No. __-_____

IN THE

Supreme Court of the United States

ANDRES ABELINO AYON-BRITO,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

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PETITION FOR WRIT OF CERTIORARI

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Question Presented

Does a "found in" violation of 8 U.S.C. § 1326 occur when an alien reenters the country, as the Fourth, Seventh, Ninth, and Tenth Circuits have held, or when the alien is "found in" the United States by immigration officials, as the First, Second, Third, and Eleventh Circuits have held?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Ayon-Brito*, No. 1:18-cr-259, U.S. District Court for the Eastern District of Virginia. Judgment entered May 17, 2019.

(2) *United States v. Ayon-Brito*, No. 19-4403, U.S. Court of Appeals for the Fourth Circuit. Judgment entered December 2, 2020.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Andres Ayon-Brito respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

INTRODUCTION

Violations of 8 U.S.C. § 1326, an offense subject to a specific venue provision in 8 U.S.C. § 1329, constitute the most commonly prosecuted federal crime.[1] Section 1326 prohibits a previously-deported alien from "entering, attempting to enter, or being found in" the United States. Yet the courts of appeals sharply disagree about a basic legal question: where a "found in" violation of the statute occurs.

Article III, the Sixth Amendment, and Rule 18 of the Federal Rules of Criminal Procedure establish that a person must be tried for a crime only where that crime was committed. *United States v. Cabrales*, 524 U.S. 1, 6-7 (1998). When Congress does not enact a specific venue provision applicable to an offense, venue is determined by the essential conduct elements. *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999). But "[i]t is significant that when Congress desires to give a choice of trial, it does so by specific venue provisions…." *United States v. Johnson*, 323 U.S. 273, 276 (1944); *see also Rodriguez-Moreno*, 526 U.S. at 279 n.1 (noting that conduct element test applies when Congress has not enacted "an express venue provision"); *United States v. Anderson*, 328 U.S. 699, 703 (1946).

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[1] *See* Table 5.3-U.S. District Courts-Criminal Judicial Facts and Figures (September 30, 2020), available at: https://www.uscourts.gov/statistics/table/53/judicial-facts-and-figures/2020/09/30 (last visited May 20, 2021).

With respect to the civil and criminal statutes set forth in 8 U.S.C. § 1321 *et seq.*, Congress enacted a specific venue provision in 8 U.S.C. § 1329. Section 1329 provides that, "notwithstanding any other law, such prosecutions … may be instituted at any place in the United States at which *the violation may occur* …." § 1329 (emphasis added).

There is a circuit split with regard to the proper venue for § 1326 violations. According to the Fourth Circuit below, § 1326 prohibits "*being* in the United States," so a previously-deported alien violates the statute "wherever he goes" after returning to the United States. Pet. App. 5a (quoting *United States v. Rodriguez-Rodriguez*, 453 F.3d 458, 460 (7th Cir. 2006)). The Seventh, Ninth, and Tenth Circuits agree.[2] According to these four circuits, a § 1326 charge thus may be brought anywhere an alien was present in the country after reentry.

But the text of § 1326 does not include the words "presence," or "being," or "remaining" in the country following reentry. *Cf. United States v. Cores*, 356 U.S. 405, 408 (1958) (addressing venue for 8 U.S.C. § 1282(c), which prohibits foreign sailors from "willfully remain[ing]" in the United States after expiration of shore leave). Section 1326 instead prohibits entry, attempted entry, or being "found in" the country following a prior removal.

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[2] *See United States v. Orona-Ibarra*, 831 F.3d 867, 870 (7th Cir. 2016); *United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1062 (9th Cir. 2000); *United States v. Villarreal-Ortiz*, 553 F.3d 1326, 1330 (10th Cir. 2009).

Four other courts of appeals thus hold that a "found in" violation of § 1326 occurs when a previously-deported alien is *found* in this country by immigration officials. *See United States v. Cuevas*, 75 F.3d 778, 784 (1st Cir. 1996); *United States v. Rivera-Ventura*, 72 F.3d 277, 281 (2d Cir. 1995); *United States v. DiSantillo*, 615 F.2d 128, 135 (3d Cir. 1980); *United States v. Canals-Jimenez*, 943 F.2d 1284, 1290 (11th Cir. 1991). In these circuits, "[w]here an alien is indicted under the 'found in' prong, … the alien is deemed to have committed the offense at the moment he was 'found.'" *United States v. DeLeon*, 444 F.3d 41, 52 (1st Cir. 2006). As a result, venue for a § 1326 violation would be proper in the district where the defendant was first "found," not in every district through which he or she had ever passed. This circuit split is ripe for this Court's adjudication. *See I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1057 (1984) (White, J., dissenting) (noting circuit split on whether § 1326 describes a continuing offense).

This Petition involves a straightforward federal question of exceptional importance involving the most commonly prosecuted federal crime. Moreover, the Fourth Circuit "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]" S. Ct. R. 10.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published at 981 F.3d 265 (4th Cir. 2020) and appears in Appendix A to this petition.

Pet. App. 1a-7a.[3] That court's order denying rehearing en banc is unpublished and appears in Appendix B. Pet. App. 8a.

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. That court issued its opinion and judgment on December 2, 2020. A timely petition for rehearing en banc was denied by the court of appeals on December 29, 2020. This Court's order of March 19, 2020, extended the deadline for filing a petition for certiorari to 150 days after the date of the lower court's judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1326 provides in relevant part:

> any alien who—
>
> (1) has been denied admission, excluded, deported, or removed …, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States …
>
> shall be fined under Title 18 or imprisoned not more than 2 years, or both.

8 U.S.C. § 1329 provides in relevant part:

> Notwithstanding any other law, such prosecutions or suits may be instituted at any place in the United States at

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[3] "Pet. App." refers to the appendix attached to this petition. "C.A.J.A." refers to the joint appendix filed in the court of appeals.

> which the violation may occur or at which the person charged with a violation under section 1325 or 1326 of this title may be apprehended.

Petitioner Andres Ayon-Brito was charged in the Eastern District of Virginia with violating 8 U.S.C. § 1326 by being "found in" the country following a prior deportation. C.A.J.A. 12. But the indictment alleged that Mr. Ayon-Brito was "found" in Cumberland County, Pennsylvania, not within the Eastern District of Virginia. *Id.* Instead, the indictment alleged that prior to being "found" in Pennsylvania, Mr. Ayon-Brito was "encountered" by law enforcement in the Eastern District of Virginia. *Id.*

Mr. Ayon-Brito moved to dismiss the indictment for lack of venue. C.A.J.A. 14-18. The district court denied the motion on the ground that the offense was a continuing one that commenced upon reentry, *id.* at 71-81, and Mr. Ayon-Brito was subsequently convicted of violating § 1326 at a bench trial. *Id.* at 82-91.

Mr. Ayon-Brito appealed to the Court of Appeals for the Fourth Circuit. The court affirmed the district court's decision in a published opinion on the ground that the statutory term "found" is "simply a prosecutorial authorization broadening the proof sufficient to establish 'reentry.'" Pet. App. 6a. According to the court, because "the *actus reus* of a § 1326 violation is the defendant's '*re-enter[ing]* the United States without permission[,]'" venue was proper "not only where the defendant enters or attempts to enter the United States but also at any place that he is present thereafter until he is found." *Id.* at 6a-7a.

The Fourth Circuit denied a petition for en banc rehearing on December 29, 2020. Pet App. 8a.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's decision in this case deepened a circuit split about where a "found in" violation of 8 U.S.C. § 1326 occurs. At least eight of the federal courts of appeals have addressed this question over the past forty years, and only this Court can resolve the disagreement among the lower courts.

This issue also is an important one, involving a basic and recurring legal question about the most commonly prosecuted federal crime. Furthermore, the Fourth Circuit's decision is fundamentally wrong, and the court of appeals reached its conclusion only by excising the "found" element that defines when a "found in" violation of the offense occurs. This Court should resolve this issue to restore uniformity, and should reject the Fourth Circuit's atextual statutory construction. Finally, this case provides an excellent vehicle to address this issue; the legal issue is apparent on the face of the charging document, and the relevant arguments have been squarely raised before the district court and the court of appeals.

I. There Is a Circuit Split Regarding Where a "Found in" Violation of 8 U.S.C. § 1326 Occurs.

A. Four Courts of Appeals Hold That a "Found In" Violation of § 1326 Occurs Upon Reentry.

The federal courts of appeals cannot agree on where a "found in" violation of § 1326 occurs. On one side of the circuit split, four courts of appeals – the Fourth, Seventh, Ninth, and Tenth Circuits – hold that a "found in" violation of § 1326 occurs when a previously-deported alien returns, and continues until the alien is "found" by

immigration officials. According to these courts, "a violation of 8 U.S.C. § 1326 for being 'found in' the United States without the Attorney General's permission is a continuing offense which commences with entry and concludes with discovery." *United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1062 (9th Cir. 2000); *accord United States v. Rodriguez–Rodriguez*, 453 F.3d 458, 460 (7th Cir. 2006) ("the alien commits the offense wherever he goes. The crime is being in the United States and is not limited to the instant at which a federal agent lays hands on the person"); *United States v. Villarreal-Ortiz*, 553 F.3d 1326, 1330 (10th Cir. 2009) ("the crime of being 'found' in the United States is a continuing offense, and in the case of a surreptitious entry, that crime is first committed when the defendant voluntarily reenters the country and continues to be committed until the defendant is 'found.'"). As explained by the Seventh Circuit,

> [F]or purposes of liability and venue, the "found in" crime does not occur "only at the instant of its detection."… [T]he phrase "'found in' must have the force of 'present in' rather than 'discovered by the INS to be in.'" Understood as a continuing offense, the date on which immigration authorities discover the violation "has no significance so far as culpability is concerned."

United States v. Are, 498 F.3d 460, 464 (7th Cir. 2007) (citation omitted).

In the case below, the Fourth Circuit similarly reasoned that "the 'found' term in the statute is not employed to define an element," and the elements of the offense are simply: (1) alien status; (2) deportation or removal; (3) reentry or attempted reentry; and (4) lack of permission. Pet. App. at 5a. According to that court, the term "'entry' is 'embedded' in the term 'found,' … [which] is thus simply a prosecutorial authorization broadening the proof sufficient to establish 'reentry.'" *Id.* at 6a.

Furthermore, the court held that venue was defined by the "essential conduct elements," namely the alien's entry or attempted entry following a prior removal. *Id.* (citing *Rodriguez-Moreno*, 526 U.S. at 280).[6]

B. Four Courts of Appeals Hold That a "Found In" Violation Occurs When the Alien Is "Found."

The First, Second, Third, and Eleventh Circuits disagree.[7] As the First Circuit explained, the plain text of § 1326 provides "three different points in time" when a

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[6] The Fifth Circuit holds that "[t]he plain words of the statute set out discrete points in time when the crime may be committed," *United States v. Gonzales*, 988 F.2d 16, 18 (5th Cir. 1993), and that a "found in" offense occurs when an alien is found by immigration officials. *United States v. Asibor*, 109 F.3d 1023, 1037 (5th Cir. 1997). But in the context of the application of the sentencing guidelines, the court stated that "[w]here a deported alien enters the United States and remains here with the knowledge that his entry is illegal, his remaining here until he is 'found' is a continuing offense because it is 'an unlawful act set on foot by a single impulse and operated by an unintermittent force.'" *United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996) (quoting *United States v. Midstate Horticultural Co.*, 306 U.S. 161, 166 (1939)).

The Eighth Circuit agrees that a "found in" offense is "a continuing violation that is not complete until [the alien] is discovered by immigration authorities," *United States v. Diaz-Diaz*, 135 F.3d 572, 575 (8th Cir. 1998), but also holds that "[w]hen an individual is 'found in' the United States, the date he or she is found is generally considered to be the date he or she violated § 1326." *United States v. Estrada-Quijas*, 183 F.3d 758, 761 (8th Cir. 1999).

[7] District courts likewise disagree amongst each other. *Compare United States v. Jimenez*, 2019 WL 6910164, at *3 (M.D. Fla. Dec. 19, 2019) ("The point in which federal—not state— authorities discover an illegal alien must trigger venue. … To hold otherwise would rewrite the law"), *and United States v. Leto*, 991 F. Supp. 684, 687 (D. Vt. 1997) ("Leto may be prosecuted in any district in which he was found, or discovered, but he may not be prosecuted in a district in which the government can arguably show he was present, but cannot show he was found."), *with United States v. Mancebo-Santiago*, 886 F. Supp. 372, 375 (S.D.N.Y. 1995) ("the locations where venue is appropriate for a § 1326 prosecution are those locations where the defendant has been present subsequent to the alleged illegal reentry").

violation of § 1326 may occur. *United States v. DeLeon*, 444 F.3d 41, 52 (1st Cir. 2006). Accordingly, with respect to conviction for being "found in" the country following a prior removal, "even though [a] defendant illegally reentered the United States in 1990, he committed his § 1326(a) offense in 1995, when he was 'found.'" *United States v. Cuevas*, 75 F.3d 778, 784 (1st Cir. 1996).

The Second Circuit likewise holds that § 1326 "describes an offense that is complete when any of three events occurs: when a previously deported alien (1) 'enters,' or (2) 'attempts to enter,' or (3) 'is at any time found in the United States." *United States v. Rivera-Ventura*, 72 F.3d 277, 281 (2d Cir. 1995) (noting that "[i]f Congress had meant that the unlawfully returned alien could be prosecuted at any time that he could be located in the United States, it could have accomplished this with clarity" with different statutory language). The term "found in" the United States is therefore not "synonymous with 'present in the United States.'" *United States v. Macias*, 740 F.3d 96, 98 (2d Cir. 2014).

The Third Circuit similarly rejects the argument that "entry" of a previously-deported alien constitutes a continuing offense, and provides that an alien is "found" when located within the country by immigration officials. *United States v. DiSantillo*, 615 F.2d 128, 136-37 (3d Cir. 1980).[8] It also explains that "the INS actively sought a

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[8] There are numerous decisions issued by the courts of appeals addressing the distinct questions – under the Sentencing Guidelines – of when a § 1326 offense "commenced" or whether it constitutes a continuing offense. *See, e.g., United States v. Hernandez-Gonzalez*, 495 F.3d 55, 60-62 (3rd Cir. 2007) (addressing commencement date for purposes of U.S.S.G. § 4A1.2(e)(2)); *see also United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996); *United States v. Castrillon-*

specific venue provision for the offense described in § 1326 because it assumed that the offense was not continuing. The addition of § 1329, the special venue provision, is therefore further demonstration that the congressional intent was not to treat § 1326 as a continuing offense." *Id.* at 137.

Finally, the Eleventh Circuit holds that § 1326 "provides for three separate and distinct violations of the law—entering, attempting to enter, and being found in the United States." *United States v. Canals-Jimenez*, 943 F.2d 1284, 1290 (11th Cir. 1991). For a "found in" violation of the statute, therefore, "it is not [the alien's] conduct which creates criminal liability." *Id.* at 1289.

There is an entrenched split between the circuits on this question that will not be resolved without this Court's intervention.

II. This Case Presents an Important Question Worthy of This Court's Review.

Prosecutions for illegal reentry constitute almost 30 percent of federal felony cases concluded over the past two years.[9] As one scholar noted with respect to all immigration offenses, "[n]ot since Prohibition has a single category of crime been prosecuted in such record numbers by the federal government." Ingrid V. Eagly,

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Gonzalez, 77 F.3d 403, 406 (11th Cir. 1996); *United States v. Mendez-Cruz*, 329 F.3d 885, 889 (D.C. Cir. 2003). The analysis in these decisions is based upon the text of the U.S. Sentencing Guidelines and is inapposite to the question presented in this petition.

[9] Judicial Business of the U.S. Courts, Admin. Office of the U.S. Courts, table D-4 (Dec. 30, 2020 & Dec. 30, 2019), https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (In 2020, illegal reentry constituted 18,015 out of 63,230 felony cases terminated (28.49%); in 2019, illegal reentry constituted 25,736 out of 87,070 felony cases (29.5%)).

Prosecuting Immigration, 104 Nw. U. L. Rev. 1281 (2010). Convictions for violating 8 U.S.C. § 1326 also may lead to considerable terms of imprisonment, as the maximum sentence is up to 20 years in prison if a defendant was convicted of an aggravated felony prior to removal. 8 U.S.C. § 1326(b).

Underlying the legal distinctions outlined above is the question whether merely being present in the United States is a federal crime. "As a general rule," this Court has said, "it is not a crime for a removable alien to remain present in the United States." *Arizona v. United States*, 567 U.S. 387, 407 (2012). Yet the Fourth Circuit analogized the presence of a previously-removed alien to a parasitic plant: "Just as it makes perfect sense to say that 'the lousewort is found in all 50 states' so it makes sense—if it is not an inevitable reading of the statute—to say the alien is 'found' *wherever he is*." Pet. App. 5a (quoting *United States v. Rodriguez-Rodriguez*, 453 F.3d 458, 460 (7th Cir. 2006)). To the extent that this construction is inconsistent with the plain text and meaning of the statute, and yet in full alignment with the statute's racist origins,[10] it is important for this Court to say so.

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[10] *See* Brief for Professors Kelly Lytle Hernandez, Mae Ngai, and Ingrid Eagly as Amicus Curiae Supporting Respondent, *United States v. Refugio Palomar-Santiago*, No. 20-437, at 3-28 (describing the "blatantly racist intentions of the legislators who drafted Sections 1325 and 1326"). Congress added the "found in" provision to the statute in 1952 so that "venue would be proper in any district in which the defendant was found, instead of just the district in which the defendant illegally re-entered." Doug Keller, *Re-Thinking Illegal Entry and Re-Entry*, 44 Loy. U. Chi. L.J. 65, 85 (2012). The position adopted by the Fourth Circuit makes prosecution under this statute even easier, as it permits prosecution wherever an alien was previously present, not simply where the alien was found by immigration officials.

To be sure, the Fourth Circuit said that its decision will "increase[] the number of available venues," to include not only where Petitioner was "found," in Pennsylvania, but also where he "lived and worked," in Virginia. Pet. app. 7a. But its decision also expands potential venue for 1326 prosecutions to any other place in the country previously visited by defendants, however tangentially connected to them.

There already exist significant disparities in sentences for § 1326 convictions based upon the uneven adoption of "Fast Track" sentencing programs among federal judicial districts. *See* Tom McKay, *Judicial Discretion to Consider Sentencing Disparities Created by Fast-Track Programs: Resolving the Post-Kimbrough Circuit Split*, 48 Am. Crim. L. Rev. 1423, 1423 (2011). Such disparities are only exacerbated if the government prosecutes defendants found in "Fast Track" districts in other districts without such programs based upon the defendant's previous presence in such a district. As this Court has observed, "such leeway not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution." *United States v. Johnson*, 323 U.S. 273, 275 (1944).

This case presents a simple legal question about the most commonly-prosecuted federal crime that has deeply divided the courts of appeals, and will continue to do so until this Court resolves it. It is important, and worthy of this Court's consideration.

III. The Fourth Circuit's Decision Below Is Wrong on the Merits.

In addition to the points above, the Fourth Circuit's decision is deeply flawed. 8 U.S.C. § 1329 requires that a § 1326 prosecution take place where "the violation" occurred, or where the defendant was apprehended.[11] Section 1329's reference to "the violation" means the completed offense charged in the charging document. *Cf. Richardson v. United States*, 526 U.S. 813, 818-19 (1999) (holding that the term "series of violations" in 21 U.S.C. § 848 refers to elements of an offense rather than simply "an act or conduct," as a "'violation is not simply an act or conduct; it is an act or conduct that is contrary to law."). Section 1329 thus limits venue to where the charged offense is allegedly completed (or where the defendant is apprehended), not, for example, "in the district wherein *any act or transaction constituting the violation occurred*." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 n.9 (1979) (emphasis added) (quoting specific venue provision set forth at 15 U.S.C. § 78aa).

"[W]here there is a place explicitly designated by law" as the location of an offense, that is where a prosecution must take place. *United States v. Lombardo*, 241 U.S. 73, 78 (1916). In *Lombardo*, for example, a defendant who harbored an alien prostitute in Seattle, Washington, was charged with failing to file a statement "concerning such alien woman … with the Commissioner General of Immigration."

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[11] 18 U.S.C. § 3237(a) is a general venue statute providing for venue "in any district in which [an] offense was begun, continued, or completed." But the general venue statute applies only in the absence of a specific venue provision, as the text specifies that it applies "[e]xcept as otherwise expressly provided by enactment of Congress[.]"

Id. at 74-75. Rejecting the government's argument that venue was proper in the Western District of Washington, the Court explained that "[a] court is constrained by the meaning of the words of a statute[,]" and the offense of "filing" was "not complete until the document is delivered and received." *Id.* at 76-78 (citation omitted).

Likewise, in *Travis v. United States*, 364 U.S. 631 (1961), a defendant who resided in Colorado was convicted there of filing false affidavits with the National Labor Relations Board in Washington, D.C. *Id.* at 632-63. Although the defendant executed the affidavits in Colorado, they were sent to and filed in Washington, D.C., and the statute at issue specified that the offense was not complete until the "filing in the District of Columbia." *Id.* at 635. Absent the filing, this Court noted, "[t]here would seem to be no offense," *id.*, even though the defendant sent the false affidavits from Colorado. In both *Lombardo* and *Travis*, this Court rejected the government's argument that venue was proper under a general venue statute authorizing venue wherever an offense was begun or completed. *Lombardo*, 241 U.S. at 78; *Travis*, 364 U.S. at 636 (citing *Lombardo*).

A "found in" violation of § 1326 is like the statutes in *Lombardo* and *Travis*: if a defendant is not "found" by immigration officials, "there would seem to be no offense." *See United States v. Macias*, 740 F.3d 96, 98-99, 102 (2d Cir. 2014) (defendant who "had indisputably been present in the United States illegally for nearly a decade," but who was found only after he had departed the United States and tried to enter Canada, could not be found guilty of a "found in" violation of § 1326 based upon his prior unauthorized presence in the country); *cf. United States v.*

Canals-Jimenez, 943 F.2d 1284, 1287 (11th Cir. 1991) (holding that alien seeking admission at immigration port of entry could not be guilty of being "found").

The essential conduct elements test, originally set forth in *United States v. Anderson*, 328 U.S. 699 (1946), is inapplicable because Congress has enacted a specific venue provision applicable to § 1326 violations. *Rodriguez-Moreno*, 526 U.S. at 279 n.1. The Fourth Circuit's focus on a defendant's conduct elements, notwithstanding § 1329, gives license to ignore other specific venue provisions in federal law that authorize prosecution in places where conduct elements may not have occurred. *See, e.g.*, 18 U.S.C. § 1073 (authorizing prosecution for offense of fleeing to avoid prosecution where original offense was committed); 18 U.S.C. § 1512(i) (charges for witness tampering may be brought either in the district where the proceeding "was intended to be affected" or where the obstructive behavior occurred).

Furthermore, the premise that unlawful "'entry' is 'embedded' in the term 'found,'" Pet. App. at 6a, and therefore that the offense must begin upon reentry, is simply wrong. Illegal reentry is not an element of a "found in" violation of § 1326, and there is no requirement "that the crime of 'entry' must be charged in order to charge the crime of being 'found in.'" *United States v. Parga-Rosas*, 238 F.3d 1209, 1213 (9th Cir. 2001). Indeed, a previously-deported alien can violate § 1326 by lawfully reentering the country and subsequently being "found in" the country after the expiration of a visa. *See United States v. Pina-Jaime*, 332 F.3d 609, 611-13 (9th Cir. 2003) (affirming "found in" violation of § 1326 notwithstanding lawful initial entry); *see also United States v. Castrillon-Gonzalez*, 77 F.3d 403, 406 n.1 (11th Cir. 1996)

("one could commence the offense of being 'found in' by remaining in the United States after the expiration of a legitimate visa"); *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012) (same); 8 C.F.R. § 212.2 (providing for application by previously-deported alien for visa, admission, or adjustment of status).

The Fourth Circuit erred because it held that "the 'found' term in the statute [was] not employed to define an element of § 1326." Pet. App. 5a. It thereby "abandon[ed] any pretense of interpreting the statute's terms," *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1485 (2021), and redrafted the elements of petitioner's violation of § 1326 as defined by "the 'reentry' element of the crime." Pet. App. 5a. In sum, seeking to avoid the "contrain[ts] [of] the meaning of the words of a statute[,]" *Lombardo*, 241 U.S. at 78, the Fourth Circuit discarded the operative element of a "found in" violation of § 1326 on the specious ground that "the 'found' term in the statute [was] not employed to define an element of § 1326." Pet. App. 5a. This atextual construction is contrary to the plain text and meaning of the statute. Under these circumstances, this important issue merits the review of this Court.

IV. This Case Provides an Excellent Vehicle to Address the Question Presented.

This case represents an excellent vehicle for review for several reasons. First, in this case the indictment itself acknowledges that the Petitioner was "found" in a place, Pennsylvania, outside of where he was prosecuted, Virginia. The facts are not in dispute and are apparent on the face of the indictment, unlike a typical case in which the issue of venue arises in the context of the proof presented at a trial. As

such, this case provides a clear opportunity to address the important legal question without concerns regarding evidentiary questions or the burden of proof at a trial.

Second, Petitioner preserved his argument by moving to dismiss the indictment for lack of venue on the same grounds he asserts here, being convicted in a bench trial, and raising the same argument before the court of appeals.

In sum, the facts of the case are not in dispute, and it cleanly presents a fundamental legal issue upon which the courts of appeals are deeply divided.

CONCLUSION

For the reasons given above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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