

2015

# Involuntary Return and the “Found In” Clause of 8 U.S.C. § 1326(a): An Immigration Conundrum

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### Recommended Citation

Matthew J. Geyer, *Involuntary Return and the “Found In” Clause of 8 U.S.C. § 1326(a): An Immigration Conundrum*, 83 Fordham L. Rev. 2091 (2015).

Available at: <http://ir.lawnet.fordham.edu/flr/vol83/iss4/14>

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**INVOLUNTARY RETURN AND  
THE “FOUND IN” CLAUSE OF 8 U.S.C. § 1326(A):  
AN IMMIGRATION CONUNDRUM**

*Matthew J. Geyer\**

*Illegal reentry into the United States by previously removed aliens is a major problem that has risen steadily in recent years. 8 U.S.C. § 1326(a) punishes such aliens. Specifically, § 1326(a) provides for criminal fines or imprisonment (or both) of any previously removed alien who enters, attempts to enter, or is “found in” the United States at any time after his or her initial removal.*

*What does it mean to be “found in” the United States in violation of § 1326(a)? The easy case is when a previously removed alien surreptitiously reenters the United States illegally, remains in the United States undetected for some time, and is then physically found by U.S. officials within the country’s borders. But, what happens when a previously removed alien surreptitiously reenters the United States illegally and remains undetected by U.S. officials until that alien subsequently attempts to leave the country and is involuntarily returned to the United States by foreign officials after physically crossing into that foreign territory? Should these aliens be considered “found in” the United States?*

*The Ninth Circuit has answered this question in the affirmative twice, while the Second Circuit has declined to consider such aliens to be “found in” the United States in violation of § 1326(a). This Note argues that the federal courts should adopt the Second Circuit’s holding for numerous legal and policy reasons that are consistent with major U.S. Supreme Court and circuit court decisions that have shaped U.S. immigration law since the beginning of the twentieth century.*

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INTRODUCTION

The Immigration and Nationality Act of 1952<sup>1</sup> (INA) has been described as a “hideous creature” containing “excruciating technical provisions that are often hopelessly intertwined.”<sup>2</sup> Codified under Title 8 of the United States Code,<sup>3</sup> the INA contains many ambiguous provisions that have left important questions relating to immigration unanswered and passionately contested. Key among such ambiguities are provisions of the INA that provide for criminal prosecution of previously removed aliens<sup>4</sup> who illegally reenter the United States.<sup>5</sup> Illegal reentry of previously removed aliens is a rising problem and is currently the most common federal immigration charge in the U.S. district courts.<sup>6</sup> In 2013 alone, the United States commenced 23,942 actions for immigration offenses in the district courts, with the offense of illegal reentry accounting for 20,120 (just over 84 percent) of these total actions.<sup>7</sup> Thus, ambiguities in certain provisions of the INA related to prosecuting these aliens are particularly concerning.

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1. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

2. STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1 (5th ed. 2009).

3. 8 U.S.C. §§ 1101–1537 (2012).

4. For the purpose of consistency, this Note adopts the INA’s definition of “alien” to mean any individual who is “not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3).

5. See Jason D. Anton, Note, *Defining “Found in”: Constructive Discovery and the Crime of Illegal Reentry*, 113 COLUM. L. REV. 1239, 1239–41 (2013).

6. U.S. COURTS, TABLE D-2, U.S. DISTRICT COURTS—CRIMINAL DEFENDANTS COMMENCED, BY OFFENSE, DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 2009 THROUGH 2013 (2013), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/D02DSep13.pdf>.

7. *Id.*

One of these provisions, 8 U.S.C. § 1326(a), relates specifically to punishing previously removed aliens who illegally reenter the United States.<sup>8</sup> It provides in relevant part:

[A]ny 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 . . . shall be fined under Title 18, or imprisoned not more than 2 years, or both.<sup>9</sup>

There are three ways a previously removed alien can violate the statute: (1) by entering the United States; (2) by attempting to enter the United States; or (3) by being “found in” the United States.<sup>10</sup> This Note focuses on how federal courts of appeals have applied the section’s “found in” clause to a particular group of aliens following an unusual immigration pattern.<sup>11</sup>

There are many questions surrounding what it actually means to be “found in” the United States in violation of § 1326(a).<sup>12</sup> The easy case is when a previously removed alien surreptitiously reenters the United States illegally, remains undetected for some time, and is later physically found by U.S. officials within the country’s borders. However, a much harder case—one that has been adjudicated by federal courts of appeals three times since 2009<sup>13</sup>—is when a previously removed alien surreptitiously reenters the United States illegally, but remains undetected until the alien attempts to leave the country and is involuntarily returned to the United States by foreign officials after physically crossing into that foreign territory.

This Note focuses on the harder case: Should such aliens be considered “found in” the United States in violation of § 1326(a), and therefore subject to potential prison time? This issue has divided the Ninth and Second Circuits.<sup>14</sup> Beyond resolving the immediate conflict arising from the Ninth and Second Circuits’ differing interpretations of the “found in” clause, resolution of this split is important for additional reasons. First, previously removed aliens carrying out the same actions will face different treatment under the “found in” clause depending on the circuit in which they are present. This produces inconsistent results for an already complex immigration system.

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8. See 8 U.S.C. § 1326(a). Although this provision is also codified in the INA under section 276, this Note refers to the provision solely as § 1326(a) for consistency.

9. *Id.*

10. *Id.*; see also *infra* note 77 and accompanying text.

11. See *infra* Part II.

12. See Anton, *supra* note 5, at 1241.

13. See *infra* Part II.

14. See *United States v. Macias*, 740 F.3d 96, 102 (2d Cir. 2014) (holding that such aliens are *not* “found in” the United States); *United States v. Gonzalez-Diaz*, 630 F.3d 1239, 1240–41 (9th Cir. 2011) (holding that such aliens *are* “found in” the United States); *United States v. Ambriz-Ambriz*, 586 F.3d 719, 725 (9th Cir. 2009) (also holding that such aliens *are* “found in” the United States); see also *infra* Part II.

Second, in light of continued legislative inaction and controversial executive action in the area of immigration reform,<sup>15</sup> judicial action may be the only way to address fundamental uncertainties and problems facing the country's immigration landscape. As noted above, illegal reentry is the most common federal immigration charge in the U.S. district courts,<sup>16</sup> and the courts are in a unique position to remedy inconsistencies—like the one addressed in this Note—where the other branches of the government have continued to delay action.<sup>17</sup>

Lastly, the unusual immigration patterns in *United States v. Ambriz-Ambritz*,<sup>18</sup> *United States v. Gonzalez-Diaz*,<sup>19</sup> and *United States v. Macias*<sup>20</sup> pose a new kind of policy question not only for the courts but for American society: Should the United States criminally sanction previously removed aliens for attempting, albeit unsuccessfully, to stop living in the very country in which they are illegally present? This question drives at the very heart of the debate between the Ninth and Second Circuits over whether such aliens should be considered “found in” the United States in violation of § 1326(a).

Part I of this Note explores the history of the INA and § 1326(a), and discusses the meanings of the “enters,” “attempts to enter,” and “found in” clauses of the statute. Part I concludes with a discussion of the “official restraint” analysis, which can be used as a defense to a “found in” violation under § 1326(a).<sup>21</sup> Part II lays out the split between the Ninth and Second Circuits by articulating the facts of each case and each circuit's doctrinal and policy arguments for their differing interpretations of the “found in” clause. Part III argues that the federal courts should adopt the Second Circuit's interpretation as applied to the specific immigration pattern discussed in this Note for numerous legal and policy reasons.

#### I. A BRIEF HISTORY OF U.S. IMMIGRATION LAW AND RELATED DOCTRINES

In order to understand this circuit split, it is important to contextualize § 1326(a) within the larger landscape of U.S. immigration law and to define the pertinent statutory language. Part I.A gives a brief overview of the INA and how it came into law. Part I.B takes a detailed look at § 1326(a), evaluating the congressional intent behind its passage, the meaning of its language, and its legislative history. Part I.C explores the meaning and history of the “official restraint” doctrine, which serves as a potential defense to a “found in” violation and helps to inform the Ninth and Second Circuit's reasoning in their decisions.

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15. See Ashley Parker, *Senate Democrats Parry Vote Tied to Immigration*, N.Y. TIMES, Feb. 5, 2015, at A18.

16. See *supra* notes 6–7 and accompanying text.

17. See Parker, *supra* note 15.

18. 586 F.3d 719 (9th Cir. 2009).

19. 630 F.3d 1239 (9th Cir. 2011).

20. 740 F.3d 96 (2d Cir. 2014).

21. See *infra* Part I.C.

A. *The Immigration and Naturalization Act: A “Hideous Creature”*

Since about 1875, the federal government has exercised exclusive power to regulate and control immigration in the United States.<sup>22</sup> In 1917, Congress passed the first comprehensive national immigration legislation with the Immigration Act of 1917,<sup>23</sup> in response to an influx of European immigration resulting from the federal government’s previously liberal immigration policy.<sup>24</sup> This Act codified the grounds for deportation and the process for deporting aliens, and it set forth a list of specific immigrant classes excluded from immigrating to the United States.<sup>25</sup>

In an effort to modernize, recodify, and consolidate all immigration and naturalization policies into a single act, Congress, in 1952, enacted the INA, also known as the McCarran-Walter Act.<sup>26</sup> The INA expanded the grounds for deportation and provided aliens with greater flexibility when choosing to which country they would be deported.<sup>27</sup> However, the expansion of deportation grounds led to great inconsistencies among courts in interpreting some of the Act’s provisions and confusion at the federal agency level over which of the various provisions the Attorney General should invoke during deportation hearings.<sup>28</sup> In response to continuing confusion and inconsistency, Congress has amended the INA numerous times since its initial passage in 1952.<sup>29</sup>

One of these amendments was the Illegal Immigration Reform and Immigrant Responsibility Act of 1996<sup>30</sup> (IIRIRA). Congress passed IIRIRA to reorganize the immigration process and provisions of the original INA of 1952 as well as to strengthen the presence of the Immigration and Naturalization Service (INS) in immigration proceedings.<sup>31</sup> Specifically, IIRIRA vastly expanded the grounds for deportation of noncitizens and reduced the availability of relief to such noncitizens.<sup>32</sup> IIRIRA also introduced expedited procedures for the removal of noncitizens and imposed additional restrictions on noncitizens seeking asylum.<sup>33</sup>

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22. See Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 795–96 (2008). Prior to 1875, the individual states played a major role in regulating immigration. For a detailed discussion on this point, see Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993).

23. Act of Feb. 5, 1917, ch. 29, 39 Stat. 874 (repealed 1952).

24. See Jamie Norman, *Accepting the Unacceptable: How Jama v. Immigration and Customs Enforcement Affects Deportation Policies with Non-Accepting Governments*, 26 J. NAT’L ASS’N ADMIN. L. JUDGES 159, 161–62 (2006).

25. *Id.* at 162.

26. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

27. See Norman, *supra* note 24, at 164.

28. *Id.* at 164–65.

29. See LEGOMSKY & RODRÍGUEZ, *supra* note 2, at 1.

30. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8, 18 U.S.C.); see also Kevin J. Fandl, *Immigration Posses: U.S. Immigration Law and Local Enforcement Practices*, 34 J. LEGIS. 16, 20 (2008).

31. Norman, *supra* note 24, at 167 n.24.

32. Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw. U. L. REV. 1281, 1345 (2010).

33. See LEGOMSKY & RODRÍGUEZ, *supra* note 2, at 22.

Additionally, IIRIRA changed some of the terminology of U.S. immigration law.<sup>34</sup> Prior to IIRIRA's passage, the law distinguished between noncitizens who were physically within the United States and those who were outside U.S. borders seeking entry.<sup>35</sup> Noncitizens who were already within the United States faced deportation proceedings for committing deportable offenses, while those seeking entry from outside of the United States faced exclusion proceedings if found to be inadmissible at the border.<sup>36</sup> While IIRIRA preserved separate criteria for deportability and inadmissibility,<sup>37</sup> it placed all deportable or inadmissible noncitizens in "removal" proceedings.<sup>38</sup> Therefore, today a noncitizen may be "removed" from the United States if found to be either inadmissible or deportable.<sup>39</sup>

### B. Section 1326(a): The Crime of Illegal Reentry

One of the provisions of the INA—8 U.S.C. § 1326(a)—relates to punishing aliens who illegally reenter the United States after previous removal.<sup>40</sup> The most current version of the statute provides that any individual who is "denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding" and "enters, attempts to enter, or is at any time found in, the United States" is guilty of a felony and "shall be fined under Title 18, or imprisoned not more than 2 years, or both."<sup>41</sup> The purpose of this provision was to impose a uniform penalty on any alien who returned to the United States without permission after deportation, regardless of the basis for the original deportation.<sup>42</sup>

As § 1326(a) indicates, there are three separate ways for a previously removed alien to violate the statute: (1) by entering the United States; (2) by attempting to enter the United States; or (3) by being "found in" the United States.<sup>43</sup> It is difficult to draw distinctions between these violations, especially between the crimes of "entering" and being "found in" the United States. It is also difficult to deduce the actual meaning of the terms "enters," "attempts to enter," and "found in." Nevertheless, each term has a

34. See Eagly, *supra* note 32, at 1289 n.39.

35. *Id.*

36. *Id.*

37. For a list of grounds for deportability, see 8 U.S.C. § 1227 (2012). For a list of inadmissibility grounds, see *id.* § 1182.

38. See Eagly, *supra* note 32, at 1289 n.39. Accordingly, this Note refers to all previously deported or excluded aliens as "previously removed" aliens.

39. See *id.*

40. See 8 U.S.C. § 1326(a).

41. *Id.* The statute also provides an exception for aliens who gain express approval from the Attorney General to reapply for admission into the United States and to aliens who were removed under certain excludability grounds that do not require advance approval from the Attorney General to reapply for admission. See *id.*

42. See *United States v. Mendoza-Lopez*, 481 U.S. 828, 835 n.10 (1987) (citing S. REP. NO. 81-1515, at 656 (1950)). Section 1326(b) of the statute relates to sentencing enhancements based on the category of crime that the alien was convicted of that triggered the initial removal proceedings. See 8 U.S.C. § 1326(b).

43. 8 U.S.C. § 1326(a); see also *infra* note 77 and accompanying text.



separate and distinct meaning,<sup>44</sup> and federal courts have used tools of statutory interpretation to define each term.<sup>45</sup> In doing so, the courts first have looked to the plain meaning of the statute, and then interpreted its language to give effect to Congress's intent in passing the statute.<sup>46</sup> Additionally, the courts have employed the canon against surplusage<sup>47</sup> when construing § 1326(a), avoiding interpretations that would render words redundant or meaningless.<sup>48</sup> Lastly, while legislative history may aid in statutory interpretation, determinative legislative history on § 1326(a) is practically nonexistent and therefore has not been used by the courts to construe the meaning of the statute's terms.<sup>49</sup>

This section discusses how the courts have defined the terms "enters," "attempts to enter," and "found in," using the tools of statutory interpretation noted above.<sup>50</sup>

### 1. The Meaning of "Enters"

Prior to 1952, statutes regulating immigration in the United States did not define the words "enter" or "entry."<sup>51</sup> This changed with the passage of the INA, which defined "entry" as "any coming of an alien into the United States from a foreign port or place."<sup>52</sup> However, after several amendments to the INA, the above definition is no longer in place.<sup>53</sup> Instead, case law has developed a more precise definition of "entry" that includes three requirements: "(1) a crossing into the territorial limits of the United States, i.e., physical presence; (2)(a) inspection and admission by an immigration officer, or (b) actual and intentional evasion of inspection at the nearest inspection point; and finally (3) freedom from official restraint."<sup>54</sup> All three requirements must be met in order to affect an "entry" into the United States.<sup>55</sup>

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44. See *infra* Part I.B.1–3.

45. See *infra* notes 77–79 and accompanying text.

46. See *United States v. DiSantillo*, 615 F.2d 128, 134 (3d Cir. 1980) (citing *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940)); see also *infra* notes 77–78.

47. The canon against surplusage is a tool of statutory interpretation stating that terms within a statute should be read broadly so that each term has a different and separate meaning from the other terms in the statute. See William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 573 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: INTERPRETATION OF LEGAL TEXTS* (2012)).

48. See *United States v. Canals-Jimenez*, 943 F.2d 1284, 1287 (11th Cir. 1991); *DiSantillo*, 615 F.2d at 135; see also *infra* note 77.

49. See *DiSantillo*, 615 F.2d at 135 (describing the legislative history of § 1326(a) as "barren").

50. See *infra* Part I.B.1–3.

51. *United States v. Vasilatos*, 209 F.2d 195, 197 (3d Cir. 1954).

52. *Id.*

53. See 8 U.S.C. § 1101 (2012). The term "entry" is no longer defined in this or any other section of the current INA. Rather, it has been replaced with the term "admission." *Id.*

54. *Matter of Ching & Chen*, 19 I. & N. Dec. 203, 205 (B.I.A. 1984) (citing *Matter of Pierre*, 14 I. & N. Dec. 467, 468 (B.I.A. 1973)).

55. See *id.*

The first requirement of the “entry” test is self-explanatory: one must physically cross the border into the United States.<sup>56</sup> The second and third requirements require further clarification. Under prong (2)(a), the alien must physically present him or herself to an immigration officer at an immigration inspection point for inspection or admission.<sup>57</sup> Alternatively, under prong (2)(b), the alien must actually and intentionally evade either the completion of inspection at the checkpoint<sup>58</sup> or the inspection point altogether.<sup>59</sup> Therefore, an alien may cross the border surreptitiously under prong (2)(b) and still effectuate an entry, despite lack of knowledge by immigration officials of this entry.<sup>60</sup> The third requirement for entry, “freedom from official restraint,” requires the most clarification, as “official restraint” is facially ambiguous, and its meaning is complex.<sup>61</sup> “[F]reedom from official restraint” requires freedom from continuous government observation or surveillance from the moment an alien attempts to make an entry.<sup>62</sup>

Accordingly, a previously removed alien has “entered” into the United States only after meeting all three of the requirements outlined above.<sup>63</sup> Once this entry has been effectuated, the alien has violated the “entry” prong of § 1326(a) and therefore may be subject to serving time in prison.<sup>64</sup>

## 2. The Meaning of “Attempts to Enter”

Like the “entry” test, case law has also developed a working test to determine whether an alien has “attempted to enter” the United States.<sup>65</sup>

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56. *See id.*

57. *See id.*

58. *See id.*

59. *See* United States v. DiSantillo, 615 F.2d 128, 135 (3d Cir. 1980) (“Congress must have intended to include the crimes committed by entry . . . through the regular immigration service procedures, of which the INS would have an official record . . .”).

60. *See id.*

61. *See infra* Part I.C.

62. United States v. Bello-Bahena, 411 F.3d 1083, 1087 (9th Cir. 2005). As “freedom from official restraint” factors heavily into the meaning of the “found in” prong of § 1326(a), the definition of “official restraint” is discussed in greater detail in Part I.C.1.

63. *See* Matter of Ching & Chen, 19 I. & N. Dec. 203, 205 (B.I.A. 1984).

64. *See* 8 U.S.C. § 1326(a) (2012). There is a caveat here. An alien violates the “entry” prong of § 1326(a) by effectuating an entry through the (2)(a) requirement. However, those effectuating an entry through the (2)(b) requirement do not violate the “entry” prong; rather, they violate the “found in” prong of § 1326(a), as they are entering into the United States surreptitiously, and INS has no record of the entry. This anomalous idea is further examined in Part I.B.3.

65. *See* United States v. Cardenas-Alvarez, 987 F.2d 1129, 1131–32 (5th Cir. 1993). A majority of the circuit courts have also held that the crime of “entry” under § 1326(a) is a general intent crime, not a specific intent crime. *See, e.g.,* United States v. Gracidas-Ulibarry, 192 F.3d 926, 930 (9th Cir. 1999) (“We therefore join other circuits in the view that the government need not prove that a defendant had specific intent to violate the statute; all that is required is that a defendant enter or attempt to enter the United States voluntarily without permission.”); United States v. Martus, 138 F.3d 95, 97 (2d Cir. 1998) (“[T]he government need only prove a voluntary act of reentry or attempted reentry by the defendant that is not expressly sanctioned by the Attorney General.”); United States v. Trevino-Martinez, 86 F.3d 65, 69 (5th Cir. 1996) (“This court concludes with the majority of circuits that § 1326 does not require the government to prove specific intent nor does it provide an

The test includes four requirements: (1) the perpetrator must have been an alien at the time of the offense; (2) the alien must have been previously arrested and removed; (3) the alien must have attempted to enter the United States; and (4) the alien must not have received express consent from the Attorney General to apply for readmission to the United States since the time of his or her previous removal.<sup>66</sup> The first, second, and fourth prongs of this test are self-explanatory. However, the third prong does little to actually define what an “attempted entry” looks like.

The courts have acknowledged and addressed this problem by holding that any previously removed alien who, without authorization from the Attorney General, voluntarily approaches a recognized immigration port of entry<sup>67</sup> and makes a false claim of citizenship or residency, has “attempted to enter” the United States.<sup>68</sup> The Fifth Circuit further clarified that, unlike an “entry,” an “attempted entry” does not require “freedom from official restraint” because “[t]o graft ‘freedom from official restraint’ onto the crime of attempted entry would make that crime synonymous with actual entry.”<sup>69</sup> Accordingly, a previously removed alien “attempts to enter” the United States in violation of § 1326(a) by voluntarily approaching an immigration point of entry, making a false claim of citizenship or residency to the immigration officer, and ultimately failing to make an actual entry, regardless of whether the alien is “free from official restraint.”<sup>70</sup>

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alien who reenters this country illegally with a defense of reasonable mistake.”); *United States v. Espinoza-Leon*, 873 F.2d 743, 746 (4th Cir. 1989) (“We agree with the majority of the circuits which have considered the issue and held that only general intent must be proven by the government in order to secure a conviction under § 1326.”); *United States v. Miranda-Enriquez*, 842 F.2d 1211, 1212 (10th Cir. 1988) (“To secure a section 1326 conviction . . . [n]o intent to break the law—whether characterized as ‘specific intent’ or ‘general criminal intent’—must be proved.”); *United States v. Hussein*, 675 F.2d 114, 116 (6th Cir. 1982) (“[T]he Government need not prove specific intent, that is, that appellants knew they were not entitled to reenter the country without the permission of the Attorney General.”).

66. *Cardenas-Alvarez*, 987 F.2d at 1131–32.

67. As defined by the U.S. Department of Homeland Security, a recognized port of entry is “[a]ny location in the United States or its territories that is designated as a point of entry for aliens and U.S. citizens. All district and files control offices are also considered ports, since they become locations of entry for aliens adjusting to immigrant status.” *Definition of Terms*, DEP’T OF HOMELAND SEC., <http://www.dhs.gov/definition-terms> (last visited Feb. 23, 2015).

68. See *United States v. Cabral*, 252 F.3d 520, 523 (1st Cir. 2001) (“An alien who has been deported and, without prior authorization, voluntarily approaches a port of entry and makes a false claim of residency has attempted to re-enter the United States . . . .”); *Gracidas-Ulibarry*, 192 F.3d at 930 (“[A previously removed] alien . . . voluntarily ‘attempts to enter’ by approaching a port of entry and making a false claim of citizenship.”); *Cardenas-Alvarez*, 987 F.2d at 1133 (“The precise question for our determination is whether an alien who approaches a port of entry and who makes a false claim of citizenship . . . has attempted to enter the United States. . . . Cardenas attempted to enter by attempting to convince the border inspectors that he was entitled to pass.”).

69. *Cardenas-Alvarez*, 987 F.2d at 1133.

70. See *supra* notes 66–69 and accompanying text. Additionally, the Supreme Court has held that the crime of “attempted entry” under § 1326(a) is a general intent crime, not a specific intent crime. See *United States v. Resendiz-Ponce*, 549 U.S. 102, 107–08 (2007). Therefore, a previously deported alien need only “attempt” to enter the United States in order to violate the “attempts to enter” prong of the statute. *Id.* at 108.

### 3. The Meaning of “Found In”

The crux of the conflict explored in this Note is the meaning of the “found in” clause of § 1326(a).<sup>71</sup> The plain text of the statute neither defines what “found in” means nor distinguishes it from the offenses of “enter[ing]” or “attempt[ing] to enter.”<sup>72</sup> In fact, the term “found in” was not included in the original language of § 1326(a) when it was first enacted in 1917.<sup>73</sup> This created an anomaly in the law: previously removed aliens could effectuate an entry into the United States by actually and intentionally evading either the completion of inspection at a checkpoint or the inspection point altogether without violating the “entry” prong of § 1326(a), because immigration officials had no record of such aliens effectuating this entry.<sup>74</sup> Without record or knowledge of these entries, § 1326(a) lacked any mechanism for punishing previously removed aliens who surreptitiously reentered the United States.<sup>75</sup>

Congress addressed this issue in 1952 when it added the “found in” language to the reenacted statute.<sup>76</sup> Using various tools of statutory interpretation—particularly the canon against surplusage—the courts have interpreted this addition to imply that Congress intended to distinguish between the crimes of entry, attempted entry, and being “found in” the United States.<sup>77</sup> The distinction is that only aliens who make a *surreptitious entry* into the United States can violate the “found in” clause; all others may be convicted under the “enters” or “attempts to enter” clauses.<sup>78</sup> Thus, previously removed aliens who are not apprehended by immigration officers as they reenter the country nevertheless can be prosecuted for unlawful entry when they are found.<sup>79</sup>

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71. See *infra* Part II.

72. See 8 U.S.C. § 1326(a) (2012).

73. See *United States v. DiSantillo*, 615 F.2d 128, 135 (3d Cir. 1980).

74. See *id.*

75. *Id.*

76. *Id.*

77. See *United States v. Rodriguez*, 26 F.3d 4, 8 (1st Cir. 1994) (stating “[w]e think it plain that ‘enters,’ ‘attempts to enter,’ and ‘is at any time found in’ describe three distinct occasions on which a deported alien can violate Section 1326”); *United States v. Canals-Jimenez*, 943 F.2d 1284, 1287 (11th Cir. 1991) (“Canals’ contention, with which we agree, is that ‘found in’ must have a different meaning from ‘enters’ and ‘attempts to enter.’”); *DiSantillo*, 615 F.2d at 134–35 (“[W]e must proceed on the assumption that Congress intended a distinction among crimes committed at the separate times mentioned in the statute.”).

78. See *Rodriguez*, 26 F.3d at 8 (“Congress must have intended to broaden the statute to include the crime committed when an alien enters the United States surreptitiously, of which the INS would have no official record, as well as the crimes committed by entry or attempted entry through regular immigration procedures.”); *Canals-Jimenez*, 943 F.2d at 1287 (“In order for ‘found in’ and ‘enters’ to have different meanings, thus to avoid ‘enters’ being a mere redundancy, ‘found in’ must apply to aliens who have entered surreptitiously, bypassing a recognized immigration port of entry.”); *DiSantillo*, 615 F.2d at 135 (“Congress must have included the word ‘found’ in § 1326 to alleviate the difficult law enforcement burden of finding and prosecuting this class of illegal aliens, who are already aware that they are in violation of the law as evidenced by their surreptitious entry . . .”).

79. *Rodriguez*, 26 F.3d at 8.

Additionally, while the courts have interpreted “enters” and “found in” to have distinct meanings and to constitute different offenses,<sup>80</sup> the courts also have held that a previously removed alien cannot be convicted of a “found in” offense without first making an entry—albeit a surreptitious one—into the United States.<sup>81</sup> Without making this entry, there can be no violation of either the “entry” or “found in” prongs of § 1326(a).<sup>82</sup>

As outlined above, the conflict at issue in this Note concerns whether a certain group of immigrants, under an unusual set of circumstances, meets the “found in” criteria.<sup>83</sup> Yet, to fully appreciate that conflict, it is first important to analyze what it means to be “free from official restraint,”<sup>84</sup> a requirement of an “entry” and, thus, to sustaining a “found in” conviction.<sup>85</sup>

### C. The “Official Restraint” Analysis

As discussed above, the third requirement for effectuating an “entry” into the United States is that the alien must be “free from official restraint.”<sup>86</sup> Accordingly, if an alien is *not* free from official restraint, then he or she has not effectuated an entry and the government cannot sustain a “found in” conviction under § 1326(a).<sup>87</sup> Therefore, an alien who *is* under “official restraint” can argue there was no “entry” and thus, assert a complete defense to being “found in” the United States in violation of § 1326(a).<sup>88</sup> This section explores the meaning of “official restraint,” then discusses certain requirements that make an alien “free from official restraint,” and finally evaluates different factual scenarios where the courts have required an “official restraint” analysis.

#### 1. The Meaning of “Official Restraint”

For an alien to be considered under “official restraint,” that alien must be under continuous governmental observation or surveillance from the moment he or she attempted to make an entry into the United States.<sup>89</sup>

80. See *supra* notes 77–78 and accompanying text.

81. See, e.g., *United States v. Pacheco-Medina*, 212 F.3d 1162, 1165 (9th Cir. 2000) (“[T]he courts have not been so benighted as to think that a person could be found in the United States if he had never entered at all. In fact, it is difficult to speak of one concept without entangling it in the other.”); *United States v. Diaz-Diaz*, 135 F.3d 572, 576 (8th Cir. 1998) (“A reasonable reading of the indictment as a whole . . . should have alerted Diaz-Diaz that he was accused of having unlawfully reentered the United States and of having been found therein.”); *United States v. Castrillon-Gonzalez*, 77 F.3d 403, 406 (11th Cir. 1996) (“By definition, one must enter the United States, either legally or illegally, in order to be found therein.”).

82. See *Castrillon-Gonzalez*, 77 F.3d at 406. Therefore, a previously removed alien can only violate the “attempts to enter” prong of § 1326(a) if he or she has not effectuated an entry. See *infra* Part I.B.2.

83. See *infra* Part II.

84. See *infra* Part I.C.

85. See *supra* Part I.B.1–3.

86. See *supra* note 54 and accompanying text.

87. See *supra* note 81 and accompanying text.

88. See *supra* Part I.B.1–3.

89. See *United States v. Pacheco-Medina*, 212 F.3d 1162, 1164 (9th Cir. 2000).

Such surveillance can take the form of physical observation by any government official,<sup>90</sup> detainment at any U.S. port of entry,<sup>91</sup> or any kind of electronic surveillance.<sup>92</sup> Additionally, the alien must “lack[] the freedom to go at large and mix with the population,”<sup>93</sup> but the alien need not be aware of the surveillance.<sup>94</sup> Any alien under this kind of sustained surveillance has not entered the country in violation of § 1326(a).<sup>95</sup> This definition of “official restraint” has been adopted by at least three circuit courts and appears uncontroversial.<sup>96</sup>

## 2. “Freedom from Official Restraint”: The Exercise of “Free Will” During and After Entry

In order to be “free” from the official restraint described above, an alien must demonstrate: (1) freedom from the forms of government surveillance discussed in Part I.C.1;<sup>97</sup> and (2) the exercise of “free will” after he or she entered the United States.<sup>98</sup> In order to exercise this “free will,” an alien must fall out of sight of any physical or electronic surveillance for a substantial amount of time,<sup>99</sup> and must be able to freely “mix” with the general population without fear that government officials are tracking the alien’s whereabouts after he or she has entered into the United States.<sup>100</sup>

*United States v. Martin-Plascencia*<sup>101</sup> helps demonstrate what “free will” means. In *Martin-Plascencia*, the Ninth Circuit held that the defendant was not under official restraint after surreptitiously entering the United States through a recognized port of entry.<sup>102</sup> While at the port of entry, Plascencia bypassed the questioning and inspection areas, out of the view of any physical or electronic surveillance by immigration officials, and crawled through an opening in the fence to gain physical entry into United States territory.<sup>103</sup> Law enforcement officials apprehended Plascencia while he

90. See *United States v. Ruiz-Lopez*, 234 F.3d 445, 448 (9th Cir. 2000).

91. See *United States v. Vasilatos*, 209 F.2d 195, 197 (3d Cir. 1954).

92. *United States v. Zavala-Mendez*, 411 F.3d 1116, 1119 (9th Cir. 2005).

93. *Matter of Pierre*, 14 I. & N. Dec. 467, 469 (B.I.A. 1973).

94. See *United States v. Bello-Bahena*, 411 F.3d 1083, 1087 (9th Cir. 2005).

95. See *id.*

96. See, e.g., *Yang v. Murgans*, 68 F.3d 1540, 1549 (3d Cir. 1995) (adopting the Second Circuit’s definition of “official restraint” as defined in *Correa v. Thornburgh*, 901 F.2d 1166 (2d Cir. 1990)); *Correa*, 901 F.2d at 1172 (defining official restraint as any “constraint emanating from the government that would otherwise prevent [an alien] from physically passing on”); *United States v. Kavazanjian*, 623 F.2d 730, 736–37 (1st Cir. 1980) (describing similar instances of governmental surveillance as discussed above that constitute “official restraint”).

97. See *supra* Part I.C.1.

98. *United States v. Pacheco-Medina*, 212 F.3d 1162, 1165 (9th Cir. 2000) (citing *United States v. Aguilar*, 883 F.2d 662, 677 (9th Cir. 1989)).

99. *United States v. Zavala-Mendez*, 411 F.3d 1116, 1119 (9th Cir. 2005). In *Zavala-Mendez*, the Ninth Circuit held that falling out of surveillance for “a half second” is not substantial enough to be deemed free from official restraint. *Id.* at 1120–21.

100. See *supra* note 93 and accompanying text.

101. 532 F.2d 1316 (9th Cir. 1976).

102. *Id.* at 1317–18.

103. *Id.* at 1317.

attempted to scale a concrete wall, after traveling about fifty yards into the United States past the point of entry.<sup>104</sup>

The Ninth Circuit held that even though Plascencia was within the confines of a recognized point of entry, he was not under official restraint because he managed to avoid any kind of physical or electronic surveillance by law enforcement.<sup>105</sup> The court also noted that, because Plascencia surreptitiously avoided detection and escaped fifty yards into the United States, he exercised “his free will, youthful enterprise, and physical agility in evading fixed physical barriers in accomplishing his entry.”<sup>106</sup> It is this very kind of exercise of “free will” that most circuit courts agree constitutes “freedom from official restraint” for purposes of determining whether an alien has made an “entry” into the United States.<sup>107</sup> The idea of exercising “free will” plays an important role in determining whether the aliens in *Ambriz-Ambriz*, *Gonzalez-Diaz*, and *Macias* can argue that they were under “official restraint,” in order to reverse their convictions of being “found in” the United States in violation of § 1326(a).<sup>108</sup>

### 3. When to Require an “Official Restraint” Analysis

The courts are not always required to conduct an “official restraint” analysis when investigating potential violations of § 1326(a).<sup>109</sup> However, they recognize two broad categories of cases where an “official restraint” analysis is required: (1) cases involving aliens entering into the United States through an airport;<sup>110</sup> and (2) cases involving aliens who attempt to surreptitiously enter the United States but are observed by immigration officials in the process and are subsequently arrested.<sup>111</sup> Additionally, there is a conflict over whether the courts should require an “official restraint” analysis for a third category, where a previously removed alien is involuntarily handed over to U.S. officials by foreign officials after that alien physically crossed the Canadian border in an attempt to leave the United States.<sup>112</sup> That conflict is discussed at length in Part II.D of this Note, as it directly relates to the conflict over whether this group of aliens meets the “found in” criteria of § 1326(a).<sup>113</sup> Before reaching that

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104. *Id.*

105. *Id.*

106. *Id.*

107. *See supra* notes 98–106 and accompanying text.

108. *See infra* Part II.D.

109. For example, the crime of “attempted entry” does not require an “official restraint” analysis, because aliens attempting to enter the United States are under government surveillance by their very nature of conversing with an immigration officer. *See supra* Part I.B.2. Additionally, “freedom from official restraint” is not a requirement for the “attempted entry” prong of § 1326(a). *See supra* note 69 and accompanying text.

110. *See infra* Part I.C.3.a.

111. *See infra* Part I.C.3.b.

112. *See* *United States v. Macias*, 740 F.3d 96 (2d Cir. 2014); *United States v. Gonzalez-Diaz*, 630 F.3d 1239 (9th Cir. 2011); *United States v. Ambriz-Ambriz*, 586 F.3d 719 (9th Cir. 2009).

113. *See infra* Part II.D.

discussion, however, it is first important to address the two scenarios where the court has required an “official restraint” analysis.<sup>114</sup>

*a. The Airport Cases*

The first factual scenario where the courts have required an “official restraint” analysis is when an alien physically enters the United States by an airplane and immediately proceeds to an immigration or customs officer or checkpoint in the airport.<sup>115</sup> In *United States v. Canals-Jimenez*,<sup>116</sup> the defendant was a previously deported alien who physically reentered the United States via an American Airlines flight into Miami from Santo Domingo, Dominican Republic.<sup>117</sup> The Eleventh Circuit held that the defendant was under “official restraint” after he de-boarded his plane, walked past a few restaurants, and proceeded directly to an INS officer, whereupon he was passed along to a secondary inspection area and detained by the INS for a few days.<sup>118</sup> In reaching its decision, the court noted that “[f]or over a half century th[e] [Supreme] Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States,”<sup>119</sup> and that Canal-Jimenez’s interaction with the INS officer at the airport fit into this type of detention.<sup>120</sup>

The Fifth Circuit also applied an “official restraint” analysis to a similar set of facts in *United States v. Angeles-Mascote*.<sup>121</sup> In *Angeles-Mascote*, Jose Manuel Angeles-Mascote, a previously deported alien who physically entered the United States via airplane from Mexico to Texas, was also found to be under “official restraint” after landing in the airport and proceeding directly to a U.S. immigration officer.<sup>122</sup> Relying on the Eleventh Circuit’s analysis in *Canals-Jimenez*, the Fifth Circuit noted that an alien who seeks admission to the United States by voluntarily approaching a recognized port of entry cannot be considered “found in” the United States, because that alien is under “official restraint” and, thus, has not yet made an “entry.”<sup>123</sup> This reasoning is consistent with other circuits that have held that an alien cannot be “found in” the United States without

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114. See *infra* Part I.C.3.a–b.

115. See *United States v. Angeles-Mascote*, 206 F.3d 529, 530–32 (5th Cir. 2000); *United States v. Canals-Jimenez*, 943 F.2d 1284, 1285–89 (11th Cir. 1991).

116. 943 F.2d 1284 (11th Cir. 1991).

117. *Id.* at 1285.

118. *Id.* at 1285–86.

119. *Id.* at 1288 (quoting *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958)). While the Eleventh Circuit does not refer to “official restraint” by name, the detention the court refers to is one of the categories of surveillance that the definition of “official restraint” encompasses. See *supra* Part I.C.1.

120. *Canals-Jimenez*, 943 F.2d at 1288.

121. 206 F.3d 529, 530–32 (5th Cir. 2000).

122. *Id.* at 530.

123. *Id.* at 531.



first making an “entry,”<sup>124</sup> and that one cannot make an “entry” if he or she physically entered the country under “official restraint.”<sup>125</sup>

*b. Attempted Surreptitious Entry*

The second category of cases where courts have required an “official restraint” analysis is when an alien attempts to sneak across the border but is observed in the process by government officials and subsequently arrested.<sup>126</sup> In *United States v. Bello-Bahena*,<sup>127</sup> Carmelo Bello-Bahena attempted to sneak across the border from Mexico to the United States with a group of other illegal aliens but was observed by U.S. Border Patrol Agent Drake.<sup>128</sup> Agent Drake radioed to Agent Rodriguez that Bello-Bahena was heading toward Hagen’s Pond, where Agent Rodriguez was performing “line watch duties.”<sup>129</sup> Agent Drake guided Agent Rodriguez and two other agents to Bello-Bahena’s location, where Agent Rodriguez found him hiding in a bush. Agent Rodriguez asked for his documents, arrested him, and transported him to a Border Patrol Station for further processing.<sup>130</sup>

While the Ninth Circuit ultimately held that there was a question of fact over whether Bello-Bahena was under constant surveillance from the moment he crossed the border until his arrest and processing (and thus, under “official restraint”),<sup>131</sup> the court still noted that it was appropriate to conduct an “official restraint” analysis, and that the lower court erred by failing to provide a jury instruction on “official restraint.”<sup>132</sup>

## II. THE SPLIT: INCONSISTENT “FOUND IN” DETERMINATIONS

The Ninth and Second Circuits have made inconsistent determinations in finding whether a certain group of previously removed aliens should be convicted of being “found in” the United States in violation of § 1326(a).<sup>133</sup> The Ninth Circuit held that previously removed aliens, who surreptitiously reenter the United States illegally but remain undetected by U.S. officials

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124. *See supra* Part I.B.3.

125. *See supra* Part I.C.1.

126. *See United States v. Bello-Bahena*, 411 F.3d 1083, 1086 (9th Cir. 2005).

127. 411 F.3d 1083 (9th Cir. 2005).

128. *Id.* at 1086.

129. *Id.* “Line watch duties” generally include monitoring the border to ensure that illegal aliens and contraband are not surreptitiously entering into the United States. *See United States v. Nelson*, No. CR 11-01364-TUC-JGZ, 2011 WL 7477835, at \*1 n.1 (D. Ariz. Dec. 5, 2011).

130. *Bello-Bahena*, 411 F.3d at 1086.

131. *Id.* at 1091–92. The court found that it was unclear whether Agent Drake had actually observed Bello-Bahena crossing the border. If Agent Drake had, then Bello-Bahena would have been under official restraint from the time he crossed the border to his subsequent arrest. If Agent Drake had not, then Bello-Bahena would have been free from official restraint for some period after illegally crossing the border. The court noted that the jury had sufficient evidence to decide either way and therefore found that the lower court erred by not providing a jury instruction on official restraint. *Id.*

132. *Id.*

133. *See infra* notes 134–35 and accompanying text.

until they attempt to leave the country and are involuntary returned by foreign officials after physically crossing into that foreign territory, should be considered “found in” the United States in violation of § 1326(a).<sup>134</sup> To the contrary, the Second Circuit held that aliens under the same circumstances should not be considered “found in” the United States in violation of the statute.<sup>135</sup>

In arriving at these conflicting determinations, the Ninth and Second Circuits disagreed over two legal questions pertinent to the “found in” analysis: (1) whether the aliens were continuously present in the United States from their initial surreptitious reentry, even after physically crossing the Canadian border with no intent to be present in the United States;<sup>136</sup> and (2) whether an “official restraint” analysis should apply to these cases.<sup>137</sup> In addition to their conflicting answers to these legal questions, each circuit also relied on differing policy justifications to explain how the “found in” clause should be applied and evaluated in these cases.<sup>138</sup>

Part II.A discusses the facts of the Ninth and Second Circuit cases at issue here. Part II.B then draws similarities between the immigration patterns followed by the previously removed aliens in each case. Part II.C explores the Ninth Circuit’s legal justification of its continuous presence theory in holding that the aliens at issue were “found in” the United States, and then discusses the Second Circuit’s conflicting holding criticizing this continuous presence theory as a legal fiction. Part II.D describes the Ninth Circuit’s justification for holding that an “official restraint” analysis is inapplicable, and then discusses the Second Circuit’s contrary holding that the analysis is indeed applicable and precludes such aliens from receiving a “found in” conviction. Finally, Part II.E addresses the differing policy justifications adopted by the Ninth and Second Circuits in determining how the “found in” clause should be applied and evaluated in these types of cases.

A. *A Factual Analysis of United States v. Ambriz-Ambriz, United States v. Gonzalez-Diaz, and United States v. Macias*

To understand the conflicting determinations reached by the Ninth and Second Circuits, it is important to track the specific immigration patterns of the aliens at issue in each case in order to draw the similarities among each of the three situations. This section discusses the Ninth Circuit cases first, as they were decided before the Second Circuit’s *Macias* decision and help to set the landscape for the conflict examined in this Note.

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134. *United States v. Gonzalez-Diaz*, 630 F.3d 1239, 1244 (9th Cir. 2011); *United States v. Ambriz-Ambriz*, 586 F.3d 719, 725 (9th Cir. 2009).

135. *United States v. Macias*, 740 F.3d 96, 102 (2d Cir. 2014).

136. *See infra* Part II.C.

137. The Ninth Circuit held that an “official restraint” analysis was unnecessary and inapplicable to the facts of these cases, while the Second Circuit held that an “official restraint” analysis was necessary and could be used by the aliens in these cases as a defense to their “found in” convictions. *See infra* Part II.D.

138. *See infra* Part II.E.

## 1. The Ninth Circuit

Within the past six years, the Ninth Circuit has twice applied a “found in” analysis to an analogous set of facts.<sup>139</sup> This section discusses these cases in chronological order.

The Ninth Circuit first engaged in a “found in” analysis in *United States v. Ambriz-Ambriz*.<sup>140</sup> Jose Ines Ambriz-Ambriz was a Mexican citizen who was removed from the United States in 1985 after being convicted of an aggravated felony—a deportable offense—in 1980.<sup>141</sup> At some point after his deportation, Ambriz reentered the United States unlawfully without inspection or permission.<sup>142</sup> On February 28, 2008, Ambriz attempted to leave the United States by driving his car across the Canadian border with two other individuals.<sup>143</sup> While they physically crossed the border into Canadian territory,<sup>144</sup> they were denied entry into Canada.<sup>145</sup> Canadian officials forced Ambriz to subsequently turn his car around and cross the border back into the United States, where he was stopped for inspection at the Roosville Port of Entry.<sup>146</sup>

While stopped, a U.S. Border Patrol agent asked Ambriz for identification, and Ambriz showed the officer a California driver’s license.<sup>147</sup> The officer then directed Ambriz and his vehicle to a secondary inspection station, where fingerprinting and a record check revealed that Ambriz was a Mexican citizen who was removed from the United States in 1985.<sup>148</sup> The officer promptly arrested Ambriz, and a grand jury indicted him for illegal reentry in violation of § 1326(a).<sup>149</sup> The district court held that Ambriz was indeed “found in” the United States in violation of § 1326(a) and sentenced him to twenty-eight months in prison, followed by a three-year period of supervised release.<sup>150</sup> Ambriz timely appealed to the Ninth Circuit.<sup>151</sup>

The Ninth Circuit agreed that Ambriz was indeed “found in” the United States in violation of § 1326(a), because he never legally gained entry into Canada and was therefore continuously present in the United States even

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139. *See infra* Part II.A.1.

140. 586 F.3d 719 (9th Cir. 2009).

141. *Id.* at 721.

142. *Id.* It is unclear exactly when Ambriz made this reentry into the United States, and the Ninth Circuit does not discuss or focus on this point. *See id.*

143. *Id.* It is also unclear why Ambriz sought entry into Canada. The court speculated that it could have been for a medical procedure but again did not focus on this point. *Id.*

144. *Id.* at 723 (“Although Ambriz may have technically traveled onto Canadian land from the United States, he was never legally in Canada.”).

145. *Id.* at 721.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* Count one of the indictment stated that Ambriz was “found to have reentered the United States,” but the district court struck this language because it is not part of the actual language contained in § 1326(a) and replaced it with “found in.” *Id.* at 721–22; *see also* 8 U.S.C. § 1326(a) (2012).

150. *Ambriz-Ambriz*, 586 F.3d at 722.

151. *Id.*

after crossing into Canada.<sup>152</sup> The Ninth Circuit also held that an “official restraint” analysis was inapplicable<sup>153</sup> for reasons that are discussed further in Part II.D.1.<sup>154</sup>

The Ninth Circuit addressed the same issue again only two years after *Ambriz* in *United States v. Gonzalez-Diaz*.<sup>155</sup> Javier Dolores Gonzalez-Diaz was a Mexican citizen who was previously removed from the United States for deportable offenses on four separate occasions prior to 2009.<sup>156</sup> In April 2009, Gonzalez-Diaz illegally entered from Mexico into Arizona surreptitiously.<sup>157</sup> While unlawfully living in the United States, Gonzalez-Diaz procured false identification and applied for a U.S. passport using another U.S. citizen’s name, birth certificate, and social security number.<sup>158</sup> On June 19, 2009, Gonzalez-Diaz drove his car from Montana to the Canadian border, where he attempted to gain entry into Canada.<sup>159</sup> At the border, Gonzalez-Diaz presented his fraudulent Utah identification card to the Canadian Border Services Agency (CBSA) officer, who then asked Gonzalez-Diaz for proof of U.S. citizenship.<sup>160</sup> Gonzalez-Diaz was unable to meet this request and, accordingly, the CBSA officer directed the vehicle to a secondary inspection area where a further search revealed conflicting documents with Gonzalez-Diaz’s name and another individual’s name on them.<sup>161</sup> In light of these inconsistencies and the fact that Gonzalez-Diaz was unable to provide the officers with proof of U.S. citizenship, the agents denied Gonzalez-Diaz entry into Canada and informed him that they would be preparing an “Allowed to Leave Canada”<sup>162</sup> form so that he could return back into the United States.<sup>163</sup>

Gonzalez-Diaz then told the officers that he could not return to the United States out of fear of dying in prison and could not return to Mexico out of fear that he would be killed by a drug cartel.<sup>164</sup> The CBSA officer handling the case interpreted these remarks as a potential refugee claim and completed an “Entry for Further Examination” form on Gonzalez-Diaz’s behalf.<sup>165</sup> A Royal Mountain Canadian Police (RMCP) escort drove

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152. *Id.* at 725. The reasoning behind this legal conclusion is discussed further in Part II.C.1.

153. *Ambriz-Ambriz*, 586 F.3d at 721.

154. *See infra* Part II.D.1.

155. 630 F.3d 1239 (9th Cir. 2011).

156. *Id.* at 1241–42.

157. *Id.* at 1241.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. An “Allowed to Leave Canada” form is a form issued by Canadian border officials to persons deemed inadmissible into Canada. *See* GOVERNMENT OF CANADA, ENF 5 WRITING 44(1) REPORTS, available at <http://www.cic.gc.ca/english/resources/manuals/enf/enf05-eng.pdf>. This form allows inadmissible persons to withdraw their applications to enter Canada, and then allows them to voluntarily leave Canada without further questioning by Canadian officials. *See id.*

163. *Gonzalez-Diaz*, 630 F.3d at 1241.

164. *Id.*

165. *Id.*

Gonzalez-Diaz fifty-five miles into Canadian territory to the Carway Port of Entry.<sup>166</sup> However, it was closed upon Gonzalez-Diaz's arrival, so he was taken another fifteen miles away to a RMCP detention facility, where officials held him overnight.<sup>167</sup> The next morning, on June 20, 2009, RMCP brought Gonzalez-Diaz back to the Carway Point of Entry, where he was interviewed and found inadmissible due to his lack of a passport.<sup>168</sup> Canadian officers then issued an exclusion order to Gonzalez-Diaz and drove him back across the U.S. border.<sup>169</sup>

Once across the border, the Canadian officials released Gonzalez-Diaz into the custody of U.S. officials at Piegan Port of Entry in Montana.<sup>170</sup> While at Piegan, U.S. Customs and Border Protection (USCBP) ran several records checks, which revealed that Gonzalez-Diaz was a Mexican citizen who had been previously removed from the United States on four occasions.<sup>171</sup> Gonzalez-Diaz admitted to these facts and was arrested.<sup>172</sup> The U.S. government indicted Gonzalez-Diaz on eight counts, including being "found in" the United States in violation of § 1326(a).<sup>173</sup> During his trial in the district court, Gonzalez-Diaz moved for acquittal under Rule 29 of the Federal Rules of Criminal Procedure, arguing that he was not "found in" the United States in violation of the statute.<sup>174</sup> The court denied his motion, holding that he was "found in" the United States, and convicted him on all of the additional counts.<sup>175</sup> Gonzalez-Diaz timely appealed the decision to the Ninth Circuit.<sup>176</sup>

Borrowing from its earlier analysis in *Ambriz-Ambriz*, the Ninth Circuit held that Gonzalez-Diaz was indeed "found in" the United States in violation of § 1326(a), because, like Ambriz, Gonzalez-Diaz never legally gained entry into Canada and was therefore continuously present in the United States even after crossing well into Canadian territory.<sup>177</sup> The court also held, as it did in *Ambriz-Ambriz*, that an "official restraint" analysis was inapplicable to the facts of this case and, therefore, Gonzalez-Diaz's "official restraint" defense was moot.<sup>178</sup>

## 2. The Second Circuit

The Second Circuit had its first opportunity to address the immigration pattern present in *Ambriz-Ambriz* and *Gonzalez-Diaz* as it relates to the "found in" clause of § 1326(a) in the factually analogous case of *United*

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166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 1241–42.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 1243–44.

178. *Id.* at 1244; *see also infra* Part II.D.1.

*States v. Macias*.<sup>179</sup> Walter Yovany Vasquez Macias was a citizen of Honduras who had been removed from the United States in 2000 after being convicted of selling drugs to undercover police officers—a deportable offense—in the late 1990s.<sup>180</sup> Macias then surreptitiously reentered the country illegally at some point in 2001 and entered into the antique business.<sup>181</sup> For unknown reasons, Macias decided to leave the United States and traveled with a friend from Texas to the Canadian side of Niagara Falls.<sup>182</sup> On January 10, 2012,<sup>183</sup> Macias and his friend walked across the Rainbow Bridge into Canada, where a CBSA officer spotted Macias on the Canadian side of the bridge.<sup>184</sup> The officer then brought Macias into a Canadian facility for further inspection, where Macias revealed that he lacked a U.S. passport or a visa to enter into Canada.<sup>185</sup> A CBSA officer then refused Macias entry into Canada and prepared an “Allowed to Leave Canada” form.<sup>186</sup> Canadian officers then brought Macias back into the United States in handcuffs and forcibly turned him over to USCBP officials.<sup>187</sup>

After running an immigration investigation and multiple records checks, USCBP officials discovered that Macias was a Honduran citizen who had been previously removed in 2000 for his felony drug conviction.<sup>188</sup> Macias was subsequently arrested and indicted for being “found in” the United States in violation of § 1326(a).<sup>189</sup> On May 11, 2012, a jury found Macias guilty of being “found in” the United States in violation of the statute, and Macias thereafter moved for a judgment of acquittal despite the verdict.<sup>190</sup> The district court denied the motion, finding the motion untimely and, relying on the Ninth Circuit’s reasoning in *Gonzalez-Diaz*, finding it unnecessary to reconsider its prior ruling with respect to the merits of the case.<sup>191</sup> Macias appealed the decision to the Second Circuit.<sup>192</sup>

Contrary to the Ninth Circuit’s previous decisions in *Ambriz-Ambriz* and *Gonzalez-Diaz*, the Second Circuit held that Macias was not “found in” the United States in violation of § 1326(a).<sup>193</sup> In its ruling, the Second Circuit discredited the Ninth Circuit’s “continuous presence” theory as a “legal fiction,” noting that Macias was not continuously present in the United

179. 740 F.3d 96 (2d Cir. 2014).

180. *Id.* at 97. Prior to his deportation in 2000, Macias had been detained in California in 1990, voluntarily left the country, and then illegally reentered the country. *Id.*

181. *Id.*

182. *Id.* at 97–98.

183. *United States v. Macias*, No. 12-CR-90-A, 2012 WL 3581024, at \*1 (W.D.N.Y. Aug. 17, 2012), *rev’d and remanded*, 740 F.3d 96 (2d Cir. 2014).

184. *Macias*, 740 F.3d at 98.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *United States v. Macias*, No. 12-CR-90-A, 2012 WL 3581024, at \*1 (W.D.N.Y. Aug. 17, 2012), *rev’d and remanded*, 740 F.3d 96 (2d Cir. 2014).

191. *Id.* at \*3.

192. *Macias*, 740 F.3d at 98.

193. *Id.*

States after he physically crossed the border into Canada.<sup>194</sup> The Second Circuit also held that an “official restraint” analysis was necessary and applicable to the facts of this case (and therefore, by implication, to the facts of *Ambriz-Ambriz* and *Gonzalez-Diaz*), and precluded Macias (and, similarly, would have precluded Ambriz and Gonzalez-Diaz) from a “found in” conviction under § 1326(a).<sup>195</sup>

B. *Factual Similarities Among Ambriz-Ambriz, Gonzalez-Diaz, and Macias*

There are important similarities between the facts of *Ambriz-Ambriz*, *Gonzalez-Diaz*, and *Macias* that enable the Ninth and Second Circuits to evaluate the issues presented in each case using the same “found in” criteria.<sup>196</sup> This section proceeds by discussing three areas of similarity between the three cases: (1) each alien’s prior immigration history and status; (2) each alien’s physical presence in Canada; and (3) each alien’s denial of entry into Canada and subsequent involuntary return to the United States.

1. Prior Immigration History and Status

Ambriz, Gonzalez-Diaz, and Macias were all present in the United States at some point preceding their illegal reentries at issue here, before being removed for various offenses.<sup>197</sup> Each alien also made an unlawful surreptitious reentry after his initial removal and remained in the United States undetected.<sup>198</sup> Therefore, Ambriz, Gonzalez-Diaz, and Macias were not lawfully present in the United States at any point after their last reentries into the United States before attempting to cross into Canada.<sup>199</sup>

2. Physical Presence in Canada

Another important similarity is that each alien physically crossed the border into Canada before being apprehended.<sup>200</sup> In *Ambriz-Ambriz*, Ambriz drove his car past the Canadian border and into Canadian territory.<sup>201</sup> Despite his short time in Canada, the Ninth Circuit still acknowledged that Ambriz “technically traveled onto Canadian land from

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194. *Id.* at 99. The court’s reasoning behind this conclusion is discussed at length in Part II.C.2.

195. *Macias*, 740 F.3d at 99–100; *see also infra* Part II.D.2.

196. *See infra* Part II.B.1–3.

197. *See Macias*, 740 F.3d at 97; *United States v. Gonzalez-Diaz*, 630 F.3d 1239, 1241–42 (9th Cir. 2011); *United States v. Ambriz-Ambriz*, 586 F.3d 719, 721 (9th Cir. 2009).

198. *See Macias*, 740 F.3d at 97; *Gonzalez-Diaz*, 630 F.3d at 1241; *Ambriz-Ambriz*, 586 F.3d at 721.

199. *See supra* Part II.A.

200. *See Macias*, 740 F.3d at 98; *Gonzalez-Diaz*, 630 F.3d at 1241; *Ambriz-Ambriz*, 586 F.3d at 721, 723.

201. *Ambriz-Ambriz*, 586 F.3d at 721, 723.

the United States” and hence, was physically in Canada at the time of his apprehension.<sup>202</sup>

In *Gonzalez-Diaz*, Gonzalez-Diaz likewise drove his vehicle across the Canadian border and into Canadian territory.<sup>203</sup> The Ninth Circuit acknowledged that Gonzalez-Diaz had a “brief physical presence in Canada,” and hence, was physically present in Canada at the time of his apprehension.<sup>204</sup> While Gonzalez-Diaz spent a longer time in Canadian territory and custody than Ambriz, the Ninth Circuit noted that such factual distinctions on this point were “immaterial.”<sup>205</sup>

Lastly, in *Macias*, Macias gained physical entry into Canada by walking across the Rainbow Bridge and crossing the Canadian border.<sup>206</sup> The Second Circuit noted that Macias was “on Canadian soil seeking admission into Canada” and, thus, he, too, was physically present in Canada at the time of his apprehension.<sup>207</sup>

### 3. Denial of Entry and Involuntary Return

The last important factual similarity is that each alien was denied entry into Canada and subsequently forced to return to the United States.<sup>208</sup> In *Ambriz-Ambriz*, Canadian border officials forced Ambriz to turn his vehicle around and proceed back to the United States after denying him entry.<sup>209</sup> In *Gonzalez-Diaz*, Canadian officials physically drove Gonzalez-Diaz across the border and released him into U.S. custody after denying him entry into Canada.<sup>210</sup> In *Macias*, Canadian officials forcibly brought Macias back into the United States in handcuffs and turned him over to USCBP officials after denying him entry.<sup>211</sup> These factual similarities are important, as they enable the Ninth and Second Circuits to evaluate each case using the same criteria.<sup>212</sup>

#### C. Continuous Presence: Legal Fact or Legal Fiction?

In arriving at conflicting determinations over whether aliens under the circumstances described above<sup>213</sup> meet the “found in” criteria in violation of § 1326(a), the Ninth and Second Circuits first disagree over whether such aliens are “continuously present” in the United States even after physically crossing the border into Canada.<sup>214</sup> In *Ambriz-Ambriz* and *Gonzalez-Diaz*,

202. *Id.* at 723.

203. *Gonzalez-Diaz*, 630 F.3d at 1241.

204. *Id.* at 1240.

205. *Id.* at 1244.

206. *United States v. Macias*, 740 F.3d 96, 98 (2d Cir. 2014).

207. *Id.* at 99.

208. *See id.* at 98; *Gonzalez-Diaz*, 630 F.3d at 1241; *United States v. Ambriz-Ambriz*, 586 F.3d 719, 721 (9th Cir. 2009).

209. *Ambriz-Ambriz*, 586 F.3d at 721.

210. *Gonzalez-Diaz*, 630 F.3d at 1241.

211. *Macias*, 740 F.3d at 98.

212. *See infra* Part II.C–D.

213. *See supra* Part II.B.

214. *See infra* Part II.C.1–2.



the Ninth Circuit held that Ambriz and Gonzalez-Diaz were continuously present in the United States even after physically entering Canada, and they therefore had never legally left the United States for the purposes of being “found in” the country by U.S. immigration officials.<sup>215</sup> In *Macias*, the Second Circuit discredited this “continuous presence” theory, calling it a “legal fiction,” and held that, because Macias was not continuously present in the United States after physically crossing into Canada, he could not be considered “found in” the United States on this ground.<sup>216</sup> This section first discusses the Ninth Circuit’s rationale for employing its “continuous presence” theory and then discusses the Second Circuit’s rejection of the theory.

### 1. The Ninth Circuit: Continuous Presence As Legal Fact

In *Ambriz-Ambriz*, the Ninth Circuit sustained Ambriz’s “found in” conviction on the grounds that Ambriz was continuously present in the United States on February 28, 2008, even after physically crossing into Canadian territory.<sup>217</sup> The court reasoned that because Ambriz never gained legal entry into Canada when he attempted to drive his vehicle across the border, he never legally left the United States.<sup>218</sup> Therefore, because Ambriz never legally left the United States, he was still “present” in the United States during his apprehension at the Canadian border.<sup>219</sup> The court also noted that because Ambriz failed to make a legal entry into Canada, he was not reentering the United States from a foreign country after Canadian officials turned his vehicle around and directed him to the Roosville Point of Entry on the U.S. side of the border.<sup>220</sup> Accordingly, the Ninth Circuit took the view that Ambriz had been continuously present in the United States from the moment he surreptitiously reentered the country after his initial removal in 1985 through the moment U.S. officials discovered his unlawful presence at the Roosville Point of Entry, despite his brief physical presence in Canada.<sup>221</sup> The Ninth Circuit affirmed Ambriz’s “found in” conviction on the grounds that, for purposes of § 1326(a), Ambriz never left the United States and was therefore “found in” the country during his detention at the Roosville Point of Entry.<sup>222</sup>

In *Gonzalez-Diaz*, the Ninth Circuit utilized this continuous presence theory to affirm Gonzalez-Diaz’s “found in” conviction.<sup>223</sup> In that case, the Ninth Circuit applied the same principles it used in *Ambriz-Ambriz* to hold that Gonzalez-Diaz was continuously present in the United States despite his overnight stay in a Canadian detention facility, because he never gained

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215. *Gonzalez-Diaz*, 630 F.3d at 1244; *United States v. Ambriz-Ambriz*, 586 F.3d 719, 723–24 (9th Cir. 2009).

216. *Macias*, 740 F.3d at 99.

217. *Ambriz-Ambriz*, 586 F.3d at 721.

218. *Id.* at 723–24.

219. *Id.*

220. *Id.* at 722–23.

221. *See id.* at 721.

222. *See id.*

223. *See United States v. Gonzalez-Diaz*, 630 F.3d 1239, 1240–41 (9th Cir. 2011).

legal entry into Canada and hence, never left the United States.<sup>224</sup> The court acknowledged its reliance on *Ambriz-Ambriz*, noting “[Gonzalez-Diaz] neither departed the United States nor entered Canada in the sense contemplated by the aforementioned authorities. Our conclusion is dictated by *United States v. Ambriz-Ambriz*, . . . which we decided shortly after Gonzalez-Diaz’s trial.”<sup>225</sup>

While Gonzalez-Diaz himself conceded that he was “found” by U.S. Immigration officials after Canadian officials released him into U.S. custody at the Piegan Port of Entry in Montana, he denied that he was “found in” the United States, because he was not present in the United States when he was first found by Canadian officials on the Canadian side of the border.<sup>226</sup> Instead, Gonzalez-Diaz argued that his presence in the United States ended when he physically crossed into the Canadian border and was held there from June 19 to 20.<sup>227</sup> Accordingly, he argued that he could not have been “continuously present” in the United States.<sup>228</sup> The Ninth Circuit rejected this argument, however, because Gonzalez-Diaz “neither departed the United States nor entered Canada in the sense contemplated by the aforementioned authorities.”<sup>229</sup> Further, the Ninth Circuit noted that while Gonzalez-Diaz was physically in Canada from June 19 to 20, he was in some form of custody during his entire stay and therefore, he remained “in” the United States until he was “found” by U.S. officials on June 20.<sup>230</sup>

Gonzalez-Diaz also tried to argue that Ninth Circuit precedent dictates that previously removed aliens like Gonzalez-Diaz who surreptitiously reenter the United States and remain undetected can avoid a “found in” conviction by leaving the United States,<sup>231</sup> and that he indeed “left” the United States on June 19.<sup>232</sup> However, the Ninth Circuit also rejected this argument, returning to the idea that because Gonzalez-Diaz never gained legal entry into Canada, he never “left” the United States to avoid a “found in” conviction.<sup>233</sup> Accordingly, as in *Ambriz-Ambriz*, the Ninth Circuit affirmed Gonzalez-Diaz’s “found in” conviction on the grounds that he was continuously present in the United States from the moment he surreptitiously reentered the country after his initial removal proceedings until U.S. officials discovered his unlawful presence at the Piegan Point of Entry, despite his overnight physical presence in Canada.<sup>234</sup>

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224. *See id.*

225. *Id.* at 1243.

226. *Id.* at 1242–43.

227. *Id.*

228. *Id.*

229. *Id.* at 1243.

230. *Id.* at 1244.

231. *Id.* at 1243 (citing *United States v. Ayala*, 35 F.3d 423, 425 (9th Cir. 1994)). In *Ayala*, the Ninth Circuit held that “[t]o avoid being ‘found in’ the United States, a deported alien can either not re-enter the United States or, if he has already re-entered the United States, he can leave.” *Ayala*, 35 F.3d at 425.

232. *Gonzalez-Diaz*, 630 F.3d at 1243.

233. *Id.*

234. *See id.* at 1244.

## 2. The Second Circuit: Continuous Presence As Legal Fiction

In *United States v. Macias*, the Second Circuit rejected the Ninth Circuit's continuous presence theory, calling it a legal fiction and refusing to apply it to the similar set of facts.<sup>235</sup> Departing from the Ninth Circuit's reasoning in *Ambriz-Ambriz* and *Gonzalez-Diaz*, the Second Circuit held that Macias was not present in the United States while he was physically on Canadian soil attempting to seek admission into Canada, and that when Macias physically crossed the border into Canada, "he had neither a legal nor a physical presence in the United States."<sup>236</sup> The Second Circuit recognized this explicit departure from the Ninth Circuit's stance, stating, "under similar circumstances the Ninth Circuit has twice held that the aliens were 'found in' the United States pursuant to a theory that employed a legal fiction of their continuous presence in the United States after having crossed into Canadian territory."<sup>237</sup>

In rejecting the Ninth Circuit's theory of continuous presence, the Second Circuit pointed out that by concluding that Ambriz and Gonzalez-Diaz never "legally left" the United States or "legally entered" Canada, the Ninth Circuit assumed that Ambriz and Gonzalez-Diaz were either legally present in the United States or Canada, neither of which the Second Circuit found to be true in these cases.<sup>238</sup> The Second Circuit then noted that nothing in the Ninth Circuit cases (or any other "found in" cases) suggested that an alien who is denied entry into another country is still considered "present" in their country of origin—just because Macias was denied entry into Canada does not mean he was still present in the United States, his "country of origin" here.<sup>239</sup>

To support this point, the Second Circuit turned to the Supreme Court's ruling in *Shaughnessy v. United States ex rel. Mezei*,<sup>240</sup> where the Court held that persons denied entry into the United States might also not be present in any other country.<sup>241</sup> In *Mezei*, a once lawful resident-alien of the United States was denied reentry into the country at Ellis Island for security reasons after returning from a trip to Hungary.<sup>242</sup> Every country that the United States consulted—including Hungary, France, the United Kingdom, and about twelve Latin American countries—refused to take Mezei back.<sup>243</sup> Accordingly, the Court held that Mezei was neither present in the United States—despite his physical detainment there—nor in

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235. *United States v. Macias*, 740 F.3d 96, 99 (2d Cir. 2014).

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 99–100.

240. 345 U.S. 206 (1953).

241. *Macias*, 740 F.3d at 100 (citing *Mezei*, 345 U.S. at 209, 216).

242. *Mezei*, 345 U.S. at 207–08.

243. *Id.* at 209.

Hungary, France, the United Kingdom or any other country that refused to take him back.<sup>244</sup>

The Second Circuit extended this principal to Macias: just because Macias was denied entry into Canada does not mean he was still “present”—albeit unlawfully—in the United States.<sup>245</sup> Accordingly, the Second Circuit concluded that Macias (and any other alien similarly situated) was not “continuously present” in the United States after crossing the Canadian border and hence, could not be convicted of being “found in” the United States in violation of § 1326(a) on this ground.<sup>246</sup>

#### D. “Official Restraint” Analysis: Inapplicable or Applicable?

The second point of contention between the Ninth and Second Circuits is whether an “official restraint” analysis is applicable to the facts on *Ambriz-Ambriz*, *Gonzalez-Diaz*, and *Macias*, and accordingly, whether the “official restraint” defense precludes them from receiving “found in” convictions.<sup>247</sup> In *Ambriz-Ambriz* and *Gonzalez-Diaz*, the Ninth Circuit held that an “official restraint” analysis was not applicable to the facts of these cases,<sup>248</sup> while the Second Circuit held otherwise in *Macias*.<sup>249</sup> Each circuit’s answer to this question is partially predicated on its acceptance or rejection of the “continuous presence” theory advanced by the Ninth Circuit in *Ambriz-Ambriz* and *Gonzalez-Diaz*.<sup>250</sup> This section first discusses the Ninth Circuit’s rationale for holding that an “official restraint analysis” is not applicable to the facts of the cases at issue, and then discusses the Second Circuit’s contrary holding that an “official restraint” analysis is indeed applicable and precludes these aliens from receiving “found in” convictions under § 1326(a).

##### 1. The Ninth Circuit: “Official Restraint” Analysis Inapplicable

In *Ambriz-Ambriz*, the Ninth Circuit held that Ambriz could not invoke “official restraint” as a defense to his “found in” conviction for two reasons: (1) he never “left” the United States; and (2) an “official restraint” analysis was not applicable to Ambriz, as he was not “entering” into the United States from a foreign country.<sup>251</sup>

As to the first point, the Ninth Circuit noted that invoking an “official restraint” defense is only appropriate in situations where an alien is making an entry into the United States.<sup>252</sup> However, because Ambriz did not gain

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244. See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citing *Mezei*, 345 U.S. at 213, 215); *Macias*, 740 F.3d at 100.

245. See *Macias*, 740 F.3d at 99–100.

246. See *id.* at 102.

247. See *infra* Part II.D.1–2.

248. See *United States v. Gonzalez-Diaz*, 630 F.3d 1239, 1243–44 (9th Cir. 2011); *United States v. Ambriz-Ambriz*, 586 F.3d 719, 722–23 (9th Cir. 2009).

249. See *Macias*, 740 F.3d at 100.

250. See *supra* Part II.C.1.

251. *Ambriz-Ambriz*, 586 F.3d at 722–23.

252. See *id.* at 723.

legal entry into Canada, the Ninth Circuit reasoned that Ambriz had never “left” the United States in the first place and hence, was not making an “entry” back into the United States after Canadian officials directed his car back to the U.S. side of the border.<sup>253</sup> Without Ambriz making this “entry,” the Ninth Circuit reasoned that there was no need for “official restraint” to enter into its “found in” analysis.<sup>254</sup>

The Ninth Circuit also explained that the alien must have been making that entry into the United States *from a foreign country* in order for an “official restraint” defense to apply.<sup>255</sup> The court noted that because Ambriz did not gain legal entry into Canada, he was not entering the United States from a “foreign country” and thus, could not claim that he was under “official restraint” after being forced to drive back across the U.S. border.<sup>256</sup> The court also noted that Ambriz’s brief physical presence in Canada did not change this analysis, as the court found him to be “continuously present” in the United States despite his physical presence on Canadian soil.<sup>257</sup>

In *Gonzalez-Diaz*, the Ninth Circuit again relied on its earlier holding in *Ambriz-Ambriz* to reach the conclusion that Gonzalez-Diaz was not entitled to invoke an “official restraint” defense.<sup>258</sup> As it did in *Ambriz-Ambriz*, the Ninth Circuit held that because Gonzalez-Diaz did not gain legal entry into Canada, he was not “entering” the United States from a foreign country—as the “official restraint” defense requires—when Canadian border officials drove him back across the border into the United States.<sup>259</sup> As such, the court concluded that an “official restraint” analysis was not applicable to the facts of the case and therefore, Gonzalez-Diaz could not invoke an “official restraint” defense to his “found in” conviction.<sup>260</sup>

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253. *See id.* at 723–24.

254. *See id.*

255. *Id.* at 722–23.

256. *See id.* at 723.

257. *See supra* Part II.C.1.

258. *See* *United States v. Gonzalez-Diaz*, 630 F.3d 1239, 1243 (9th Cir. 2011). In adhering to its holding in *Ambriz-Ambriz*, the Ninth Circuit noted, “Our conclusion is dictated by *United States v. Ambriz-Ambriz* . . . . We rejected Ambriz’s argument, explaining that the official restraint doctrine ‘pertains to an individual entering the United States from a foreign country, and thus is inapplicable to Mr. Ambriz’s situation.’” *Id.* (quoting *Ambriz-Ambriz*, 586 F.3d at 723).

259. *Id.* at 1244.

260. *See id.* It is worth noting that Gonzalez-Diaz tried to distinguish his case from *Ambriz-Ambriz* by pointing out that while Ambriz was rejected at the border, Gonzalez-Diaz spent a considerably longer time within Canadian territory. *Id.* However, the Ninth Circuit found these factual differences to be immaterial, noting, “The Canadian border services officers involved in Gonzalez-Diaz’s detention uniformly testified that he never gained legal entry into Canada. The Entry for Further Examination form states that ‘[t]his authorization to enter Canada does not confer status.’” *Id.* Therefore, because neither Ambriz nor Gonzalez-Diaz gained legal status in Canada, the Ninth Circuit found the length of time physically spent in Canada by Ambriz and Gonzalez-Diaz to be irrelevant to the “found in” analysis. *See id.*

## 2. The Second Circuit: “Official Restraint” Analysis Applicable

In *Macias*, the Second Circuit held that an “official restraint” analysis was applicable to *Macias*’s immigration pattern—and by extension, to the facts of *Ambriz-Ambriz* and *Gonzalez-Diaz* as well—and that, under such an analysis, *Macias* had a legitimate “official restraint” defense that precluded a “found in” conviction.<sup>261</sup> This section first discusses why the Second Circuit applied an “official restraint” analysis, and then discusses how the “official restraint” defense precluded *Macias* (and would preclude similarly situated aliens) from receiving a “found in” conviction.

### a. An “Official Restraint” Analysis Is Applicable

The Second Circuit put forth two reasons why an “official restraint” analysis was applicable to the facts of *Macias*.<sup>262</sup> First, the Second Circuit noted that in order for an alien’s “attempted entry” to become an “actual entry” into the United States, the alien must be physically present in the country as well as free from official restraint.<sup>263</sup> Contrary to the Ninth Circuit, the Second Circuit explicitly held that because aliens like *Macias* were not “continuously present” in the United States while seeking entry into Canada on Canadian soil, these aliens were indeed in the position of making an entry back into the United States when they were forced to return to the U.S. side of the border.<sup>264</sup> Given these facts, the court held that conducting an official restraint analysis was appropriate to the situation at hand.<sup>265</sup>

Second, the Second Circuit questioned the Ninth Circuit’s assertion that invoking an “official restraint” defense requires an alien to make an entry into the United States *from a foreign country*.<sup>266</sup> To this point, the Second Circuit noted, “[n]either *Gonzalez-Diaz* nor *Ambriz-Ambriz* explains why the logic of the official restraint doctrine, which distinguishes between physical and legal presence, should not apply unless an alien is entering *from another country*.”<sup>267</sup>

Moreover, the Second Circuit reasoned that even if entering from another country was a requirement for an official restraint defense to apply, *Macias* was “entering” the United States from another country.<sup>268</sup> In reaching this conclusion, the Second Circuit drew parallels between *Macias* and *United States v. 1903 Obscene Magazines*,<sup>269</sup> an earlier Second Circuit case

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261. See *United States v. Macias*, 740 F.3d 96, 100–02 (2d Cir. 2014).

262. See *infra* Part II.D.2.a.

263. *Macias*, 740 F.3d at 100.

264. See *supra* Part II.C.2.

265. See *Macias*, 740 F.3d at 100.

266. *Id.* at 100 n.7.

267. *Id.*

268. See *infra* notes 269–74 and accompanying text.

269. 907 F.2d 1338 (2d Cir. 1990).

dealing with the shipment of goods across the U.S.-Canadian border.<sup>270</sup> In *Obscene Magazines*, the Second Circuit held that goods rejected from Canada nevertheless were considered to have entered into the United States from a “foreign country,” regardless of the fact that they never gained legal entry into Canada.<sup>271</sup> In making this determination, the Second Circuit noted, “[w]hether the magazines were accepted into Canada or denied entry and held by Canadian Customs is irrelevant,”<sup>272</sup> and that therefore, the magazines were still entering the United States *from Canada* regardless of their fate at the border.<sup>273</sup> The Second Circuit reasoned that it was appropriate to extend this logic to aliens attempting to reenter the United States as well: regardless of their fate at the Canadian border, they should still be considered to be entering the United States from Canada and hence, *from a foreign country*.<sup>274</sup> Accordingly, the Second Circuit concluded that an “official restraint” analysis was applicable to the facts of *Macias* on these grounds as well.<sup>275</sup>

*b. The “Official Restraint” Defense Precludes Macias  
from Receiving a “Found In” Conviction*

After concluding that an “official restraint” analysis was applicable to the facts of the case, the Second Circuit held that *Macias* was precluded from receiving a “found in” conviction by invoking an “official restraint” defense.<sup>276</sup>

In reaching this determination, the Second Circuit extended the “entry” requirements—physical presence and freedom from official restraint<sup>277</sup>—to a “found in” conviction, noting, “The same principles [applying to entry] apply to being ‘found in’ the United States; if an alien’s presence here (after she has left the country) is so attenuated that she has not yet ‘entered,’ then it is insufficient to support ‘found in’ liability.”<sup>278</sup> The court noted that *Macias* was not free from official restraint when Canadian officials delivered him to U.S. officials, because he was brought back over the border involuntarily in handcuffs with “neither a desire to enter, nor a will to be present in, the United States.”<sup>279</sup> Therefore, the court concluded that *Macias* did not make an “entry” into the United States because he was

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270. *Macias*, 740 F.3d at 100–01. Before drawing this comparison, the Second Circuit acknowledged that the question of criminal liability for previously removed aliens moving across the U.S.-Canadian border was one of first impression for the court. *See id.*

271. *See Obscene Magazines*, 907 F.2d at 1343 (“[G]oods rejected by the Customs officials of a foreign country to which export is attempted are imported ‘from [that] foreign country.’”).

272. *Id.* at 1342.

273. *Id.*

274. *See Macias*, 740 F.3d at 100–01.

275. *Id.*

276. *Id.* at 100–02.

277. *Id.* at 100.

278. *Id.*

279. *Id.* at 102.

under “official restraint” and thus, could not be “found in” the United States for purposes of § 1326(a).<sup>280</sup>

### E. Policy Justifications

In addition to their differing legal conclusions, the Ninth and Second Circuits also adopted differing policy justifications to arrive at their inconsistent holdings.<sup>281</sup> This section first discusses the Ninth Circuit’s policy justifications in reaching its conclusion, and then discusses the Second Circuit’s diverging policy justifications in reaching the opposite conclusion.

#### 1. Ninth Circuit Justifications

In *Ambriz-Ambriz*, the Ninth Circuit expressed a concern that if the court did not convict Ambriz of being “found in” the United States, then the government would have no way of punishing Ambriz for being illegally present in the United States.<sup>282</sup> In articulating this concern, the court conceded that Ambriz was not “entering” or “attempting to enter” the United States, because he had no “intent” to enter and because he was already “in” the United States by virtue of his continuous presence in the country throughout the entire ordeal.<sup>283</sup> Accordingly, the court noted that accepting Ambriz’s argument that he was not “found in” the United States would lead to the “untenable result” that the government would have no means to prosecute Ambriz under § 1326(a) for his unlawful reentry.<sup>284</sup> As such, the Ninth Circuit concluded that convicting Ambriz of being “found in” the United States in violation of § 1326(a) was justified on these policy grounds.<sup>285</sup>

#### 2. Second Circuit Justifications

In *Macias*, the Second Circuit dispelled the Ninth Circuit’s concerns and adopted its own policy justifications for holding that previously removed aliens like Macias, Ambriz, and Gonzalez-Diaz should not be convicted of being “found in” the United States in violation of § 1326(a).

In dismissing the Ninth Circuit’s concerns, the Second Circuit noted that while Macias did break the laws of the United States by reentering the country after his deportation in 2000, he was nonetheless not guilty of the

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280. *Id.* The court also noted that “[a]liens attempting to enter the United States, stopped in analogous circumstances, are not legally in the United States” to support the notion that such aliens are under “official restraint” by way of continuous government surveillance during these inspections. *Id.* at 99.

281. *See infra* Part II.E.1–2.

282. *See* *United States v. Ambriz-Ambriz*, 586 F.3d 719, 723 n.3 (9th Cir. 2009).

283. *Id.* In order to be convicted of “entering” or “attempting to enter” the United States in violation of § 1326(a), a previously removed alien must possess a “general intent” to make (or attempt to make) an entry. *See supra* notes 65, 70.

284. *Ambriz-Ambriz*, 586 F.3d at 723 n.3.

285. *See id.*



crime of which he was convicted—being “found in” the United States.<sup>286</sup> The court then noted that it was not troubled by the “seeming oddity,” because Macias would still be subject to punishment in the form of removal proceedings, despite the reversal of his criminal conviction.<sup>287</sup> Therefore, even though Macias could not be convicted under § 1326(a), he would still be adequately punished for his unlawful reentry into the United States following his initial removal in 2000.<sup>288</sup>

The Second Circuit also adopted its own policy justifications in arriving at the conclusion that Macias was not “found in” the United States.<sup>289</sup> The court noted that it would be “anomalous” to criminally punish Macias with potential prison time for being “found in” the United States based on his attempt to stop living in the United States unlawfully, because doing so would create a disincentive for undocumented, previously removed aliens to do exactly what Congress would like them to do—leave the country.<sup>290</sup> In light of this anomaly and the fact that Macias was “found in” the United States against his will and desire to be present in the country,<sup>291</sup> the Second Circuit found Macias’s conviction to be “plainly erroneous” and that it would constitute “manifest injustice” to allow Macias’s “found in” conviction to stand.<sup>292</sup>

### III. PRECEDENT, POLICY, AND CONSTRUCTION: WHY THE SECOND CIRCUIT APPROACH SHOULD PREVAIL

This part argues that the federal courts should adopt the Second Circuit’s position: previously removed aliens who surreptitiously reenter the United States without permission, but remain undetected until they subsequently attempt to leave the country and are involuntarily returned to the United States by foreign officials, should not be considered “found in” the United States in violation of § 1326(a). The Second Circuit offers a better legal analysis that is consistent with major Supreme Court and circuit court decisions that have shaped U.S. immigration law since the early 1900s.<sup>293</sup> This resolution of the legal issue is also better policy because it encourages illegal aliens to leave the United States—which is exactly what Congress wants them to do—without the fear of receiving prison time if their attempt to leave is ultimately unsuccessful.<sup>294</sup>

Part III.A agrees with the Second Circuit’s position that the Ninth Circuit’s construction of “continuous presence” in the cases is a legal

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286. *United States v. Macias*, 740 F.3d 96, 101 (2d Cir. 2014).

287. *Id.* In making this argument, the court acknowledged that one may be skeptical of this punishment, as Macias had already been removed once and yet had unlawfully reentered the country. *Id.* at 101 n.10. The court answered this concern by noting that “[Macias]’s genuine attempt to leave might hint at his disinclination to return.” *Id.*

288. *See id.* at 101.

289. *See id.* at 98, 101–02.

290. *Id.* at 101.

291. *Id.* at 102.

292. *Id.* at 98.

293. *See infra* Part III.A–B.

294. *See infra* Part III.C.

fiction and should not dictate the outcome of such cases. Part III.B argues that an “official restraint” defense should be applicable to aliens under the same circumstances as Ambriz, Gonzalez-Diaz, and Macias, and that this defense should preclude them from receiving “found in” convictions under § 1326(a). Part III.C advances additional policy justifications for concluding that previously removed aliens like Ambriz, Gonzalez-Diaz, and Macias should not be convicted of being “found in” the United States in violation of § 1326(a).

#### A. *Continuous Presence: A Legal Fiction*

This section puts forth three compelling reasons why the Ninth Circuit’s “continuous presence” theory should be considered a legal fiction and, therefore, rejected.

##### 1. It Is Possible to Be “Stateless” for Immigration Purposes

In formulating its “continuous presence” theory, the Ninth Circuit relies too heavily on the false proposition that a noncitizen must be lawfully or unlawfully “present” (separate from being physically present) in some country at all given times.<sup>295</sup> *Ambriz-Ambriz* and *Gonzalez-Diaz* demonstrate their reliance on this false proposition by holding that neither Ambriz nor Gonzalez-Diaz “left” the United States because they never gained legal entry into Canada.<sup>296</sup> This holding ignores the Supreme Court precedent in *Mezei*, which held that a noncitizen does not necessarily have to be “present” in any country despite having a physical presence in a definite location.<sup>297</sup> Specifically, *Mezei* held that even though the defendant was physically present in the United States, he did not maintain a lawful or unlawful “presence” in any country: he was not “present” in Hungary, where his trip began, nor in any other country he passed through on his return journey to the United States.<sup>298</sup> Thus, *Mezei* was stateless for immigration purposes.<sup>299</sup>

The Second Circuit was correct to extend this principle to *Macias* by holding that *Macias* was not still “present” in the United States after he was denied legal entry into Canada while on Canadian soil.<sup>300</sup> Thus, *Macias* was also “stateless” for immigration purposes after he was denied entry into Canada. This conclusion is consistent with the Supreme Court’s holding in *Mezei* and does not rest on the false proposition that a noncitizen must

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295. The Ninth Circuit also cited no authority to support its position that those denied entry to a foreign country are still present in their countries of origin. *See Macias*, 740 F.3d at 99–100.

296. *See supra* Part II.C.1.

297. *Macias*, 740 F.3d at 100 (citing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 209, 216 (1953)).

298. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citing *Mezei*, 345 U.S. at 213, 215); *Macias*, 740 F.3d at 100.

299. *See Mezei*, 345 U.S. at 213.

300. *See supra* Part II.C.2.

maintain either a lawful or unlawful presence in some country at all given times.<sup>301</sup>

## 2. “Continuous Presence” Defies Common Sense

The Ninth Circuit’s “continuous presence” theory also defies common sense. It is reasonable to conclude—as the Second Circuit did—that once a previously removed alien physically leaves United States, that alien is no longer present—either lawfully or unlawfully—in the country.<sup>302</sup> To illustrate this point, it is helpful to consider the following hypothetical: say, for example, instead of driving his car across the border to Canada, Ambriz snuck onto a ship, sailed across the Atlantic Ocean, and docked in Portugal. At the port of entry in Portugal, Ambriz is subsequently denied entry into the country. At that very moment, should Ambriz still be considered “present” in the United States? One may fairly assume that most individuals would likely say no, and this would be a reasonable conclusion.

Yet, employing its theory of “continuous presence,” the Ninth Circuit would answer that question affirmatively. As set out above, this conclusion runs contrary to how most individuals would logically view the situation. Perhaps it was the close physical proximity between Canada and the United States that led the Ninth Circuit to its initial conclusion—that Ambriz and Gonzalez-Diaz were still “present” in the United States while they were physically on Canadian soil attempting entry into Canada.<sup>303</sup> But physical proximity between countries should not matter; neighboring countries are still different countries, and actual physical presence in one country certainly should have an effect on one’s lawful or unlawful presence in another country—as the Second Circuit held in *Macias*<sup>304</sup>—regardless of how close those countries are on a map.

## 3. The Ninth Circuit Defied Its Own Precedent

Finally, the Ninth Circuit defied its own precedent in convicting Ambriz and Gonzalez-Diaz of being “found in” the United States on the basis that each was “continuously present” in the United States despite being physically present in Canada.<sup>305</sup> Prior to its decisions in *Ambriz-Ambriz* and *Gonzalez-Diaz*, the Ninth Circuit held in *United States v. Ayala*<sup>306</sup> that previously removed aliens who surreptitiously reenter the United States and remain undetected could avoid a “found in” conviction by leaving the United States.<sup>307</sup> Nothing in *Ayala* requires that a previously removed alien

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301. See *supra* Part II.C.2.

302. See *supra* Part II.C.2.

303. See *supra* Part II.C.1.

304. See *supra* Part II.C.2; see also *United States v. Macias*, 740 F.3d 96, 99 (2d Cir. 2014) (“Prior to this ‘discovery,’ [Macias] physically crossed the border from the United States into Canada; at that point, he had neither a legal nor a physical presence in the United States.”).

305. See *supra* Part II.C.1.

306. 35 F.3d 423 (9th Cir. 1994); see also *supra* note 231.

307. *Ayala*, 35 F.3d at 425; see also *supra* note 231.

gain legal entry in another country in order to “leave” the United States.<sup>308</sup> Such a requirement should not be implicitly read into the court’s holding. Ambriz, Gonzalez-Diaz, and Macias did just what the Ninth Circuit said they needed to do to avoid a “found in” conviction—they left the United States.<sup>309</sup> Accordingly, the Ninth Circuit should not have convicted Ambriz and Gonzalez-Diaz of being “found in” the United States in violation of § 1326(a) on fictitious “continuous presence” grounds.

### B. An “Official Restraint” Analysis Is Applicable

This section argues that: (1) an “official restraint” analysis is applicable to cases like *Ambriz-Ambriz*, *Gonzalez-Diaz*, and *Macias*, and (2) invoking an “official restraint” defense should preclude aliens in such cases from receiving “found in” convictions under § 1326(a).

#### 1. An “Official Restraint” Analysis Is Applicable to These Cases

There are two compelling reasons why an “official restraint” analysis should be applicable to cases like *Ambriz-Ambriz*, *Gonzalez-Diaz*, and *Macias*. First, it is well-settled among the circuit courts that invoking an “official restraint” defense requires an alien to be in the position of making an “entry” or “attempted entry” into the United States.<sup>310</sup> For the reasons stated in Part III.A, Ambriz, Gonzalez-Diaz, and Macias should not have been considered “continuously present” in the United States while they were on Canadian soil attempting to enter into Canada.<sup>311</sup> Accordingly, each should be seen as being in the position of making an entry back into the United States while Canadian border officials escorted them across the border and delivered them to U.S. officials. As such, Ambriz, Gonzalez-Diaz, and Macias should be able to invoke an “official restraint” defense on the grounds that they were each in the position of making an “entry” back into the United States, as invoking an “official restraint” defense requires.<sup>312</sup>

Second, in *Ambriz-Ambriz* and *Gonzalez-Diaz*, the Ninth Circuit held that in order for an “official restraint” defense to apply, an alien must have been entering the United States “from a foreign country;”<sup>313</sup> however, as the Second Circuit correctly noted in *Macias*, the Ninth Circuit pointed to no authority to support this proposition.<sup>314</sup> Additionally, neither the plain language of § 1326(a) nor the major circuit court cases discussing “official restraint” require that an alien be entering into the United States “from a

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308. See *Ayala*, 35 F.3d at 423–26.

309. See *supra* Part II.A–C.

310. See *supra* Part I.C.3; see also *supra* note 96 and accompanying text.

311. See *supra* Part III.A.

312. See *supra* Part I.C.3.

313. See *United States v. Gonzalez-Diaz*, 630 F.3d 1239, 1243 (9th Cir. 2011); *United States v. Ambriz-Ambriz*, 586 F.3d 719, 722–23 (9th Cir. 2009); see also *supra* Part II.D.1.

314. See *United States v. Macias*, 740 F.3d 96, 100 n.7 (2d Cir. 2014); see also *supra* Part II.D.2.a.

foreign country” for the “official restraint” defense to apply.<sup>315</sup> Therefore, the requirement should not be read into the defense.

However, even if the courts were to adopt this additional requirement, the Second Circuit convincingly argued that previously removed aliens like Macias should indeed be considered entering the United States “from a foreign country” by way of comparison to its earlier holding in *Obscene Magazines*.<sup>316</sup> Although the Second Circuit held in *Obscene Magazines* that *goods* rejected at the Canadian border were still considered to be coming into the United States “from a foreign country”—regardless of the fact that they never legally entered Canada<sup>317</sup>—it seems logical to extend this reasoning to aliens crossing the border as well.<sup>318</sup> At the very least, the Second Circuit points to some authority to support its reasoning, unlike the Ninth Circuit.<sup>319</sup> For these additional reasons, previously removed aliens like Ambriz, Gonzalez-Diaz, and Macias should be able to invoke an “official restraint” defense to their “found in” convictions.

## 2. The “Official Restraint” Defense Precludes Such Aliens from Receiving “Found In” Convictions

Having argued above that an “official restraint” analysis should be applicable to cases like *Ambriz-Ambriz*, *Gonzalez-Diaz*, and *Macias*,<sup>320</sup> this Note next argues that invoking an “official restraint” defense should preclude aliens in such cases from receiving “found in” convictions.<sup>321</sup>

### a. Each Alien Was Under Continuous Government Surveillance

To be under “official restraint,” an alien must first be under continuous governmental observation or surveillance from the moment that he or she attempted to make an entry.<sup>322</sup> In *Ambriz-Ambriz*, *Gonzalez-Diaz*, and *Macias*, each alien was decidedly under such surveillance upon their reentries into the United States after being denied entry into Canada: Canadian border officials instructed Ambriz to turn his car around and re-cross the border into the United States, where he fell into the surveillance of U.S. Border Patrol agents;<sup>323</sup> the RMCP physically drove Gonzalez-Diaz across the border into the United States and released him immediately into the custody of U.S. officials;<sup>324</sup> and finally, Canadian officials escorted

315. See *supra* Part I.C; see also *Macias*, 740 F.3d at 102 (“[N]othing in 8 U.S.C. § 1326 requires entry into the United States following legal presence in another country . . .”).

316. See *Macias*, 740 F.3d at 100–01; see also *supra* Part II.D.2.a.

317. See *United States v. 1903 Obscene Magazines*, 907 F.2d 1338, 1340 (2d Cir. 1990); see also *supra* Part II.D.2.a.

318. See *supra* Part II.D.2.a.

319. See *supra* Part II.D.2.a.

320. See *supra* Part III.B.1.

321. See *infra* Part III.B.2.a–b.

322. See *United States v. Pacheco-Medina*, 212 F.3d 1162, 1164 (9th Cir. 2000); see also *supra* Part I.C.1.

323. See *supra* Part II.A.1.

324. See *supra* Part II.A.1.

Macias in handcuffs across the border into the United States and into the custody of USCBP officials.<sup>325</sup> Accordingly, each alien defendant was under continuous government surveillance as he reentered the United States from Canada and thus, meets the first requirement for falling under “official restraint.”

*b. Each Alien Was Unable to Exercise His “Free Will” During Reentry*

In addition to being under continuous government surveillance from the moment they attempt to make an entry, aliens must also lack the ability to exercise their “free will” during their reentries to fall under “official restraint.”<sup>326</sup> To exercise “free will,” an alien must fall out of sight of any physical or electronic surveillance for a substantial amount of time, and must be able to freely “mix” with the general population without the fear that government officials are tracking his or her whereabouts after the alien entered into the United States.<sup>327</sup> Ambriz, Gonzalez-Diaz, and Macias were unable to exercise this free will: Ambriz neither slipped out of the surveillance of officials nor freely mixed with the general population, as he proceeded immediately to the Roosville Port of Entry on the U.S. side of the border;<sup>328</sup> and Gonzalez-Diaz and Macias were both physically restrained by Canadian officials and thus, had no chance to either slip out of surveillance or freely mix with the general population upon their reentries.<sup>329</sup> Accordingly, Ambriz, Gonzalez-Diaz, and Macias all meet the second requirement for falling under “official restraint.”

Ambriz, Gonzalez-Diaz, and Macias—as well as aliens in similar circumstances—should be considered under “official restraint” because they meet both requirements of being under continuous government surveillance and being unable to exercise their “free will” upon reentry into the United States.<sup>330</sup> Accordingly, they did not effectuate an “entry” into the United States after their rejections at the Canadian border, because they were not “free from official restraint” as is required to make an “entry” into the country.<sup>331</sup> Thus, because these aliens did not make an actual “entry” into the United States, they cannot be convicted of being “found in” the United States in violation of § 1326(a), as one must first make an “entry” into the country before being subsequently “found in” the United States.<sup>332</sup> For these reasons, the Second Circuit correctly held that Macias was precluded from receiving a “found in” conviction by way of his “official restraint” defense. Accordingly, other circuits should follow the Second Circuit’s lead on this issue.

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325. *See supra* Part II.A.2.

326. *See supra* Part I.C.2.

327. *See supra* Part I.C.2.

328. *See supra* Part II.A.1.

329. *See supra* Part II.A.1.–2.

330. *See supra* Part III.B.2.

331. *See* Matter of Pierre, 14 I. & N. Dec. 467, 468 (B.I.A. 1973).

332. *See supra* note 81 and accompanying text.

### C. Policy Justifications for Adopting the Second Circuit Approach

In addition to the Second Circuit's more sound legal reasoning, strong policy reasons weigh in favor of adopting the Second Circuit's approach. This section proceeds by discussing three of these reasons: (1) punishment and disincentive to leave; (2) economic efficiency; and (3) moral prerogative.

#### 1. Punishment and Disincentive to Leave

At first glance, the Ninth Circuit presented a legitimate concern that failing to convict Ambriz of being "found in" the United States would result in the government having no way of punishing Ambriz under § 1326(a) for being illegally present in the United States.<sup>333</sup> However, as the Second Circuit correctly pointed out in *Macias*, this concern overlooks the fact that Ambriz, Gonzalez-Diaz, and Macias would still be subject to removal proceedings even if they were not found to have violated any prong of § 1326(a).<sup>334</sup> Removal from the United States is punishment in and of itself,<sup>335</sup> so while these aliens should not have to face prison time under § 1326(a), they will still face the potentially harsh consequences associated with removal.<sup>336</sup>

Additionally, the Second Circuit persuasively argued that previously removed aliens who return and remain undetected in the United States may have no incentive to leave the country if they are aware of the prospect of facing prison for failing to gain legal entry into another country.<sup>337</sup> This argument is both reasonable and logical; these aliens would likely choose to remain living in the United States undetected rather than taking the risk of leaving the United States and being "found in" the country. As the Second Circuit also correctly noted, providing such aliens with this "disincentive to leave" runs contrary to the very intent of Congress—to have these aliens leave the country and cease living in the United States unlawfully.<sup>338</sup>

#### 2. Economic Efficiency

As aliens like Ambriz, Gonzalez-Diaz, and Macias will face the ample punishment of removal regardless of any conviction under § 1326(a),<sup>339</sup> one must consider whether it is really necessary to imprison these aliens in the United States before removing them from the country. If Congress's goal is for these aliens to leave the country—which is exactly what these aliens are attempting to do—then why keep them imprisoned in the very country

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333. See *United States v. Ambriz-Ambriz*, 586 F.3d 719, 723 n.3 (9th Cir. 2009).

334. See *United States v. Macias*, 740 F.3d 96, 101 (2d Cir. 2014). These aliens will face removal proceedings on the grounds that they are inadmissible to the United States. See *supra* note 37.

335. See LEGOMSKY & RODRÍGUEZ, *supra* note 2, at 593.

336. See *id.*

337. See *Macias*, 740 F.3d at 101.

338. See *id.*

339. See *supra* Part III.C.1.

Congress wants them to leave? While imprisonment may deter these aliens from reentering the country yet again after their removals, it also exhausts the country's economic resources by exacerbating the problem of overcrowding in the U.S. prison system.<sup>340</sup> In lieu of contributing to this issue, courts should adopt the Second Circuit's solution of refusing to criminally convict aliens like Ambriz, Gonzalez-Diaz, and Macias under § 1326(a) and should instead focus on expeditiously removing them from the country.

### 3. Moral Prerogative

Lastly, subjecting these aliens to “found in” convictions under § 1326(a) raises the question this Note began with: Should the United States criminally sanction previously removed aliens for attempting to stop living in the very country in which they are illegally present? While aliens like Ambriz, Gonzalez-Diaz, and Macias undoubtedly broke the laws of the United States after their initial removals by surreptitiously reentering the country, many other aliens have done likewise and currently remain in this country, undetected, with no intention to leave. From a moral standpoint, is it really wise for the government to spend time and resources prosecuting aliens like Ambriz, Gonzalez-Diaz, and Macias, who are at least attempting to stop living in the country unlawfully? Perhaps the United States should invest more time and resources in punishing aliens who are illegally living in the country undetected with no intention of leaving or, alternatively, in preventing these aliens from entering and reentering the United States in the first place. Frankly, this is a task the country has failed to accomplish thus far as evidenced by immigration trajectories of Ambriz, Gonzalez-Diaz, Macias, and the thousands of previously removed aliens who illegally cross the border into the United States each year.<sup>341</sup>

### CONCLUSION

With the crime of illegal reentry of previously removed aliens on the steady rise,<sup>342</sup> it is imperative that immigration statutes relating to punishing illegal reentrants—like § 1326(a)—are applied with consistency and accuracy. As evidenced by the inconsistent decisions in *Ambriz-Ambriz*, *Gonzalez-Diaz*, and *Macias*, the circuit courts are failing at this task. The Ninth and Second Circuits have analyzed an analogous set of facts under the “found in” clause of § 1326(a), and have arrived at alarmingly opposite legal conclusions. Without a resolution to this circuit split, previously removed aliens like Ambriz, Gonzalez-Diaz, and Macias will receive different treatment under the “found in” clause of § 1326(a)

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340. See *America's Overcrowded Prisons: One Nation, Behind Bars*, ECONOMIST (Aug. 17, 2013), <http://www.economist.com/news/leaders/21583680-eric-holders-ideas-locking-up-fewer-americans-are-welcome-do-not-go-far-enough-one>.

341. See *supra* notes 6–7 and accompanying text.

342. See *supra* notes 6–7 and accompanying text.



depending on the circuit in which they are present. In the already complex system of U.S. immigration law, this result is not acceptable.

This Note argues that the circuit courts—or the Supreme Court, should it decide to resolve this split—should reach the Second Circuit’s conclusion that previously removed aliens who surreptitiously reenter the United States without permission, but remain undetected until they subsequently attempt to leave the country and are involuntarily returned by foreign officials, should not be considered “found in” the United States in violation of § 1326(a). Unlike the Ninth Circuit’s contradictory conclusion—that such aliens *should* be considered “found in” the United States—the Second Circuit’s reasoning and outcome are consistent with major Supreme Court and circuit court decisions that have shaped U.S. immigration law since the beginning of the twentieth century.<sup>343</sup> The Second Circuit’s conclusion is also sound on policy grounds, because it encourages illegal aliens to leave the United States—which is exactly what Congress would like them to do—without the fear of receiving a criminal conviction if they are turned away at another country’s border. In the context of the complicated web that is U.S. immigration law, ensuring consistency and sound policy is crucial to the fair resolution of these intricate and perplexing immigration conundrums.

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343. *See supra* Part III.A–B.