the United States for purposes of 8 U.S.C. 1325(a)(1) or 8 U.S.C. 1326 (a separate criminal provision that prohibits reentry by an alien who has previously been removed from the country). See United States v. Gonzalez-Torres, 309 F.3d 594, 598-599 (9th Cir. 2002), cert. denied, 538 U.S. 969 (2003). For example, in United States v. Pacheco-Medina, 212 F.3d 1162, 1163 (9th Cir. 2000), a Border Patrol agent observed an alien dropping to the bottom of a fence demarcating the U.S.-Mexico border, gave chase, and apprehended him. The Ninth Circuit held that "[the alien] was in the clutches of the authorities the whole time" and, accordingly, "did not 'enter' the United States." Id. at 1165.

No other court of appeals, however, has definitively addressed whether an alien commits an unlawful entry under the criminal immigration statutes where the alien was subject to continuous surveillance from the time she crossed the border. 8 U.S.C. 1325(a)(1). The Fifth Circuit "ha[s] mentioned the [Ninth Circuit's] official restraint doctrine in previous cases," but it

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between aliens who have, and those who have not, effected an entry into the United States "where that distinction makes perfect sense: with regard to the question of what procedures are necessary to prevent entry as opposed to what procedures are necessary to eject a person already in the United States") (emphases omitted).

"ha[s] never explicitly adopted the doctrine." United States v. Rojas, 770 F.3d 366, 368 (5th Cir. 2014), cert. denied, 135 S. Ct. 2312 (2015). And the Sixth Circuit has stated that "if the government 'maintains continuous observation' of a group of illegal immigrants from the time they cross the border until their apprehension, the aliens have not 'entered' the country in violation of [8 U.S.C. 1326(a)]." Lopez, 851 F.3d at 631 (quoting Gonzalez-Torres, 309 F.3d at 599) (brackets omitted). But that statement was dictum, made during consideration of a petition for review from a BIA decision denying cancellation of removal under a provision that required determining whether an alien had "been apprehended at the time of entry." Id. at 630 (quoting 8 C.F.R. 240.61(a)(1)).[2]

Moreover, there is reason to think that even the Ninth Circuit may reconsider its determination that continuous surveillance qualifies as official restraint in the context of criminal immigration statutes. As both the district court and the court of appeals in this case observed, the Ninth Circuit's case law in

[2] Since IIRIRA's enactment, other circuits have suggested that -- based on pre-IIRIRA deportation and exclusion precedents -- continuous surveillance might be sufficient to negate the existence of an "entry" with respect to civil immigration provisions. See, e.g., De Leon v. Holder, 761 F.3d 336, 339-342 (4th Cir. 2014); Farquharson v. U.S. Attorney Gen., 246 F.3d 1317, 1321-1322 (11th Cir. 2001). But those circuits have not made the same statements in the context of criminal immigration statutes, which prevents them from being in any conflict with the decision below.

this area often involves "hair splitting determinations about whether a unique set of facts constitutes official restraint through surveillance." 362 F. Supp. 3d at 1120; see also Pet. App. A6-A7 (observing that the Ninth Circuit cases sometimes turn on "distinctions so fine as to become meaningless, if not arbitrary"). For example, the district court pointed to one Ninth Circuit case holding that aliens were under official restraint because, "although [the border patrol agent] lost sight of them for moments at a time," the agent "observed the suspects continuously." 362 F. Supp. 3d at 1120 (citing Gonzalez-Torres, 309 F.3d at 597). And the district court compared that case to an unpublished Ninth Circuit decision finding that an alien was not under official restraint because the agent surveilling the border area through a security camera was "pretty certain" he did not see the alien until the alien was already inside the United States. Ibid. (quoting United States v. Castro-Juarez, 715 Fed. Appx. 636, 637 (9th Cir. 2017)). Similarly, the court of appeals in this case observed that while the Ninth Circuit asserts that continuous surveillance is sufficient to demonstrate official restraint, it has also held that "persistent tracking" of an alien and seismic detection of a border crossing are not enough to undermine a conviction under Section 1325(a). Pet. App. A7 (quoting United States v. Hernandez-Herrera, 273 F.3d 1213, 1218-1219 (9th Cir. 2001), cert. denied, 537 U.S. 868 (2002); citing United States v.

Vela-Robles, 397 F.3d 786, 789 (9th Cir. 2005)). And in places where a portion of border fence is not actually on the border but some distance inside the United States, then an agent who sees an alien coming over (or around) the fence will already have missed the alien's actual entry, preventing there from being continuous surveillance from the time of the border crossing.

One member of the Ninth Circuit recently explained that the circuit's approach in this area "has reached an absurd position." United States v. Corrales-Vazquez, 931 F.3d 944, 955 (9th Cir. 2019) (Bybee, J., concurring) (citation omitted). He encouraged the court to "clean up [its] own mess under [Section] 1325(a)(1) at the first opportunity." Id. at 955-956. Moreover, the Ninth Circuit's incentive to respond may be increased by this Court's recent decision in Department of Homeland Security v. Thuraissigiam, 140 S. Ct. 1959 (2020), which reversed the Ninth Circuit's conclusion that IIRIRA's restrictions on certain procedural protections were unconstitutional as applied to an alien apprehended near the border. See note 1, supra.

Because the existing disagreement in the circuits is shallow, and because the Ninth Circuit may revisit its precedent of its own accord, the question presented would benefit from further percolation.

3. Even if the disagreement that petitioner identifies otherwise warranted this Court's review, this case would not be an

appropriate vehicle in which to resolve it. While it is undisputed that a Border Patrol agent was observing petitioner's group as it came around the end of the border fence, Pet. App. A2, it is unclear that the nature of the agent's observation would suffice to establish continuous surveillance even under the Ninth Circuit's precedents. As noted, those precedents draw fine distinctions with respect to what constitutes surveillance. And in this case, the agent who observed petitioner's group through binoculars could not initially discern whether he was observing people or animals. Specifically, the agent testified that he initially saw "some movement at the end of the [border] fence," D. Ct. Doc. 40-1, at 20-21, and that movement in that area could "sometimes * * * be animals," id. at 20. It was only after the "silhouette" of the group moved "a little bit further north of the [border] fence" (i.e., further into the United States) that the agent could "tell they were people" because "they weren't walking on all fours say like an animal would." Id. at 22. Even then, he still "wasn't sure" "how many were" in the group. Ibid. In other words, the agent arguably did not actually see petitioner (as opposed to "movement" or a "silhouette" of some kind of group of indefinite size) until after petitioner and her group were already inside the United States.

Petitioner's case is therefore similar to Castro-Juarez, where the Ninth Circuit held that there was no continuous

surveillance because the agent who was surveilling the border was "pretty certain" he had not seen the alien until the alien had crossed into the United States. 715 Fed. Appx. at 637. It is also similar to Vela-Robles, where the Ninth Circuit found that there was no continuous surveillance even though the alien's movements at the border triggered a seismic sensor that quickly brought border patrol agents to the site. 397 F.3d at 787; see also ibid. ("[S]eismic sensors respond to the movement of animals, people, or vehicles, or even may be set off by the weather."). Review is therefore unwarranted because, even if this case had been brought in the Ninth Circuit, it is likely that petitioner would not have prevailed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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