

No. 25-6989

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

REPLY IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI

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ARGUMENT

The government notes that Herrera-Salazar’s “final unlawful reentry resulted in criminal proceedings.” Response at 2. Precisely. That one reentry spawned two criminal prosecutions for violating 8 U.S.C. § 1326(a), creating the double jeopardy issue the Court should review.

The government concedes that there must be a prior removal before there can be a prosecution for illegal reentry under § 1326(a), but it contends “the statute does not require each ‘found in’ offense to be preceded by a unique removal and reentry.” Response at 9. The government thus wants to have its cake and eat it too, treating violations of § 1326(a) as continuous offenses or continual ones when it serves its purposes.

But properly interpreted, § 1326(a) creates a continuous offense only, that is, one that commences when a noncitizen returns to the United States after a removal (or voluntary absence from the country) and continues until he or she is “found” in the United States—the point of arrest. The continuous offense is completed at that point. *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) (same).

But here, the government treated the found in offense as a *continual* offense, one that does not require an absence from the United States before a second offense can begin—contrary to *Santana-Castellano* and *Are*, which hold it is a *continuous* offense. The Tenth Circuit below agreed with the government by allowing the second prosecution of Herrera-Salazar and thereby treating the found in offense

under the statute not as a continuous one but as a continual one. The Tenth Circuit’s decision thereby conflicts with *Santana-Castellano* and *Are*. The government largely ignores this conflict by instead noting only that those decisions provide no indication that the found in offense must begin with an *independent* predicate reentry. Response at 10-11. But the government fails to explain how the statute can create both a continuous offense and a continual one and thereby fails to explain away the conflict the Tenth Circuit has created with the Fifth and Seventh Circuit decisions.¹

Nor does the government persuasively explain away the conflict between the decision below and the Ninth Circuit’s decisions in *United States v. Meza-Villarelo*, 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). The government contends, instead, that Herrera-Salazar “overreads the Ninth Circuit’s atextual gloss” as requiring that a new found in offense cannot begin until the defendant is removed and later reenters the country. Response at 11-12. Wrong. The government “underreads” the Ninth Circuit’s decisions. The only reason the Ninth Circuit in *Meza-Villarelo* did not have to

¹ Attempting to downplay the conflict, the government states that “Upon completing his term of imprisonment in June 2021, petitioner *relocated* to the Eastern District of Oklahoma.” Response at 3 (emphasis added). The government fails to tell the Court that Herrera-Salazar went to Oklahoma to serve a term of supervised release. He was under supervised release there when he was arrested for the instant offense. It was the government that had him under supervision in the Eastern District of Oklahoma and sent him there rather than remove him from the United States. Therefore, the government created this double jeopardy issue through its own actions.

decide the double jeopardy issue on its merits was that the defendant in *Meza-Villarelo* had admitted to officers that he had crossed the border back into the United States earlier on the day he was arrested for the second offense. 602 F.2d at 211. Thus, the predicate presence-outside-the-country-before-reentry requirement was met: “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-Villarelo's next most recent conviction.*” *Id.* (emphasis added). But here there was no evidence that Herrera-Salazar returned to Mexico or otherwise left the United States after his release following service of his prison term for the first offense. The facts here are the exact double jeopardy problem *Meza-Villarelo* identified, and the conflict between this case and *Meza-Villarelo* is patent.

The government also argues that Herrera-Salazar overreads *Meza-Villarelo* as requiring a subsequent removal and that the Ninth Circuit does “not require that the trip outside the United States be a ‘removal.’” Response at 11. Herrera-Salazar does not mean to imply that an involuntary removal is required or that a voluntary absence from the United States would not satisfy the Ninth Circuit’s requirement of a subsequent absence from the country before the second § 1326(a) offense can begin. Removal or voluntarily leaving the country both suffice to satisfy the Ninth Circuit’s double jeopardy concern. But that fact does not affect the double jeopardy problem here nor the conflict in the case law. Here, it is undisputed that Herrera-Salazar never left the United States after his release from prison in Texas after

serving his sentence for the first § 1326(a) conviction—the government sent him to Oklahoma to serve his supervised release. There was no removal or voluntary absence from the country that could satisfy the Ninth Circuit’s double jeopardy concern. Thus, the conflict between the decision below and the Ninth Circuit’s cases is front and center here and remains unresolved.

Tellingly, the government all but ignores the Ninth Circuit’s decision in *Sanchez-Aguilar*, referencing it only in passing in a citation. *See* Response at 12. But *Sanchez-Aguilar* is central to the double jeopardy issue here and illustrates the conflict created by the decision below. *Sanchez-Aguilar* reaffirmed the double jeopardy requirement from *Meza-Villarelo*, with the Ninth Circuit noting 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.” 719 F.3d at 1110. Herrera-Salazar’s case is the case the Ninth Circuit warned about.

Moreover, *Sanchez-Aguilar* was a split decision that turned on whether the fact of the defendant’s presence outside the country before another prosecution could commence was a jury question or not. The majority noted that proof of the defendant’s post-first-offense departure from the country, “*although necessary to avoid double jeopardy concerns*, was not an element of the § 1326 offense *submitted to the jury*.” 719 F.3d at 1110 (emphasis added). The dissenting judge, on the other hand, would have reversed the defendant’s conviction on insufficiency-of-the-

evidence grounds because the government failed to prove the defendant had been outside the United States since his prior § 1326(a) conviction—the same factual deficiency present here. *See Sanchez-Aguilar*, 719 F.3d at 1111-14 (Fitzgerald, J., dissenting). *Sanchez-Aguilar* left no doubt that in order for a later § 1326(a) prosecution to comply with double jeopardy, the defendant must be outside the United States after the first offense but before the second offense commences. The Tenth Circuit below rejected Herrera-Salazar’s double jeopardy claim and thus disagreed with *Sanchez-Aguilar*. While the government ignores the importance of *Sanchez-Aguilar*, the case demonstrates the double jeopardy concern present here and illustrates the unresolved conflict between the decision below and Ninth Circuit precedent.

The government concedes that Herrera-Salazar “is correct that there must be a prior removal,” Response at 9, but claims “the statute does not require each ‘found in’ offense to be preceded by a unique removal and reentry.” Response at 9. But that is precisely the conflict that exists and warrants this Court’s review. The Ninth Circuit concludes that to comply with the Double Jeopardy Clause, the statute must be interpreted to require a “unique removal [or voluntary absence from the country] and reentry.”

The government criticizes the petition for citing “no decision from any circuit that affirmed the dismissal of a charge under Section 1326(a) on double-jeopardy grounds.” Response at 10. But as noted, the government failed to discuss *Sanchez-Aguilar*, particularly the dissenting opinion in that case. The dissent in *Sanchez-*

Aguilar would have reversed the defendant's conviction and remanded for entry of a judgment of acquittal because the government failed to prove "that the defendant has been outside the United States since the prior Section 1326 conviction." 719 F.3d at 1112 (Fitzgerald, J., dissenting). The majority in *Sanchez-Aguilar* would have found a double jeopardy problem but for evidence that the defendant had been outside the country between the first and second offenses. *See* 719 F.3d at 1110. The government wants this Court to ignore the double jeopardy conflict that exists.

Without resolution from this Court, this double jeopardy issue will not go away. This case presents the perfect vehicle to resolve the issue and the conflicts between the Ninth, Fifth, and Seventh Circuits and the Tenth Circuit. The facts and procedure here are simple and straightforward and essentially undisputed. And given the extensive ongoing immigration enforcement activities today, cases like this are likely to recur more frequently in the future. Accordingly, this Court should 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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