No. 21-

IN THE
Supreme Court of the United States

MARCIO SANTOS-PORTILLO,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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October 29, 2021

QUESTION PRESENTED

Whether a federal court has the discretion to exclude evidence obtained by federal law enforcement agents in violation of a federal statute, as three circuits have held, or whether courts *per se* lack such authority in the absence of a constitutional violation or express statutory remedy, as the lower court and three other circuits have held.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Marcio Santos-Portillo. Respondent is the United States. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the U.S. District Court for the Eastern District of North Carolina and the U.S. Court of Appeals for the Fourth Circuit:

United States v. *Santos-Portillo*, No. 7:18-cr-00010-H-1 (E.D.N.C. Feb. 12, 2020).

United States v. *Santos-Portillo*, No. 20-4159 (4th Cir. May 7, 2021).

There are no proceedings in state or federal courts that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Marcio Santos-Portillo respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit is reported at 997 F.3d 159 and is reproduced in the appendix to this petition at Pet. App. 1a–21a. The unpublished order denying Mr. Santos-Portillo's motion for rehearing en banc is reproduced at Pet. App. 41a. The district court's unpublished order adopting the report and recommendation of a magistrate judge is reproduced at Pet. App. 22a–24a. The magistrate judge's report and recommendation is reproduced at Pet. App. 25a–40a.

JURISDICTION

The Fourth Circuit entered judgment on May 7, 2021. Pet. App. 1a. Mr. Santos-Portillo's timely petition for rehearing en banc was denied on June 4, 2021. Pet. App. 41a. The district court had original jurisdiction under 18 U.S.C. § 3231, and the Fourth Circuit had appellate jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1357(a) provides:

> Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> * * *
>
> (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in

violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

* * *

(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion, or removal of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States . . . .

INTRODUCTION

When a federal law enforcement officer violates a federal statute to obtain evidence for use in a criminal prosecution, can a court do anything about it? That is a question that has vexed and divided the circuit courts.

At least three circuits—the Fifth, the Ninth, and the Eleventh—have, consistent with this Court's guidance in *McNabb* v. *United States*, 318 U.S. 332, 347 (1943), held that "evidence seized under egregious circumstances may be suppressed." *De La Paz* v. *Coy*, 786

F.3d 367, 376 (5th Cir. 2015); *accord*, *e.g.*, *Bacon*, 851 F.2d at 1313 (evidence gathered in "aggravated or repeated" violation of a statute may be suppressed). Reaching a contrary conclusion, four other circuits—the First, the Sixth, the Seventh, and now the Fourth—have concluded that evidentiary exclusion is available *only* for constitutional violations or where the statute expressly requires or permits suppression. These courts have, in other words, effectively overruled *McNabb sub silentio*.

This case involves the an admittedly "common practice" of Immigration and Customs Enforcement ("ICE") agents not to seek warrants to detain individuals with prior deportation orders, regardless of whether the arresting agent has reason to believe that the individual will flee. This policy, which has been blessed by ICE counsel and implemented in districts nationwide, is directly contrary to Congress' command that ICE may make warrantless arrests of individuals suspected of being in the United States illegally only where the individual "is likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. § 1357(a)(2).

Consistent with this general practice of executing illegal, warrantless arrests, ICE agents arrested petitioner Marcio Santos-Portillo without a warrant, even though ICE had no reason to believe Mr. Santos-Portillo would flee before it could obtain a warrant. To the contrary, ICE waited a week before returning to arrest Mr. Santos-Portillo. Despite this clear violation of federal law, the courts below ruled that they were *per se* prohibited from suppressing evidence obtained following Mr. Santos-Portillo's illegal arrest because § 1357(a)(2) does not expressly require or authorize suppression and because there was no Fourth Amendment violation.

Unlike in other cases, where "widespread and repeated" violations are merely theoretical, federal immigration officers in this case acknowledged without hesitation, under oath and in open court, that they routinely ignore the statutory requirement to obtain a warrant before effectuating an immigration-related arrest under 8 U.S.C. § 1357(a). That practice, moreover, was the result not of individual agents' in-the-field decisionmaking, but rather was dictated by guidance issued by ICE counsel. And government counsel below characterized the agents' violation of the warrant requirement in this case as "something that law enforcement officers do all the time." Pet. App. 91a.

The decision below does more than deepen a split of authority in the lower courts. It also upends the separation of powers in the area of immigration enforcement. Congress made clear its requirement and its expectation that ICE agents would perform warrantless arrests only where, *inter alia*, the agent has reason to believe the suspect would flee in the time it would take to obtain a warrant. 8 U.S.C. § 1357(a)(2). Yet the Fourth Circuit deemed this statute "hortatory," intended merely to "encourage good behavior" with no expectation that the law could be enforced or followed in the main. Giving ICE license to decide for itself when to follow this statute is directly contrary to the well-established understanding that "*Congress*"—not the Executive—"has exclusive jurisdiction over immigration." *Terrace* v. *Thompson*, 263 U.S. 197, 217 (1923) (emphasis added). Where the Executive openly and notoriously disregards the rules Congress has established for immigration law enforcement, it falls to the Judiciary to rebalance the separation of powers.

STATEMENT OF THE CASE

A. Factual and Statutory Background

Section 287 of the Immigration and Nationality Act ("INA") limits the authority of federal immigration personnel authority to make warrantless arrests to a few narrowly defined circumstances. 8 U.S.C. § 1357(a). As relevant here, where an immigration officer "has reason to believe" that an individual is in the United States illegally, the officer must obtain an arrest warrant unless the individual "is likely to escape before a warrant can be obtained." *Id.* § 1357(a)(2); *accord* 8 C.F.R. § 287.8(c)(2)(ii) ("A warrant of arrest shall be obtained except when the designated immigration official has reason to believe that the person is likely to escape before a warrant can be obtained.").

Immigration officials undisputedly violated this statutory requirement here. On January 9, 2018, ICE Special Agent Thomas Swivel observed a Hispanic man leave a grocery store and enter a car. Pet. App. 26a–27a. Through a search of law enforcement databases, Special Agent Swivel learned that the car was registered to Marcio Santos-Portillo and that Mr. Santos-Portillo had a prior deportation record. Pet. App. 27a. Over the following week, Special Agent Swivel developed information about Mr. Santos-Portillo and a plan to administratively arrest him, take his fingerprints and interrogate him, and turn over the information he learned to the U.S. Attorney's Office for prosecution. Pet. App. 27a–28a.

A week later, on January 16, Agent Swivel staked out Mr. Santos-Portillo's home with four other ICE agents and arrested Mr. Santos-Portillo as he left his home. Pet. App. 28a–29a. As planned, following this arrest, Special Agent Swivel took Mr. Santos-Portillo's fingerprints and interrogated him, during which Mr.

Santos-Portillo admitted that he had previously been deported and that he had not obtained permission to return to the United States. Pet. App. 29a. Special Agent Swivel presented this information for prosecution after the arrest, and a grand jury later returned an indictment for illegal reentry into the United States, in violation of 8 U.S.C. § 1326(a). Pet. App. 25a.

B. District Court Proceedings

Mr. Santos-Portillo moved to suppress the information obtained as a result of his illegal arrest, including his fingerprint records and incriminatory statements. The government opposed the motion on the grounds that a warrant "was not necessary" given Mr. Santos-Portillo's prior deportation, but never argued it would have been infeasible to obtain a warrant in the days leading up to the January 16 arrest. Joint Appendix 104 (4th Cir. Dkt. No. 13) [hereinafter, "JA"]. Moreover, at the suppression hearing, Special Agent Swivel admitted that it was "common practice" not to seek a warrant where the target of the arrest has a prior deportation record. Pet. App. 66a–67a. The prosecutor, in addition, proffered that the government had "reach[ed] out to ICE Counsel" and received guidance confirming that Agent Swivel, in ICE's view, had "follow[ed] proper procedures." Pet. App. 88a. Mr. Santos-Portillo also cited other examples of cases where ICE agents violated § 1357's warrant requirement. See, *e.g.*, Pet. App. 20a–21a (discussing *United States* v. *Segura-Gomez*, No. 4:17-CR-65, 2018 WL 6582823 (E.D.N.C. May 25, 2018)); see also *infra* p.22.

In a report and recommendation on the motion to suppress, the magistrate judge rejected the government's primary contention that 8 U.S.C. § 1357(a) does not apply to arrests of persons with a prior deportation. Pet. App. 36a ("The Government provides no caselaw or regulatory authority for its position."). The

magistrate also found that the government's warrantless arrest of Mr. Santos-Portillo violated the statute, because the government "failed to show that the time period was too short to enable agents to obtain a warrant without Santos-Portillo escaping." Pet. App. 34a. Nonetheless, despite finding that ICE agents had plainly violated § 1357's warrant requirement and illegally arrested Mr. Santos-Portillo, the magistrate recommended denying the motion to suppress because district courts categorically lack the discretion to suppress evidence obtained in violation of § 1357 unless there has been a constitutional violation or the statute expressly permits suppression. Pet. App. 36a–40a. Over Mr. Santos-Portillo's objections, JA 246–256, the district court adopted the magistrate judge's recommendation. Pet. App. 25a–27a.

At trial, the government relied on the post-arrest evidence in its case-in-chief and at closing argument. *E.g.*, JA 295–297, JA 351–356. Special Agent Swivel testified to Mr. Santos-Portillo's post-arrest statements, and a fingerprint expert matched Mr. Santos-Portillo's post-arrest fingerprints with those in the immigration database. *E.g.*, JA 310–311, 353–354. The jury found Mr. Santos-Portillo guilty, and the district court imposed a time-served sentence of fifteen months. Pet. App. 5a. Immigration agents immediately took Mr. Santos-Portillo into custody and deported him. *Id*.

C. Fourth Circuit Decision

Mr. Santos-Portillo filed a timely appeal, arguing that the district court erred in its finding that it categorically lacked the authority to suppress evidence from an illegal arrest that did not also violate the Fourth Amendment. Appellant Br. 17 (4th Cir. Dkt. No. 11). Mr. Santos-Portillo argued that because the agents violated a statute "connected to the gathering

of evidence," it was in a class of statutory violations that confer authority to suppress evidence. *Id.* at 21 (quoting *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 349 (2006)).

In a 2–1 decision, the Fourth Circuit affirmed, characterizing Mr. Santos-Portillo's warrantless arrest as "perfectly lawful" and agreeing that the district court lacked any authority to suppress evidence obtained in violation of § 1357 unless the arrest also violated the Constitution as well. Pet. App. 12a. Comparing the statutory warrant requirements to "hortatory laws [that] encourage admirable behavior rather than mandate it," such as the Flag Code and the statute establishing Parents' Day, the court concluded that district courts lacked any mechanism for ICE agents to obtain a warrant where required by statute. Pet. App. 13a.

In dissent, Judge Floyd wrote that the panel majority "too narrowly views federal courts' inherent authority to supervise the proceedings before them." Pet. App. 16a. Relying on *McNabb* v. *United States*, Judge Floyd pointed to the district courts' long-established authority to "establish[] and maintain[] civilized standards of procedure and evidence." Pet. App. 17a (quoting *McNabb*, 318 U.S. at 340). In particular, Judge Floyd rejected as inapposite the majority's reliance on cases involving judicially created causes of action. Suppression, Judge Floyd explained, "is merely an evidentiary remedy to deter government reliance on illegally obtained evidence at trial." Pet. App. 18a. Not content to relegate *McNabb* to "a relic of a bygone era," Judge Floyd concluded that he "would hold that systemic or repeated violations of § 1357(a) could tip the balance in favor of the suppression remedy in a given case," and that the court should have remanded to consider suppression in light of Mr. Santos-Portillo's "compelling evidence of repeated violations in the face

of a plain statutory requirement." Pet. App. 16a, 19a–20a. Accordingly, Judge Floyd wrote that the conviction should have been vacated and the case remanded so the district court could decide, in the first instance, whether to exercise its discretion to exclude the post-arrest evidence. Pet. App. 21a.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH'S CIRCUIT *PER SE* RULE IS CONTRARY TO THE PRECEDENT OF THIS COURT AND THE DECISIONS OF OTHER CIRCUITS.

A. The Fourth Circuit's Decision is Contrary to This Court's Decision in *McNabb*.

In *McNabb*, federal revenue agents arrested and (over the course of a two-day detention) questioned suspected bootleggers, in violation of a federal statute requiring that arrestees "shall be" presented to "the nearest United States commissioner or the nearest judicial officer having jurisdiction . . . for a hearing, commitment, or taking bail for trial." 318 U.S. 332, 342 (1943) (quoting 18 U.S.C. § 595). The Court cautioned that "a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law." *Id.* at 345. In excluding evidence obtained during the defendants' unlawful detention, this Court reasoned that the "principles governing the admissibility of evidence in federal criminal trials have not been restricted [] to those derived solely from the Constitution." *Id.* at 341. For "this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions." *Id.*

As Judge Floyd recognized in his dissent below, the decision in *McNabb* was rooted in the unremarkable premise that federal courts have the inherent authority to "establish[] and maintain[] civilized standards of procedure and evidence." Pet. App. 17a (quoting *McNabb*, 318 U.S. at 340). Accordingly, the judicial authority recognized in *McNabb* does not turn on an aggressive view of courts' ability to create causes of action or an illicit use of common lawmaking; rather, the authority to "impos[e] evidentiary sanctions" precluding the reliance on illegally obtained evidence inheres in Article III and ensures "the integrity of 'the enforcement of the federal criminal law in the federal courts.'" Pet. App. 16a–18a (quoting *McNabb*, 318 U.S. at 341); *accord*, *e.g.*, *Bank of N.S.* v. *United States*, 487 U.S. 250, 254 (1988) (recognizing the inherent authority of federal courts to "formulate procedural rules not specifically required by the Constitution or the Congress").

District courts' discretion to exclude illegally obtained evidence "serves the 'twofold' purpose of deterring illegality and protecting judicial integrity." Pet. App. 19a (quoting *United States* v. *Payner*, 447 U.S. 727, 736 (1980)). As this Court recognized in *Miller* v. *United States*, "the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness." 357 U.S. 301, 313 (1958) (excluding evidence obtained incident to an arrest that violated a statutory limit on a 'no-knock' warrant). Accordingly, a federal court's inherent authority to regulate the admissibility of evidence in proceedings before it "extends to policing those requirements [governing searches and seizures] and making certain that they are observed." *Rea* v. *United States*, 350 U.S. 214, 217 (1956).

Post-*McNabb*, this Court has continued to recognize the authority of federal courts to regulate evidence and procedure to ensure that federal proceedings "are conducted in a manner consistent with basic notions of fairness." *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 808 (1987); *accord*, *e.g.*, *Bank of N.S.*, 487 U.S. at 264 (Scalia, J., concurring) ("[E]very United States court has an inherent supervisory authority over the proceedings conducted before it."). While subsequent decisions refined and explained the situations in which exclusion is an appropriate remedy, see*, e.g.*, *Herring* v. *United States*, 555 U.S. 135, 141 (2009) (weighing the "benefits of deterrence" against the cost of exclusion), no decision from this Court has ever abrogated the discretionary authority of federal district courts to exclude evidence obtained in violation of congressional command. Cf. *United States* v. *Caceres*, 440 U.S. 741, 750 (1979) (refusing to suppress recording made in violation of agency regulation because "*federal statutes* impose no restrictions on recording a conversation with the consent of one of the conversants") (emphasis added).[1]

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[1]Contrary to the Fourth Circuit's holding below, this Court's decision in *Sanchez-Llamas* v. *Oregon*, did not vitiate federal courts' authority to suppress illegally obtained evidence absent a constitutional violation or express statutory mandate. That case arose out of a state-court proceeding, and federal courts "do not hold supervisory power over the courts of the several States." *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331 (2006). at 345; see Pet. App. 18a– 20a (Floyd, J., dissenting). Moreover, in construing the treaty at issue there, *Sanchez-Llamas* recognized that suppression could be authorized "either expressly *or implicitly*." 548 U.S. at 347 (emphasis added). In declining to construe that treaty to authorize state courts to suppress illegally obtained evidence, the Court did not through its silence "limit its understanding of its supervisory authority." Pet. App. 19a (Floyd, J., dissenting). In addition, *Sanchez-Llamas* did not hold, as the majority below did, that a "*constitutional* violation" was needed to suppress evidence,

B. The Fourth Circuit's Decision Conflicts with the Decisions of Its Sister Circuits.

The decision below casts *McNabb* aside as "being a part of the '*ancien regime*'" in which federal courts had "freewheeling power" to create remedies where Congress did not. Pet. App. 9a; *accord id.* ("[T]he winds have changed."). The result of this bold declaration, as Judge Floyd noted in dissent, is that *McNabb* "has lost its vitality, and has been cabined such that—practically speaking—suppression is warranted only when (1) there is a constitutional violation, or (2) it is explicitly provided for by statute." Pet. App. 16a (Floyd, J., dissenting). Under this categorical rule, if there is no constitutional violation and no explicit statutory provision for suppression, there can *never* be a court-fashioned suppression of illegally gathered evidence—even if the evidence is acquired by a widespread and repeated practice that violates federal law.

That is simply not what *McNabb* says, and circuit courts may not, on their own initiative, cast aside decisions from this Court as "relic[s] of a bygone era." *Id.* What is more, the Fourth Circuit's opinion conflicts not only with *McNabb* but also with the decisions of at least three other circuits, which reject such a categorical rule.

The Fifth, Ninth, and Eleventh Circuits have all recognized that suppression of evidence obtained in violation of a statute may be appropriate where the violation is "widespread and repeated." *United States* v. *Salinas*, 823 F. App'x 259, 260 (5th Cir. 2020) (quoting

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Pet. App. 10a; rather, the Court noted that it had "suppressed evidence for *statutory* violations that *implicated* important Fourth and Fifth Amendment *interests*," such as "evidence that was the product of a search incident to an unlawful arrest." *Sanchez-Llamas*, 548 U.S. at 348 (emphases added).

United States v. *Hartley*, 796 F.2d 112, 115 (5th Cir. 1986)). For example, in a series of decisions involving defenses arising under the Posse Comitatus Act, the Fifth Circuit refused to suppress evidence that had been obtained through what were, at best, one-off violations of the Act, but stated that if "confronted in the future with widespread and repeated violations . . . , an exclusionary rule can be fashioned at that time." *United States* v. *Wolffs*, 594 F.2d 77, 85 (5th Cir. 1979); *accord United States* v. *Johnson*, 410 F.3d 137, 149 (4th Cir. 2005) (same).

In *Wolffs*, the police and a soldier arranged to buy a large quantity of marijuana from the defendant, who was subsequently arrested and charged with crimes such as conspiracy to possess with the intent to distribute. This plan possibly violated the Posse Comitatus Act ("PCA"), which forbids law enforcement from using military personnel as an aid to policing but contained no provision for exclusionary remedy. The Fifth Circuit stated that, even if there had been a violation of the Posse Comitatus Act, in the absence of "widespread or repeated," violations there exclusion was not warranted. *Id.*; see also *Hartley*, 796 F.2d at 115 (citing *Wolff's* "widespread or repeated" standard).

The Fifth Circuit has also indicated that a similar analysis applies under § 1357. In *De la Paz*, the Fifth Circuit held that a Fourth Amendment challenge to an immigration-related arrest could not be pursued as a *Bivens* cause of action. The Fifth Circuit reached this conclusion, in part, because the INA "includes provisions specifically designed to protect the rights of illegal aliens," including § 1357's warrant requirement, which can be enforced through suppression. See 786 F.3d at 376 ("[E]vidence seized under egregious circumstances *may be suppressed*.") (emphasis added). Under the Fourth Circuit's contrary view, however,

§ 1357 offers little more than a best practices guide that law enforcement agencies may follow or not follow at their discretion.

The Eleventh Circuit followed the Fifth Circuit's approach in another PCA case, *United States* v. *Bacon*, 851 F.2d 1312 (11th Cir. 1988). In that case, the defendant argued that the evidence against him—a controlled buy of narcotics by an undercover narcotics agent assigned to the Army's Criminal Investigation Command—had been obtained in violation of the PCA. The court refused to suppress the controlled buy because it did not violate the PCA at all, but left open exclusion if another defendant could "demonstrate any *aggravated or repeated instance of violations*." *Id.* at 1313 (emphasis added) (citing *United States* v. *Walden*, 490 F.2d 372, 376 (4th Cir. 1974)). The law of the Ninth Circuit is in accord, recognizing that courts may craft an exclusionary rule where "need[ed] to deter future violations." *United States* v. *Roberts*, 779 F.2d 565, 568 (9th Cir. 1986); see also *United States* v. *Dreyer*, 804 F.3d 1266, 1278 (9th Cir. 2015) (en banc) (recognizing that exclusion for statutory violations is appropriate in "rare circumstances" but refraining from suppressing evidence for a statutory violation when the military stated its intent to self-correct).

In the decision below, the Fourth Circuit joined the First, Sixth, and Seventh Circuits in holding that suppression is *never* available in the absence of a constitutional violation, infringement upon constitutional interests, or an express statutory command. Pet. App. 1a–21a; see, *e.g.*, *United States* v. *Procknow*, 784 F.3d 421, 429 (7th Cir. 2015) ("[T]he federal exclusionary rule . . . does not extend to violations of statutes and regulations."); *United States* v. *De La Cruz*, 835 F.3d 1 (1st Cir. 2016) (suppression must be tethered to "the abridgement of constitutional rights"); *United States* v.

Abdi, 463 F.3d 547, 556 (6th Cir. 2006) ("[T]he exclusionary rule is an appropriate sanction for a statutory violation only where the statute specifically provides for suppression as a remedy."). None of these decisions addresses *McNabb*, yet all of them foreclose any discretion on the part of federal courts to exclude evidence, even though doing so would effectively countenance, and make federal courts "accomplices in[,] willful disobedience of law." See *McNabb*, 318 U.S. at 345.

II. THE DECISION BELOW PRESENTS CRITICALLY IMPORTANT ISSUES FOR NATIONWIDE IMMIGRATION LAW ENFORCEMENT.

A. The Fourth Circuit's *Per Se* Rule Raises Substantial Separation of Powers Concerns.

Here, Executive branch officers, with the blessing of ICE counsel, admitted to routinely violating Congress' command, thus arrogating for the Executive powers rightfully belonging to Congress. That notion is anathema to core separation of powers principles. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 587 (1952) ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. . . . And the Constitution is neither silent or equivocal about who shall make laws which the President is to execute.").

Immigration is a domain within the exclusive purview of the federal government. See, *e.g.*, *Kerry* v. *Din*, 576 U.S. 86, 97 (2015); *Takahashi* v. *Fish & Game Comm'n*, 334 U.S. 410, 419 (1948); *Terrace*, 263 U.S. at 217; *Ping* v. *United States*, 130 U.S. 581 (1889); *Chirac* v. *Lessee of Chirac*, 15 U.S. 259 (1817). Within that exclusive federal domain, this Court repeatedly held that Congress' power is foremost amongst the

branches. *INS* v. *Chadha*, 462 U.S. 919, 940 (1983) ("The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question."); *Galvan* v. *Press*, 347 U.S. 522, 530–31 (1954) ("The power of Congress over the admission of aliens and their right to remain is necessarily very broad . . . that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."). Executive branch officials are undoubtedly entrusted with important discretion in the prioritization and exercise of immigration law, but such discretion is explicitly cabined by Congress. *DHS* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (finding executive policy-making on immigration matters constrained by the Administrative Procedure Act).

The inevitability of executive policy-making and discretionary enforcement in the area of immigration does not authorize executive agents to act free from Congressional constraint. *Lincoln* v. *Vigil*, 508 U.S. 182, 193 (1994) ("[A]n agency is not free to disregard statutory responsibilities."). It certainly does not authorize agencies to override Congress' exercise of legislative power. See *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 505 (1915) ("The Constitution does not confer upon [the president] any power to enact laws or to suspend or repeal such as the Congress enacts."). In this case, Congress empowered executive agents with a specific, *but conditional*, grant of authority to make arrests. 8 U.S.C. § 1357(a)(5)(B) (giving the power to make warrantless arrests, "if there is a likelihood of the person escaping before a warrant can be obtained for his arrest."). Congress imposed limits on the arrest authority in these circumstances. There is no question that Special Agent Swivel and his fellow immigration

enforcement officers breached those well-defined limits; the fact that these violations have been repeated in districts nationwide and blessed by ICE counsel demonstrate why this is not a situation where the Executive can be left to self-regulate, and the acts of law enforcement officials nationwide demonstrates that such disregard is, at a minimum, a *de facto* DHS policy.

Judicial intervention is necessary to preserve the separation of powers envisioned by the Founders and engrained in the Constitution.

B. ICE's Disregard of the Warrant Requirement Renders § 1357 Meaningless.

The courts below concluded that the government had violated a clear federal command but that the judiciary was powerless to address that transgression or deter further violations. Under this view, the Executive has unilateral power to set, enforce, and adjudicate policies pertaining to immigration arrests. Review is warranted to ensure that an important federal statute is not rendered toothless by executive disregard and judicial inaction.

Statutes requiring warrants or limiting law enforcement's authority to perform warrantless arrests are not unique to the immigration context. Where Congress grants authority for federal law enforcement to make warrantless arrests, such grants have always been explicit and narrowly defined in terms of who may effect warrantless arrests, what crimes merit warrantless arrest (typically felonies), and/or what circumstances must be present to justify not seeking a warrant (such as crimes committed in the presence of the officer). See, *e.g.*, 18 U.S.C. § 3051(a) (granting the power to *special agents* of the Bureau of Alcohol, Tobacco, and Explosives); 18 U.S.C. § 3052 (granting the

power to the *Directors, inspectors, and agents* of the Federal Bureau of Investigation); 18 U.S.C. § 3053 (grating the power to United States *marshals and their deputies*); 18 U.S.C. § 3056(c) (granting the power to the *officers and agents* of the Secret Service).

The statute at issue in this case likewise carefully and comprehensively defines when and how a warrantless arrest may be effected. However, Congress required the authorized ICE officers to seek warrants except where, as relevant here, the arrestee "is likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. § 1357(a)(2); *accord id.* § 1357(a)(4), (5) (imposing a similar limitation on warrantless arrests in other circumstances).

The Fourth Circuit's decision relegates § 1357(a)'s warrant requirement to "a hortatory enactment," which is neither capable of being nor expected to be enforced by federal courts. See Pet. App. 14a. But § 1357(a)'s warrant requirement "is not mere verbiage." *United States* v. *Pacheco-Alvarez*, 227 F. Supp. 3d 863, 889 (S.D. Ohio 2016); *accord United States* v. *Cantu*, 519 F.2d 494, 496–97 (7th Cir. 1975) (§ 1357 "is always seriously applied"). Rather, it reflects a core congressional determination that suspected unlawful aliens should be protected from warrantless arrest *unless* there is a demonstrated likelihood of escape. See H.R. Rep. No. 82-1365 at 1710 (section 1357 was written to "make a very carefully considered distinction between powers which may be exercised without warrant and such where a warrant will be required"). Indeed, while many other agencies are not constrained by the likelihood of escape requirement, "Congress specifically limited deportation officers' authority to make warrantless arrests to situations where arrestees pose a risk of escape." *United States* v. *Bautista-Ramos*, No. 18-CR-4066-LTS, 2018 WL 5726236, at *8 (N.D. Iowa

Oct. 15, 2018) (noting that ATF, FBI, the U.S. Marshals, and the Secret Service are not similarly constrained).

Section 1357's carefully designed scheme for who may make immigration arrests, when immigration arrests may be made, and whether a pre-arrest warrant is required is of such weighty federal concern that this Court has held that it *preempts* state laws to the contrary. See *Arizona* v. *United States*, 567 U.S. 387, 408 (2012) ("If no federal warrant has been issued, those officers have more limited authority."). It would make no sense for this statute to be so critical to federal immigration enforcement prerogatives that it displaces state laws on the subject, but at the time not important enough to merit judicial enforcement even where the violations are egregious and widespread. The Fourth Circuit, however, saw no difference between the weighty legislative judgment on when immigration officials "shall" have the power to effect warrantless arrest and purely hortatory provisions of the Flag Code and declarations of minor holidays. See Pet. App. 14a (citing 4 U.S.C. § 8, which provides that "[n]o disrespect should be shown to the flag of the United States," and 36 U.S.C. § 135(b), which "encourage[s]" the celebration of Parents Day).

The harm posed by the Fourth Circuit's *per se* prohibition of suppression in the absence of a constitutional violation or a statutory command will have far-reaching consequences not just on immigration arrests, but in all contexts where Congress has explicitly limited the authority of law enforcement officers to arrest an individual without a warrant. In the absence of judicial discretion to determine whether to admit evidence obtained in violation of statutory law, the enforcement of these warrant requirements would depend on the good faith and diligence of line officers. But such

dependence on the good conduct of government officials is antithetical to our constitutional structure. See The Federalist No. 51 (James Madison) ("If men were angels, no government would be necessary.") As this case powerfully demonstrates, in the absence of an effective enforcement mechanism, disregard of Congress' commands will become "something that law enforcement officers do all the time." Pet. App. 91a.

III. THIS PETITION IS AN APPROPRIATE VEHICLE TO RESOLVE THIS IMPORTANT QUESTION.

There is no genuine dispute that ICE agents violated § 1357(a)'s warrant requirement: agents did not obtain a warrant before the arrest, and there is no reason why they could not have obtained a warrant in the week between when Special Agent Swivel encountered Mr. Santos-Portillo and when ICE agents took him into custody. Pet. App. 90a–93a.

Moreover, unlike in other cases where evidence of widespread, repeated, or egregious violations of a statutory requirement is theoretical or undeveloped, here, "Santos-Portillo presented compelling evidence of repeated violations in the face of a plain statutory requirement." Pet. App. 20a (Floyd, J., dissenting). In particular, at the suppression hearing, Special Agent Swivel admitted to not seeking warrants as a matter of course:

> Q. [Y]ou just said you didn't need to get a warrant because there was a prior deportation . . . ?
>
> A. Yes.
>
> Q. And you're saying that's the **common practice** . . . ?
>
> A. That's correct.

* * *

Q. So you can arrest somebody without a warrant just to determinate alienage?

A. Absolutely, and **did it all the time** on Border Patrol.

Pet. App. 65a, 67a (emphases added); *accord* Pet. App. 98a–99a (testimony at detention hearing that ICE agents "generally . . . do these arrests without a warrant").[2]

Evidence developed in the district court, moreover, confirms that eschewing the warrant requirement is not isolated or the result of a good-faith mistake in certain cases. At the suppression hearing, the prosecutor represented that Special Agent Swivel was acting in accord with ICE policy not to seek an arrest warrant where the individual has a prior deportation order. Pet. App. 88a ("I just wanted to proffer that to Your Honor, that we did reach out to ICE Counsel to make sure we were following proper procedures."); see also Pet. App. 65a (Special Agent Swivel testifying that the practice was the same "on Border Patrol"). Based on that guidance from ICE and Special Agent Swivel's testimony, the prosecutor argued that making "a warrantless arrest" of a person suspect of being "guilty of . . . illegal re-entry" is "common" and indeed

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[2]The government's justifications below for its warrantless arrest only serve to further demonstrate that its actual conduct was unlawful. Initially, the government relied on an administrative warrant executed in 2011. JA 84; see Pet. App. 34a–35a; see also *Bautista-Ramos*, 2018 WL 5726236 at *5 (rejecting same argument). Belatedly, the government argued instead that no warrant was required because the arresting officers were actually enforcing *customs* law, JA 96, but Agent Swivel admitted that he did not work on customs matters, Pet. App. 35a–36a.

"something that law enforcement officers do all the time." Pet. App. 90a–91a.

This common and widespread practice of illegal, warrantless immigration arrests is further confirmed by the growing volume of reported decisions where courts found a clear violation of § 1357 but nonetheless found themselves unable to remedy the violation. In another case from the same district, the court found that ICE "violated 8 U.S.C. § 1357" by executing a warrantless arrest of a person suspected of illegal reentry. See *United States* v. *Segura-Gomez*, No. 4:17-CR-65, 2018 WL 6582823, at *5–10 (E.D.N.C. May 25, 2018) ("[T]he court concludes that [the arresting agent] violated these provisions when he failed to obtain a warrant before arresting defendant."). The same practice was followed in Iowa, where ICE agents targeted fifteen people for warrantless arrests. See *Bautista-Ramos*, 2018 WL 5726236. There, the district court found a "troubl[ing] . . . practice of effecting warrantless arrests without regard to the requirements of § 1357(a)," but concluded it lacked authority to suppress the illegally obtained evidence. *Id.* at *8–9. Other examples abound.[3]

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[3]*See*, *e.g.*, *Moreno* v. *Napolitano*, 213 F. Supp. 3d 999, 1005–06 (N.D. Ill. 2016) (noting that "ICE's policies and practices" do not require a likelihood of escape determination before executing a warrantless arrest); *Araujo* v. *United States*, 301 F. Supp. 2d 1095, 1101–02 (N.D. Cal. 2004) ("The government has not attempted to demonstrate, and cannot demonstrate, that Jose Araujo was 'likely to escape before a warrant can be obtained.' The only evidence in the record is to the contrary."); *Pearl Meadows Mushroom Farm, Inc.* v. *Nelson*, 723 F. Supp. 432, 449 (N.D. Cal. 1989) ("[T]he individuals arrested in this case failed to meet many of the INS' own criteria for determining a likelihood of escape.").

This case is also an appropriate vehicle because the illegally obtained post-arrest evidence was essential to the government's case at trial. See *supra* p.7. The government's case-in-chief and closing argument featured prominently Mr. Santos-Portillo's post-arrest fingerprints, his post-arrest incriminatory statements, and additional evidence learned as a result of his unlawful arrest. Thus, if the petition is granted and the judgment below vacated, the district court's resolution on remand of whether to exclude the post-arrest evidence is likely to be dispositive of this case.

Finally, this case involves a recurring factual situation and an illegal policy that dramatically changes the relationship Congress envisioned between immigration personnel and the hundreds of thousands of people ICE interacts with each year. The Fourth Circuit found suppression an unnecessary deterrent, because there were administrative measures, "including the potential loss of employment," that would foster compliance with Congress' command. See Pet. App. 13a. But as the record in this case demonstrates, administrative remedies are illusory at best because ICE leadership "blessed" their agents' illegal actions. Pet. App. 20a; see *supra* p.6. Accordingly, this Petition squarely and neatly presents the legal question of whether Congress intended for § 1357 to be enforceable, or if its enforcement is simply a matter of Executive largesse.

CONCLUSION

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

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October 29, 2021