No. _____

IN THE

# Supreme Court of the United States

MAGDALY SULEYDY PEREZ-VELASQUEZ AND
JENIFER MILADIS ALVARADO-DIAZ,

*Petitioners*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The questions presented are:

Whether entry under 8 U.S.C. § 1325(a) requires freedom from official restraint; and

Whether continuous surveillance by means of visual observation constitutes official restraint.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners Magdaly Suleydy Perez-Velasquez and Jenifer Miladis Alvarado-Diaz respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

## OPINIONS BELOW

The panel decision of the United States Court of Appeals for the Tenth Circuit is published at 16 F.4th 729. App. 3a-8a. The order denying the petition for rehearing and rehearing en banc is unpublished. App. 1a-2a. The district court's memorandum opinions and orders are unpublished. App. 9a-20. The magistrate courts' orders were issued orally. App. 33a-46a, 57a-63a.

## JURISDICTION

The Tenth Circuit entered its judgment on October 25, 2021. On December 16, 2021, the Tenth Circuit denied Petitioners' Petition for Rehearing *En Banc* and Panel Rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The following statute is at issue in this Petition:

> Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, . . . shall, for the first commission of any such offense, be fined under Title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under Title 18, or imprisoned not more than 2 years, or both.

8 U.S.C. § 1325(a).

## STATEMENT OF THE CASE

Ms. Perez-Velasquez and Ms. Alvarado-Diaz were convicted of illegal entry into the United States. This petition raises the question whether Ms. Perez-Velasquez and Ms. Alvarado-Diaz had to be free from official restraint to be properly convicted of illegal entry. It also raises the question whether continuous surveillance with the naked-eye constitutes official restraint.

### I. Legal Background

8 U.S.C. § 1325(a) criminalizes any alien who "enters or attempts to enter the United States" under certain circumstances. Thus, it requires proof of entry by the defendant. The concept of entry has been interpreted to include not merely crossing the border but also freedom from official restraint when doing so. *See, e.g., United States v. Argueta-Rosales*, 819 F.3d 1149, 1155 (9th Cir. 2016).

The concept of freedom from official restraint as a requirement for "entry" began in the civil context of immigration law. *Ex Parte Chow Chok,* 161 F. 627 (N.D.N.Y.), *aff'd,* 163 F. 1021 (2d Cir. 1908). Based upon this doctrine, an alien does not enter the United States until he/she does so free of official restraint and is "free to go at large and at will within the United States." *United States v. Vazquez-Hernandez*, 849 F.3d 1219, 1228 (9th Cir. 2017) (internal quotations omitted) (citing, *inter alia*, *Chow Chok*, 161 F. at 630)). "The doctrine is premised on the theory that the alien is in the government's constructive custody at the time of physical entry. By contrast, when an alien is able to exercise his free will subsequent to physical entry, he is not under official restraint." *United States v. Pacheco-Medina*, 212 F.3d 1162, 1165 (9th Cir. 2000) (quoting *United States v. Aguilar*, 883 F.2d 662, 683 (9th

Cir. 1989)). The notion that official restraint can take the form of "continuous surveillance" dates back to 1908, more than one century ago. *See Chow Chok*, 161 F. at 628-29.

Subsequently, the official restraint doctrine has been applied in criminal immigration cases. *See, e.g., Vazquez-Hernandez*, *supra*. Despite undertaking various immigration-related congressional enactments, Congress has made no efforts to define entry. *United States v. Gaspar-Miguel*, 947 F.3d 632, 633-34 (10th Cir. 2020). Abiding by the principle that the settled meaning of a term should be inferred where legislation fails to provide a different definition, most courts and the Board of Immigration Appeals have continued to recognize freedom from official restraint as a requirement of entry. *See Gaspar-Miguel*, 947 F.3d at 634; *see also Lopez v. Sessions*, 851 F.3d 626, 631 (6th Cir. 2017), *abrogated on other grounds by Guerrero-Lasprilla v. Barr*, 140 S.Ct. 1062 (2020); *United States v. Macias*, 740 F.3d 96, 100 (2d Cir. 2014); *United States v. Laville*, 480 F.3d 187, 198 (3d Cir. 2007) (McKee, J., concurring); *In re Martinez-Serrano*, 25 I & N Dec. 151, 153 (BIA 2009).

In this case, however, when affirming the judgment of the district court, the Tenth Circuit stated that "even if [the court] assumed that freedom from official restraint is required, neither [Petitioner] can establish official restraint because they rely on the theory of continuance surveillance, and continuous surveillance alone does not equate to restraint." *United States v. Perez-Velasquez*, 16 F.4th 729, 732-33 (10th Cir. 2021).

This Court has never addressed whether an entry under 8 U.S.C. § 1325(a)

requires freedom from official restraint, or whether continuous surveillance by law enforcement is sufficient to establish official restraint. The Circuit Courts have now openly split over whether freedom from official restraint is required for an illegal entry, and what circumstances are required for official restraint.

## II. Factual History

### A. Magdaly Suleydy Perez-Velasquez

On January 6, 2019, Border Patrol Agent Roberto Tellez was on line-watch duty in Sunland Park, New Mexico. App. 22a. Agent Tellez was parked in a marked Border Patrol vehicle about 200 yards west of the end of the international border fence separating Mexico from the United States. App. 23a, 25a-26a.

There is no designated port of entry at that location. App. 27a. At about 1:30 p.m. in the afternoon, Agent Tellez "observed three individuals cross into the United States at the end of the fence. . . ." App. 23a. With an unobstructed view, he saw Ms. Perez right as she crossed the international border. App. 28a, 30a-31a. Agent Tellez did not require the use of binoculars, cameras, or any other surveillance device to see her. App. 30a.

Ms. Perez came directly to Agent Tellez. App. 29a. If she had tried to get away from him in any direction, he would have pursued her. App. 32a. He had visual contact with her the whole time. App. 38a. Ms. Perez did not have any documents that would allow her to legally enter or remain in the United States. App. 24a.

### B. Jenifer Miladis Alvarado-Diaz

On December 29, 2018, U.S. Border Patrol Agent Ernest Campos was working in Sunland Park, New Mexico, along the fence at the international boundary, about

seven miles west of the closest port of entry. App. 48a. People are able to walk around the fence. App. 53a.

Ms. Alvarado walked around the fence. App. 56a. She was able to see the Border Patrol vehicle and went directly to it. App. 55a. Agent Campos saw Ms. Alvarado and another individual walking and running towards him, parallel to the international boundary fence, from about four-tenths of a mile away. App. 49a-51a, 54a. They came directly to him. App. 54a. Ms. Alvarado did not have any immigration documents allowing her to enter the United States legally. App. 52a.

### C. Basis of Federal Jurisdiction in the First Instance

The United States District Court for the District of New Mexico originally had jurisdiction pursuant to 18 U.S.C. § 3231, which provides exclusive jurisdiction for offenses against the United States. Both defendants were tried and convicted of misdemeanor entry without inspection in violation of 8 U.S.C. § 1325(a)(1). App. 44a, 61a. On appeal, the district court affirmed their convictions. App. 15a, 20a. Ms. Perez-Velasquez and Ms. Alvarado-Diaz appealed their convictions to the United States Court of Appeals for the Tenth Circuit under 28 U.S.C. § 1291. App. 4a. The Tenth Circuit affirmed their convictions in a consolidated published decision. App. 3a-8a. The Petitioners filed a Petition for Rehearing and Request for Rehearing en banc, which was summarily denied. App. 1a-2a.

## REASONS FOR GRANTING THE WRIT

### I. The Circuits Are Now Divided Over the Meaning of "Entry" in 8 U.S.C. § 1325(a) And This Court Has Never Addressed This Issue

This Court has never developed a test for determining when an entry, pursuant

to 8 U.S.C. § 1325(a), has occurred, instead leaving unresolved the question of whether individuals like Petitioners are guilty of illegal entry when under official restraint. As a result, federal courts have adopted disparate approaches to answer the question. Certiorari is needed to resolve this split, and this case provides an excellent opportunity to resolve this entrenched conflict.

The definition of entry is well established. Entry has been defined as:

(1) A crossing into the territorial limits of the United States, or physical presence.

(2) An inspection or admission by an immigration officer or actual and intentional evasion of inspection at the nearest inspection point;

(3) And freedom from official restraint.

*See In re Pierre*, 14 I. & N. Dec. 467, 468 (BIA 1963); *De Leon v. Holder,* 761 F.3d 336, 338 (4th Cir. 2014).

The Tenth Circuit acknowledged that the term "entry" is a term of art with a well-settled meaning. "When interpreting 'entry,' we must acknowledge Congress is using a term with a settled meaning. And, if the statute at issue does not dictate otherwise, we must infer that Congress meant to incorporate the term's settled meaning." *Gaspar-Miguel,* 947 F.3d at 634. Pursuant to the well-settled meaning referenced by the Tenth Circuit, an alien does not effect an entry unless he/she is free from official restraint. Nonetheless, the Tenth Circuit stated that it "has never required freedom from official restraint for an 'entry' under § 1325(a)." *Perez-Velasquez,* 16 F.4th at 731.

The Tenth Circuit's decision in this case effectively eliminates the long-standing definition of "entry" by ostensibly acknowledging that "[i]n interpreting 'entry,' 'we must acknowledge Congress [used] a term with a settled meaning[,]'" *id.* (quoting *Gaspar-Miguel*, 947 F.3d at 634), and then immediately asserting that "this court has never required freedom from official restraint for an 'entry' under §1325(a), and we need not decide whether it is required here." *Id.* This unique approach adopted by the Tenth Circuit of acknowledging that the well-settled meaning of entry includes freedom from official restraint, but not requiring freedom from official restraint for an "entry," divides it from other Circuits affirmatively requiring freedom from official restraint. On the merits, the Tenth Circuit's unique approach is not supported by other courts' precedent or by common-sense. This case is an excellent vehicle to resolve the conflict.

### A. Seven Circuits Have Held that Freedom From Official Restraint is Necessary for an Entry to Occur.

Seven circuit courts have made consistent determinations that for an alien to effectuate an entry, he/she must be free from official restraint.

In *United States v. Kavazanjian*, 623 F.2d 730 (1st Cir. 1980), the First Circuit held that aliens arriving at United States airports under the status of "transits without visa," who obtained parole, never "entered" the United States for purposes of a prosecution under 8 U.S.C. § 1324. *Kavazanjian*, 623 F.2d at 736-37.

The Second Circuit held in *United States v. Macias*, 740 F. 3d 96 (2d Cir. 2014), that a defendant was not found in the United States for purposes of 8 U.S.C. § 1324 where he had attempted to enter Canada, and was then forcibly returned to the

United States. *Id.* at 99-100. The Court applied the principle of the official restraint doctrine to conclude that he could not be "found in" the United States. *Id.* at 100.

The Third Circuit stated in *United States v. Vasilatos*, 209 F.2d 195 (3d Cir. 1954), that "freedom from official restraint must be added to physical presence before entry is accomplished." *Id.* at 197. In that case, the entrant was only free from official restraint when an immigration officer cleared the entrant for a temporary stay. *Id.* In *Yang v. Maugans*, 68 F.3d 1540 (3d Cir. 1995), the Third Circuit also applied the doctrine to conclude that aliens who swam ashore to a beach that had law enforcement on it did not enter free of official restraint. *Id.* at 1550.

The Fourth Circuit, in *De Leon v. Holder*, 761 F.3d 336 (4th Cir. 2014), stated that: "An alien enters free from official restraint only if he experiences some degree of liberty in the United States before the government apprehends him." *Id.* at 338. In that case, the petitioner had entered free of official restraint where he was not spotted until he was several miles into the United States. *Id.* at 342-43.

The Sixth Circuit recognized that entry into the United States requires freedom from official restraint in *Lopez v. Sessions*, 851 F.3d 626, 630 (6th Cir. 2017).

The Ninth Circuit also has held that freedom from official restraint is an element of entry. *See United States v. Gonzalez-Torres*, 309 F.3d 594 (9th Cir. 2002). In *Gonzalez-Torres*, the Court concluded that, because Gonzalez-Torres' group was under continuous observation from the time they crossed the border until apprehended, the defendant was never free of official restraint. *Id.* at 598-99.

The Eleventh Circuit affirmed the Board of Immigration Appeals' conclusion

that the petitioner was deportable for making an entry without inspection where he surreptitiously landed a plane in the United States and there was no evidence he was under surveillance at the time. *Farquharson v. United States Attorney General*, 246 F.3d 1317, 1321-22 (11th Cir. 2001).

Because these jurisdictions require freedom from official restraint for an entry to have occurred, none of them would have convicted the Petitioners in this case.

### B. One Circuit has neither Adopted nor Rejected the Doctrine.

The Fifth Circuit claims to have neither adopted nor rejected the doctrine. *See United States v. Angeles-Mascote*, 206 F.3d 529 (5th Cir. 2000).

### C. Two Circuits have not Addressed the Issue.

Two other circuits – the Seventh Circuit and the Eighth Circuit – have not spoken on the issue. Notably, the geographic location of these circuits is such that they are unlikely to encounter the issue.

The Tenth Circuit's decision creates a significant departure from other circuit court precedent. This Court should grant certiorari to address a question of exceptional importance because it conflicts with opinions from numerous other courts of appeals and the Board of Immigration Appeals.

For the foregoing reasons, review is necessary.

## II. The Circuits Are Divided Over Whether Continuous Surveillance Constitutes Official Restraint

The federal courts of appeals are now split regarding whether visual surveillance alone is sufficient to constitute official restraint, thereby preventing an entry into the United States. The Tenth Circuit's decision should be reviewed as it

conflicts with what is required for an individual to be under official restraint. The Tenth Circuit, for argument purposes, stated that even if freedom from official restraint is required for entry, the defendants were not under official restraint "because, at most, they were only surveilled." *Perez-Velasquez,* 16 F.4th at 731-32.

"What, then, is freedom from official restraint? It's the alien's liberty to go where he wishes and to mix with the general population." *Lopez v. Sessions*, 851 F.3d at 630. "The doctrine is premised on the theory that the alien is in the government's constructive custody at the time of physical entry. By contrast, when an alien is able to exercise his free will subsequent to physical entry, he is not under official restraint." *Pacheco-Medina*, 212 F.3d at 1165 (internal quotations omitted).

The notion that continuous surveillance amounts to official restraint has existed for more than a century. It "was expressed in a 1908 case where aliens had crossed the border and proceeded for a quarter of a mile along railroad tracks, but had been under the surveillance of border inspectors from before the time they crossed until their actual physical capture." *Id.* at 1163-64 (citing *Chow Chok*, 161 F. at 628-29.) The Board of Immigration Appeals explicitly adopted the doctrine in *In re Pierre*, 14 I. & N. Dec. 467 (1973), stating that "[t]he restraint may take the form of surveillance, unbeknownst to the alien; he has still not made an entry despite having crossed the border with the intention of evading inspection, because he lacks the freedom to go at large and mix with the population." *Id.* at 469 (citing *Chow Chok, supra*).

This test has been followed by numerous circuits. The Fourth Circuit has

stated that "[a]n alien enters free from official restraint only if he experiences some degree of liberty in the United States before the government apprehends him." *De Leon*, 761 F.3d at 338. The Eighth Circuit recognized the official restraint doctrine, observing that "[o]fficial restraint continues only so long as an alien has 'no opportunity to get free' of authorities." *Nyirenda v. Immig. and Naturalization Serv.*, 279 F.3d 620, 624 (8th Cir. 2002) (quoting *Pacheco-Medina*, 212 F.3d at 1165). In applying the doctrine to the facts in *Nyirenda*, the Court ultimately concluded that petitioners who had driven for two miles into the United States out of sight of immigration officials were sufficiently free of official restraint to have effectuated an entry. *Id.*

The Ninth Circuit held a defendant was under official restraint where a surveillance camera observed the defendant and his companions as they scaled the border fence. *Pacheco-Medina,* 212 F.3d at 1163. An agent immediately responded and arrived as the defendant and his companions landed on the ground. *Id.* The defendant ran and "never left the agent's sight except for a split second as he rounded a corner, and within a few yards of the border, he was captured and taken into custody." *Id.*

The Second Circuit has also held that surveillance can constitute official restraint. *See Zhang v. Slattery*, 55 F.3d 737 (2d Cir. 1995). In that case, the defendant abandoned a sinking ship to swim to shore. *Id.* at 755. He contended he was not free of restraint at that time. *Id.* The Second Circuit disagreed, saying, "Zhang was already under the surveillance of the local law enforcement agencies by

the time he left the [ship]." *Id.* Likewise, the Third Circuit found that aliens swimming from a smuggling ship that ran aground to a beach, which was eventually cordoned off, were never free from official restraint. *See Yang*, 68 F.3d at 1550.

If under the facts of cases such as *Chow Chok, Zhang*, *Yang*, and *Pacheco-Medina*, where there was arguably more opportunity to go at large, official restraint was present, how is it possible that the conditions under which the Petitioners were apprehended did not constitute official restraint? The Petitioners, in this case, were not able to exercise their free will. They entered under the continuous visual surveillance of Border Patrol agents and were very close to agents. The agents did not use binoculars or any electronic surveillance device to observe the Petitioners. Accordingly, they lacked the freedom to go at large and mix with the population.

If continuous visual surveillance cannot be official restraint under the circumstances in Petitioners' cases, the Tenth Circuit's decision effectively precludes the doctrine of official restraint. There is no restraint more basic than actual observation with the naked eye. If actual observation with the naked-eye and with the ability to immediately apprehend the individual, or "constant surveillance" as the Tenth Circuit refers to it, does not constitute official restraint, then what does constitute official restraint? The Tenth Circuit's holding does not say and does not clarify. However, what the Tenth Circuit's decision does is effectively preclude any circumstances from constituting official restraint, as there could not be more narrow circumstances as the ones in these cases.

The Supreme Court should accordingly grant review because the Tenth Circuit

misapprehends the doctrine of official restraint, and the decision is contrary to more than 100 years of consistent precedent from numerous circuit courts and the Board of Immigration Appeals.

## III. The Question Presented Is Extremely Important

The importance of clarifying the official restraint doctrine is manifest. The charge of illegal entry is a federal criminal law and should be undeviatingly enforced. It is essential that enforcement and interpretation of federal criminal laws be consistent and that a breach of those laws be uniformly determined. If someone crossing the international border under continuous surveillance is not guilty of illegal entry in the state of California, but is guilty in the state of New Mexico, uniform enforcement is absent. This issue of whether someone is guilty of illegal entry should not turn on the location of the prosecuting court.

A core goal of our criminal justice system is to avoid "wrongful conviction[s]." *Berger v. United States,* 295 U.S. 78, 88 (1935.) The majority of the circuit courts require freedom from official restraint to effectuate an entry into the United States. If actual physical observation constitutes continuous surveillance and continuous surveillance is official restraint, the Petitioners did not enter. They were wrongfully convicted of illegal entry.

## IV. This Case Is An Ideal Vehicle For Resolving The Split.

The facts and procedural posture of this case make it an excellent vehicle to determine: (1) whether the definition of entry requires freedom from official restraint; and (2) under what circumstances continuous surveillance constitutes official restraint.

The questions are squarely and cleanly presented. They were raised and addressed at every stage of the proceedings below: at trial, App. 33a-46a, 57a-63a; on appeal to the District Court, App. 9a-20a; and on direct appeal to the Tenth Circuit, App. 3a-8a. Petitioners sought rehearing *en banc*, expressly asking the Tenth Circuit to reconsider its holding regarding official restraint. The Tenth Circuit denied the petition without comment. App. 1a-2a. This case comes before this Court on direct review, without any of the complications that sometimes arise on collateral review. There are no procedural hurdles to overcome for this Court to address the merits of this critically important question.

The questions presented are also outcome-determinative. The Tenth Circuit acknowledged that the well-settled meaning of entry includes freedom from official restraint, but then stated that the Tenth Circuit has never required freedom from official restraint for an "entry." If freedom from official restraint is required for an entry and continuous surveillance with the naked-eye is official restraint, Petitioners did not enter and did not commit the crime charged.

If this Court grants certiorari and holds that "entry" into the United States requires freedom from official restraint, and official restraint includes surveillance with the naked-eye, Petitioners are entitled to relief on remand.

## CONCLUSION

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

Respectfully submitted,

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Date: March 17, 2022