No. 21-5352

IN THE SUPREME COURT OF THE UNITED STATES

VERNON D. NELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment forecloses a Border Patrol agent from making an investigative stop of a vehicle based on reasonable suspicion of a non-immigration offense.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 990 F.3d 947. The order of the district court (Pet. App. B1-B2) is unreported. The report and recommendation of the magistrate judge (Pet. App. C1-C18) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2021. On March 19, 2020, this Court extended the time within which to file a petition for a writ of certiorari to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The

petition for a writ of certiorari was filed on August 9, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of conspiring to distribute at least 50 kilograms of marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) and 846. Judgment 1. Petitioner was sentenced to 36 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A12.

1. On October 30, 2018, petitioner approached a U.S. Border Patrol checkpoint near Laredo, Texas, stated that he was a United States citizen, and consented to a scan of his tractor-trailer. Pet. App. A2. A Border Patrol agent, Marcus Stauffiger, conducted the scan using a "Vehicle and Cargo Inspection System" -- "an x-ray machine" for commercial vehicles. Ibid. The scan showed several bundle-shaped objects and the outline of a dolly. Ibid. Agent Stauffiger, however, noticed a seal on the trailer's back door. Ibid. In his experience, such a seal would be unnecessary if the trailer contained only equipment. Ibid. Agent Stauffiger could not direct petitioner's truck to secondary inspection, however, due to construction at the checkpoint. Ibid. Petitioner accordingly left the checkpoint. Ibid.

Based on the scan of petitioner's tractor-trailer, Agent Stauffiger developed suspicions that petitioner's trailer contained bundles of narcotics. Pet. App. A3. He and a second Border Patrol agent left the checkpoint in separate marked vehicles and stopped petitioner's trailer six miles north of the checkpoint. Ibid.

During the stop, petitioner presented a bill of lading showing five pallets of Kellogg's cereal. Pet. App. A3. Agent Stauffiger doubted that account because the scan had revealed only two pallets, because the bill of lading misspelled "Kellogg" and "seal," and because the bill listed two seal numbers instead of one. Ibid. After petitioner refused to consent to a search, Agent Stauffiger requested a service dog to inspect the trailer. Ibid. In the meantime, Agent Stauffiger posed questions to petitioner about the trailer and its registration. Id. at A3-A5.

Within a few minutes, another agent arrived with a service dog. Pet. App. A5. The dog alerted on the trailer. Ibid. The agents searched it and located 72 kilograms of marijuana packed in tightly wrapped bundles. Ibid.

2. A grand jury in the Southern District of Texas returned an indictment charging petitioner with one count of conspiring to distribute at least 50 kilograms of marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) and 846; and one count of distributing at least 50 kilograms of marijuana, in violation of

21 U.S.C. 841(a)(1) and (b)(1)(C) and 18 U.S.C. 2. Indictment 1-2.

Petitioner filed a motion to suppress, arguing (as relevant) that the Border Patrol agents violated the Fourth Amendment on the theories that they lacked authority to stop him for a non-immigration offense and stopped him without reasonable suspicion. Pet. App. C1-C2. The magistrate judge recommended that the motion be denied. Id. at C1-C18. The magistrate judge found that the agents had reasonable suspicion that petitioner's trailer was connected to drug smuggling, id. at C7-C10, and explained that the agents' legal authority to stop petitioner for criminal activity was not limited solely to suspected violations of the immigration laws, id. at C5-C7. The magistrate judge cited the Fifth Circuit's decision in United States v. Perkins, 352 F.3d 198 (2003), cert. denied, 541 U.S. 980 (2004), which had recognized that "Border Patrol agents may make roving stops on the basis of reasonable suspicion of any criminal activity, and are not limited to suspicion of violation of immigration laws." Pet. App. C6 (quoting Perkins, 352 F.3d at 200).

The district court overruled petitioner's objections to the magistrate judge's report, adopted the judge's recommendation, and denied petitioner's motion to suppress. Pet. App. B1-B2. Petitioner pleaded guilty pursuant to a plea agreement, in which he agreed to plead guilty to the drug-conspiracy charge and

reserved his right to appeal the denial of his suppression motion. Id. at A5-A6.

3. The court of appeals affirmed. Pet. App. A1-A12. The court agreed with the district court that the Border Patrol agents had reasonable suspicion that petitioner's vehicle was engaged in illegal activity. Id. at A7-A10. And the court of appeals rejected petitioner's claim that the agents lacked authority for investigatory stops related to non-immigration offenses, citing its earlier decision in Perkins. Id. at A12.

ARGUMENT

Petitioner contends (Pet. 13-16) that Border Patrol agents violate the Fourth Amendment by conducting investigative stops of vehicles based on reasonable suspicion of non-immigration offenses. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. This Court has previously denied certiorari on this issue, see Martinez-Hernandez v. United States, 547 U.S. 1041 (2006) (No. 05-7647), and should follow the same course here.

1. Law-enforcement agents, including Border Patrol agents, may conduct investigative stops of vehicles based on "reasonable suspicion to believe that criminal activity may be afoot." United States v. Arvizu, 534 U.S. 266, 273 (2002) (citation and internal quotation marks omitted). Petitioner does not dispute

that the investigative stop here was supported by reasonable suspicion that he was transporting controlled substances. See Pet. App. A7-A10. The stop of the tractor-trailer that petitioner was driving was therefore lawful.

Although petitioner contends (Pet. 13-16) that Border Patrol agents lack authority under 8 U.S.C. 1357 to make stops based on reasonable suspicion of non-immigration offenses, that statute is irrelevant because it does not provide the basis for the stop at issue here. Section 1357(a)(3) authorizes Border Patrol agents to conduct warrantless searches of vehicles and other conveyances near the border "for the purpose of patrolling the border to prevent the illegal entry of aliens." 8 U.S.C. 1357(a)(3). But that affirmative grant of authority to conduct warrantless searches to prevent illegal entry does not limit Border Patrol agents' separate authority to conduct investigative stops based on reasonable suspicion of other offenses. Indeed, nothing in the text of Section 1357(a)(1)-(5) even addresses investigative stops, which pose only a "minimal intrusion" and have long been upheld under a more lenient standard than the one applied to warrantless searches. See United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975).

2. Petitioner errs in contending (Pet. 26-31) that the court of appeals' decision conflicts with the Ninth Circuit's decision in United States v. Santa Maria, 15 F.3d 879 (1994).

Santa Maria involved neither an investigative stop nor the question whether Section 1357 implicitly prohibits all seizures that it does not expressly authorize. Instead, the question there was whether Section 1357(a)(3) authorized the search of a locked trailer on private land. Id. at 880. The Ninth Circuit concluded that it did not, id. at 883, and the government could point to no other source of authority (such as consent) that would justify the warrantless search, ibid. Because the government did not argue (and could not have argued) that the search at issue there could be upheld as an investigative stop based on reasonable suspicion, the Ninth Circuit had no occasion to address the question presented here, and its decision is not in conflict with the decision below.

The Ninth Circuit's decision in Santa Maria also predates United States v. Arvizu, supra, where this Court held that Border Patrol agents on roving patrols may conduct "brief investigatory stops" without violating the Fourth Amendment "if the officer's action is supported by reasonable suspicion to believe that criminal activity may be afoot." 534 U.S. at 273 (citation and internal quotation marks omitted). The Court in Arvizu stressed the importance of its holding "to the enforcement of federal drug and immigration laws," ibid., removing any suggestion that a Border Patrol agent's investigatory authority was limited to immigration-related offenses.

The Ninth Circuit itself made a similar observation in United States v. Valdes-Vega, 738 F.3d 1074 (2013) (en banc), cert. denied, 573 U.S. 912 (2014), stating that "border patrol agents must keep our country safe by curbing the smuggling of undocumented aliens and drugs." Id. at 1076 (emphasis added). Indeed, in finding reasonable suspicion for the investigatory vehicle stop in that case, the en banc court observed that the defendant's vehicle "was traveling along a known drug corridor not far from the border." Id. at 1081. The decision in Valdes-Vega accordingly confirms the Ninth Circuit's present view that Border Patrol agents have authority to conduct investigatory stops based on reasonable suspicion of drug trafficking.

Moreover, the Ninth Circuit's decision in Santa Maria has been overtaken by subsequent legislative developments. As the Ninth Circuit has observed, in the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, Congress transferred the Border Patrol program to an agency within the Department of Homeland Security "tasked with securing the border and administering the customs laws." United States v. Juvenile Female, 566 F.3d 943, 949 (9th Cir. 2009) (citing 6 U.S.C. 202), cert. denied, 558 U.S. 1134 (2010). Congress further designated the Customs Service as "the Bureau of Customs and Border Protection ('CBP')," which would "contain the resources and missions relating to borders and ports of entry * * * , including the Border

Patrol." Ibid. (quoting 6 U.S.C. 542 note). In the wake of congressional action uniting customs and border functions, the Ninth Circuit

> conclude[d] that Border Patrol agents, acting within the other statutory limits on their powers, also have the authority, under 19 U.S.C. § 482, to "stop, search, and examine . . . any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise . . . introduced into the United States in any manner contrary to law."

Ibid. (quoting 19 U.S.C. 482(a)). And the Ninth Circuit accordingly recognized that a Border Patrol agent had legal authority under that provision to stop an individual suspected of a drug-trafficking crime. Id. at 944, 950.

3. At all events, even assuming that Section 1357(a) confined a Border Patrol agent's investigative authority to the enumerated circumstances, petitioner would not be entitled to suppression of the drug evidence seized from his trailer. In Virginia v. Moore, 553 U.S. 164 (2008), this Court held that the Fourth Amendment is satisfied when objective justifications exist for an intrusion, regardless of whether the intrusion violates state law. Moore upheld as "constitutionally reasonable" the arrest of a motorist whom police had probable cause to believe had violated Virginia law, even though state law itself would have authorized only a citation rather than an arrest. Id. at 171. The Court explained that, because the arrest was "reasonable," it was permissible under the Constitution, and "state restrictions d[id]

not alter the" calculus. Id. at 176; see id. at 172 ("We thought it obvious that the Fourth Amendment's meaning did not change with local law enforcement practices -- even practices set by rule.").

Moore's holding applies equally to petitioner's contention that the Border Patrol agents here violated the Fourth Amendment by putatively exceeding their federal authority when they conducted an investigative stop based on reasonable suspicion of drug trafficking. See Moore, 553 U.S. at 169 ("None of the early Fourth Amendment cases that scholars have identified sought to base a constitutional claim on a violation of a state or federal statute concerning arrest." (emphasis added)); see also City of Ontario v. Quon, 560 U.S. 746, 764 (2010) (rejecting argument that violation of federal statutory requirements would render a search per se unreasonable (citing, inter alia, Moore, supra)). Because the stop here was supported by reasonable suspicion, it was "reasonable" and therefore permissible under the Fourth Amendment. See, e.g., United States v. Ryan, 731 F.3d 66, 70 (1st Cir. 2013) (recognizing that "the district court was not required to exclude the evidence obtained following the arrest" where officer lacked arrest authority under federal law).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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