No. 25-6989

IN THE SUPREME COURT OF THE UNITED STATES

JESUS HERRERA-SALAZAR, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment prohibits the prosecution of a defendant who, after being convicted of illegal reentry in violation of 8 U.S.C. 1326(a), remains in the country without lawful status and is subsequently "found in[] the United States," ibid., by law enforcement.

PARTIES TO THE PROCEEDING

Petitioner is Jesus Herrera-Salazar. Respondent is the United States of America.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Herrera-Salazar, No. 06-cr-289 (Dec. 19, 2006)

United States v. Herrera-Salazar, No. 08-cr-380 (May 21, 2009)

United States District Court (S.D. Tex.):

United States v. Herrera-Salazar, No. 14-po-7416 (July 24, 2014)

United States v. Herrera-Salazar, No. 20-cr-355 (Dec. 7, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 4-22) is available at 2025 WL 2741693.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 2025. A petition for rehearing was denied on November 10, 2025. Pet. App. 24. On January 14, 2026, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including March 10, 2026. The petition for a writ of certiorari was filed on March 4, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Oklahoma, petitioner was convicted of illegal presence in the United States after removal, in violation of 8 U.S.C. 1326(a) and (b)(1). 23-cr-56 Judgment 1. The district court sentenced petitioner to 21 months of imprisonment, to be followed by three years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. 4-22.

1. Petitioner, a citizen of Mexico, has been removed from the United States -- and has subsequently illegally reentered the country -- on numerous occasions over the last 21 years. See 23-cr-56 Presentence Investigation Report (PSR) ¶¶ 11-12, 33-35, 44. Petitioner first entered the United States in 1999, was convicted of domestic abuse in 2002 and 2005, and was removed to Mexico in June 2005. PSR ¶¶ 12, 28-30, 47. He then unlawfully reentered the United States in July 2005; was removed in August 2005; unlawfully reentered in June 2006; was removed in May 2007; unlawfully reentered in May 2008; was removed in May 2010; unlawfully reentered in July 2014; was removed in February 2015; and unlawfully reentered in March 2018. PSR ¶ 12.

Petitioner's final unlawful reentry resulted in criminal proceedings. In 2020, a police officer encountered him just north of the U.S.-Mexico border in Brownsville, Texas. PSR ¶ 35. Petitioner admitted that he had illegally reentered the United States on March 15, 2018, by crossing the Rio Grande River. Ibid.

A federal grand jury in the Southern District of Texas indicted petitioner on one count of illegally reentering the United States following removal, in violation of 8 U.S.C. 1326(a) and (b)(1). 20-cr-355 Indictment 1. Section 1326(a) makes it unlawful for an alien who has been removed from the United States to "enter[], attempt[] to enter, or [be] at any time found in, the United States," unless he has obtained (or is exempt from needing to obtain) government consent. 8 U.S.C. 1326(a)(2). Here, the grand jury alleged that petitioner was "found in" the Southern District of Texas "[o]n or about May 16, 2020," after being "previously denied admission, excluded, deported, and removed," and without having obtained the consent of the Attorney General or the Secretary of Homeland Security to reapply for admission to the United States. Ibid. Petitioner pleaded guilty, and the district court sentenced him to 15 months of imprisonment, to be followed by two years of supervised release. PSR ¶ 35.

2. Upon completing his term of imprisonment in June 2021, petitioner relocated to the Eastern District of Oklahoma. PSR ¶¶ 35, 47. On April 1, 2022, law enforcement in Oklahoma conducted a traffic stop of a vehicle in which petitioner was a passenger. PSR ¶ 9. During the stop, officers found a glass pipe containing methamphetamine residue and a plastic bag holding a large amount of methamphetamine near petitioner's seat. Ibid. Law enforcement arrested petitioner and ran his name through a database, which yielded "a positive hit through the United States Citizenship and

Immigration Services" (USCIS). PSR ¶¶ 9-10, 43. USCIS later confirmed that petitioner was unlawfully present in the United States. PSR ¶ 10.

A federal grand jury in the Eastern District of Oklahoma indicted petitioner on one count of violating 8 U.S.C. 1326(a) and (b)(1). Pet. App. 28. The grand jury alleged that petitioner was "found in" the Eastern District of Oklahoma "[o]n or about April 1, 2022," after having been "previously denied admission, excluded, deported, and removed from the United States * * * on or about February 12, 2015," and without having obtained the consent of the Attorney General or the Secretary of Homeland Security to reapply for admission to the United States. Ibid.

Petitioner moved to dismiss the indictment under the Double Jeopardy Clause of the Fifth Amendment, asserting that he had been convicted and sentenced in the Southern District of Texas for the same crime. 23-cr-56 Doc. 22, at 1-3. The district court denied the motion. 23-cr-56 Doc. 29, at 1-2. Observing that the Texas indictment charged petitioner with violating Section 1326(a) in May 2020 while the Oklahoma indictment charged petitioner with violating Section 1326(a) a second time in April 2022, the court explained "that the Double Jeopardy Clause is inapplicable to 'two reentry prosecutions involv[ing] entirely separate violations of the law' on separate dates." Ibid. (quoting United States v. Valencia-Martinez, 153 Fed. Appx. 545, 547 (10th Cir. 2005)).

Following a jury trial, petitioner was convicted of illegal reentry. PSR ¶ 7. The district court sentenced him to 21 months of imprisonment, to be followed by three years of supervised release. 23-cr-56 Judgment 2-3.

3. Although he was removed in 2024 after his release from prison, petitioner appealed his conviction. See Pet. App. 4, 9 n.6. In that appeal, petitioner renewed his double-jeopardy claim, contending that the government should have been required to prove that, after his Texas illegal-reentry conviction, he had been removed from and then had unlawfully reentered the United States. Pet. C.A. Br. 9-10. Petitioner also challenged the sufficiency of the evidence supporting his conviction. Id. at 20-22.

The court of appeals affirmed in an unpublished disposition. Pet. App. 4-22. As relevant here, the court explained that, when a defendant who was previously deported is charged under 8 U.S.C. 1326(a) with being "at any time found in" the United States -- as opposed to "enter[ing]" or "attempt[ing] to enter" the United States, 8 U.S.C. 1326(a)(2) -- "[t]he proscribed offense * * * is not necessarily the entry itself, but the [defendant's] unlawful presence," Pet. App. 12-13. And based on the "plain text" of Section 1326(a), the court determined that petitioner's Texas offense "was completed on May 16, 2020, when a border patrol agent discovered him," while his Oklahoma offense was completed "on April 1, 2022, when an officer verified his undocumented status" during the traffic stop. Id. at 15-16. The court thus concluded that the Oklahoma indictment was "based on an independent criminal offense" and its prosecution "was not a double jeopardy violation." Id. at 16. The court noted that petitioner was on supervised release in Oklahoma, and had been instructed by his probation officer not to leave the Eastern District of Oklahoma, but observed that petitioner did not contend that his reentry after his 2015 removal had been "involuntary," and found that the terms of his supervised release were immaterial to his double-jeopardy argument. Id. at 17-18; see id. at 7. The court further noted that he had not "raise[d] a due process claim in the district court or on appeal." Id. at 10 n.7.

ARGUMENT

Petitioner renews his contention (Pet. 6-12) that his Oklahoma conviction violated the Double Jeopardy Clause, on the theory that the illegal-reentry statute, 8 U.S.C. 1326(a), requires an independent predicate removal and reentry before each prosecution that charges a defendant with being "at any time found in" the United States. The court of appeals correctly rejected that atextual reading of Section 1326(a), and its unpublished disposition does not conflict with any decision of this Court or the controlling precedent of any other court of appeals. Further review is unwarranted.

1. a. The Double Jeopardy Clause provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The Clause prohibits "a

second prosecution for the same offense after acquittal," "a second prosecution for the same offense after conviction," and "multiple punishments for the same offense." Ohio v. Johnson, 467 U.S. 493, 498 (1984) (quoting Brown v. Ohio, 432 U.S. 161, 165 (1977)).

"Where successive prosecutions are at stake," the Double Jeopardy Clause shields "the accused from attempts to relitigate the facts underlying a prior acquittal and from attempts to secure additional punishment after a prior conviction and sentence." Brown, 432 U.S. at 165-166. But the Clause imposes "[f]ew, if any limitations * * * on the legislative power to define offenses." Sanabria v. United States, 437 U.S. 54, 69-70 (1978). Indeed, the Constitution assigns to Congress the role of federally proscribing criminal conduct and determining whether such conduct amounts to one or more violations of a single statute. See United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952).

b. The court of appeals correctly rejected petitioner's double-jeopardy claim based on the "plain text" of Section 1326(a). Pet. App. 5, 15.

To obtain a conviction for illegal reentry, the government must prove that a defendant (i) is an alien; (ii) has been previously removed from the United States; (iii) thereafter entered, attempted to enter, or was "at any time found in" the United States; and (iv) lacked (or was exempt from needing to seek) the consent of the proper legal authority to reapply for admission. 8 U.S.C. 1326(a); Pet. App. 21. As the court of appeals explained, the third element sets out three distinct actus rei, the third of which -- being "at any time found in" the United States -- does not require proof of precisely when or where the defendant reentered the country after a previous removal. Id. at 13-14. Rather, the government need only prove that, "at any time" after that previous removal, the defendant was "found in" the United States, which occurs when the government, "'through the exercise of diligence typical of law enforcement,' becomes aware of the illegality of [the defendant's] presence." Id. at 14-15 (quoting United States v. Villarreal-Ortiz, 553 F.3d 1326, 1330 (10th Cir. 2009)); see id. at 15-16 (recognizing that the "'found in' language of [Section] 1326(a) is synonymous with 'discovered in'" (citation omitted)).

After considering the statutory text, the court of appeals correctly determined that the indictment in the Southern District of Texas and the indictment in the Eastern District of Oklahoma charged petitioner with separate offenses. Pet. App. 15-16. In the first case, petitioner was charged with violating Section 1326(a) when law enforcement found him in Texas in 2020 -- after his 2015 removal -- and arrested him. Pet. App. 15. In the second case, petitioner was charged with violating Section 1326(a) when, two years later in 2020, a different law-enforcement officer in a different jurisdiction encountered him during a traffic stop and arrested him. Id. at 16. As the court of appeals explained, the "plain text" of Section 1326(a) provides no "indication that a 'found in' crime must begin with an independent predicate reentry." Id. at 15. Indeed, on petitioner's reading, a once-removed defendant who remains indefinitely in the United States unlawfully following an illegal-reentry conviction would be forever immune from punishment under Section 1326(a) for that conduct.

c. Petitioner points to nothing in Section 1326(a)'s text that would support his double-jeopardy claim. He instead asserts (Pet. 7, 11-12) that the government failed to prove additional facts not required by the text of Section 1326(a) in his Oklahoma prosecution -- namely, that he was removed from and reentered the United States after his 2020 conviction in Texas -- and therefore failed to establish that he was again "found in" the United States in 2022. In his view, the offense is a "continuing offense" that continues until the defendant is found in the United States but must begin with a previous removal and "return[] to this country." Pet. 6, 7. He is correct that there must be a prior removal, but the statute does not require each "found in" offense to be preceded by a unique removal and reentry.

2. The decision below does not implicate any division of authority in the courts of appeals. As a threshold matter, the court of appeals' unpublished disposition is not precedential and thus made no law that is binding in any future case. Pet. App. 4 n.*. In fact, petitioner contends that the Tenth Circuit has previously adopted his preferred interpretation of Section 1326(a) in binding precedent. See Pet. 7 (citing United States v. Romero-

Lopez, 981 F.3d 803 (10th Cir. 2020)). Petitioner has thus identified, at most, a conflict between published and unpublished decisions of the same court of appeals. Such an intra-circuit conflict does not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Petitioner further contends (Pet. 7-8) that the unpublished disposition in his case "conflicts with decisions of the Fifth, Seventh, and Ninth Circuit[s]," but he cites no decision from any circuit that affirmed the dismissal of a charge under Section 1326(a) on double-jeopardy grounds. The cases that petitioner cites from the Fifth and Seventh Circuits do not mention the Double Jeopardy Clause at all. In United States v. Santana-Castellano, 74 F.3d 593, cert. denied, 517 U.S. 1228 (1996), the Fifth Circuit held that, for purposes of determining under the Sentencing Guidelines when a defendant committed an offense, a violation of Section 1326(a) terminates when a defendant's unlawful presence "is discovered" by law enforcement. Id. at 598. And in United States v. Are, 498 F.3d 460 (2007), the Seventh Circuit declined to decide whether the statute of limitations under Section 1326(a) begins to run on "the date of [a defendant's] actual 'discovery'" or on "the date of his arrest." Id. at 462, 466-467. Neither decision addresses, let alone contradicts, the court of appeals' determination in petitioner's case that the "plain text" of Section

1326(a) provides no "indication that a 'found in' crime must begin with an independent predicate reentry." Pet. App. 15.

The Ninth Circuit case on which petitioner primarily relies (Pet. 8-9) expressly declined to "reach the double-jeopardy questions that might lurk" in circumstances similar to petitioner's. United States v. Meza-Villarello, 602 F.2d 209, 211 (per curiam), cert. denied, 444 U.S. 968 (1979). There, a defendant who was twice convicted under 8 U.S.C. 1326 after he was "found in" the United States in 1975 and again in 1978 appealed the district court's rejection of a jury instruction in his second prosecution that was "tendered upon a double-jeopardy theory." Id. at 210. In declining to reach the defendant's double-jeopardy claim, the Ninth Circuit (like the decision below) determined that Congress did not "intend[] to require a separate official or formal act of deportation to precede each repeated violation of section 1326." Id. at 211; see id. at 210 (noting that the contrary argument "is not supported by the words of the statute or by its history").

The Ninth Circuit did, however, state that "[t]o avoid an unfair prosecution following an arrest the prison gates," the government "should be required to prove that the defendant had been outside the United States after each conviction before again prosecuting him" under Section 1326. Meza-Villarello, 602 F.2d at 211. But as the facts of that case illustrate, the Ninth Circuit did not require that the trip outside the United States be a "removal." See ibid. Petitioner therefore overreads the Ninth

Circuit's atextual gloss as concluding that "[a] new found in offense cannot begin * * * until the defendant is removed and later reenters the country." Pet. 11 (emphasis added). Regardless, even with regard to the actus reus of being found in the United States, the decision below properly recognized that the reference in Meza-Villarello to "unfair prosecution" -- in a decision that disclaimed reaching double-jeopardy questions -- makes it unclear that "the Ninth Circuit removal rule concerns double jeopardy at all." Pet. App. 19; cf. United States v. Sanchez-Aguilar, 719 F.3d 1108, 1111 n.1 (9th Cir. 2013) (describing the rule as "grounded in double jeopardy concerns" but also recognizing that "no double jeopardy concerns were raised" under the facts of Meza-Villarello).

To the extent that Meza-Villarello was directed to concerns about fairness, the decision below noted that petitioner had not raised a due-process claim. Pet. App. 10 n.7, 19. Nor has he raised, either in the district court, the court of appeals, or this Court, any other claim based on an assertion that his unlawful presence in Oklahoma was involuntary due to the terms of his supervision. To the extent that such a theory might have been asserted in this case, or could still be asserted on collateral review, any such contentions do not implicate the Double Jeopardy Clause issue presented by his petition for a writ of certiorari.

Moreover, even assuming that the "avoid[ing] unfair prosecution" remark in the per curiam decision in Meza-Villarello were in some tension with the unpublished disposition below, any such tension would not warrant this Court's review at this juncture.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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