No. 21-7432

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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The Government cannot justify the Tenth Circuit's failure to abide by their acknowledgement that when interpreting the term "entry," Congress is using a term with a well settled meaning, which Congress meant to incorporate into 8 U.S.C. §1325. The Government cannot justify the panel's refusal to decide whether an entry is only completed once an individual is free from official restraint. The Government does not contest that courts and the Board of Immigration Appeals have interpreted "entry" as only completed once an individual is "free from official restraint." The Government cannot justify the panel's decision that surveillance by actual observation with the naked eye does not constitute official restraint.

The Government nevertheless urges this Court to deny review.

The Government's arguments are unpersuasive. The Tenth Circuit is fractured from other Circuits that have addressed the issue and have found that freedom from official restraint is required for an illegal entry. The Government's efforts to characterize the circuit split as "shallow," BIO 14, and therefore unworthy of this Court's intercession are unavailing.

The important facts as to Ms. Alvarado-Diaz are undisputed. Ms. Alvarado-Diaz walked around the fence at the international boundary. She was able to see the Border Patrol vehicle and went directly to it. Agent Campos saw Ms. Alvarado-Diaz walking and running towards him, parallel to the international boundary fence, from about four-tenths of a mile away. She came directly to him. Pet. at 4-5.

The facts as to Ms. Perez-Velasquez are similar. A Border Patrol agent conducting line-watch duty "observed three individuals cross into the United States at the end of the fence. . . ." He saw Ms. Perez-Velasquez, with an unobstructed view, right as she crossed the international border; he did not require the use of binoculars, cameras, or any other surveillance device to see her. Ms. Perez-Velasquez came directly to the agent, who had visual contact with her the whole time. If she had tried to get away from him in any direction, he would have pursued her. Pet. at 4.

If these scenarios do not amount to official restraint, it is hard to see what would.

This Court's intervention is needed to address the split over whether freedom from official restraint is required to effectuate an entry. Further, the Court's clarification as to whether continuous surveillance with the naked-eye constitutes official restraint is needed. There is no impediment to review in this case.

The Petition should be granted.

1. The Petition demonstrates that the Tenth Circuit has broken into a different camp from seven other Circuits that have adopted freedom from official restraint as a requirement for an entry. Pet. 5-9. The Government's brief does not dispel that reality.

a. The Government in fair detail recounts the historical development of freedom from official restraint as a requirement for entry. BIO 7-9. Although the Government underscores that the doctrine began in the civil context, the Government does not contest that courts have applied the doctrine in criminal cases. BIO 10-11.

Despite any changes to civil immigration proceedings that were established in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546, those changes did nothing to affect the term "enter" as used in the criminal context. The Tenth Circuit even acknowledged that when Congress used the term "entry," Congress used a term with a well settled meaning, which unless otherwise indicated, Congress incorporated into the statute. *See United States v. Gaspar-Miguel*, 947 F.3d 632, 634 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 873 (2020); Pet. App. 6a.

b. The Government claims that the Tenth Circuit's opinion in these cases did "nothing to disturb the potential applicability of the doctrine of official restraint in the criminal context." BIO 10. This is wrong. That is exactly what the Tenth Circuit did. The Tenth Circuit unequivocally stated that the Court "has never required freedom from official restraint for 'entry' under § 1325(a)." Pet. App. 6a. Further, the Court declined to decide the issue. Pet. App. 6a-7a. The Tenth Circuit's holding that it has never required freedom from official restraint splits it from those Circuits that have found that an entry is only complete once an individual is free from official restraint. Pet. at 7-9.

c. The split in the circuits and the sheer number of cases to which this doctrine is applicable makes this an important issue for this Court's review. By far, the greatest number of federal criminal cases charged are brought under the criminal

immigration statutes.[1] Undocumented individuals have a right to know whether their conduct rises to a level of criminal culpability. If the term "entry" is defined differently in different districts, an undocumented person cannot know if their conduct is chargeable. In the civil context, where there are fewer procedural protections, there is no dispute regarding the definition of entry. This highlights the importance of having a clear definition of entry in the criminal context where an individual is afforded greater procedural protections. It is critical to resolve this circuit split.

d. Although the Tenth Circuit facially acknowledged the applicability of the established doctrine of "official restraint" and the long-established definition of "entry," the Court eviscerated the doctrine by applying the holding that "continuous surveillance alone cannot constitute restraint." *See Gaspar-Miguel*, 947 F.3d at 634. This conclusion conflicts with other circuits' and the Board of Immigration Appeals' decisions holding that, indeed, surveillance, alone, is official restraint sufficient to prevent an entry. *See, e.g., Zhang v. Slattery*, 55 F.3d 732, 755 (2d Cir. 1995), *superseded by statute on other grounds as stated in* 618 F.3d 172, 202 (2d Cir. 2010) ("once the ship was spotted ... the passengers aboard it were already under restraint ... Continuous surveillance by immigration authorities can be sufficient to place an alien under official restraint"); *Farquharson v. U.S. Attorney Gen.*, 246 F.3d 1317,

[1] The Government boasts that in 2019, 80,866 defendants were charged with misdemeanor Improper Entry (8 U.S.C. §1325(a)), surpassing the record set in 2018 by 18.1 percent. https://www.justice.gov/opa/pr/department-justice-prosecuted-record-breaking-number-immigration-related-cases-fiscal-year, checked on June 5, 2022.

1321-22 (11th Cir. 2001) (evidence was "insufficient to indicate that [defendant] was under surveillance, and therefore under constructive restraint, when he landed his plane in Florida[,] ... [his] landing was witnessed only by a private individual[,] ... [and he] was not located by officials until approximately one-half hour after he landed"); *United States v. Gonzalez-Torres*, 309 F.3d 594, 598–99 (9th Cir. 2002) (observing that "[a]n alien does not have to be in the physical custody of the authorities to be officially restrained"; surveillance counts as official restraint); *De Leon v. Holder*, 761 F.3d 336, 339-43 (4th Cir. 2014) (applicants for cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act must prove they "entered the United States 'free from official restraint,' " which "may take the form of surveillance, unbeknownst to the alien" (quoting *In re Pierre*, 14 I. & N. Dec. 467, 469 (1973)).

e. Contrary to the government's contention, the Tenth Circuit's decision not only "disturb[s] the potential applicability of the doctrine of official restraint in the criminal context," BIO 10, it effectively negates it. The Tenth Circuit refused to find the doctrine applicable in its most basic context: agents observing, with their own eyes, the Petitioners crossing the border. Clearly, under these circumstances, Petitioners lacked the freedom to go at large and mix with the population. *In re Pierre*, 14 I. & N. Dec. 467, 469 (1973) (citing *Ex Parte Chow Chok,* 161 F. 627, 629-30, 633 (N.D.N.Y.), *aff'd* 163 F. 1021 (2d Cir. 1908)). Indeed, the case establishing the doctrine, *Chow Chok*, involved surveillance by agents of migrants who crossed

the border. *Id.* at 630 (stating that "from the moment when they crossed the border, they were in the actual, though not formal, custody of the inspectors").

f. Other than the Ninth Circuit, the Government references only the Fifth Circuit and the Sixth Circuit as having addressed the official restraint doctrine. BIO 12. It is true that in *United States v. Rojas*, 770 F.3d 366 (5th Cir. 2014), the Fifth Circuit addressed the doctrine, noting the court had mentioned the official restraint doctrine, but never explicitly adopted the doctrine. *Rojas*, 770 F.3d at 368. Specifically, in *United States v. Cardenas–Alvarez,* 987 F.2d 1129, 1132–33 (5th Cir.1993), the Fifth Circuit noted that, "Most courts who have decided what conduct comprises an 'entry' have concluded that physical presence in the country is required, as well as freedom from official restraint." Again, seven years later, in discussing the distinction between actual entry and attempted entry, the Fifth Circuit observed "'actual entry' has been found by most courts to require both physical presence in the country as well as freedom from official restraint." *United States v. Angeles-Mascote*, 206 F.3d 529, 531 (5th Cir. 2000). The Sixth Circuit, however, contrary to the Government's assertion, did not address the doctrine only in dictum. In applying the doctrine, the Sixth Circuit in *Lopez v. Sessions*, 851 F.3d 626 (6th Cir. 2017), vacated and remanded with instruction to resolve the factual question. *Id.* at 631.

g. Aside from the Fifth Circuit and the Sixth Circuit, the Government's suggestion that the Ninth Circuit is the only circuit to adopt the official restraint doctrine is wrong. The Government, itself, has noted, as did the Tenth Circuit, that "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'" BIO 9 (citing *Gaspar-Miguel*, 947 F. 3d at 634.) A number of these decisions, requiring "freedom from official restraint" are criminal cases, for example: the First Circuit in *United States v. Kavanjian*, 623 F.2d 730 (1st Cir. 1980); the Second Circuit in *United States v. Macias*, 740 F.3d 96 (2d Cir. 2014); and the Third Circuit in *United States v. Vasilatos*, 209 F.2d 195 (3d Cir. 1954), as well as the Ninth Circuit in numerous decisions, *see, e.g., United States v. Gonzalez-Torres*, 309 F.3d 594 (9th Cir. 2002). Additionally, in *Nyirenda v. Immig. and Naturalization Serv.*, 279 F.3d 620, 624 (8th Cir. 2002), the Eighth Circuit relied on a criminal case, *United States v. Pacheco-Medina*, 212 F.3d 1162 (9th Cir. 2000).

2. The Government further asserts that the Ninth Circuit – which the Government claims is the only circuit to find that continuous surveillance amounts to official restraint – may reconsider its determination. The Government's claim is without merit.

a. The Government cites to the Tenth Circuit's criticism of the Ninth Circuit as a basis for its position. However, there is nothing to indicate that the Tenth Circuit's criticism of Ninth Circuit case law involving "distinctions so fine as to become meaningless, if not arbitrary," BIO 13, is suddenly going to affect years of precedent from the Ninth Circuit.

b. Indeed, the Ninth Circuit is not as rogue as the Government Represents. The Ninth Circuit has set limitations as to what forms of surveillance constitute official restraint. The Government cites to such Ninth Circuit authority. In *United*

States v. Castro-Juarez, 715 Fed. Appx. 636, 637 (9th Cir. 2017) (unpublished), the alleged "official restraint at issue included video surveillance at the border." A border patrol agent assigned to a camera room at a station saw an individual, who was later located approximately one-half mile north of the border by an agent on patrol duty. *Id.* at 637. The Court held Mr. Castro-Juarez was free from official restraint as he was not under video surveillance when he crossed the border. *Id.* In another case, the Ninth Circuit refused to extend the doctrine to an alien who, while crossing the border, triggered a seismic sensor causing border patrol agents to respond and detect his presence roughly one-half mile north of border. *United States v. Vela-Robles*, 397 F.3d 786, 787 (9th Cir. 2005). "Vela-Robles was not subject to official restraint before his arrest because he was not in the constant visual or physical grasp of governmental authorities after he crossed the border." *Id.* at 789.

c. The Ninth Circuit decisions that the Government criticizes involve electronic surveillance. Whether electronic surveillance constitutes official restraint is not at issue in this case. The Government's citation to cases involving "seismic detection," security cameras, "still watch" agents and other forms of electronic surveillance provide no basis to deny this Petition. The agents saw Ms. Perez-Velasquez and Ms. Alvarado-Diaz with their own eyes. Both were observed without the use of binoculars or any other electronic devices. As the Government concedes "it is undisputed that a Border Patrol agent observed each petitioner's group at about the time it came around the border fence…." BIO 15. Petitioners "on entering, were … effectually deprived of their liberty and prevented from going at large within the

United States." *Chow Chok*, 161 F. at 630. This case does not present any issue of arbitrary or fine distinctions regarding what constitutes surveillance.

d. The fact that one judge in the Ninth Circuit has criticized his circuit's approach and called for his colleagues to clean up their mess, BIO 14, is no indication that the Ninth Circuit may reconsider its position. To date, the Ninth Circuit has not, in fact, reconsidered its position. More importantly, neither has the BIA or any of the other circuits. If clarification is needed as to what constitutes official restraint, this Court is the correct institution to do so.

e. The Government is wrong that Petitioners' cases are similar to the facts of *Castro-Juarez*. As noted, Mr. Castro-Juarez was free from official restraint as he was not under video surveillance by an agent at a remote camera room, when he crossed the border. *Id.* In contrast, Petitioners were visually observed, with the naked eye, "about the time [they] came around the border fence." The facts in Petitioners' cases are more similar to *Chow Chok* decided in 1908, where law enforcement observed the migrants at all times from the time they crossed the border until their arrest, and thus the migrants had not "entered" the United States. *Chow Chok*, 161 F. at 628-29.

3. Petitioners' Petition for a Writ of Certiorari was timely filed on March 17, 2022. The United States fails to acknowledge Supreme Court Rule 30.1 which provides, in pertinent part:

> In the computation of any period of time prescribed or allowed by these Rules, by order of the Court, or by an applicable statute, the day of the act, event, or default from which the designated period begins to run is not included.

The Petition for Rehearing was denied on December 16, 2021. Pursuant to Rule 30.1, the period for filing the Petition did not begin running until December 17, 2021. The Petition was timely filed on March 17, 2022.

The time has come for this Court to clearly define whether entry for purposes of 8 U.S.C. § 1325(a) requires that an alien be free from official restraint. The number of cases that the Government boasts of prosecuting under the criminal statute clearly demonstrates that this issue is too important and too often implicated to allow doubt as to what conduct is culpable. This case – limited to surveillance by actual observation – is the perfect vehicle to clarify the definition of entry.

CONCLUSION

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

Respectfully submitted,
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Date: June 6, 2022