No. 20-134

In the Supreme Court of the United States

ABILIO HERNANDEZ, LAZARO BETANCOURT, NORGE RODRIGUEZ, and JOSE PEREZ

Petitioners

v.

JASON BOLES and DONNIE CLARK,

Respondents

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

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF FOR CERTIORARI

1. INCORRECT STANDARD OF REVIEW

The Respondents, Troopers Jason Boles and Donnie Clark, have not even denied that the Sixth Circuit used the wrong standard of review. Instead, they only argue that the erroneous standard is unworthy of certiorari because, supposedly, they would win even under the right standard. BIO 4. In truth, the question of who would win remains to be answered because no court has yet applied the right standard. For this issue, at minimum the Court should vacate the judgment and remand for reconsideration under the right standard. Often this Court will grant such limited relief where a party has acknowledged error. *See, e.g., Brown v. Barr*, 19-5133 (Apr. 20, 2020); *White v. United States*, 138 S.Ct. 641 (2018) (No. 17-270); *Lindsey v. Indiana*, 137 S.Ct. 32 (2016) (No. 15-7813); *Ajoku v. United States*, 572 U.S. 1056 (2014) (No. 13-7264). Effectively that is what the Troopers have done. *See* Sup. Ct. R. 15.2 (Obligation to point out any alleged misstatements of law).

Further, the Troopers have failed to address the Sixth Circuit's ongoing pattern of applying the wrong standard. They have called the erroneous standard a "longstanding precedent" of the Sixth Circuit, but they never attempt to defend it as correct. BIO 4. That is because the precedent is not correct. Still, as longstanding precedent, the error affects not just this case but civil rights cases across the board. The Plaintiffs did try to challenge the practice via petition for rehearing *en banc*, but the Sixth Circuit took no action. The error invites intervention by this Court.

2. CIRCUIT SPLIT

The Troopers have disputed whether there is any split on the Fourth Amendment issue, but they misconstrue the question being debated. For example, they have argued that there is no circuit split because here the passengers gave their names up quickly, whereas the Ninth Circuit suggested that an officer may ask for a passenger's name if done briefly and without causing any delay. BIO 9-10, *citing United States v. Landeros*, 913 F.3d 862, 870 (9th Cir. 2019); *United States v. Diaz-Castaneda*, 494 F.3d 1146, 1152 (9th Cir. 2007). Regardless, the question presented here is not whether the police may ask questions or investigate, but whether they may "extend the stop" to do it. Petition for Certiorari i. Generally the four Petitioners do not dispute that an officer may do whatever he wants — traffic-related or otherwise. He simply may not lengthen the stop to do it. *Arizona v. Johnson*, 555 U.S. 323, 333 (2009). The real issue is about lengthening a stop, not asking questions.

Indeed, lengthening the stop is where the courts are split. The Fourth Circuit says that an officer may extend a stop to investigate passengers. In that circuit, the officer may not just ask for a passenger's name, but may also interrupt the writing of summonses in order to run both driver and passenger through a criminal history database, a "lengthy process." *United States v. Hill*, 852 F.3d 377, 380 (4th Cir. 2017). The Ninth Circuit disagrees, holding that any measurable delay of a stop to investigate a passenger is unlawful. *Landeros*, 913 F.3d 862. Finally, as shown

here, the Sixth Circuit has chosen to let each individual jury decide. Given these three positions, there is a three-way split on this recurring topic.

The Troopers have said that there is no split because the Petition for Certiorari complains about "back-to-back checks for outstanding warrants," whereas the cited Ninth Circuit cases dealt with a comprehensive second database check not specifically about warrants. BIO 10-12, citing *United States v. Evans*, 786 F.3d 779 (9th Cir.2015) and *United States v. Gorman*, 859 F.3d 706 (9th Cir. 2017). But in this present case the check likewise involved a "second, more comprehensive database" as compared to an ordinary warrants check. *Hernandez*, 949 F.3d 251, at 253. Namely, the Blue Lightning Operations Center (BLOC) was used to conduct a "more detailed check" on all four Plaintiffs. *Id.* By that point, the Plaintiffs had already been checked for warrants. It can be safely assumed that the BLOC check was not truly about warrants.[1] In any event, the non-traffic-related BLOC check was directly analogous to the non-traffic-related El Paso Intelligence Center (EPIC) check condemned in *Gorman*, 859 F.3d 706. It was analogous to the "ex-felon registration" check condemned in *Evans*, 786 F.3d 779. It was analogous to the PISTOL check allowed in *Hill*, 852 F.3d 377.

Altogether, the Fourth Circuit has condoned these secondary checks. *Hill*, 852 F.3d 377, at 380-381. The Ninth Circuit has condemned them. *Gorman*, 859 F.3d

1 After completing the BLOC check, the officer said on video, "[T]hey've got an extensive background — meth." *Hernandez*, 949 F.3d 251, at 255.

706; Evans, F.3d 779. Finally, the Sixth Circuit has said that each individual jury can decide. Once again, there is a three-way split.

3. MERITS OF THE FOURTH AMENDMENT ISSUE

On the merits, the Troopers have argued that they did not actually violate the Fourth Amendment, because, supposedly: 1) Their own safety requires them to check the passengers for criminal history and to do it multiple times in a row; 2) There is no "bright-line rule" saying that they cannot; and 3) Their repeated checks and interrogation did not lengthen the stop. BIO 5-8. In reality, all three points are mistaken.

The latter two issues can be dealt with very quickly. As to whether the stop was lengthened, the stipulated facts clearly show that the checks and double-checks of the passengers, along with the roadside interrogation, did lengthen the stop by about eighteen or nineteen minutes. Pet. Appx. 30a-31a, ¶¶ vii-xiv (12:00 p.m.—12:19 p.m.). It is impossible to deny this delay. Eighteen minutes is more than twice the delay condemned in *Rodriguez v. United States*, 575 U.S. 348, 352 (2015) (eight minutes). As such, there can be no serious argument for denying that the stop was lengthened.

As for the Troopers' argument that this Court should defer to the lay jurors because there is no "bright-line rule" undermining the verdict, the Troopers have simply reverted back to the erroneous standard of review already addressed.

Constitutional error should be reviewed de novo, without deference. *Muehler v. Mena*, 544 U.S. 93, 98 n. 1 (2005). There is no need for a "bright-line rule" to overturn a jury verdict. *See Illinois v. Gates*, 462 U.S. 213, 236 (1983) (Distinguishing "de novo" review from the type of deference advocated by the Respondents here). In any event, diligence in carrying out a traffic stop is a bright-line rule. *Rodriguez*, 575 U.S. 348, at 354. And the sequence of events here showed a total lack of diligence because the BLOC check was not even started until twenty minutes into the stop. *See Hernandez*, 949 F.3d 251, at 254-255.

Last, the Troopers have argued that their traffic mission rightly includes the investigation of a passenger's background, simply as a matter of standard practice. To protect themselves, supposedly they need to seize passengers and check their backgrounds, and for this rule they cite *Maryland v. Wilson*, 519 U.S. 408 (1997). *See* BIO 6-7. The biggest problem with their argument is that *Wilson* only allows the police to modify a seizure's conditions, not create or lengthen a detention. This Court only allowed the police to get someone out of a car on the premise that it would *not* lengthen the stop. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977). During a traffic stop, "[t]he police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it." *Id.*; *see also Wilson*, 519 U.S. 408, at 413-414 ("[T]he passengers are already stopped by virtue of the stop of the vehicle."). In contrast, here the Troopers seek an excuse to detain

someone who would otherwise be released. That is quite a difference. The Fourth Amendment requires probable cause or else reasonable suspicion to detain someone. *See, e.g., Terry v. Ohio*, 392 U.S. 1 (1968). These Troopers have argued that they can detain someone without either.

In practical terms, the Troopers have not explained whatsoever how checking someone's background would improve an officer's safety, anyway. This Court has allowed for concrete safety measures, such as letting the police remove someone from a vehicle so that if the person draws a gun, at least the officer can see it. *See Mimms*, 434 U.S. 106, at 110. In the same holding, the Court noted that an officer standing next to a driver's window might be hit by oncoming traffic, and that moving everyone farther away from the road makes sense. *Id.* In contrast, here the Court has zero reason to believe that investigating a passenger's criminal past will protect an officer.

If anything, checking someone's background would seem to place the officer in greater danger, simply by creating the potential for a more serious confrontation. If an armed, dangerous, and wanted person in a car is stopped for speeding but only expects to receive a ticket and otherwise to carry on, he has no motive to instigate violence. On the other hand, if he expects the officer to check his background, learn about an outstanding warrant, and arrest him, then he has motive to attack. By encouraging a more serious confrontation, a warrants check or background check enhances the danger rather than mitigating it.

In any event, present law clearly holds that the warrants check is not designed to protect the officer, but rather to protect *other motorists*. If drivers could keep violating the traffic laws without ever answering their traffic citations and without ever being arrested, then the traffic laws would become meaningless. That is why this Court expressly held that the purpose of the warrants check of a driver is to protect other motorists: "These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." *Rodriguez*, 575 U.S. 348, at 355 (internal citations omitted). Checking warrants does not protect an officer. It protects everyone else. In fact, it does so at the officer's expense.

But whereas checking a driver for outstanding warrants may at least promote the safety of other motorists, the same rationale cannot apply to checking a passenger. No matter how many traffic tickets a passenger might have accumulated in the past, as long as he stays away from the steering wheel, the traffic laws have served their purpose. Confronting a passenger does not keep the roadways safe. Instead, if the police do confront passengers, they are doing it for other reasons. They are doing it to ferret out generalized crime. For example, here the Troopers confronted the passengers simply because they work for "Interdiction Plus," and it was their job to look for generalized crime during traffic stops. *Hernandez v. Boles*, 949 F.3d 251, 254 and 257 (6th Cir. 2020). Checking passengers has nothing to do with enforcing the traffic code.

4. THIS CASE IS AN IDEAL VEHICLE TO DECIDE THE ISSUES

Finally, the Troopers have argued that this case is a poor vehicle to decide the Fourth Amendment claim because supposedly they would be entitled to qualified immunity. Although the Plaintiffs dispute whether the Troopers are entitled to any immunity, that question has absolutely nothing to do with this petition. Further, the Troopers ignore other ideal aspects of the case.

For one thing, the Plaintiffs dispute that qualified immunity could even apply. While the case law has generally gotten murkier in recent years due to the Fourth Circuit's rulings, at the time of this incident the only relevant court cases were favorable. Most importantly, *Rodriguez* held that 1) the police must act diligently in their traffic mission, 2) eight minutes is too long to keep someone without independent reasonable suspicion, and 3) the only valid purpose of a warrants check is to ensure a driver's — not passenger's — adherence to the traffic code. 575 U.S. 348. Likewise, the Ninth Circuit had condemned a second database check for a non-traffic-related purpose. *Evans*, 786 F.3d 779. Regardless, here the Troopers never raised the issue of qualified immunity for this claim before the Court of Appeals. The defense is forfeited.

Even if qualified immunity were preserved, such a potential defense would pose no hurdle to review of the constitutional claim. This Court routinely decides cases where other defenses may still be invoked upon remand. *See, e.g., United States v. Stitt*, 139 S.Ct. 399, 407-08 (2018); *BNSF Ry Co. v. Tyrell*, 137 S.Ct. 1549,

1559 (2017); *McLane Co. v. EEOC*, 137 S.Ct. 1159, 1170 (2017). Even in *Rodriguez*, 575 U.S. 348, where this this Court addressed comparable issues, the criminal defendant won before this Court, but he later got re-convicted on remand due to good-faith immunity. *United States v. Rodriguez*, 799 F.3d 122 (2015). The question of immunity did not impact the Court's review in *Rodriguez*. Nor does it impact review here.

And although the Troopers have claimed that the Court should wait for a better opportunity to decide the questions, it is doubtful that a better opportunity will ever arise. In this case, essentially all the facts were undisputed. Most of the incident was even caught on video. The key timeline was stipulated. Pet. App. 30a-31a. But just as important as the undisputed facts, lower case developments also simplified the legal issues. For example, the Sixth Circuit held that the Troopers forfeited the issue of independent reasonable suspicion. *Hernandez*, 949 F.3d 251, at 257 n. 2. Arguably the same thing should apply to qualified immunity, which they now raise. In contrast, in future lawsuits the defense of qualified immunity could be preserved, and also *strengthened*, due to the growing diversity of court opinions on this topic. As such, future civil rights cases are less likely to make it to a ruling on the merits. Even in criminal cases, the comparable defense of good-faith immunity could hinder future appeals to this Court. In contrast, here the case is presented. It is presently cleanly. The iron is hot. The ideal time to decide the issues is now.

CONCLUSION

Petitioners Abilio Hernandez, Lazaro Betancourt, Norge Rodriguez, and Jose Perez ask for the writ of certiorari in this case, and ultimately for reversal of the judgment.

Respectfully submitted,

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