

No.

IN THE
SUPREME COURT OF THE UNITED STATES

JESUS HERRERA-SALAZAR,

PETITIONER,

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 WRIT OF CERTIORARI

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March 4, 2026

QUESTION PRESENTED

Whether the Double Jeopardy Clause prohibits a second prosecution for the crime of illegally reentry, specifically, the “found in” offense under 8 U.S.C. § 1326(a), where the government fails to show that, after the first prosecution of the defendant for being found in the United States, the defendant was removed from the country and later reentered the country illegally.

LIST OF RELATED PROCEEDINGS

There are no related proceedings.

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QUESTION PRESENTEDi

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jesus Herrera-Salazar respectfully petitions for a writ of certiorari to review the September 26, 2025 Order and Judgment of the Tenth Circuit affirming his conviction.

OPINIONS BELOW

The unpublished Tenth Circuit decision in *United States v. Herrera-Salazar*, No. 24-7029, 2025 U.S. App. LEXIS 24970, 2025 WL 2741693 (10th Cir. Sept. 26, 2025), is Attachment A in the Appendix (slip opinion version). The Tenth Circuit's Order denying the petition for rehearing en banc (November 10, 2025) is Attachment B in the Appendix.

JURISDICTION

The United States District Court for the Eastern District of Oklahoma had jurisdiction under 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. It issued an Order and Judgment affirming Herrera-Salazar's conviction on September 26, 2025. Appendix at 4-22. On October 8, 2025, the Tenth Circuit granted Herrera-Salazar's timely motion for extension of time to file a petition for rehearing, extending the deadline to October 31, 2025. Herrera-Salazar filed his Petition for Rehearing En Banc in the Tenth Circuit on October 31, 2025. The Tenth Circuit denied rehearing on November 10, 2025. Appendix at 24. On January 2, 2026, Herrera-Salazar filed an application for an extension of time to file this petition for writ of certiorari (25A812), which Justice Gorsuch granted on January 14, 2026, extending the petition deadline to March 10, 2026. This court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent constitutional and statutory provisions are

1. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution: “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.”

2. 8 U.S.C. § 1326(a) and (b)(1):

(a) “Subject to subsection (b), any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless

(A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney

General has expressly consented to such alien’s reapplying for admission; or

(B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.”

(b) “Notwithstanding subsection (a), in the case of any alien described in such subsection—

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not

more than 10 years, or both”

STATEMENT OF THE CASE

This case involves a double jeopardy issue of exceptional importance and one on which the Tenth Circuit’s decision conflicts with decisions of other circuits. The question presented is whether the Double Jeopardy Clause prohibits a second prosecution for the crime of illegally reentry, specifically, the “found in” offense under 8 U.S.C. § 1326(a), where the government fails to show that, after the first prosecution of the defendant for being found in the United States, the defendant was removed from the country and later reentered the country illegally. The Tenth Circuit concluded Herrera-Salazar’s second prosecution did not violate double jeopardy.

But as other circuits have recognized, the found in offense in § 1326(a) is a continuing offense that is completed when the defendant is “found” in the United States, *i.e.*, when the defendant is arrested. *See United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996) (found in violation of § 1326 is a continuing offense), *cert. denied*, 517 U.S. 1228 (1996); *United States v. Are*, 498 F.3d 460, 462 (7th Cir. 2007) (the found in offense is a *continuing offense* for which the statute of limitations does not run *until the illegal conduct is terminated, i.e., when the defendant is discovered by authorities or arrested by them*); *see also United States v. Romero-Lopez*, 981 F.3d 803, 804 (10th Cir. 2020) (the “crime of illegal reentry begins when a noncitizen returns to this country after removal and continues until he or she is ‘found’ in the United States”), citing *United States v. Villarreal-Ortiz*, 553 F.3d 1326, 1330 (10th Cir. 2009) (*per curiam*). Against this

legal backdrop, Petitioner Herrera-Salazar asserts his Double Jeopardy rights were violated by his prosecution in this case because he was previously prosecuted and imprisoned for the same offense in Texas in 2020.

The government prosecutes Herrera-Salazar in Texas in 2020 for being found in the United States based on a 2015 removal and a post-2015-removal reentry.

Herrera-Salazar was previously removed from the United States on February 12, 2015 and reentered the United States knowingly after February 12, 2015. *See* Appendix at 30, 28. In May 2020, Border Patrol Agents encountered Herrera-Salazar near Brownsville, Texas. Appendix at 30. Herrera-Salazar was charged and later pled guilty in the Southern District of Texas (Case No. 1:20CR00355-001) (“the Texas case”) to one count of Alien Unlawfully Found in the United States After Deportation, 8 U.S.C. §§ 1326(a) and (b)(1)—the same found in charge as in the instant case. In the Texas case, he was sentenced to 15 months of imprisonment and 2 years of supervised release.

In June 2021, Herrera-Salazar was released from prison in Post, Texas. Following his release, however, he was not deported but instead was asked to give an address and phone number in the United States because he was being released on supervised release. He received a bus ticket from Texas to Heavener, Oklahoma, was taken to the bus station, and was told by prison officials that that he needed to report to the United States Probation Office in Muskogee, Oklahoma (in the Eastern District of Oklahoma) within 72 hours. He reported as instructed and was assigned a probation officer who visited him many times at his home during his

supervised release in Oklahoma. At trial in this case, he testified that his probation officer told him he could not go to Mexico and could not leave Oklahoma.

In April 2022, while still on supervised release in the Texas case, Herrera-Salazar is arrested in the Eastern District of Oklahoma and again charged with being found in the United States after having been previously removed based on the same 2015 removal and post-2015-removal reentry used in the Texas case. He moves to dismiss the indictment under the Double Jeopardy Clause.

On April 1, 2022, while still serving his supervised release in the Texas case, Herrera-Salazar was arrested in Heavener, Oklahoma, and indicted in the Eastern District of Oklahoma on one count of Unlawful Reentry of Removed Alien, under 8 U.S.C. §§ 1326(a) and (b)(1)—the identical charge in the Texas case and one based on the same 2015 removal and subsequent reentry. Appendix at 28, 30.

Herrera-Salazar moved to dismiss the indictment as barred by the Double Jeopardy Clause, arguing the indictment in the Eastern District of Oklahoma alleged the same offense as the Texas case for which he had pled guilty and received a prison sentence. The government argued that the two prosecutions involved separate violations of the law, even though both prosecutions were based on the same 2015 removal and the same subsequent reentry after Herrera-Salazar's 2015 removal but before his 2020 arrest. The district court denied the motion to dismiss the indictment. At trial, a jury found Herrera-Salazar guilty. But the government never introduced evidence of a post-2015 removal. Herrera-Salazar was sentenced to 21 months of imprisonment followed by 3 years of supervised release.

On appeal to the Tenth Circuit, Herrera-Salazar again raised the double jeopardy issue, contending that the government's prosecution in the Eastern

District of Oklahoma violated his double jeopardy rights. The Tenth Circuit rejected that argument and affirmed. Appendix at 4-22 (Order and Judgment). Herrera-Salazar timely petitions for review.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit’s decision creates a conflict with the Ninth, Fifth, and Seventh Circuits because it treats the found in offense under 8 U.S.C. § 1326(a) as a continual offense, rather than as a continuing offense as the other circuits treat it. The petition should be granted to resolve the conflict between the Tenth Circuit’s and the Ninth, Fifth, and Seventh Circuits’ respective treatments of the found in offense. Because the found in offense is a continuing offense, double jeopardy barred Herrera-Salazar’s prosecution in the Eastern District of Oklahoma.

The Tenth Circuit panel ostensibly recognized that a found in offense under § 1326(a) “begins when a noncitizen returns to this country after removal and continues *until he or she is ‘found’ in the United States.*” Appendix at 13, quoting *Romero-Lopez*, 981 F.3d at 804 (emphasis added). But despite recognizing a found in offense is completed when the defendant is found in the United States, the court allowed a second prosecution of Herrera-Salazar after his found in offense had already been completed with his arrest in Texas in 2020—for which he had already been prosecuted and imprisoned. The Tenth Circuit’s decision here conflicts with the decisions of other circuits. Those decisions treat the found in offense as a continuing offense that begins with an illegal entry and ends when the defendant is found in the United States. The Tenth Circuit’s decision treats the found in offense as a *continual* offense, not a continuous one. Despite this inter-circuit conflict, the Tenth Circuit denied en banc review. This Court should grant review to address

and resolve the circuit conflict. This Court should reverse and hold that Herrera-Salazar's conviction in the Eastern District of Oklahoma violated the Double Jeopardy Clause.

Other Tenth Circuit decisions have explained that the crime of illegal reentry “begins when a noncitizen *returns to this country after removal* and continues *until he or she is ‘found’ in the United States.*” *Romero-Lopez*, 981 F.3d at 804 (emphasis added), citing *Villarreal-Ortiz*, 553 F.3d at 1330. After Herrera-Salazar's first found in offense, the Texas case, he was never removed from the United States. To the contrary, he was told by probation that he had to remain in the Eastern District of Oklahoma for his supervised release and that he could not go to Mexico. Under the quoted language of *Romero-Lopez*, a second found in offense could not begin until Herrera-Salazar returned to this country after removal, something that never occurred after his 2021 release from prison in Texas. Thus, a second, independent found in offense never began, meaning that the prosecution in the Eastern District of Oklahoma constituted a second prosecution for the same offense—a patent double jeopardy violation. The Tenth Circuit's contrary conclusion below conflicts with the quoted language of *Romero-Lopez*. It also conflicts with the Tenth Circuit's decision in *Villarreal-Ortiz*, which said that in a case of surreptitious reentry, “the ‘found in’ offense *is first committed at the time of reentry and continues to the time when the defendant is arrested for the offense.*” 553 F.3d at 1328 (emphasis added).

The decision below also conflicts with decisions of the Fifth, Seventh, and Ninth Circuit, specifically (1) the language of the Fifth Circuit's decision in

Santana-Castellano, 74 F.3d at 598 (where “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*” (emphasis added)); (2) the language of the Seventh Circuit’s decision in *Are*, 498 F.3d at 462 (the found in offense is a continuing offense that ends when the defendant is discovered by authorities or arrested by them); and (3) the Ninth Circuit’s decisions in *United States v. Meza-Villarello*, 602 F.2d 209 (9th Cir. 1979) (per curiam), *cert. denied*, 444 U.S. 968 (1979), and *United States v. Sanchez-Aguilar*, 719 F.3d 1108 (9th Cir. 2013), *cert. denied*, 571 U.S. 938 (2013).

In *Meza-Villarello*, the defendant was deported as an alien in 1971. In 1975, he was convicted of violating § 1326. There was no evidence that he was deported following his prison sentence for that offense. He was again convicted of illegal reentry in 1979 following a 1978 arrest. On appeal, he argued that the district court had erred in refusing a tendered double jeopardy instruction. 602 F.2d at 209-10. The Ninth Circuit rejected that argument because after the defendant’s 1978 arrest, he had given an address in Mexico and had admitted to officers that he had crossed the border earlier on the day he was arrested. *Id.* at 211. Thus, on the facts, a second found in offense had occurred.

But addressing the double jeopardy concerns, the Ninth Circuit noted:

We do not believe Congress intended to require a separate official or formal act of deportation to precede each repeated violation of section 1326. *To avoid an unfair prosecution following an arrest at the prison gates, however, the government should be required to prove that the defendant had been outside the United States after each*

conviction before again prosecuting him for being 'found' within the United States in violation of 8 U.S.C. § 1326.

Id. (emphasis added). The Ninth Circuit noted, “We need not reach the double-jeopardy questions that might lurk in this case *had there been no evidence of a return to Mexico followed by a renewed presence in the United States after Meza-Villarello's next most recent conviction.*” *Id.* (emphasis added).

Here, unlike in *Meza-Villarello*, there was *no* evidence that Herrera-Salazar was removed from the United States after his 2020 Texas conviction and *no* evidence that he reentered the United States after that. Therefore, under *Meza-Villarello*, Herrera-Salazar’s conviction violated double jeopardy, and the Tenth Circuit’s contrary conclusion creates a conflict between the Ninth and Tenth Circuit’s double jeopardy case law in § 1326(a) cases.

In a later case, *Sanchez-Aguilar*, the Ninth Circuit noted that *Meza-Villarello* adopted the rule that under § 1326, “the same removal order can serve as the basis for more than one conviction, *so long as the government 'prove[s] that the defendant ha[s] been outside the United States after each conviction' before he is again prosecuted for violating § 1326.*” *Id.* at 1110 (emphasis added). The Ninth Circuit emphasized that it “adopted that rule, *grounded in double jeopardy concerns*, to avoid the specter of the government obtaining one § 1326 conviction and then, after releasing the defendant from prison, arresting him at the prison gates for again being ‘found in’ the United States.” *Id.* (emphasis added). Herrera-Salazar is the case the Ninth Circuit warned about.

Akin to these Ninth Circuit cases, the Seventh Circuit has held that the found in offense under § 1326(a) is a continuing offense, not a continual one. In *Are*, the Seventh Circuit concluded that because the found in offense is a continuing offense, the five-year statute of limitations for a found in offense did not begin to run until the defendant was arrested. The court said, “the statute of limitations generally does not begin to run for continuing offenses *until the illegal conduct is terminated.*” 498 F.3d at 462 (emphasis added). Defendant Are had illegally reentered the United States in 1998 but was not arrested until June 2005. Are’s illegal conduct commenced upon his 1998 illegal reentry and continued until his June 2005 arrest. *See id.* The statute of limitations did not begin until Are’s June 2005 arrest. Therefore, the defendant’s September 2005 indictment was not barred by the five-year statute of limitations.

Under *Are*’s reasoning and rationale, Herrera-Salazar’s illegal conduct ended and his found in offense was completed with his 2020 arrest in Texas. Because there was no removal and illegal reentry after that arrest, the arrest in Oklahoma in 2022 was for the same found in offense that ended in 2020. The prosecution in Oklahoma thereby violated double jeopardy as it tried Herrera-Salazar twice for the same offense.

Similarly, the Fifth Circuit has also held the found in offense under § 1326(a) to be a continuing offense. In *Santana-Castellano*, the Fifth Circuit addressed a sentencing enhancement issue that turned on whether the found in offense is a continuing one or not. *See generally* 74 F.3d at 596-98. Rejecting the defendant’s

argument that it was not a continuing offense, the Fifth Circuit explained, “Where 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,’ to use the Supreme Court's language.” 74 F.3d at 598 (emphasis added).

Unlike these other circuits, the Tenth Circuit’s decision here does not treat the found in offense under § 1326(a) as a continuing offense but instead treats it as a “continual” offense, one that occurs and is completed over and over again. Had the Tenth Circuit properly treated it as a continuous offense, the court would have reversed on double jeopardy grounds. *See Meza-Villarello* and *Santana-Castellano*, *supra*. For double jeopardy purposes, the found in offense is completed when the defendant is found, which completes the offense and terminates the illegal conduct. A new found in offense cannot begin thereafter until the defendant is removed and later reenters the country. The Tenth’s Circuit contrary conclusion conflicts with the Ninth Circuit’s decisions in *Meza-Villarello* and *Sanchez-Aguilar*, and with the Fifth and Seventh Circuit’s (correct) conclusions that the found in offense is a continuing one that terminates upon the defendant’s arrest (i.e., his being found). Under the Ninth, Fifth, and Seventh Circuit’s decisions, Herrera-Salazar’s conviction here violated double jeopardy because his found in offense ended upon his arrest in Texas in 2020. No new offense commenced thereafter. Accordingly, the prosecution in Oklahoma was for the same offense for which Herrera-Salazar

was previously prosecuted in Texas, and therefore the Oklahoma prosecution violated double jeopardy.

The government never explained how a new offense began after Herrera-Salazar's 2020 arrest in Texas. What the government argued here, and what the Tenth Circuit's decision means, is not that the found in offense is a "continuing offense" but instead that it is a *continual* offense, that is, one that occurs over and over, every day an alien is in the United States after an illegal reentry. But an offense can either be a continuing one or a continual one. It cannot be both because they are mutually exclusive. The Tenth Circuit's decision thus creates a patent conflict with the Ninth, Fifth, and Seventh Circuits.

The Tenth Circuit's treatment of found in offenses as continual offenses rather than continuing ones produces a troubling result that conflicts with the other circuits' decisions. Under the Tenth Circuit's reasoning, the government has the power to arrest an alien *every day* and charge a separate found in offense for *each daily arrest*, an absurd result. Yet the Tenth Circuit's opinion gives the government carte blanche to do so. By contrast, the rule in *Meza-Villarello* and *Sanchez-Aguilar* prohibits that absurdity and would bar Herrera-Salazar's conviction here.

Contrary to the Tenth Circuit's decision below, the found in offense is a continuing one completed as soon as the defendant is found in the United States. The Tenth Circuit's decision conflicts with the Ninth Circuit, Fifth Circuit, and Seventh Circuit's treatment of the found in offense as a continuing offense. The only way to resolve this conflict is for this Court to grant review.

CONCLUSION

The Court should grant this petition, address this case on its merits, and reverse Herrera-Salazar's conviction as violating the Double Jeopardy Clause.

Respectfully submitted,

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