

Statement of SOTOMAYOR, J.

SUPREME COURT OF THE UNITED STATES

JESUS HERRERA-SALAZAR v. UNITED STATES

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

No. 25–6989. Decided October 13, 2026

The petition for a writ of certiorari is denied.

Statement of JUSTICE SOTOMAYOR, with whom JUSTICE GORSUCH joins, respecting the denial of certiorari.

Jesus Herrera-Salazar was indicted in 2020 on one count of being “found in” the United States following removal, in violation of 8 U. S. C. §1326(a). He pleaded guilty and served his term of imprisonment. While on supervised release, during which he was expressly instructed not to leave the Eastern District of Oklahoma, Herrera-Salazar was pulled over in a traffic stop in Heavener, Oklahoma, and once again arrested and indicted under §1326(a). He was convicted by a jury and sentenced to new terms of imprisonment and supervised release. Because I hope the facts of this case are anomalous and because Herrera-Salazar has since been removed from the United States, I concur in the Court’s decision not to grant review in this case. I write, however, to underscore the serious constitutional problems that plague the Government’s treatment of Herrera-Salazar.

After being once convicted and punished for being found in the United States and, as part of his original sentence, prohibited from leaving the United States, Herrera-Salazar was convicted and punished for being found in the United States a second time. As an initial matter, it is not clear that the statutory language “found in . . . the United States” can fairly be read to encompass a person who has already been found by the Government and compelled to remain in the United States under Government supervision. Even assuming that it can, however, Herrera-Salazar’s second

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conviction is difficult to square with the Constitution’s admonition that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” Amdt. 5. As our precedents explain, “the Double Jeopardy Clause protects against a second prosecution for the same offense after conviction.” *Currier v. Virginia*, 585 U. S. 493, 501 (2018) (internal quotation marks omitted). The question in a case like this is what constitutes the “same offense.”

In rejecting Herrera-Salazar’s double jeopardy objections, the Tenth Circuit looked to the text of §1326(a) to answer that question. It concluded that because the “allowable unit of prosecution” did not require a separate predicate reentry for each violation of the statute, see *Sanabria v. United States*, 437 U. S. 54, 69 (1978), each of Herrera-Salazar’s prosecutions and convictions was for a separate offense. By those lights, with a single unlawful reentry supplying the necessary statutory predicate, a person in Herrera-Salazar’s shoes can be subjected to repeated, limitless “found in” charges without offending the Constitution.

“The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.” *Brown v. Ohio*, 432 U. S. 161, 169 (1977). Yet that is just what the Government did here. Herrera-Salazar was convicted of “a crime which was continuous, extending over the whole period” he was present in the United States after his previous removal and reentry. *In re Nielsen*, 131 U. S. 176, 187 (1889). That continuous crime plainly could not have concluded until the Government allowed Herrera-Salazar to leave the country. Because the crime of being found in the United States was thus still ongoing at the time of his second arrest, the Government’s theory rests on the premise that Herrera-Salazar could be charged, convicted, and punished twice solely “because the charges against him focused on different parts of” his compelled continuous presence in the United States.

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Brown, 432 U. S., at 169 (recognizing a double jeopardy violation where the petitioner faced two charges based on two points of time within a continuous “9-day joyride”).

When a defendant is convicted of a crime that involves continuous, uninterrupted conduct, our precedents and the logic of the Double Jeopardy Clause strongly suggest that the Government is barred from charging that defendant with the same continuous crime for a second time simply by focusing on a different time marker. That makes sense. Were it otherwise, there might be “‘an indictment covering each of the . . . months’” of the continuous crime, “‘or even an indictment covering every week.’” *In re Nielsen*, 131 U. S., at 186. There is even more force to this double jeopardy objection where the Government itself effectively forbids the defendant to cease his unlawful conduct. Here, indeed, the Government might have charged Herrera-Salazar with a separate violation of §1326(a) for each day that he was “found in” prison while serving his sentence for the first conviction. Absurd as that seems, it is a logical outgrowth of the Government’s contention that Herrera-Salazar’s second §1326(a) conviction poses no double jeopardy problem.

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From the moment he was released from custody after serving his first term of imprisonment, Herrera-Salazar was presented with a Hobson’s choice. In the Government’s eyes, whether Herrera-Salazar remained in the Eastern District of Oklahoma or left the United States, he would be breaking the law. While Herrera-Salazar was caught in this bind, the Government prosecuted and punished him yet again for being “found in” the United States, even though all agree he was forbidden to leave the United States. Should circumstances like these arise again, I encourage courts to avoid the constitutional absurdity that occurred here and give the Double Jeopardy Clause its full weight and meaning.