No. 17-696

IN THE
Supreme Court of the United States

ALEXIS GONZALEZ-BADILLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The brief in opposition confirms that the government's understanding of its authority to damage personal property during a consensual search is just what the Framers feared. Its understanding also diverges from the line it advanced to this Court in *Florida v. Jimeno*, 500 U.S. 248 (1991).

The government's account of the courts of appeal is not credible, and its principal arguments simply beg the merits of the constitutional question. It does not contest that the question is important and squarely presented.

The Court should grant certiorari.

I. The Government's Understanding Of Its Authority To Damage Personal Property Is Ahistorical And Remarkable.

According to the government, lower courts across the country "have generally concluded" that, upon receiving general consent to search, officers may inflict intentional damage to property "so long as [they] do not destroy the container or render it useless for its intended purpose." BIO 7-8. The government took that position below: that, upon Petitioner's consent to search his bag, Officer Nevarez was permitted to cause intentional damage to his boot, short of "render[ing] [it] destroyed or useless." Gov't 5th Cir. Br. at 16 n.4. That position is ahistorical, illogical, and inconsistent with the government's prior position before this Court.

1. The government does not contest that its position embodies the very apprehensions that led to rati-

fication of the Fourth Amendment. Pet. 28-29 & n.13. As Judge Elrod observed, "[o]ur Founders knew that '[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.'" Pet. App. 10a. During passage of the Bill of Rights, "much of the rhetoric" regarding search and seizure focused specifically on the concern that "wrongful searches and seizures could result in the damaging or mishandling of goods." Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 Yale L.J. 946, 991 (2016). Such trespass on personal property "was often analogized to violence to real property, like the breaking of a door to a home." *Id.*

The government not only ignores this history, but fails to advance *any* constitutional principles in support of the expansive authority it assumes.

2. The government's position today—that the law of all circuits allows its officers to damage property during a consensual search "so long as [they] do not destroy [it] or render it useless for its intended purpose," BIO 7-8—would no doubt shock the innumerable citizens who, every day, willingly entrust their luggage to law enforcement for the purposes of a search.

Consider the following interaction:

Officer: "Excuse me sir, may I search your bag?"

Citizen: "Sure."

In the government's view, this officer has just been granted permission to damage property within this citizen's bag, short of complete destruction. Without further inquiry, the officer may rip open the lining of a suit jacket, cut open the pockets of a handbag, and pry open the soles of this citizen's shoes. This damage would be lawful on some fiction that the citizen consented to it. BIO 8.[1]

The government's position undermines the good-faith relationship between citizen and law enforcement that causes people to consent to a search in the first place. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 243 (1973) (recognizing that "the community has a real interest in encouraging consent").

3. The government's view has not always been so brazen. In *Jimeno*, the United States told this Court that in understanding the scope of an individual's general consent to search, it should draw the line at property damage. It proposed this specific rule: "A general consent to search a car for narcotics authorizes the search of all containers inside the car that might contain narcotics and *can be opened without causing property damage*." Br. of U.S. at 10, *Jimeno*, 500 U.S. 248 (No. 90-622) 1991 WL 11009211 (emphasis added). The government expressly acknowledged that such damage would exceed any reasonable interpretation of general consent to search. It explained that the paper bag at issue was "*unlike the case where the police must damage a container in*

[1] The interaction above is identical, in all relevant respects, to Officer Nevarez's description in this case. *See* ECF No. 67 at 13-14.

order to gain access to it," for which a reasonable person would "expect the officer to seek further consent." *Id.* at 20 (emphasis added). Accordingly, the *Jimeno* officers did not violate the Fourth Amendment because "the search of the paper bag in th[at] case did not require or result in damage to property." *Id.*

II. The Government's Position That Pulling Apart The Sole Of A Boot Is "Minimal" Under The Fourth Amendment Begs The Constitutional Question.

1. As the government acknowledges, Officer Nevarez testified that he "pulled [the sole of the boot] apart" from an existing slit and "opened up the boot." ECF No. 67 at 17, 49; *see also id.* at 41 (he "pried open" the boot); BIO 3. The magistrate judge's factual finding, adopted by the district court and uncontested on appeal, is similarly that Officer Nevarez "pull[ed] open the boot." Pet. App. 32a.

In its BIO, the government adopts the Fifth Circuit majority's position that pulling apart the sole of a work boot is "minimal" for the purposes of the Fourth Amendment. BIO 10. It is worth noting that the government did not even attempt this argument below. The words "minimal" or "de minimis" never surface in any of its written or oral submissions to the magistrate judge, district court, or Fifth Circuit. In those courts, the government was forthright in describing Officer Nevarez "tearing into [Petitioner's] boot to gain access." Gov't 5th Cir. Br. at 12.

More fundamentally, however, the notion that this damage was "minimal" for the purposes of the Fourth Amendment is just a value judgment that begs the

constitutional question—whether Petitioner's general consent to search provided justification for pulling apart his work boot. As Judge Elrod pointed out, the conclusion that such damage is "minimal" is nothing more than a veiled judgment about the value or condition of Petitioner's property—a consideration that is (and should be) foreign to Fourth Amendment analysis. Pet. App. 13a ("[I]t makes no difference that this case involves work boots that can be glued back together, rather than high-end Christian Louboutin pumps: Fourth Amendment protections do not wax and wane based on the monetary value of a citizen's property."). Officers conducting a consensual search have no place making a subjective assessment that your property is not valuable enough to be afforded constitutional protection.[2]

2. The government attributes significance to the fact that in this and other cases raising the question presented, the defendant failed "to limit or modify general consent" before the damage occurred. BIO 2, 9-10. Of course that is true. If a citizen were to specifically qualify his consent to exclude damage, there would be no occasion to consider whether general consent authorized it. Failure to "limit or

[2] This case demonstrates how unworkable the government's test is. As Judge Elrod observed, it is rather contrived to say that prying open the sole of a boot does not "destroy" the boot or "render it useless." *See* Pet. App. 19a ("A boot with a detached, or partially detached, sole does not give the wearer a stable foundation on which to walk, nor is it effective to protect against dirt, water, and other elements.").

modify general consent" is an essential feature of every case raising the question presented.

III. The Circuits Are In Conflict.

The petition set forth the conflict among the circuits, with reference to the actual legal standards that those circuits apply. In the Sixth, Seventh, Eighth, and Eleventh Circuits, "'permission to search does not include permission to inflict intentional damage to the places or things to be searched.'" Pet. 15-18 (quoting *United States v. Torres*, 32 F.3d 225, 231-32 (7th Cir. 1994)). The Tenth and D.C. Circuits hold that "law enforcement violates the Fourth Amendment only insofar as it engages in 'complete and utter destruction' of personal property or 'render[s] [it] useless.'" Pet. 21-24 (quoting *United States v. Jackson*, 381 F.3d 984, 988-89 (10th Cir. 2004)). And the Second and Third Circuits have held that the need to damage to property to search within "do[es] not defeat the principle underlying the *Jimeno* ruling . . . that permission [to search] extends to any items within that area that a reasonable person would believe to contain drugs.'" Pet. 18-21 (quoting *United States v. Kim*, 27 F.3d 947, 956 (3d Cir. 1994)).

The government's claims there is no conflict. Its account is not credible:

1. Upon asserting that courts have "generally concluded" that it may cause intentional damage "so long as officers do not destroy the [property] or render it useless," the government quotes *exclusively* from Tenth and D.C. Circuit cases, BIO 7-8—the same circuits Petitioner identified as having adopted that position, Pet. 21-23.

2. The government's suggestion that the Sixth, Seventh, Eighth, and Eleventh Circuits also apply a complete destruction/render useless standard is wrong. First, despite citing over a dozen cases from these circuits, the government does not identify *a single case* applying that standard. Second, the government ignores the express articulation of the constitutional standard by these circuits, quoted in detail in the petition. *See* Pet. 16-18. For instance, the government does not even acknowledge the Seventh Circuit's recognition that, under its case law, "[i]t is well-settled that 'permission to search does not include permission to inflict intentional damage to the places or things to be searched.'" *United States v. Smith*, 67 F.3d 302, 1995 WL 568345, *3 (7th Cir. 1995) (quoting *United States v. Torres*, 32 F.3d 225, 231-32 (7th Cir. 1994)).

The government's characterization of these circuits is premised upon two superficial maneuvers. First, it selectively quotes language that general consent permits a "*nondestructive*" search, and suggests that this is equivalent to the complete destruction/render useless standard applied in the Tenth and D.C. Circuits. BIO 13-14. This simply exploits an ambiguity in the word "destructive," which commonly describes causing damage, not necessarily the complete destruction of an object. *E.g.*, Merriam-Webster Online Dictionary ("to destroy" means "to ruin the structure . . . or condition of");[3] Cambridge Dictionary Online ("destructive" means "causing, or

[3] https://www.merriam-webster.com/dictionary/destroy.

able to cause, damage").[4] A hurricane that shatters the windows of your house was "destructive," even if your house still stands. For this reason, the two circuits applying a complete destruction standard have said so in plain terms, asking whether officers have engaged in "complete and utter destruction or incapacitation" or "render[ed] [property] completely useless." *Jackson*, 381 F.3d at 988-89. On the other hand, as set forth in the petition (and ignored by the government), the Sixth, Seventh, Eighth, and Eleventh Circuits have been clear that general consent cannot be used to justify "cutting,"[5] "slash[ing],"[6] "drilling,"[7] or otherwise causing "damage."[8] Indeed, they have specifically stated that the "destructive search" prohibited under their case law encompasses "*[c]utting or destroying* an object." *Santana-Aguirre*, 537 F.3d at 932 (emphasis added); *see also* Wayne R. LaFave, 2 Criminal Procedure § 3.10(f) n.219 (4th ed. 2017) (citing these circuits for proposition that general consent to search does not allow officers to

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[4] https://dictionary.cambridge.org/us/dictionary/english/destructive.

[5] *United States v. Santana-Aguirre*, 537 F.3d 929, 932 (8th Cir. 2008) (referring "[c]utting or destroying"); *United States v. Alverez*, 235 F.3d 1086, 1088-89 (8th Cir. 2000).

[6] *United States v. Strickland*, 902 F.2d 937, 942 (11th Cir. 1990).

[7] *United States v. Zamora-Garcia*, 831 F.3d 979, 983 (8th Cir. 2016).

[8] *United States v. Garrido-Santana*, 360 F.3d 565, 576 (6th Cir. 2004); *United States v. $304,980.00 in U.S. Currency*, 732 F.3d 812, 820 (7th Cir. 2013).

"break into locked containers *or otherwise do physical damage in carrying out the search*"). [9]

The government's second maneuver is to limit its inquiry to whether any circuit has adopted a "categorical rule" that there cannot be "any damage to personal property" during a consensual search. BIO 11. This is a red herring. At bottom, one set of circuits holds that general consent to search permits officers to pry open or cut into personal property that might contain the object of the search (whether it's a can,[10] sneaker,[11] or boot[12]). A discrete set of circuits holds that general consent does not (a can,[13] candle,[14] and spare tire[15]). The government does not offer any basis for concluding that the Constitution affords lesser protection to a work boot than these other effects. To the contrary, clothing was a specific category of property that Madison sought to protect, that "orators

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[9] The government uses the same ambiguity to distance itself from its many briefs acknowledging the standard in the Sixth, Seventh, Eighth, and Eleventh Circuits. BIO 11 n.2. But it has also been too explicit for that. *E.g.*, Br. of U.S. at 26, *United States v. Lee*, 220 F.3d 589 (11th Cir. 2000) (No. 98-6746), 2000 WL 34012932 ("[I]t is understood that the general permission to search does not include permission to inflict intentional damage to places or things that are to be searched."); Pet. 18 n.7.

[10] *Kim*, 27 F.3d 956-57.

[11] *United States v. Mire*, 51 F.3d 349, 352 (2d Cir. 1995).

[12] Pet. App. 6a-7a.

[13] *United States v. Osage*, 235 F.3d 518, 521 (10th Cir. 2000).

[14] *Santana-Aguirre*, 537 F.3d at 932-33.

[15] *Strickland*, 902 F.2d at 941-42; *Alverez*, 235 F.3d at 1088-89.

gave impassioned speeches about," and that had "special status" in the law in the founding era. *Brady*, *supra*, at 987-88.

3. The government's characterization of the Second and Third Circuits is also unsound. For instance, it construes the Third Circuit's decision in *Kim* as being just about "the opening of the specific cans in that case." BIO 15. That completely disregards the majority's legal basis for upholding the search: that the factory-sealed cans were not "similar to locked briefcases" and the need to break them open did not "defeat the principle underlying the *Jimeno* ruling that when one gives general permission to search for drugs in a confined area, that permission extends to any items within that area." *Kim*, 27 F.3d at 956-57. It also disregards the legal basis for Judge Becker's dissent: that "[c]onsent to search property cannot reasonably be construed to mean consent to damage the property." *Id.* at 968.

4. The government attributes significance to the fact that the decision below was unpublished. BIO 5, 6, 11. This Court has said the opposite: "[T]he fact that the Court of Appeals' order under challenge here is unpublished carries no weight in [this Court's] decision to review the case." *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987). As the petition noted (and the government ignored), the Fifth Circuit, sitting *en banc*, previously divided evenly on the question presented. Pet. 23 n.9.[16]

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[16] This government's urging that the decision below is "non-precedential," BIO 6, is particularly dubious given that, immediately following the decision, it urged courts that they

IV. The Question Presented Is Squarely Presented.

1. The government concedes that the question presented is perfectly preserved. BIO 5. It also confirms the facts are settled and simple: Officer Nevarez obtained general consent to search Petitioner's bag and, without seeking further consent, pried open the sole of a boot within. Pet. 4-5; BIO 3.

The government does not reassert *any* of the alternative justifications that were relied upon in the courts below. It abandons the magistrate judge's and district court's rationale that probable cause justified warrantless intentional damage, Pet. 6-7, and abandons its arguments that exigent circumstances and the plain view doctrine justified the damage. Pet. 7, 26.

2. In its brief in opposition, the government argues for the first time that intentional damage to the boot could be justified as a search incident to arrest. The government claims this is so even though the damage took place during a consensual encounter with Petitioner, during which the boot was already in the government's control, and Officer Nevarez's undisputed testimony that he arrested Petitioner only after pulled apart the boot. ECF No. 67 at 17; Pet. App. 32a.[17]

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must "follow[] its precedence." Suppl. Br. of U.S. at 1, *United States v. Hernandez*, No. 5:17-cr-00067 (W.D. La. July 28, 2017) (ECF No. 35).

[17] None of the circuit or district court cases cited on p.17 of the BIO involves circumstances similar to this case. All involved

The government's announcement of this strange Fourth Amendment argument serves no impediment to this Court's review. First, the government waived this argument by failing to raise it below. *See Illinois v. Lafayette*, 462 U.S. 640, 642-43 (1983) (government previously "waived the argument that the search was incident to a valid arrest" and Court granted certiorari to resolve nonwaived justification). Second, even if this argument were not waived, it is not within the question presented set forth by either party. *See* Pet. i; BIO i. Third, the merits of the government's odd argument (and its waiver) can be resolved by the Fifth Circuit on remand.

As the United States has advised in support of its own Fourth Amendment certiorari petitions, "[t]his Court does not ordinarily review questions that were not specifically decided by the court of appeals." Reply of U.S. at 9-10, *United States v. Jones*, 565 U.S. 400 (2012) (No. 10-1259), 2011 WL 2326714. "If the Court were to grant certiorari and reverse with respect to [the question presented], the court of appeals could consider on remand [the government's] alternative argument." *Id.* This is especially so where the Respondent "failed to raise this issue in the court of appeals." Reply of U.S. at 11, *United States v. Kebodeaux*, 570 U.S. 387 (2013) (No. 12-418), 2012 WL 6693642; *see also* Pet. 26 (collecting cases in which the

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either an object in the defendant's control during an arrest, a search immediately following arrest, an automobile search, or a warrant authorizing the damage—precisely what the officers should have obtained here. *E.g.*, *Fillmore v. Ordonez*, 829 F. Supp. 1544, 1559-60 (D. Kan. 1993) (upholding forcible opening of briefcase where officer obtained warrant).

Court has reserved alternative justifications for remand).

CONCLUSION

For the reasons above and in the petition, the Court should grant certiorari.

Respectfully submitted,

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