No. 21-7432

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IN THE SUPREME COURT OF THE UNITED STATES

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

v.

UNITED STATES OF AMERICA

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

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

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

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Perez-Velasquez, No. 19-po-44 (July 17, 2019)

United States v. Alvarado-Diaz, No. 19-po-4579 (Aug. 14, 2019)

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

United States v. Perez-Velasquez, No. 19-2118 (Oct. 25, 2021)

United States v. Alvarado-Diaz, No. 19-2134 (Oct. 25, 2021)

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-8a) is reported at 16 F.4th 729. The opinions and orders of the district court (Pet. App. 9a-15a, 16a-20a) are not published in the Federal Supplement but are available at 2019 WL 3219260 and 2019 WL 3818231.

## JURISDICTION

The judgment of the court of appeals was entered on October 25, 2021. A petition for rehearing was denied on December 16, 2021 (Pet. App. 1a-2a). The petition for a writ of certiorari was

not filed until March 17, 2022, and is out of time under Rules 13.1 and 13.3 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following separate bench trials in the United States District Court for the District of New Mexico, petitioners were each convicted on one misdemeanor count of improperly entering the United States, in violation of 8 U.S.C. 1325(a)(1). Pet. App. 3a-5a. A magistrate judge imposed the lesser of an 18-day or time-served sentence on petitioner Perez-Velasquez, 19-po-44 Docket Entry (Jan. 28, 2019), and the lesser of a 21-day or time-served sentence on petitioner Alvarado-Diaz, 18-po-4579 Docket Entry (Jan. 28, 2019). The district court affirmed petitioners' convictions. Pet. App. 9a-15a, 16a-20a. The court of appeals also affirmed. Id. at 3a-8a.

1. Petitioners unlawfully entered the United States near Sunland Park, New Mexico. Pet. App. 10a, 17a.

a. On December 29, 2018, a U.S. Border Patrol agent was on "line watch duties" approximately half a mile from the end of the international boundary fence. Pet. App. 10a. At around 12:05 p.m., the agent saw petitioner Alvarado-Diaz and a second individual approach him. Ibid. The agent had not seen them on the Mexican side of the border. Ibid. After the agent identified

himself, Alvarado-Diaz stated that she was a citizen of El Salvador and had crossed the border without documentation. Ibid.

b. On January 6, 2019, a different U.S. Border Patrol agent was approximately 200 yards west of the end of the border fence and looking east along the fence line. Pet. App. 16a-17a, 26a. At around 1:30 p.m., the agent saw petitioner Perez-Velasquez, a citizen of Guatemala, and two other individuals emerge along the United States side of the fence. Id. at 17a. The agent had not, however, seen them on the Mexican side of the border. Ibid. When the agent approached the group in his marked vehicle, Perez-Velasquez stated that she was a noncitizen and had crossed the border without documentation. Ibid.

2. The government charged each petitioner with one count of improperly entering the United States, in violation of 8 U.S.C. 1325(a)(1). Pet. App. 9a, 16a. 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).[1] After separate bench trials, a magistrate judge found each petitioner guilty. Pet. App. 11a, 17a-18a.

[1] This brief uses "noncitizen" as equivalent to the statutory term "alien." See Barton v. Barr, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

The district court affirmed petitioners' convictions. Pet. App. 9a-15a, 16a-20a. As relevant here, the court rejected petitioners' contention that they had not "enter[ed]" the United States within the meaning of Section 1325(a)(1) because they were under continuous surveillance from the moment they crossed the border and, therefore, were officially restrained. Id. at 12a-14a, 18a-20a. The court recognized that courts applying immigration statutes had historically evaluated whether a noncitizen was "free[] from official restraint" at the moment she entered the country. Id. at 12a, 18a (citation omitted). But the court rejected the proposition that merely being under continuous surveillance constitutes the kind of official restraint that would negate an unlawful entry under Section 1325(a)(1). Id. at 12a-14a, 19a-20a.

3. The court of appeals consolidated petitioners' appeals and affirmed. Pet. App. 3a-8a. It summarized the origins of the "freedom from official restraint doctrine," under which noncitizens who "entered" the country received certain procedural rights whereas those who had not "entered" could be summarily excluded. Id. at 5a-6a. The court observed that it had never required freedom from official restraint when interpreting the "entry" element in 8 U.S.C. 1325(a), but declined to resolve that question in this case. Pet. App. 6a.

The court of appeals instead "assum[ed] for purposes of argument that freedom from official restraint is required for an

'entry'" under Section 1325(a) and held that petitioners were "n[ot] * * * under official restraint because, at most, they were only surveilled" upon crossing into the United States. Pet. App. 6a. The court cited its earlier decision in United States v. Gaspar-Miguel, 947 F.3d 632 (10th Cir.), cert. denied, 141 S. Ct. 873 (2020), which held that "continuous surveillance alone cannot constitute restraint." Pet. App. 7a. And because "neither [petitioner] allege[d] any sort of restraint other than continuous surveillance," the court held that "they both 'entered' the country within the meaning of § 1325(a)(1)" and that "their convictions were proper." Id. at 8a.

ARGUMENT

Petitioners renew (Pet. 5-14) the contention that they did not "enter[]" the United States, within the meaning of 8 U.S.C. 1325(a)(1), because they were under continuous surveillance by law enforcement after they crossed the border. The petition should be denied because it is untimely and they did not seek leave to file it out of time. In any event, the court of appeals correctly affirmed petitioners' convictions, and -- although the Ninth Circuit has adopted a different interpretation of the term "enters" in 8 U.S.C. 1325 and another criminal provision -- this case would not be an appropriate vehicle in which to resolve that shallow disagreement. This Court has previously denied review of the question presented, see Gaspar-Miguel v. United States, 141

S. Ct. 873 (2020) (No. 19-8733), and the same result is warranted here.

1. The petition for a writ of certiorari is untimely, and it could be denied on that ground alone. The court of appeals denied petitioners' petition for rehearing on December 16, 2021, and the 90-day deadline for filing a petition for a writ of certiorari began to run on that date. See Sup. Ct. R. 13.1 and 13.3; pp. 1-2, supra. Petitioners did not ask this Court for an extension of the time within which to file a petition for a writ of certiorari. Cf. Sup. Ct. R. 13.5. Thus, the time for filing a petition for a writ of certiorari expired on March 16, 2021. But the petition was not filed until March 17, 2022, and it is therefore out of time.

Although this Court has discretion to consider an untimely petition for a writ of certiorari in a criminal case if "the ends of justice so require," Schacht v. United States, 398 U.S. 58, 63-65 (1970); see Bowles v. Russell, 551 U.S. 205, 212 (2007), petitioners offer neither explanation nor justification for the untimeliness of their petition, and none is apparent from the record. Accordingly, the Court should deny their petition as untimely.

2. Even if the petition were timely, it would not warrant this Court's review. The court of appeals correctly affirmed petitioners' convictions.

a. Petitioners were found guilty of violating a criminal prohibition of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., that applies to "[a]ny alien who * * * enters or attempts to enter the United States at any time or place other than as designated by immigration officers." 8 U.S.C. 1325(a)(1). The case law regarding when a noncitizen has "entered" the United States for various purposes under the INA developed largely in the context of civil proceedings because -- 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 government used different immigration procedures depending on whether a noncitizen had already entered the United States or was deemed to be seeking admission. A noncitizen who had entered the United States received a deportation hearing, whereas a noncitizen 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 a noncitizen 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, a noncitizen 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 You Yi 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 a noncitizen 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 noncitizens 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 a noncitizen was properly placed in exclusion rather than deportation proceedings where the noncitizen 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 a noncitizen receives no longer turns on whether she has "entered" the United States. The INA still distinguishes in some respects between "inadmissible" and "deportable" noncitizens, but that distinction generally turns on whether the noncitizen has been lawfully admitted into the United States, not whether the noncitizen has effectuated a physical entry into the United States. See Chi Thon Ngo v. INS, 192 F.3d 390, 394 n.4 (3d Cir. 1999) (summarizing related changes made by IIRIRA); In re Collado-Munoz, 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. Before the decision below, the Tenth Circuit had already explained that, 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.'" United States v. Gaspar-Miguel, 947 F.3d 632, 634 (10th Cir.)), cert. denied, 141 S. Ct. 873 (2020) (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 noncitizen 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); see Pet. 7-9 (citing examples).

The court of appeals' opinion in these cases did nothing to disturb the potential applicability of the doctrine of official restraint in the criminal context. Rather, the court expressly found that "[it] need not decide" whether "freedom from official restraint [is required] for an 'entry' under § 1325(a)." Pet. App. 6a; see Gaspar-Miguel, 947 F.3d at 634 (same). The court assumed the doctrine applied in this circumstance and, consistent with its previous holding in Gaspar-Miguel, held that petitioners' "continuous surveillance alone cannot constitute restraint." Pet. App. 7a (citing Gaspar-Miguel, 947 F.3d at 634).[2]

[2] 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 civil immigration proceedings. Cf. Department of Homeland Sec. 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") (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 between those 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).

Because the court of appeals assumed that Section 1325(a) incorporates the concept of freedom from official restraint, this case presents no occasion for this Court to address that question.

c. Petitioners correctly observe (Pet. 8, 11) that the Ninth Circuit has held that a noncitizen who is under continuous surveillance from the time she crosses the border until her apprehension is under "official restraint" and, accordingly, has not "enter[ed]" 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 a noncitizen 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 a noncitizen dropping to the bottom of a fence demarcating the U.S.-Mexico border, gave chase, and apprehended him. The Ninth Circuit held that the noncitizen "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 a noncitizen commits an unlawful entry under the criminal immigration statutes where the noncitizen was subject to continuous surveillance from the time she crossed the border. The

Fifth Circuit "ha[s] mentioned the [Ninth Circuit's] official restraint doctrine in previous cases," but it "ha[s] never explicitly adopted the doctrine." United States v. Rojas, 770 F.3d 366, 368 (2014), cert. denied, 575 U.S. 1011 (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 a noncitizen had "been apprehended at the time of entry." Id. at 630 (quoting 8 C.F.R. 240.61(a)(1)).[3]

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 the Tenth Circuit has observed, the Ninth

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[3] Since IIRIRA's enactment, other circuits have suggested -- based on pre-IIRIRA deportation and exclusion precedents -- that 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); Nyirenda v. INS, 279 F.3d 620, 623 (8th Cir. 2002); Farquharson v. U.S. Att'y 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.

Circuit's case law in this area often involves "distinctions so fine as to become meaningless, if not arbitrary." Gaspar-Miguel, 947 F.3d at 635. For example, one case held that noncitizens were under official restraint because, "[a]lthough [the Border Patrol agent] lost sight of them for moments at a time," the agent "observed the suspects continuously." Gonzalez-Torres, 309 F.3d at 597. Another decision, by contrast, found that a noncitizen was not under official restraint because the agent surveilling the border area through a security camera was "pretty certain" he did not see the noncitizen until the noncitizen was already inside the United States. United States v. Castro-Juarez, 715 Fed. Appx. 636, 637 (9th Cir. 2017). Accordingly, 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 a noncitizen coming over (or around) the fence will already have missed the noncitizen's actual entry, preventing there from being continuous surveillance from the time of the border crossing. And, while the Ninth Circuit asserts that continuous surveillance is sufficient to demonstrate official restraint, it has also held that seismic detection of a border crossing and "[p]ersistent tracking" of a noncitizen are not enough to undermine a conviction under Section 1325(a). See United States v. Vela-Robles, 397 F.3d 786, 789 (9th Cir. 2005); United States v. Hernandez-Herrera, 273 F.3d 1213, 1218-1219 (9th Cir. 2001), cert. denied, 537 U.S. 868 (2002). In

any event, even assuming that continuous surveillance could keep someone from "enter[ing]" the United States for purposes of Section 1325(a)(1), it would be a rare case in which someone who happened to be under surveillance at the moment of crossing the border would not still be "attempt[ing] to enter" the United States for purposes of Section 1325(a)(1).

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 (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 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 a noncitizen apprehended near the border. See p. 10 n.2, 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 petitioners identify otherwise warranted this Court's review, their petition does not present an appropriate vehicle in which to resolve it. While it is undisputed that a Border Patrol agent observed each petitioner's group at about the time it came around the border fence, it is unclear that the nature of each agent's observations 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 these cases, the magistrate judge credited testimony that the agents did not actually see each petitioner's group until after it had crossed the border. See Pet. App. 13a (district court finding no clear error in magistrate judge's "finding that [the Border Patrol agent's] 'surveillance, awareness, and visibility' of [petitioner Alvarado-Diaz] 'began after she had crossed into the United States'") (brackets omitted); id. at 17a (noting magistrate judge's "finding of fact that [the Border Patrol agent] 'was looking perpendicular down the fence and couldn't see through it so he did not see [petitioner Perez-Velasquez] * * * approach the fence or actually cross the international boundary") (brackets omitted); id. at 7a n.1 (court of appeals declining to decide whether that finding was clearly erroneous).

Petitioners' cases are 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 noncitizen until the noncitizen had crossed into the United States. 715 Fed. Appx. at 637. Review is therefore unwarranted because, even if their cases had been brought in the Ninth Circuit, it is unclear that petitioners would have prevailed.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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