NO._____

SUPREME COURT OF THE UNITED STATES

October Term 2019

PETRONA GASPAR-MIGUEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Amanda Skinner
Assistant Federal Public Defender
506 South Main, Suite 400
Las Cruces, New Mexico 88001
(575) 527-6930
Amanda_Skinner@fd.org

Service to:
Solicitor General of the United States
Department of Justice
950 Pennsylvania Ave. NW, Room 5616
Washington, D.C. 20530-0001

June 8, 2020

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SUPREME COURT OF THE UNITED STATES

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PETRONA GASPAR-MIGUEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

QUESTION PRESENTED FOR REVIEW

Ms. Gaspar-Miguel was convicted of entry without inspection in violation of 8 U.S.C. § 1325(a)(1) after she crossed the border between the United States and Mexico at a place that was not an official port of entry in broad daylight and under the constant surveillance of U.S. Border Patrol agents. One of them actually watched Ms. Gaspar-Miguel physically cross the border. She was almost immediately apprehended. She did not attempt to flee or hide.

The issue presented in this Petition is whether constant surveillance by a law enforcement agent is "official restraint" that prevents an "entry" and thus a conviction for "entry without inspection" within the meaning of § 1325(a)(1).

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PARTIES TO THE PROCEEDING

The only parties to the proceeding are those appearing in the caption to this petition.

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DECLARATION OF COUNSEL

Pursuant to Supreme Court Rule 29.2, I, Amanda Skinner, Assistant Federal Public Defender, declare under penalty of perjury that I am counsel for Petitioner, Petrona Gaspar-Miguel, and, pursuant to this Court's Order of April 15, 2020, I personally mailed the Petition for a Writ of Certiorari to this Court by depositing the original in an envelope addressed to the Clerk of this Court, sealed the envelope, and sent it by United States Postal Service, postage prepaid, at approximately 4 p.m. on June 8, 2020.

/s/Amanda Skinner
Attorney for Petitioner

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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Petitioner Petrona Gaspar-Miguel respectfully requests this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to review the opinion of *United States v. Gaspar-Miguel*, 947 F.3d 632 (10th Cir. 2020).

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, *United States v. Gaspar-Miguel*, 947 F.3d 632 (10th Cir. 2020), is attached hereto as Appendix A. The Motion for Rehearing was filed on January 29, 2020, and denied on February 14, 2020. *See* Appendix B.

JURISDICTIONAL STATEMENT

The Tenth Circuit's decision was filed January 16, 2020. Defendant filed a motion for rehearing on January 29, 2020, which was denied on February 14, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), which grants the United States Supreme Court jurisdiction to review by writ of certiorari all final judgments of the Courts of Appeals. Jurisdiction is also conferred upon this Court by 28 U.S.C. § 1651(a), which grants the United States Supreme Court jurisdiction to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Pursuant to Supreme Court Rules 13.1, 13.3, 13.4, and 30, and 28 U.S.C. § 2101(c), and this Court's Order of March 19, 2020, extending the time for filing petitions to 150 days, this Petition is timely if filed on or before July 13, 2020.

APPLICABLE STATUTORY PROVISION

The Question Presented above pertains to the following statute:

I. 8 U.S.C.A. § 1325, which provides in pertinent part:

> (a) Improper time or place; avoidance of examination or inspection; misrepresentation and concealment of facts
>
> Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or

> misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under Title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under Title 18, or imprisoned not more than 2 years, or both.

STATEMENT OF THE CASE AND THE FACTS

Ms. Gaspar-Miguel crossed the border between Mexico and the United States at a place that was not a port of entry. She walked around the end of a fence with a group of people a little after noon. A border patrol agent saw the group as they crossed the border. He called for assistance. The agent kept the group continuously under surveillance until the other agents arrived. He did not observe anyone running or attempting to hide. He did not hear any reports on the radio indicating anyone was running, trying to hide, or being uncooperative.

Ms. Gaspar-Miguel was charged with illegal entry without inspection, in violation of 8 U.S.C. § 1325(a), a misdemeanor.

At a bench trial in magistrate court, Ms. Gaspar-Miguel contended she had not "entered" the United States. She argued that "entry" requires (1) a crossing into the territorial limits of the United States; (2) inspection and admission by an immigration officer or actual and intentional evasion of inspection; and (3) freedom from official restraint. *In re Pierre*, 14 I. & N. Dec. 467, 468 (BIA 1973). She pointed out that official restraint "may take the form of surveillance, unbeknownst to the alien." *Id.* at

469. Freedom from official restraint "means that the alien who is attempting entry is no[t] . . . under constraint emanating from the government that would otherwise prevent her from physically passing on." *Correa v. Thornburgh*, 901 F.2d 1166, 1172 (2d Cir. 1990). The magistrate judge found Ms. Gaspar-Miguel guilty of violating § 1325(a) under the theory that she had "entered" the United States and denied her Motion to Dismiss. He held that surveillance did not prevent the entry.

Ms. Gaspar-Miguel appealed the magistrate judge's decision to the District Court. The District Court affirmed the decision of the Magistrate Court on January 25, 2019. The Tenth Circuit Court of Appeals affirmed the District Court's decision on January 16, 2020. The Tenth Circuit's decision is attached hereto as Appendix A. Petitioner filed a Petition for Rehearing and Suggestion for Rehearing en banc on January 29, 2020. The Tenth Circuit denied the Petition on February 14, 2020. The Order denying the Petition is attached hereto as Appendix B.

REQUEST FOR WRIT OF CERTIORARI

I. This Court should grant the petition to address an issue of critical importance that affects a large number of federal defendants.

The issue of the meaning of the term "entry" for the purposes of the laws regarding immigration crimes, 8 U.S.C. §§ 1325 and 1326, is of critical importance because of the large number of defendants charged and sentenced for those crimes. In 2017, the most-recent year for which data is available at the United States Sentencing Commission's website, 15,895 people were sentenced under the guideline applicable to §§ 1325 and 1326. As discussed further below, there is disagreement among the circuits regarding whether continuous surveillance by law enforcement constitutes official restraint that prevents an "entry" into the United States. A uniform definition is necessary so that the defendants are not subject to differing interpretations of the law depending solely on where they cross the border into the United States.

II. This Court should grant the petition because the Tenth Circuit's decision conflicts with numerous decisions of other courts and the Bureau of Immigration Appeals, is contrary to established canons of statutory construction, and is based on unsound policy arguments, warranting this Court's review.

Gaspar was charged with violating § 1325(a).[1] The Tenth Circuit's conclusion that continuous surveillance does not constitute "official restraint" that prevents "entry" into the United States is contrary to well-established case law from numerous circuits. The Board of Immigration Appeals and many courts have held that surveillance, whether known or unknown to the defendant, is sufficient to constitute official restraint that prevents an "entry" within the meaning of the immigration laws. As defined by the BIA, "entry" requires (1) a crossing into the territorial limits of the United States; (2) inspection and admission by an immigration officer or actual and intentional evasion of inspection; and (3) freedom from official restraint. *In re Pierre*, 14 I. & N. Dec. 467, 468 (BIA 1973). Official restraint "may take the form of

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[1]That statute imposes criminal penalties on:

> Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact . . . .

§ 1325(a).

surveillance, unbeknownst to the alien." *Id.* at 469. Freedom from official restraint "means that the alien who is attempting entry is no[t] . . . under constraint emanating from the government that would otherwise prevent her from physically passing on." *Correa v. Thornburgh*, 901 F.2d 1166, 1172 (2d Cir. 1990). *See also Farquharson v. United States Attorney General*, 246 F.3d 1317, 1321 (11th Cir. 2001) ("[C]onstructive restraint may consist of surveillance which, though unknown to the alien, causes the alien to lack the freedom to go at large and mix with the population.") (quotations and citations omitted); *De Leon v. Holder*, 761 F.3d 336, 338-39 (4th Cir. 2014) ("An alien under surveillance by the government is not free from official restraint even if officials permit [her] to proceed some distance beyond the border before physically intercepting [her]." (citing *United States v. Gonzalez-Torres*, 309 F.3d 594, 599 (9th Cir. 2002)). Furthermore, "[w]hen an alien attempts to enter the United States, the mere fact that he or she may have eluded the gaze of law enforcement for a brief period of time after having come upon United States territory is insufficient, in and of itself, to establish freedom from official restraint." *Yang v. Maugans*, 68 F.3d 1540, 1550 (3d Cir. 1995).

It is well-established that the same definition of "entry" applies in both the criminal and civil immigration context. *Lopez v. Sessions,* 851 F.3d 626, 631 (6th Cir. 2017), is instructive. In *Lopez*, the petitioner was a citizen of Guatemala, who

returning from Guatemala after visiting his sick father, crossed the Rio Grande near Brownsville, Texas, on May 24, 2001. He was arrested about 30 minutes later by border patrol agents. Lopez lied about his name and nationality, and the agents let him voluntarily return to Mexico. He then crossed back successfully into the United States. The Department of Homeland Security sought to deport Lopez in 2008. At that time, he sought relief from removal under "special rule cancellation" of the Nicaraguan Adjustment and Central American Relief Act, *see* 8 U.S.C. §§ 1229b(e)(3), 1229(b)(1). *Id.* at 628-29. "Among other grants of power, the Attorney General, through decisions of the Board of Immigration Appeals, may cancel the removal of certain Guatemalans who have 'not been apprehended at the time of entry after December 19, 1990.'" *Id.* at 630 (quoting 8 C.F.R. § 240.61(a)(1)). Thus, to obtain relief, the petitioner had to show he had not been apprehended at the time of entry after December 19, 1990. The Board of Immigration Appeals held, *inter alia*, that he had not made such a showing. *Id.* at 628-29.

The Sixth Circuit reversed and remanded to the BIA for further consideration of Lopez's eligibility for special rule cancellation. The Court identified the issue as "whether law enforcement stopped Lopez 'at the time of entry' in May 2001." *Id.* at 630. The Court applied the Board's well-established definition for "entry" for immigration purposes: "(1) a crossing into the territorial limits of the United States;

(2) inspection and admission by an immigration officer or actual and intentional evasion of inspection; and (3) freedom from official restraint." *Lopez*, 851 F.3d at 630 (citing *In re Pierre*, 14 I. & N. Dec. 467, 468 (BIA 1973)). The Court then explained:

> What, then, is freedom from official restraint? It's the alien's liberty to go where he wishes and to mix with the general population. On the flip side, there are at least two ways in which the government might restrain an individual. It could stop the individual physically at the border—the most obvious form of restraint. *See Yang v. Maugans*, 68 F.3d 1540, 1550 (3d Cir. 1995). Or it could monitor the individual as he crosses the border by conducting surveillance of him.

Lopez, 851 F.3d at 630. Observing that the government might prefer differing readings of the term "official restraint" in different statutes, the Court said, "The government ... applies the same definition of entry across statutes. As well it should: In the absence of 'a reasoned explanation for the change' in interpretation or a relevant distinction between the statutory provisions, the government has no warrant to use *Chevron* deference to take opposing positions about the same concept just because it helps them in some cases to do one thing and helps them in other cases to do something else." *Id.* (quoting *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016)).

In *Lopez*, the parties agreed that "surveillance was the only form of official restraint that the government could have used against Lopez before his arrest." 851 F.3d at 631. Furthermore, although the burden was on the applicant to make the initial

showing that he was not physically stopped when he crossed the border, it was the government's burden to provide evidence in support of the affirmative defense that the applicant had not entered because he was under surveillance. *Id.* at 629, 631. No such evidence of surveillance when Lopez crossed the border had been presented. Accordingly, the Sixth Circuit vacated that portion of the BIA's decision and remanded the case for the BIA to resolve the factual issue or resolve the issue of Lopez's eligibility for special rule cancellation on a different ground. *Id.* at 631-32.

Lopez recognized that the meaning of "entry" and the conclusion that surveillance can constitute official restraint does not depend on whether the case at hand is a civil immigration case or a criminal case. Other courts have similarly applied the same definition of "entry" in both the criminal and civil immigration contexts. In *Gonzalez-Torres*, the Ninth Circuit reversed the defendant's convictions under § 1325 and § 1326 on the grounds that the defendant had failed to enter the United States because he had been under constant surveillance and thus under official restraint at all times after crossing the border, and thus "lack[ed] the freedom to go at large and mix with the population." 309 F.3d at 598 (quoting *In re Pierre*, 141 I. & N. Dec. 467 (1973)). *Gonzalez-Torres* has been cited with approval in subsequent civil immigration cases. *See, e.g., Dimova v. Holder*, 783 F.3d 30, 40 (1st Cir. 2015) (discussing with approval *Gonzalez-Torres*); *De Leon*, 761 F.3d at 338-39 (stating

"[a]n alien kept under surveillance by the government is not free from official restraint even if officials permit him to proceed some distance beyond the border before physically intercepting him" and citing *Gonzalez-Torres*); *Lopez*, 851 F.3d 631 (citing *Gonzalez-Torres* and stating that "surveillance counts as official restraint"). The fact that surveillance, even if unknown to the alien, can constitute official restraint sufficient to prevent an entry into the United States has been acknowledged by the Fifth Circuit. *See United States v. Villanueva*, 408 F.3d 193, 198-99 n.5 (5th Cir. 2005).[2] Thus, limiting the surveillance doctrine to civil immigration cases, as the Tenth Circuit did in its decision, in which the doctrine can work to the government's benefit, is contrary to precedent.

The Tenth Circuit also ignored established rules of statutory construction. "If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, or even uniform constructions by inferior courts or a responsible administrative agency, they are to be understood according to that construction." Scalia, Antonin & Garner, Bryan A., *Reading Law: The*

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[2]Although the Fifth Circuit subsequently asserted that it had "never explicitly adopted the doctrine," *United States v. Rojas*, 770 F.3d 366, 368 (5th Cir. 2014), it has not rejected it. In *Rojas*, the Court only held the doctrine would not apply where the defendant was "found in" the United States and prosecuted for violating 8 U.S.C. § 1326(a) after he was located on a bus leaving the United States for Mexico. *Id.* at 367-68.

Interpretation of Legal Texts, at 322 (Thomson/West 2012). This canon applies not only to reenactments of statutes, but also "to interpretations of the same wording in related statutes." *Id.* (citing *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (Kennedy, J.). Justice Kennedy stated in *Bragdon*: "When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." 524 U.S. at 645. Thus, the Tenth Circuit should have held, in accordance with precedent, that an entry could not occur if the person was under continuous surveillance, whether or not known to the person.

III. This Court should grant the petition because the Tenth Circuit's reasons to conclude that "continuous restraint by border patrol agents, by itself, does not constitute official restraint" do not withstand examination.

First, the panel asserted that, "the term 'official restraint' is not found in § 1325" and therefore, unlike the term "enter," it did not need to accept that Congress was using a term with "a settled meaning." Slip opn. (Appendix A) at 5. However, this ignores the fact that it is the definition of "enter" itself that incorporates the requirement of freedom from official restraint, and official restraint has long been defined as including surveillance. *See, e.g., In re Pierre*, 14 I. & N. Dec. at 469.

Second, the panel reasoned that "the notion that continuous surveillance alone can amount to official restraint has only recently been applied in the criminal context," and referred to several Ninth Circuit cases. Slip opn. (Appendix A) at 6. The "recent" cases referred to date back 20 years, to 2000. *See United States v. Pacheco-Medina*, 212 F.3d 1162, 1166 (9th Cir. 2000); *United States v. Ruiz-Lopez*, 234 F.3d 445, 449 (9th Cir. 2000). Moreover, the notion that "continuous surveillance" can constitute official restraint is much older, dating back to 1908. *See Pacheco-Medina*, 212 F.3d at 1163-64 (stating "[t]he notion was expressed in a 1908 case where aliens had crossed the border and proceeded for a quarter of a mile along railroad tracks, but had been under the surveillance of border inspectors from before the time they crossed until their actual physical capture" and citing *Ex parte Chow Chok*, 161 F. 627, 628-29, (N.D.N.Y.), *aff'd*, 163 F. 1021 (2d Cir.1908)). The BIA explicitly adopted the doctrine in *In re Pierre*, 14 I. & N. Dec. 467 (1973), in which it stated that "[t]he restraint may take the form of surveillance, unbeknownst to the alien; he has still not made an entry despite having crossed the border with the intention of evading inspection, because he lacks the freedom to go at large and mix with the population." *Id.* at 469. Thus, the doctrine is not "recent" but long-standing.

Third, the panel asserted that "practical and policy concerns support our treating continuous surveillance differently from other forms of official restraint." Slip opn.

(Appendix A) at 6. In its view, it was "illogical" for continuous surveillance to be considered "restraint" because "[i]f the alien does not know that he is under surveillance, it is difficult to perceive how that surveillance can be said to have prevented that alien from moving 'at large and at will within the United States.'" Slip opn. (Appendix A) at 6 (citations omitted). On the contrary, it is obvious that a person under continuous surveillance is not moving "at large and at will within the United States" because, at any moment, authorities can detain the person, whether or not he or she knows of the surveillance. The person is only present by the sufferance of the authorities, and not actually "free" to move about the country.

The panel also overstated the difficulty of applying the doctrine. Slip opn. (Appendix A) at 6-7. Courts routinely distinguish amongst different fact patterns in determining whether specific conduct violated a statute. This situation is no different.

The panel was also concerned that "treating continuous surveillance as official restraint in turn treats aliens who take exactly the same actions with exactly the same intent as committing different versions of a crime: attempted entry, versus entry." Slip opn. (Appendix A) at 7. It is not clear why it is a problem to require the government to prosecute using the correct theory. *See, e.g., United States v. Angeles-Mascote*, 206 F.3d 529, 531 (5th Cir. 2001) (reversing conviction for reentry; proper charge for alien stopped at port of entry was attempted reentry; court observed that "actual entry"

requires "both physical presence in the country as well as freedom from official restraint").

Finally, the Tenth Circuit was concerned that the doctrine created "the potential for perverse incentives for law enforcement agents to 'look away' to avoid the application of 'continuous surveillance.'" Slip opn. (Appendix A) at 7. It is questionable for a court to interpret the law based on concerns that law enforcement agents will not do their duty.

IV. This case raises an issue of exceptional importance justifying this Court's review.

This case presents an exceptionally important issue that deserves review. Under the Tenth Circuit's analysis, persons charged with entry without inspection in New Mexico will be treated differently from those in other circuits. The implications of the Tenth Circuit's decision in this case are far-reaching. The analysis given to these issues by the Tenth Circuit ill serves litigants who, in the future, will be affected by that Court's holding.

As a result of this constitutional error, Ms. Gaspar-Miguel was found guilty of the misdemeanor offense of illegally entering the United States without inspection in violation of 8 U.S.C. § 1325(a)(1). The Government was improperly relieved of its burden to prove that she had "entered" the United States free of official restraint as

defined by established precedent, and thus she was convicted without proof beyond a reasonable doubt that she had actually committed the offense of conviction.

CONCLUSION

For the foregoing reasons, Defendant-Petitioner Petrona Gaspar-Miguel requests that this Court grant *certiorari* in this case and reverse her conviction.

Respectfully submitted,

Stephen P. McCue
FEDERAL PUBLIC DEFENDER

/s/Amanda Skinner
Amanda Skinner
Assistant Federal Public Defender
506 S. Main St., Suite 400
Las Cruces, NM 88001
(575) 527-6930