

No. 22-6391

IN THE
Supreme Court of the United States

NONAMI PALOMARES,
Petitioner,

v.

UNITED STATES,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

REPLY BRIEF OF PETITIONER

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I. RESPONDENT CONCEDES THE QUESTION PRESENTED WARRANTS REVIEW BY THIS COURT.

As petitioner has demonstrated and the government concedes, the question presented in this case “warrants this Court’s review.” Opp. at 5. The undisputed and growing circuit conflict over the proper interpretation of the safety-valve provision of the federal sentencing statute will not be resolved absent intervention by this Court. The intractable nature of the split was made even clearer last week, when the Ninth Circuit denied the long-pending petition for rehearing *en banc* in *United States v. Lopez*, No. 19-50305, 2023 WL 501452 (9th Cir. Jan. 27, 2023). In a statement regarding the denial, one of the judges explained that “[a] circuit split will exist whether this court changes its position,” and that the “deep split” therefore “warrants Supreme Court review.” *Id.* at *1–2.

This pressing and unsettled question of statutory interpretation is creating disparate sentencing practices across the country. *Id.* at *1 (noting that the question presented “implicates how individuals are deprived of their liberty” and that the circuit split is causing “disparate administration of justice across the country”). The amicus brief filed by FAMM in support of this petition confirms the importance of the question presented and the urgency of the issue. See Br. of FAMM as Amicus Curiae in Support of Petitioner (Jan. 20, 2023).

II. THIS PETITION IS A BETTER VEHICLE TO ADDRESS THE QUESTION PRESENTED THAN *PULSIFER*.

The government does not dispute that Ms. Palomares’s case cleanly and squarely poses the question presented and that the issue is outcome determinative

in her case. See Pet. at 24–27. The government does not identify any vehicle problem with Ms. Palomares’s case. Instead, the government’s position is that the Court should “grant certiorari in *Pulsifer* [No. 22-340] and hold the petition in this case pending the Court’s decision on the merits” simply because the petition in *Pulsifer* was filed earlier. Opp. at 5–6.

The government has it backwards, however. The Court should grant Ms. Palomares’s petition because it is the superior vehicle for addressing the question presented, and hold *Pulsifer*. The United States provides no good reason why timing—the only factor it points to—should be decisive. The Court does not invariably follow a “first-to-file” approach, and such an approach has no logic when the Court is considering two petitions at the exact same time, as it is here. Indeed, the government’s failure to discuss any substantive considerations and its support of a petition with a vehicle problem (see below) suggests that it simply has a strategic reason for preferring *Pulsifer*.

Ms. Palomares’s case is the better vehicle. The undisputed purpose of the safety-valve provision is to provide nonviolent, low-level drug offenders with relief from harsh mandatory-minimum sentences. See Pet. at 3–5. In particular, it was specifically designed, and recently amended, to provide relief to such offenders who cannot *otherwise* obtain relief from mandatory minimums through substantial-assistance departures, because they played minor roles in the drug activity and therefore have no new or useful information to trade. *Id.* There is no dispute that Ms. Palomares was precisely such an offender. *Id.* at 26 (explaining that she was merely a drug courier and received the mandatory-minimum sentence because she did not have such information to trade). In contrast, the gov-

ernment concedes that the defendant in *Pulsifer* obtained relief from the mandatory minimum on *other grounds*, namely that he provided “substantial assistance” to the government under 18 U.S.C. § 3553(e). Opp. at 6. Accordingly, because Mr. Pulsifer obtained relief from the mandatory minimum on an independent basis, the district court’s failure to grant him safety-valve relief may well have been harmless error.

The government attempts to avoid the harmless-error vehicle problem by arguing that “the court in *Pulsifer* would have had authority to impose an even lower sentence ‘without regard to [the] statutory minimum,’ 18 U.S.C. 3553(f), if the defendant had satisfied the requirements for safety-valve relief under Section 3553(f).” *Id.* This carefully worded statement about the sentencing court’s authority does not refute petitioner’s showing that it is highly unlikely that application of the safety-valve provision would have lowered Mr. Pulsifer’s 162-month (13.5-year) sentence. See Pet. at 27 n.6. As Mr. Pulsifer noted in his petition, application of the safety-valve provision would have entitled him to a two-level reduction in his offense level, which would have changed his Guidelines range from 120–50 months to 100–25 months. See *Pulsifer* Petition, No. 22-340, at 24. The Guidelines range, however, did not anchor Mr. Pulsifer’s sentence; the 162-month sentence that he received was significantly above either Guidelines range. See Pet. at 27 n.6 (describing Mr. Pulsifer’s lengthy criminal history). Accordingly, it is unclear in Mr. Pulsifer’s case whether the district court’s safety-valve determination had any effect on his sentence—*i.e.*, whether resentencing in the district court would provide him any relief, even if this Court ruled in his favor. This vehicle problem is absent from Ms. Palomares’s case because—as the government does not dispute—the safety-valve ruling

in her case was outcome-determinative. *Id.* at 24–25. Ms. Palomares’s petition therefore provides the superior vehicle for addressing the question presented.

Finally, Ms. Palomares’s case is the more straightforward vehicle for interpreting a safety-valve provision that is designed to provide relief from mandatory minimum sentences. Mr. Pulsifer obtained a substantial-assistance departure; Ms. Palomares did not. Accordingly, Ms. Palomares got the mandatory-minimum sentence; Mr. Pulsifer did not.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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