No. 20-8201

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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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GEREMY C. KAMENS
Federal Public Defender
Counsel of Record
Office of the Federal Public Defender
for the Eastern District of Virginia
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800
Geremy_Kamens@fd.org

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ARGUMENT

In the decision below, the Fourth Circuit held that a "found in" violation of 8 U.S.C. § 1326 is committed when and where an alien reenters the country, and the "found in" violation continues wherever the alien is present in the country until "found" by federal immigration officials. The First, Second, Third, and Eleventh Circuits have held that a "found in" violation of § 1326 is distinct from "entry," and a "found in" violation is not committed until the alien is "found" by federal immigration officials. This disagreement constitutes a plain circuit split.

Although the government denies the split, the government fails to confront the authorities from these circuits, and even relies upon cases addressing the application of the U.S. Sentencing Guidelines—a context that is irrelevant to the question presented in this case. The government also fails to address blackletter law that in the criminal context, specific statutory venue provisions apply to the exclusion of general venue statutes. *See Travis v. United States*, 364 U.S. 631, 635 (1961); *United States v. Lombardo*, 241 U.S. 73, 78 (1916). The text of the specific venue provision applicable in this case, 8 U.S.C. § 1329, requires prosecution in the place where the violation of the statute occurs, and the violation occurs where the elements of the offense are completed.

The government offers no substantial vehicle issues or other reasons supporting denial. As such, this case is an ideal vehicle to resolve the split, and the petition should be granted.

I. There Is a Circuit Split.

The text of 8 U.S.C. § 1326 describes three distinct offenses, and disjunctively prohibits a previously-deported alien from: entering, attempting to enter, or being "found in" the United States. *Id.* § 1326(a). Section 1329 authorizes venue "at any place in the United States at which the violation may occur." *Id.* § 1329. Rejecting the argument that violation of the "found in" offense requires a defendant to be "found," the Fourth Circuit held that "the 'found' term in the statute is not employed to define an element," but instead "broaden[s] the proof sufficient to establish 'reentry'" because "'entry' is 'embedded' in the term 'found.'" Pet. App. 5a-6a (quoting *United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1061 (9th Cir. 2000)). The upshot of the decision is that a "found in" violation occurs wherever a defendant is proven to have been present after reentry. That ruling squarely conflicts with decisions from the First, Second, Third, and Eleventh Circuits.

In *United States v. DeLeon*, 444 F.3d 41 (1st Cir. 2006), the First Circuit stated that "[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.'" *Id.* at 52 (citing *United States v. Cuevas*, 75 F.3d 778, 784 (1st Cir. 1996), and *United States v. Rodriguez*, 26 F.3d 4, 8 (1st Cir. 1994)). Although *DeLeon* addressed the statute of limitations for the offense, the premise of the holding is a statutory construction that, contrary to the Fourth Circuit, "'enters,' 'attempts to enter,' and 'is at any time found in' describe three distinct occasions on which a deported alien can violate Section 1326. The phrase 'found in' otherwise would be surplusage, because it would be redundant with 'enters.'" *Rodriguez*, 26 F.3d at 8.

In *United States v. Macias*, 740 F.3d 96, 102 (2d Cir. 2014), the Second Circuit held that a 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. The term "found in," the court held, was not "synonymous with 'present in the United States.'" *Id.* at 98 (citing *United States v. Rivera-Ventura*, 72 F.3d 277, 281 (2d Cir. 1995)).

Macias is directly contrary to the Fourth Circuit's decision, and is not cited or otherwise mentioned by the government. Instead, the government wrongly states that "the statements made in *Rivera-Ventura* on which petitioner relies ["that being 'found' is not a continuing offense"] were dicta." Br. in Opp. at 16 (citing *United States v. Morgan*, 380 F.3d 698, 702 & n.3 (2d Cir. 2004)). But the Petition instead quoted the statement 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, Pet. 16 (quoting *Rivera-Ventura*, 72 F.3d at 281), a conclusion reaffirmed by the Second Circuit in *Macias*.

The government concedes that the Third Circuit held in *United States v. DiSantillo*, 615 F.2d 128, 137 (3rd Cir. 1980), that "congressional intent was not to treat § 1326 as a continuing offense," but then maintains the holding is "limited to the statute of limitations context." Br. in Opp. 17 (quoting *United States v. Hernandez-Gonzalez*, 495 F.3d 55, 59, 61 (3d Cir. 2007)). But *Hernandez-Gonzalez*

addressed a different question altogether, the "*commencement* of the instant offense," including all acts that constitute relevant conduct, for purposes of calculating criminal history under the U.S. Sentencing Guidelines. 495 F.3d at 60 (quoting U.S.S.G. § 4A1.2(e)(2)) (emphasis added). When a defendant's relevant conduct "commences" for purposes of the Guidelines has nothing to do with when a statutory violation of the "found in" offense occurs.[1]

Finally, in *United States v. Canals-Jimenez*, 943 F.2d 1284 (11th Cir. 1991), the Eleventh Circuit explicitly rejected a construction that would merge the "enter" element with the "found" element, holding that "'found in' must have a different meaning than the word 'enters'" because "otherwise Congress could have completely removed 'enters' from the statute." *Id.* at 1287 (citing *DiSantillo*, 615 F.2d at 128).

All of these decisions are directly contrary to the Fourth Circuit's decision that "entry" is "embedded" in a "found in" violation of § 1326, and the statutory text "found in" does not define an element of a distinct offense. In sum, although the government

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[1] The government cites a number of other inapposite decisions addressing the application of the Sentencing Guidelines. See Br. in Opp. 10 (citing *United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996) (applying U.S.S.G. § 4A1.1); *United States v. Jimenez*, 605 F.3d 415, 422 (6th Cir. 2010) (addressing commencement of offense under U.S.S.G. § 4A1.2); *United States v. Scott*, 447 F.3d 1365, 1369 (11th Cir. 2006) (addressing when offense concludes for purposes of criminal history calculation under U.S.S.G. § 4A1.1(e)); *United States v. Mendez-Cruz*, 329 F.3d 885, 886 (D.C. Cir. 2003) (addressing relevant conduct for § 1326 offense for purposes of applying criminal history enhancement under U.S.S.G. § 4A1.1(d)); *United States v. Villarreal-Ortiz*, 553 F.3d 1326, 1328 (10th Cir. 2009) (same)). Determining when relevant conduct "commences" for purposes of the Sentencing Guidelines says nothing about when the elements of the offense are completed and result in a violation of § 1326.

denies that there is a split, it does not meaningfully engage with the holdings or reasoning of any of the cases on the other side of the split.

II. The Fourth Circuit's Decision Is Wrong.

As this Court has said, the "crimes of illegal entry" in § 1326 "are not continuing ones, as 'entry' is limited to a particular locality and hardly suggests continuity." *United States v. Cores*, 356 U.S. 405, 409 n.6 (1958). So too with being "found in" the country, which occurs in the place and at the time an alien is discovered by immigration officials. That is why a defendant who unlawfully reenters the country but whose presence is not discovered until after the person has departed has not committed a "found in" violation of § 1326. *Macias*, 740 F.3d at 102.

To defend the Fourth Circuit's conclusion that a "found in" violation of § 1326 occurs following reentry before a defendant is "found" in the country by immigration officials, the government quotes the Fourth Circuit's characterization of the statute as prohibiting "a previously deported alien who 'enters [or] attempts to enter' the United States until '*at any time*,' he is 'found in[] the United States." Br. in Opp. (quoting Pet. App. 6a) (underlining added, italics in original). The court's description of the statutory text relocated the word "or," and added the word "until." The statutory text, of course, does not contain the word "until," which implies continuity to a specific endpoint. *See* Merriam Webster's Collegiate Dictionary 1297 (10th ed. 1996) ("until" is a preposition and "indicate[s] continuance ... of an action or condition ... to a specified time.").

Instead, § 1326(a) proscribes a previously-deported alien who "enters, attempts to enter, or is at any time found in, the United States" without

authorization. That language "is limited to [] particular localit[ies] and hardly suggests continuity." *Cores*, 356 U.S. at 409 n.6.

The government also points to the general venue statute, 18 U.S.C. § 3237, on the ground that the specific venue provision applicable to § 1326 offenses, 8 U.S.C. § 1329, does not "expressly provide" that "Section 3237(a) is unavailable for prosecutions under Section 1326." Br. in Opp. 13. But that is not the test. In criminal cases, specific statutory text defining venue applies to the exclusion of the general venue provisions. *See Travis*, 364 U.S. at 636 (rejecting application of general venue statute, § 3237, because "the locus of the offense has been carefully specified" by Congress to particular location); *Lombardo*, 241 U.S. at 78 (same); *see also United States v. Seward*, 967 F.3d 57, 60 (1st Cir. 2020) ("Where a criminal statute 'contains a specific venue provision, that provision must be honored' so long as it comports with Constitutional requirements."). Indeed, the text of § 3237(a) begins by stating that it applies "[e]xcept as otherwise expressly provided by enactment of Congress," and 8 U.S.C. § 1329 applies "[n]otwithstanding any other law." And the Fourth Circuit did not rely upon § 3237 as the basis of its decision, instead focusing on the elements of the offense that make up the statutory violation.

The pertinent text of § 1329 authorizes venue for § 1326 offenses "at any place in the United States at which the *violation* may occur." 8 U.S.C. § 1329 (emphasis added). The "words 'violates' and 'violations' appear more than 1,000 times in the United States Code." *Richardson v. United States*, 526 U.S. 813, 818-19 (1999). These words "have a legal ring," and in the context of criminal law, "a jury [is ordinarily entrusted] with determining whether alleged conduct 'violates' the law ... and ...

must act unanimously when doing so." *Id.* at 820. As such, "[t]he substantive elements [of a crime] 'primarily define[ ] the behavior that the statute calls a 'violation' of federal law.'" *See Torres v. Lynch*, 136 S. Ct. 1619, 1624 (2016) (citations omitted). A "violation" therefore means the "substantive elements" that make up a complete federal criminal offense, because a defendant has not committed a crime until all of the charged elements have been established.

In sum, § 1326 contains elements that designate the three specific places where the offense can occur: where a defendant enters the United States, attempts to enter, or is found here. 8 U.S.C. § 1326. For a "found in" violation of the statute, the place where an alien is found by immigration officials defines the place where the substantive elements of the offense occur. Consequently, venue is improper in a place where none of the elements of the offense occurred. As the indictment in this case made clear, Petitioner was not "found" in the Eastern District of Virginia. For that reason, the Fourth Circuit erred.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GEREMY C. KAMENS
Federal Public Defender

Geremy Kamens/gb

Geremy C. Kamens
Counsel of Record
Office of the Federal Public Defender
for the Eastern District of Virginia
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800
Geremy_Kamens@fd.org

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