No. 18-9381

IN THE

Supreme Court of the United States

HUBERT YOUTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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JULY 3, 2019

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The question presented is straightforward: does the Fourth Amendment require reasonable suspicion to search the living quarters of a vessel at the border? The government does not dispute that this question is a recurring one of national importance: countless seafarers and crew members dwell on vessels that dock in U.S. ports; and customs officers inspect those vessels on a daily basis. *See* Pet. 10–12. Nor does the government dispute that this case is an ideal vehicle: the question presented was pressed and passed on in the courts below; the lower courts did not alternatively find, and the government did not argue, that reasonable suspicion supported the entry and search of Petitioner's cabin; and a favorable resolution of the question presented would otherwise be case dispositive. *See* Pet. 13–14.

Instead, the government opposes review on the ground that there is no circuit conflict. It argues that, despite explicitly saying so in published opinions, the Third and Ninth Circuits have not actually held that reasonable suspicion is required to search the living quarters on a vessel at the border. Therefore, in the government's view, no conflict exists with the Eleventh Circuit's contrary holding in *United States v. Alfaro-Moncada*, 607 F.3d 720, 726–32 (11th Cir. 2010). BIO 5, 10–12. As explained below, however, the government characterizes opinions that the Third and Ninth Circuits might have written, not the opinions they actually wrote. The government also defends the Eleventh Circuit's position, BIO 5–10, but its argument ignores the privacy interests that seafarers have in their living quarters. And, in any event, the circuit split should be resolved whichever side is correct.

I. THE CIRCUIT SPLIT IS REAL

The government begrudgingly acknowledges that both the Third and Ninth Circuits have expressly stated in published opinions that reasonable suspicion is required to search a cabin at the border. BIO 10, 12. The government nonetheless argues that those statements were dicta. But the text of the opinions makes clear that those fully-reasoned statements were central to the rationale of the decisions. And the government cites no authority embracing its revisionist interpretation.

A. The Third Circuit Requires Reasonable Suspicion

The Third Circuit's decision is *United States v. Whitted*, 541 F.3d 480 (2008).

1. In its introductory paragraph, the Third Circuit framed the question before it as "whether the Fourth Amendment requires any level of suspicion to justify a border search of a passenger cabin aboard a cruise liner arriving in the United States from a foreign port." *Id.* at 482. The court then summarized its answer: "For the reasons that follow, we believe that it does and that reasonable suspicion is the appropriate standard." *Id.*

In the lead-in section of its legal analysis, the court again repeated that "[t]he question here . . . is not whether the customs officers were required to have a warrant or probable cause in order to search Whitted's private cabin, but, rather, whether reasonable suspicion was necessary." *Id.* at 485. The court continued that, in order to resolve "whether any Fourth Amendment protection applies to a search of a private sleeping cabin," the court "must first decide whether the border search

at issue was routine or non-routine and, so doing, set forth the correct standard required under the Fourth Amendment." *Id.*

Over the course of twelve paragraphs, the court analyzed whether reasonable suspicion was required to search the living quarters of a vessel at the border. *Id.* at 485–89. After summarizing other decisions, the court concluded that it was: "We believe that these courts correctly recognize that the search of private living quarters aboard a ship at the functional equivalent of a border is a nonroutine border search and must be supported by reasonable suspicion of criminal conduct." *Id.* at 488. The court repeated that conclusion multiple times. *See id.* ("We find that requiring reasonable suspicion strikes the proper balance between the interests of the government and the privacy rights of the individual. . . . We, therefore, join those courts that require reasonable suspicion to search of a passenger cabin aboard a ship."); *id.* at 489 ("Individuals have a reasonable and high expectation of privacy in their living and sleeping quarters aboard ships, even at national borders, which merits Fourth Amendment protection."); *id.* ("Because of the high expectation of privacy and level of intrusiveness, the search cannot be considered 'routine' and must therefore be supported by reasonable suspicion of illegal activity."). The Third Circuit could not have been clearer.

2. The government nonetheless argues (BIO 12) that the numerous passages above were merely dicta because the court went on to conclude that the officers in that case did in fact possess reasonable suspicion. *Id.* at 489–91. That's preposterous. The Third Circuit did what courts routinely do: it first determined

the governing legal standard (*i.e.*, reasonable suspicion); and it then determined whether the facts of the case satisfied that standard. Both aspects of the decision necessarily formed part of its holding. Indeed, if the court had instead concluded that no suspicion was required, then the decision would have stopped there. There would have been no need for the court to address whether reasonable suspicion existed. Thus, the court's thoroughly-reasoned and repeated conclusion requiring reasonable suspicion was central to the decision's *ratio decidendi*.

The government points to Judge Chagares' concurring opinion, where he explained that he would have preferred to resolve the case by instead assuming, without deciding, that reasonable suspicion was required. *Id*. at 491–93. But the majority did decide that issue and thus established the legal standard for cabin searches at the border. And not even Judge Chagares characterized that aspect of the majority's opinion as dictum. To the contrary, the very basis of his criticism was that the majority *did* require reasonable suspicion rather than simply assume it was required. In short, the government describes an opinion that it may have wanted the Third Circuit to write, not the one it actually wrote.

3. The government's characterization of *Whitted*'s holding conflicts not only with the text of the opinion itself but with this Court's characterization of its own holding in *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985). That Fourth Amendment border-search case involved the same dynamic as *Whitted*. The Court first addressed "what level of suspicion would justify a seizure of an incoming traveler for purposes other than a routine border search." *Id*. at 540. After seven

paragraphs of analysis, the Court "*h[e]ld* that the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents . . . reasonably suspect that the traveler is smuggling contraband in her alimentary canal." *Id.* at 541 (emphasis added). Notably, the Court characterized that aspect of its opinion as a "holding" even though the Court went on to conclude that reasonable suspicion did in fact exist (and that the detention there was not unreasonable in scope). *Id.* at 542–44. Just as *Montoya de Hernandez*'s holding included the aspect of the decision setting forth the reasonable-suspicion standard, so too did *Whitted*'s holding include the aspect of the decision setting forth that legal standard for cabin searches at the border.

4. Lest there be any doubt, the Third Circuit itself understands *Whitted*'s holding that way. In *Bryan v. United States*, 913 F.3d 356 (3d Cir. 2019), passengers brought suit against customs officers for searching their cabins at the border. In summarizing the applicable law, the Third Circuit stated: "In *United States v. Whitted* . . . , we *held* for the first time that because of a passenger's high expectation of privacy and the level of intrusiveness, a search of a cruise ship cabin at the border is non-routine and requires reasonable suspicion." *Id.* at 362 (quotation omitted; emphasis added). The court repeatedly referred to "the *Whitted* standard" as requiring reasonable suspicion for cabin searches at the border. *Id.* at 362–63. The court ultimately granted qualified immunity to the officers because the law was not "clearly established." But the court did not reach that conclusion because *Whitted*'s reasonable-suspicion standard was mere dictum. Rather, it did

so because *Whitted* was decided only a day or two before the searches there took place, and thus before the officers "could reasonably be expected to have learned of this development in our Fourth Amendment jurisprudence." *Id.* at 363.

Thus, the Third Circuit considers *Whitted*'s reasonable-suspicion standard to be circuit precedent. That precedent binds customs officers, prosecutors, and district courts in that Circuit. While the government observes that there is no Third Circuit decision excluding evidence under *Whitted*, it overlooks the most likely explanation for that omission: customs officers and prosecutors have been faithfully applying the holding in *Whitted*. Meanwhile, they do not need reasonable suspicion in the Eleventh Circuit under *Alfaro-Moncada*. In that regard, there are numerous busy ports in the Third and Eleventh Circuits—including in Newark, Philadelphia, Pittsburgh, Wilmington, Camden, the U.S. Virgin Islands, Mobile, Savannah, Tampa, Ft. Lauderdale, Jacksonville, and Miami, just to name a few. Accordingly, that circuit conflict alone warrants this Court's review and resolution.

B. The Ninth Circuit Requires Reasonable Suspicion

But there is more: *United States v. Alfonso*, 759 F.2d 728 (9th Cir. 1985).

1. The Ninth Circuit in *Alfonso* addressed two distinct Fourth Amendment arguments. First, the defendant argued that the search of the vessel "cannot be considered a border search" at all. *Id.* at 733. Second, the defendant argued that "even if the search is deemed a proper border search, the search of his private living quarters on the ship was unreasonable under the Fourth Amendment." *Id.* After concluding that the search of the vessel was a proper

border search under the "extended border search" doctrine, the court separately addressed the defendant's alternative argument that "its scope, extending as it did to sealed packages beneath a bunk bed in his living quarters, was unreasonable under the Fourth Amendment. The government, on the other hand, maintains there is no legitimate privacy interest immune from border search in any part of a vessel entering the United States." *Id.* at 737.

The court agreed with the defendant. It "found no cases directly confronting the permissible scope of a border search involving the living quarters of a ship." *Id.* However, after reviewing case law and general border-search principles, the Court issued the following statement of law:

> Obviously, a search of the private living quarters of a ship is more intrusive than a search of other areas. *See United States v. Eagon*, 707 F.2d 362, 366 (9th Cir. 1982) (Boochever, J., concurring); *United States v. Streifel*, 665 F.2d 414, 423 (2d Cir. 1981). The private living quarters are at least analogous to a private dwelling. As a result, even in the context of a border search, the search of private living quarters on a ship should require something more than naked suspicion.

Id. at 737–38 (internal citation omitted). There is only one way to read that paragraph: reasonable suspicion is required for cabin searches at the border.

Yet the government barely even acknowledges this critical paragraph. Indeed, it conspicuously fails to quote the first two sentences at all, quoting only the latter clause of the third sentence. BIO 10. But the first two sentences cannot be overlooked: they supply the court's rationale for requiring reasonable suspicion. That rationale focused on the heightened degree of privacy in living quarters, the intrusiveness of searching that space, and its similarity to a private dwelling.

2. Despite omitting *Alfonso*'s core reasoning, the government still argues (BIO 11–12) that the court's statement requiring reasonable suspicion was dictum because, as in *Whitted*, the court went on to conclude that reasonable suspicion existed on the facts of that case. 759 F.2d at 738. That argument fails for the same reasons explained above.

The government also argues (BIO 10–11) that the statement in *Alfonso* is dictum because, in the first section of the court's Fourth Amendment analysis, it upheld the search of the vessel under the "extended border search" doctrine, which generally requires reasonable suspicion. *Id*. at 734. The government suggests that, because the search of the cabin occurred during an extended border search of the vessel, the cabin search required reasonable suspicion for that reason.

But the Ninth Circuit did not employ that reasoning. Instead, the court conducted a separate and independent legal analysis about what level of suspicion was required to justify a "border search involving the living quarters of a ship." *Id*. at 737–38. And, in concluding that reasonable suspicion was required, the court focused exclusively on the heightened privacy interests in the living quarters and the intrusiveness of searching them. At no point in that legal analysis did the court mention the extended border search doctrine. Rather, the court's legal analysis repeatedly referred to border searches in general.[1] That section of the decision

[1] *See Alfonso*, 759 F.2d at 737 ("The government, on the other hand, maintains there is no legitimate privacy interest immune from *border search* in any part of a vessel entering the United States."); *id*. ("We have found no cases directly confronting the permissible scope of a *border search* involving the living quarters of a ship."); *id*. ("*Williams* offers limited guidance here, since it did not involve a

referred to an "extended border search" only once and that was *after* it already concluded that reasonable suspicion was legally required. At that point, the court factually found that the same level of reasonable suspicion supporting the extended border search of the ship also supported the search of the cabin. *Id*. at 738.

In short, had the Ninth Circuit believed that the extended border doctrine required reasonable suspicion for the cabin search, it could have easily said so and dispensed with further analysis. Instead, it concluded that reasonable suspicion was required for all border searches of the living quarters based on the heightened privacy interests involved. As with *Whitted*, the government is characterizing an opinion it may have wanted the court to write, not the one it actually wrote.

3. Unsurprisingly, several courts share Petitioner's interpretation. The Third Circuit in *Whitted* found *Alfonso* to be the "the case most clearly on point." For it understood *Alfonso* to have "concluded" that reasonable suspicion was required for border searches of the living quarters. *Whitted*, 541 F.3d at 486–87.

So too have numerous lower courts across the country. *See, e.g.*, *Arjmand v. Dep't of Homeland Sec.*, 2018 WL 1755428, at *6–7 (C.D. Cal. Feb. 9, 2018) (finding that the plaintiff stated a Fourth Amendment claim under *Alfonso* where customs officers allegedly searched his cabin and luggage without reasonable suspicion); *United States v. Saboonchi*, 990 F. Supp. 2d 536, 551–52 (D. Md. 2014) (discussing a

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border search."); *id*. ("*Border searches* are premised upon the right of the government to prevent the importation of contraband or undeclared merchandise and the general understanding that persons, parcels, and vehicles crossing the border may be searched."); *id*. at 738 ("As a result, even in the context of a *border search*, the search of private living quarters on a ship should require something more than naked suspicion.") (emphases added).

"line of cases that has held that searches of private quarters on ships arriving at U.S. ports from abroad resemble the search of a home too closely to be permitted absent reasonable suspicion") (quoting *Whitted* and citing *Alfonso*); *United States v. Smith*, 2000 WL 1838708, at *1 (E.D. La. Dec. 13, 2000) ("as other courts have recognized, a search of a passenger's cabin aboard a ship is not routine given the intrusive nature of the search. Accordingly even in the context of a border search, the search of private living quarters on a ship must at least be supported by reasonable suspicion of criminal activity.") (citing *Alfonso*, 759 F.2d at 737–38), *rev'd on other grounds by* 273 F.3d 629, 633 (5th Cir. 2001) (finding reasonable suspicion); *United States v. Eltayib*, 808 F. Supp. 160, 163 (E.D.N.Y. 1992) ("The *Alfonso* case . . . held that a border search could extend to the crew's living quarters and even encompass sealed packages secreted beneath a bunk bed. The court sustained such a search on reasonable suspicion that contraband was on board.").

And so too has one leading Fourth Amendment treatise. *See* Wayne R. LaFave, Search & Seizure §§ 10.5(a), (f) nn.15, 184–85 (5th ed. 2018) (grouping *Whitted* and *Alfonso* together, and contrasting their holdings with *Alfaro-Moncada*).

4. Despite the unambiguous language in *Alfonso* and the authorities interpreting it, the government speculates (BIO 11) that the Ninth Circuit might not require reasonable suspicion for a cabin search at the border. It relies solely on *United States v. Seljan*, 547 F.3d 993 (9th Cir. 2008) (en banc). But that case involved a customs inspection of an envelope placed for international mailing in a FedEx facility. And even though that case had nothing to do with the search of

living quarters, it still cited the key section of the *Alfonso* opinion with approval. *Id*. at 999. It necessarily did so with full awareness of that section's holding, as the panel opinion had expressly recognized that, "[i]n *Alfonso*, we *held* that 'in the context of a border search, the search of a private living quarters on a ship should require something more than naked suspicion.'" *United States v. Seljan*, 497 F.3d 1035, 1042 (9th Cir. 2007) (quoting *Alfonso*, 759 F.2d at 738) (emphasis added).

Ignoring that favorable citation, the government argues that, since *Alfonso*, the Ninth Circuit has found a Fourth Amendment violation only where a border search was a highly intrusive search of the person, involved the destruction of property, or was carried out in an offensive manner. But the government fails to explain why the suspicionless search of private living quarters would not qualify as highly intrusive or offensive. After all, that is what *Alfonso* held.

Rather than calling that holding into question, *Seljan* expressly "declined the government's invitation to decide th[at] case by holding that, at the border, anything goes." *Id.* at 1000. And rather than issuing any sweeping holding of its own, the court limited its ruling to "the particular circumstances" of that case. *Id.* Plus, it found that this Court had already "effectively rejected [the defendant's] contention" in *United States v. Ramsey*, 431 U.S. 606 (1977), which also involved a customs inspection of international mail. *Id*. at 1003. Yet this Court has never addressed the question here. Thus, the government identifies no reason to believe that the Ninth Circuit would not follow its own longstanding precedent requiring reasonable suspicion to search the living quarters on a vessel at the border.

5. In any event, any confusion about *Alfonso* would still not be a basis for denying review. The Third and Eleventh Circuits are manifestly divided on an important and recurring question of national importance. That split alone warrants resolution. There is no reason to allow any potential confusion to linger in the Ninth Circuit, the largest circuit home to numerous active ports. The countless customs officers and seafarers there deserve clarity. Only this Court can provide it.

II. THE DECISION BELOW IS WRONG

The government also defends the Eleventh Circuit's position on the merits. BIO 5–10. But that defense provides no basis for denying review either.

1. "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) (quoting *United States v. U.S. Dist. Court for Eastern Dist. of Mich. (Keith)*, 407 U.S. 297, 313 (1972)). "At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

Although no Fourth Amendment principle is more firmly entrenched, the government barely pays lip service to it here. BIO 7. It repeatedly asserts, without citation, that the search of a cabin is no more offensive or intrusive than a routine search of a person or his effects. BIO 6, 7, 8. But that is merely the government's opinion. Several courts and judges have disagreed, opining that seafarers possess a heightened privacy interest in their living quarters. *See* Pet. 16 & n.2 (citing cases).

At the very least, those authorities cast doubt on the government's position and exacerbate the circuit split identified above. The government simply ignores that competing viewpoint.

The government also ignores that private living quarters, wherever located, permit people to peacefully sleep, bathe, undress, pray, fornicate, defecate, meditate, recuperate from illness, etc.…. No less than mainland dwellers, the sanity of seafarers depends on "some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle." *Silverman*, 365 U.S. at 511 n.4 (quotation omitted). Invading that sanctuary is more intrusive than examining a traveler's material effects.[2] As with any other private dwelling, inside a private cabin, "*all* details are intimate details," no matter how seemingly mundane. *Kyllo v. United States*, 533 U.S. 27, 37 (2001).

2. Rather than afford any weight to this legitimate individual interest, the government's analysis focuses solely on its own interest in protecting the border. To be sure, that interest is important too. But Petitioner accounts for it. He does so by foregoing not one but two default protections embodied in the Fourth

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[2] *See, e.g.*, *Minnesota v. Olson*, 495 U.S. 91, 99 (1990) ("We are at our most vulnerable when we are asleep because we cannot monitor our own safety"); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("The makers of our Constitution . . . knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."); *Boyd v. United States*, 116 U.S. 616, 630 (1886) ("It is not . . . the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property").

Amendment's text: a warrant and probable cause. Requiring reasonable suspicion alone reflects the government's heightened interest in border security. But it does so without eliminating the seafarer's legitimate expectation of privacy.

Petitioner's charitable framework also negates the government's reliance on *California v. Carney*, 471 U.S. 386 (1985). In *Carney*, this Court held that the "automobile exception" to the warrant requirement applied to the search of a fully mobile motor home parked in a public place. Yet the Court still required probable cause to support that warrantless search. *Id.* at 387, 392, 395. Here, Petitioner is not arguing that a warrant was required. Nor is he arguing that probable cause was required. Again, to accommodate the government's interest in border security, he proposes requiring only reasonable suspicion, a less demanding standard. Thus, even if the mobile home in *Carney* could be analogized to a vessel's cabin, *Carney* would still not justify the suspicionless searches the government now seeks.

3. The government also makes a policy argument that requiring reasonable suspicion would threaten national security. BIO 9–10. But reasonable suspicion is not an onerous standard. It "requires a showing considerably less than preponderance of the evidence." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). And it may be satisfied by "information that is less reliable than that required to show probable cause." *Alabama v. White*, 496 U.S. 325, 330 (1990).

The government's argument also has no limit. Criminals routinely use private homes, phones, cars, and the internet to effectuate their schemes. But law enforcement's desire to thwart those schemes has never displaced the Fourth

Amendment from those areas. Nor does it do so at the border. Indeed, this Court has required reasonable suspicion for a prolonged detention of a suspected smuggler at the border, notwithstanding the "veritable national crisis in law enforcement caused by smuggling of illicit narcotics." *Montoya de Hernandez*, 473 U.S. at 539, 541. The same lenient standard should be required for intrusive cabin searches.

4. Lastly, and in any event, even if the government's merits arguments were correct, that would be no basis for denying review. To the contrary, that would mean two circuits are improperly requiring customs officers to obtain reasonable suspicion to search cabins. That situation in the Third and Ninth Circuits would require this Court's intervention no less than if, as Petitioner contends, customs officers are conducting unconstitutional searches in the Eleventh Circuit. Either way, there is a lack of uniformity on a recurring and important Fourth Amendment issue. This Court should resolve that untenable geographic disparity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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