NO. 19-8733

SUPREME COURT OF THE UNITED STATES

PETRONA GASPAR-MIGUEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S RESPONSE TO GOVERNMENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October 29, 2020

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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 caused to be mailed the Petitioner's Response to Government's Brief in Opposition to 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 October 29, 2020.

/s/Amanda Skinner
Attorney for Petitioner

ARGUMENT

This Court should grant the Petition for Writ of Certiorari in this case for the following reasons:

The Government agrees that there is a conflict in the circuits, with the Tenth Circuit's holding clearly contrary to that of the Ninth Circuit. Brief in Opp. at 7 (stating "the Ninth Circuit has adopted a different interpretation of the term 'enters' in [8 U.S.C. §] 1325 and another criminal provision"). As discussed in Ms. Gaspar-Miguel's Petition, the Tenth Circuit's idiosyncratic holding regarding the interpretation of "enter" is contrary to the interpretation by the Board of Immigration Appeals and every other circuit in the context of immigration law, including criminal immigration law. *See* Petition at 6-11.

The Government also agrees that, even after enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546, courts have interpreted the word "enter" in the same way as before in a variety of contexts. Brief in Opp. at 9-10.

The Government erroneously asserts that the Tenth Circuit's decision "did nothing to disturb the potential applicability of the doctrine of official restraint in the criminal context." Brief in Opp. at 9-10. Contrary to the Government's representation, the Tenth Circuit's decision is diametrically different from established law in other

circuits and by the Bureau of Immigrations Appeals, all of which have found that constant surveillance prevents an "entry." *See Lopez v. Sessions,* 851 F.3d 626, 631 (6th Cir. 2017); *De Leon v. Holder*, 761 F.3d 336, 338-39 (4th Cir. 2014); *United States v. Gonzalez-Torres*, 309 F.3d 594, 599 (9th Cir. 2002); *Farqharson v. United States Attorney General*, 246 F.3d 1317, 1321 (11th Cir. 2001); *Yang v. Maugans*, 68 F.3d 1540, 1550 (3d Cir. 1995); *Correa v. Thornburgh*, 901 F.2d 1166, 1172 (2d Cir. 1990); *In re Pierre*, 14 I. & N. 467, 468 (BIA 1973). *See also Dept. of Homeland Sec. v. Thuraissigiam,* 140 S. Ct. 1959, 1982 (2020) (stating "an alien who is detained shortly after unlawful entry cannot be said to have 'effected an entry'"); *United States v. Villanueva*, 408 F.3d 193, 198-99 n.5 (5th Cir. 2005) (acknowledging that surveillance unknown to the alien can be restraint sufficient to prevent an "entry").

The Government's final claim is that, under the current state of the law, the defendant in this case would likely be found guilty because the Border Patrol agent testified he was not immediately certain he was observing people crossing the border. Government's Brief in Opp. at 15. However, there was never any question that the agent saw something right away and kept what he saw in his sights until Ms. Gaspar-Miguel and her companions were apprehended by other Border Patrol agents. This was unquestionably continuous surveillance by the agent himself, unlike *United States v. Castro-Juarez*, 715 Fed. Appx. 646, 637 (9th Cir. 2017), in which the

defendant was spotted on camera some distance from the border. This case also does not involve the applicability of seismic sensors or infrared cameras or similar equipment that alert Border Patrol to movement of animals as well as people. Accordingly, *United States v. Vela-Robles,* 397 F.3d 786 (9th Cir. 2005), and similar cases involving electronic sensors are inapplicable. Under the facts presented here, Ms. Gaspar-Miguel would likely have prevailed in the Ninth Circuit.

This case cleanly and straightforwardly presents this Court with a conflict between the interpretation of the word "enter" created by the Tenth Circuit and the well-established definition applied by this Court, every other circuit and the Bureau of Immigration Appeals.

CONCLUSION

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

Respectfully submitted,
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