No. _____

IN THE
Supreme Court of the United States

NOEL ROMERO-ESPINAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether illegally reentering the United States in violation of 8 U.S.C. §1326 is a continuing offense.

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Fourth Circuit, *United States* v. *Romero-Espinal*, No. 19-4624 (Opinion Issued July 14, 2020)

United States District Court for the Eastern District of North Carolina, *United States* v. *Romero-Espinal*, No. 5:19-CR-122-D-1 (Final Judgment Entered August 30, 2019)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Noel Romero-Espinal respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's unpublished opinion affirming Mr. Romero-Espinal's sentence is in the appendix to this petition and is reported at *United States v. Usher*, 812 F. App'x 151 (4th Cir. 2020).

JURISDICTION

The Fourth Circuit issued its opinion on July 14, 2020. Pet. App.1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

(a) [A]ny 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 or any prior Act,
>
> shall be fined under title 18, United States Code, or imprisoned not more than 2 years or both.

8 USCS § 1326(a)

STATEMENT OF THE CASE

Mr. Noel Romero-Espinal is a citizen of Honduras. In 2003, he was removed from the United States after illegally entering. He then illegally re-entered the United States at some time "as early as 2011 or 2012." At the time he illegally re-entered, he was not serving any part of a criminal justice sentence. In 2015, North Carolina convicted him of misdemeanor assault on a female. The criminal justice sentence for that conviction ended in late 2016.

In February and March of 2019, Homeland Security investigators, acting on a tip, found Mr. Romero-Espinal in North Carolina. A grand jury sitting in the Eastern District of North Carolina then indicted him on one count of illegally re-entering the United States in violation of 8 U.S.C. § 1326(a). He pleaded guilty.

In preparation for sentencing, the United States Probation prepared a presentence report ("PSR") that recommended a criminal history category of IV and a total offense level of 13, for an advisory imprisonment range of 24-30 months. At sentencing, Mr. Romero-Espinal objected to his criminal history calculation, arguing

that the PSR improperly added two criminal history points under U.S.S.G. § 4A1.1(d) for Mr. Romero-Espinal having "committed the instant offense while under any criminal justice sentence." U.S.S.G. § 4A1.1(d). Without that enhancement, he would have 5 criminal history points, for a criminal history level of III. The resulting advisory Guidelines range would be 18-24 months imprisonment. The district court denied the objection and established an advisory Guidelines range of 24-30 months imprisonment.

The district court sentenced Mr. Romeo-Espinal to 30 months incarceration. Mr. Romero-Espinal timely appealed, arguing that at the time he illegally re-entered the United States and at the time he was found in the United States, he was not under a criminal justice sentence. The Fourth Circuit affirmed his sentence, holding that Section 1326 is a "continuing offense," so the criminal justice sentence that Mr. Romero-Espinal served between reentering the United States and being found in the United States was properly used to enhance his Guidelines range.

This petition follows.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Congress did not create a continuing offense when it enacted Section 1326. "[T]he doctrine of continuing offenses should be applied in only limited circumstances." *Toussie v. United States*, 397 U.S. 112, 115 (1970), *superseded on other grounds by statute as stated in United States v. Kerley*, 838 F.2d 932, 935

(7th Cir. 1988). A court should not interpret an offense as a continuing offense "(1) unless the explicit language of the substantive criminal statute compels such a conclusion, or (2) the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Id.* (internal numeration added).

Section 1326's explicit language does not compel such a conclusion. The statute creates three distinct ways in which one can violate it. A prohibited person can (1) enter the United States, (2) attempt to enter the United States, or (3) be found in the United States. 8 U.S.C. § 1326(a). Nothing in the statute explicitly makes any of these violations a continuing offense. *Compare, e.g.,* 18 U.S.C. § 3284 ("The concealment of assets of a debtor in a case under title 11 shall be deemed to be a continuing offense until the debtor shall have been finally discharged or a discharge denied . . . .").

Thus, we must turn to the next question—is "the nature of [illegal reentry] such that Congress much assuredly have intended that it be treated as a continuing one." Entering and attempting to enter the United States are discrete one-time acts. It makes no sense to treat either of those violations as a continuing offense. So the real question becomes whether the nature of being "found in" the United States is such that Congress must have intended for the courts to treat it as a continuing offense. Some courts have said that it is, holding that the offense continues from the moment of entry until the moment of detection. *See, e.g., United States v. Corro-*

Balbuena, 187 F.3d 483, 485 (5th Cir. 1999). Those courts are incorrect because they are interpreting a statute different than the one Congress enacted.

Congress criminalized being "found in" the United States—which is a distinct event that happens one time when federal agents become aware of someone's illegal presence. *United States v. Sosa-Carabantes*, 561 F.3d 256, 260 (4th Cir. 2009). Making this one-time event into a continuing offense changes the crime from being "found in" the United States to "remaining in" the United States. But "remaining in" the United States is not the crime that Congress created in Section 1326(a). Congress knows how to criminalize illegally remaining in the United States, and it uses that language when it wants to create that crime. *See* 8 U.S.C. § 1282(c) (punishing an alien crewman who "*willfully remains* in the United States" beyond the time granted by a conditional permit while a foreign ship is in port (emphasis added)). And, when Congress uses that language, it naturally creates a continuing offense because the nature of remaining somewhere is necessarily continuing. *United States v. Cores,* 356 U.S. 405, 408 (1958).

Here, Congress used the term "found in" and not the term "remains in." Thus, it did not create the continuing offence of "remaining in" the United States. And the courts that hold otherwise are interpreting a different statute than the one Congress enacted.

This Court's review is needed to correct those courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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