

No. _____

**In The
Supreme Court of the United States**

JULIO HERNANDEZ-PACHECO,
Petitioner,
v.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

CHRISTINE A. FREEMAN
EXECUTIVE DIRECTOR
MACKENZIE S. LUND
Counsel of Record
FEDERAL DEFENDERS FOR THE
MIDDLE DISTRICT OF ALABAMA
817 South Court Street
Montgomery, AL 36104
(334) 834-2099
Mackenzie_S_Lund@fd.org

November 1, 2021

QUESTION PRESENTED

The Eleventh Circuit has held that identity-related evidence is not suppressible in a criminal prosecution. However, this precedent relies heavily on—and expressly ties its reasoning to—“the cost-benefit balancing test” used by this Court in *Hudson v. Michigan*, 547 U.S. 586 (2006). When compared with the authoritative decisions from other appellate courts, a minority of circuits disagree with this conclusion, and an overwhelming majority disagree with this rationale. In the opinion below, the Eleventh Circuit assumed that Mr. Hernandez-Pacheco was subject to an unconstitutional vehicle stop, but affirmed the district court’s denial of his motion to suppress based on this precedent.

The question presented is: may identity-related evidence obtained as the direct result of an illegal search or seizure be suppressed under the exclusionary rule?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

- *United States v. Julio Cesar Hernandez-Pacheco*, No. 19-cr-346, U.S. District Court for the Middle District of Alabama. Judgment entered on April 17, 2020.
- *United States v. Julio Cesar Hernandez-Pacheco*, Appeal No. 20-11666, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered on June 1, 2021. Rehearing denied on August 2, 2021.

TABLE OF CONTENTS

QUESTION PRESENTED.....	ii
LIST OF PARTIES.....	iii
RELATED CASES.....	iii
TABLE OF CONTENTSiv
TABLE OF AUTHORITIES v
PETITION FOR A WRIT OF CERTIORARI.....	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL PROVISIONS.....	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	11
I. The decisions of the federal Courts of Appeals are in conflict with one another concerning the question presented.....	11
II. The panel opinion is either contrary to, or misapprehends a crucial aspect of, this Court's precedent in <i>Davis</i> and <i>Hayes</i>	14
III. This case presents an ideal vehicle Error! Bookmark not defined.	15
CONCLUSION	16
APPENDIX	

TABLE OF AUTHORITIES

Cases:

<i>Davis v. Mississippi</i> , 394 U.S. 721 (1969)	14
<i>Hayes v. Florida</i> , 470 U.S. 811 (1985)	1
<i>Hudson v. Michigan</i> , 547 U.S. 586 (2006)	13
<i>I.N.S. v. Lopez-Mendoza</i> , 468 U.S. 1032 (1984)	9, 13
<i>Pretzantzin v. Holder</i> , 736 F.3d 641 (3d Cir. 2013)	12
<i>Tolentino v. New York</i> , 562 U.S. 1043 (2010)	15
<i>United States v. Bowley</i> , 435 F.3d 426 (3d Cir. 2006)	13
<i>United States v. Chagoya-Morales</i> , 859 F.3d 411 (7th Cir. 2017)	13
<i>United States v. De La Cruz</i> , 703 F.3d 1193 (10th Cir. 2013)	12
<i>United States v. Farias-Gonzalez</i> , 556 F.3d 1181 (11th Cir. 2009)	<i>passim</i>
<i>United States v. Guevara-Martinez</i> , 262 F.3d 751 (8th Cir. 2001)	12
<i>United States v. Guzman-Bruno</i> , 27 F.3d 420 (9th Cir. 1994)	13
<i>United States v. Hernandez-Pacheco</i> , 849 Fed. App'x 252 (11 th Cir. 2021)....	1
<i>United States v. Navarro-Diaz</i> , 420 F.3d 581 (6th Cir. 2005)	13
<i>United States v. Olivares-Rangel</i> , 458 F.3d 1104 (10th Cir. 2006)	12
<i>United States v. Oscar-Torres</i> , 507 F.3d 224 (4 th Cir. 2007)	12, 14
<i>United States v. Roque-Villanueva</i> , 175 F.3d 345 (5 th Cir. 1999)	13

Statutes

8 U.S.C. § 1326(a)	2
28 U.S.C. § 1254(1)	1

PETITION FOR A WRIT OF CERTIORARI

Mr. Julio Hernandez-Pacheco respectfully requests that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's decision below is unpublished. *United States v. Hernandez-Pacheco*, 849 Fed. App'x 252 (11th Cir. 2021) (unpublished). The opinion is included in Petitioner's Appendix. Pet. App. 1a.

The district court's memorandum opinion and order denying Mr. Hernandez-Pacheco's motion to suppress is unreported. (CM/ECF for U.S. Dist. Ct. for M.D. Ala., case no. 3:19-cr-346-ALB-SRW, doc. 46). The opinion is included in Petitioner's Appendix. Pet. App. 1b.

JURISDICTION

The Eleventh Circuit's opinion in this case was issued on June 1, 2021. *See* Pet. App. 1a. Rehearing was sought and denied on August 2, 2021, rendering the petition for writ of certiorari due on or before November 1, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the U.S. Constitution protects the “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. CONST., amend. IV.

STATEMENT OF THE CASE

In September 2019, a federal grand jury returned an indictment against Mr. Julio Cesar Hernandez-Pacheco, charging him with a single count of illegal reentry by a deported alien, in violation of 8 U.S.C. § 1326(a). (Doc. 18).

Subsequently, Mr. Hernandez-Pacheco filed a motion to suppress all physical, testimonial, and identity evidence obtained as a result of the warrantless vehicle stop conducted by Immigration and Customs Enforcement (“ICE”) officers on August 23, 2019. (Doc. 24). *Inter alia*, Mr. Hernandez-Pacheco argued that: (1) the ICE officers lacked reasonable suspicion to initiate a traffic stop of the vehicle he was travelling in; (2) the ICE officers unlawfully prolonged the duration of the stop by requesting and checking the identification of all five individuals in the vehicle; and (3) as a result, the exclusionary rule required suppression of all physical, testimonial, and identity evidence obtained as a result of the vehicle stop and illegal seizure. (Doc. 24 at 1, 3-5).

At the November 2019 evidentiary hearing on the motion to suppress, the government called ICE Deportation Officer Scott Skillern to testify regarding the vehicle stop and arrest of Mr. Hernandez-Pacheco. (Doc. 51 at 5-66). Deportation Officer Skillern testified that, on August 23, 2019, he and his fellow ICE officers were investigating a “tip of an illegal alien who was suspected of committing a crime against a young child.” (*Id.* at 7). This “tip” was provided by Ms. Delores Hernandez, who was the “aunt/godmother” of the

child in question. (*Id.* at 7, 21). According to Delores, the alien—Mr. Ricardo Mendez Jarquin—was in the country illegally, and was residing with his father at a particular address on Worthy Road in Alexander City, Alabama. (*Id.* at 7-8, 20).¹ Deportation Officer Skillern was not aware of any specific relation between Delores and Mr. Mendez Jarquin, only that “she said she knows him.” (*Id.* at 23-24). Deportation Officer Skillern clarified that Mr. Hernandez-Pacheco was not the target of their investigation, and not the illegal alien they were looking for. (*Id.* at 8).

Mr. Mendez Jarquin was already under investigation by the Alexander City Police Department for alleged misconduct with the goddaughter/ niece of Ms. Delores Hernandez. (*Id.* at 16). Delores provided Deportation Officer Skillern with a copy of the police report generated by the Alexander City Police Department regarding the misconduct. (*Id.* 27-28). From this report, Deportation Officer Skillern learned that Mr. Mendez Jarquin was 5’10”, 186 pounds, and 33 years of age. (*Id.* at 31); (doc. 30-1 at 2). Deportation Officer Skillern also knew, from Delores, that Mr. Mendez Jarquin drove a red Ford pickup truck and worked at a local auto parts manufacturer called Samlip. (Doc. 51 at 36-37). Lastly, Delores provided a “somewhat hazy” Facebook photo of Mr. Mendez Jarquin. (*Id.* at 31, 12). Though Deportation Officer Skillern was aware that the Alexander City Police Department had recently

¹ As it turned out, Delores’s information about who was living in the house was factually inaccurate. (*Id.* at 43-44) (confirming that “the intel about only two adult males living there” was “not accurate”).

interviewed Mr. Mendez Jarquin, Officer Skillern did not attempt to contact the Police Department to obtain additional information. (*Id.* at 28, 30-31).

On August 23, 2019, Deportation Officer Skillern and two of his colleagues, Deportation Officers Christopher Purdy and Ben Rogers, travelled to the Worthy Road address provided by Ms. Delores Hernandez. (*Id.* at 8-9). The deportation officers did not at any point consider knocking on the door and asking for Mr. Mendez Jarquin—or otherwise initiating a consensual encounter—because “[n]obody opens the door and talks to ICE.” (*Id.* at 39-40). Instead, the officers planned to stop and “talk to whoever came out of the house.” (*Id.* at 39-40).

Deportation Officer Skillern testified that he observed an individual exit the house, enter a sedan parked out front, and drive away. (*Id.* at 9, 40). Officers Purdy and Rogers executed a vehicle stop. (*Id.* at 9, 40). The only basis for this stop was Deportation Officer Skillern’s belief that the individual might have been Mr. Mendez Jarquin, because “he lived at the same residence as the person [they] were looking for.” (*Id.* at 44). The person in the sedan was neither Mr. Mendez Jarquin nor his father, but the officers nevertheless arrested him for being in the country illegally. (*Id.* at 9, 43, 45).

While Deportation Officers Purdy and Rogers conducted the stop of the sedan, Deportation Officer Skillern observed a dark-colored pickup truck arrive at the Worthy Road residence and an individual—Mr. Hernandez-Pacheco—exited the house and entered the back seat of the truck. (*Id.* at 9-10,

12, 48). The only identifying physical characteristic that Deportation Officer Skillern was able to observe about Mr. Hernandez-Pacheco was that he was a male. (*Id.* at 12, 46). Nevertheless, Deportation Officer Skillern believed this individual might be Mr. Mendez Jarquin, so he “stopped the vehicle maybe a mile down the road.” (*Id.* at 10). The vehicle did not commit any traffic violations, and Deportation Officer Skillern did not possess the authority to issue traffic citations. (*Id.* at 48).

Deportation Officer Skillern approached the truck, and asked the five occupants to identify “who came out of the address.” (*Id.* at 10). Deportation Officer Skillern then asked “if all the people in the back seat had ID,” and “everybody in the truck” produced an identification card.” (*Id.* at 10, 49). Deportation Officer Skillern could not recall what type of identification card Mr. Hernandez-Pacheco produced, or even what country it was from. (*Id.* at 50).

Deportation Officer Skillern testified that he no longer suspected Mr. Hernandez-Pacheco of being the alien he was seeking, but nevertheless continued asking questions because he felt “there [was] an immigration violation in [his] presence.” (*Id.* at 49). Deportation Officer Skillern explained that he felt that way because “somebody who lives with illegal aliens, doesn’t speak . . . English, and hands me a foreign national ID could quite possibly be an illegal alien.” (*Id.* at 49-50). He clarified that, specifically with respect to Mr. Hernandez-Pacheco, his reasonable suspicion was that he “didn’t speak

English” and “had a foreign ID.” (*Id.* at 54). Deportation Officer Skillern acknowledged that an individual traveling as a passenger in a car was not required to have an Alabama ID, or any ID at all. (*Id.* at 51).

Deportation Officer Skillern asked Mr. Hernandez-Pacheco and the other passenger with a foreign ID “if they have any state-issued ID,” and each of them responded simply that they did not. (*Id.* at 11). Deportation Officer Skillern asked them why they were unable to produce a state-issued ID, and “they didn’t say anything.” (*Id.*). Deportation Officer Skillern then asked “if they were in the county illegally, and they said yes.” (*Id.*). Deportation Officer Skillern estimated that this encounter took “maybe a minute, minute and a half.” (*Id.* at 15).

Deportation Officer Skillern advised Officers Purdy and Rogers that Mr. Mendez Jarquin was not in the vehicle, “because I had the IDs and I had spoken to everybody.” (*Id.* at 15). One of the passengers in the vehicle, Mr. Saul Deluca-Rogers, testified that the officers told the passengers to “sit tight,” and then spent the next 10 minutes running records checks on everyone’s ID. (*Id.* at 80-82). Deportation Officers Purdy and Rogers ran all of the IDs “for criminal and immigration history,” and discovered that Mr. Hernandez-Pacheco had previously been removed from the United States. (*Id.* at 15, 53). The officers continued to detain all five individuals and ran additional record checks. (*Id.* at 80-82).

Mr. Deluca-Rogers testified that the deportation officers pulled Mr. Hernandez-Pacheco out of the truck, took away his belt, shoes, phone, and wallet, and told him he was under arrest. (*Id.* at 82-83). Ultimately, the officers took three of the five passengers into custody. (*Id.* at 58). Ms. Maria Rogers, another of the passengers in the vehicle, estimated that the passengers were detained for a total of 25-30 minutes. (*Id.* at 84, 87).

Mr. Deluca-Rogers testified that the deportation officers did not, at any point during the stop, explain who they were looking for, or ask about Mr. Mendez Jarquin. (*Id.* at 82, 87). Mr. Deluca-Rogers testified that he knew Mr. Mendez Jarquin and could have pointed the officers in the right direction. He explained that neither Mr. Hernandez-Pacheco nor “[anybody] in the car” looked anything like Mr. Mendez Jarquin.² (*Id.* at 92).

Deportation Officer Skillern returned to surveil the Worthy Road residence, and found Mr. Mendez Jarquin’s father standing in the driveway. (*Id.* at 14). The father explained that Mr. Mendez Jarquin had already left for work. (*Id.*) The deportation officers travelled to Mr. Mendez Jarquin’s place of employment, and observed the red Ford pickup truck in the parking lot. (*Id.* at

² Mr. Deluca-Rogers testified that while everyone in the car was “either a little heavyset or a little pudgy,” Mr. Mendez Jarquin was “pretty slim.” (Doc. 51 at 92). Additionally, he noted that Mr. Mendez Jarquin was “lighter skinned,” “a lot more thin,” and had distinct hair, eyebrows, and face shape as compared to Mr. Hernandez-Pacheco. (*Id.* at 92-93). Additionally, he believed that Mr. Hernandez-Pacheco had a small beard at the time, while Mr. Mendez-Jarquin did not. (*Id.* at 93).

14, 59). They then successfully apprehended their target, Mr. Mendez Jarquin. (*Id.*).

Deportation Officer Skillern testified that the Alexander City Police Department was investigating their target, Mr. Mendez Jarquin, because he had been “sending obscene pictures to an underage girl.” (*Id.* at 16). On cross-examination, Deportation Officer Skillern clarified that ICE was looking for Mr. Mendez Jarquin solely because the tipster, Ms. Delores Hernandez, had told them that Mr. Mendez Jarquin was in the country illegally. (*Id.* at 20-25, 30). Delores did not convey how she knew or suspected that Mr. Mendez Jarquin was in the country illegally, but expressed concern that he would “flee to Mexico” to avoid facing charges. (*Id.* at 22). Deportation Officer Skillern ran Mr. Mendez Jarquin’s name through various law enforcement databases and found that he had no immigration record, no ICE or criminal warrants, and no alien number of the type associated with someone previously removed or applying for a status adjustment. (*Id.* at 34-35). Deportation Officer Skillern confirmed that he had no evidence that Mr. Mendez Jarquin had ever been removed from the country or involved with ICE before conducting the stop of the vehicle that contained Mr. Hernandez-Pacheco. (*Id.* at 25).

As a final matter, Mr. Hernandez-Pacheco asked the record to reflect his relative size. (Defendant’s Exhibit 4 at 120-21). The court noted that “the record does not reflect that the defendant is a 5-10, 180 pound person. But it also does not reflect that he’s 5-2, so he’s somewhere in between that range,

and he is a heavyset individual.” (*Id.*). According to the Presentence Investigation Report (“PSI”), Mr. Hernandez-Pacheco is 5’7”, 240 pounds, and 41 years of age. (PSI at ¶ 38).

Following the hearing, each party submitted a supplemental brief addressing the constitutionality of the vehicle stop and the viability of Mr. Hernandez-Pacheco’s suppression arguments. (Doc. 51 at 122-23). Mr. Hernandez-Pacheco argued that there was no lawful basis for the vehicle stop, because none of the deportation officers possessed an *individualized* suspicion, either that Mr. Mendez Jarquin was present in the truck, or that Mr. Hernandez-Pacheco was the fugitive sought. (*Id.*). Moreover, even if the vehicle stop was justified at its outset, it was unreasonably prolonged when the deportation officers extended the stop to conduct an unrelated investigation into Mr. Hernandez-Pacheco’s citizenship status. (*Id.* at 7-10). Finally, Mr. Hernandez-Pacheco acknowledged the Eleventh Circuit’s decision in *United States v. Farias-Gonzalez*, 556 F.3d 1181 (11th Cir. 2009), but argued that *Farias-Gonzalez* was wrongly decided because it was both logically flawed and premised upon a fundamental misreading of this Court’s precedent in *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984), and *Hudson v. Michigan*, 547 U.S. 586 (2006). (*Id.* at 10-18).

The district court denied Mr. Hernandez- Pacheco’s motion to suppress. (Doc. 46). Specifically, the district court determined, as a threshold matter, that *Farias-Gonzalez* mandated the conclusion that “an alien’s identity is not

suppressible in a prosecution for illegal reentry.” (*Id.* at 2). The district court also concluded that the vehicle stop did not violate the Fourth Amendment because the deportation officers possessed reasonable suspicion that Mr. Hernandez-Pacheco may have been the person they were seeking. (*Id.* at 2-3). The court further determined that the deportation officers did not unreasonably extend the vehicle stop, because the seizure was brief and the deportation officers asked the passengers only “routine questions, such as who they were.” (*Id.* at 3-4).

Thereafter, Mr. Hernandez-Pacheco entered into a conditional guilty plea. (Doc. 55). Mr. Hernandez-Pacheco agreed to plead guilty to the indictment, but reserved his right to appeal the district court’s adverse ruling on his motion to suppress. (*Id.* at 5-6).

A magistrate judge accepted Mr. Hernandez-Pacheco’s guilty plea, and adjudged him guilty. (*See* doc. 57). Ultimately, the district court sentenced Mr. Hernandez-Pacheco to time served, which was 229 days’ imprisonment. (Doc. 68 at 2). Mr. Hernandez-Pacheco was then remanded to ICE custody for deportation proceedings. (*Id.*).

Mr. Hernandez-Pacheco appealed, challenging the district court’s adverse ruling on his motion to suppress. Specifically, Mr. Hernandez-Pacheco argued that: (1) the vehicle stop conducted by Deportation Officer Skillern was not supported by individualized reasonable suspicion; and (2) even assuming the vehicle stop was justified at its outset, the deportation officers unlawfully

prolonged the stop. Mr. Hernandez-Pacheco acknowledged the Eleventh Circuit’s holding in *Farias-Gonzalez*, 556 F.3d 1181, but sought to preserve the issue for review in the event this Court overturned this precedent.

The Eleventh Circuit rejected Mr. Hernandez-Pacheco’s arguments, and affirmed the district court’s denial of his motion to suppress. *Hernandez-Pacheco*, 849 Fed. App’x at 254. Notably, in reaching this conclusion, the panel accepted Mr. Hernandez-Pacheco’s arguments related to the constitutionality of the vehicle stop, and assumed for purposes of appeal that the stop was unconstitutional. *Id.* at 253. Nevertheless, the panel determined that it was unable to say that the district court erred, “because we previously held in *United States v. Farias-Gonzalez*, 556 F.3d 1181 (11th Cir. 2009), that identity-related evidence cannot be suppressed,” and the prior panel precedent rule precluded further inquiry into the matter. *Id.* at 254.

Mr. Hernandez-Pacheco filed a petition for rehearing en banc, which the Eleventh Circuit denied on August 2, 2021.

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I. The decisions of the federal Courts of Appeals are in conflict with one another concerning the question presented.

As already discussed, the Eleventh Circuit held—in *Farias-Gonzalez* and in the context of a § 1326 prosecution—that “the exclusionary rule does not apply to evidence to establish the defendant’s identity in a criminal prosecution.” 556 F.3d at 1189. In reaching this conclusion, the *Farias-*

Gonzalez panel relied heavily on—and expressly tied its reasoning to—“the cost-benefit balancing test” used by this Court in *Hudson v. Michigan*, 547 U.S. 586 (2006). *Id.* at 1182. Weighing the social costs of applying the exclusionary rule against the benefit of deterring constitutional violations, the *Farias-Gonzalez* panel found that: (1) the social cost would be “significant,” because “the court and the Government are entitled to know who the defendant is,” and excluding identity evidence “achieves the same result as would allowing him to suppress the court’s jurisdiction over him”; and (2) the deterrence benefit would be “minimal,” because identity-related evidence is not unique evidence that, once suppressed, cannot be obtained by other means. *Id.* at 1187-89.

A minority of circuits disagree with this conclusion, and an overwhelming majority disagree with this rationale. For instance, the Fourth, Eighth, and Tenth Circuits have reached the opposite conclusion entirely, and hold that identity-related evidence *is* suppressible in a criminal prosecution, so long as the evidence was collected for an investigatory rather than an administrative purpose. *United States v. Oscar-Torres*, 507 F.3d 224 (4th Cir. 2007); *United States v. Guevara-Martinez*, 262 F.3d 751 (8th Cir. 2001); *United States v. Olivares-Rangel*, 458 F.3d 1104 (10th Cir. 2006); *see also United States v. De La Cruz*, 703 F.3d 1193 (10th Cir. 2013). The Second Circuit appears to agree. *See Pretzantzin v. Holder*, 736 F.3d 641, 646-648 (2d Cir. 2013) (citing *Olivares-Rangel* and *Oscar-Torres* for the proposition that

this Court’s precedent does not insulate all identity-related evidence from suppression).

To be sure, the Third, Fifth, Sixth, Seventh, and Ninth Circuits have reached the same general conclusion as the Eleventh Circuit did in *Farias-Gonzalez*, and, barring egregious violations, will preclude suppression of identity-related evidence. *See United States v. Bowley*, 435 F.3d 426 (3d Cir. 2006); *United States v. Roque-Villanueva*, 175 F.3d 345 (5th Cir. 1999); *United States v. Navarro-Diaz*, 420 F.3d 581 (6th Cir. 2005); *United States v. Guzman-Bruno*, 27 F.3d 420 (9th Cir. 1994); *United States v. Chagoya-Morales*, 859 F.3d 411, 419 (7th Cir. 2017). However, the Third, Fifth, Sixth, and Ninth Circuits do so based primarily upon *Lopez-Mendoza*, and this Court’s statement that “[t]he ‘body’ or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred.” *Lopez-Mendoza*, 468 U.S. at 1039; *see also Bowley*, 435 F.3d at 430; *Roque-Villanueva*, 175 F.3d at 345; *Navarro-Diaz*, 420 F.3d at 585-87; *Guzman-Bruno*, 27 F.3d at 420. Only the Seventh Circuit seems to agree with *Farias-Gonzalez* that resolution of this issue should be governed by *Hudson v. Michigan* and the cost-benefit analysis undertaken by this Court in the context of the knock-and-announce rule. *See Chagoya-Morales*, 859 F.3d at 419.

In short, this Court has yet to expressly weigh in on whether identity-related evidence is suppressible in a criminal prosecution, and this silence has

led the federal appellate courts to fall into a state of disarray and reach disparate conclusions regarding the same issue. *See Oscar-Torres*, 507 F.3d at 228 (lamenting that the relevant Supreme Court precedent has “bedeviled and divided our sister circuits”). This issue is one of exceptional importance, as the reasoning in *Farias-Gonzalez* and the opinion below conflicts with the authoritative decision of (almost) every other circuit court to have addressed the issue.

II. The panel opinion is either contrary to—or misapprehends a crucial aspect of—*Davis* and *Hayes*.

In this case, as in *Farias-Gonzalez*, the panel determined that identity-related evidence is categorically excluded from the reach of the exclusionary rule. *See Hernandez-Pacheco*, 849 Fed. App’x at *253-54; *Farias-Gonzalez*, 556 F.3d at 1185-86.

However, fingerprints are simply another a form of identity evidence, and this Court has twice before held that fingerprint evidence obtained after an illegal arrest may be suppressed under the exclusionary rule if obtaining the fingerprints was the objective of the illegal arrest. *See Davis v. Mississippi*, 394 U.S. 721, 727 (1969); *Hayes v. Florida*, 470 U.S. 811, 815 (1985). When police exploit an illegal detention in order to obtain evidence, there is no meaningful distinction to be drawn between evidence that takes the form of a fingerprint card and evidence that takes the form of an identification card or A-file. The costs to society are no greater, and the deterrence benefit is equally important: as illustrated by the facts of this case, the deportation officers

detained, interrogated, and collected the identity evidence of *six* people under the guise of looking for Mr. Mendez Jarquin. As the district court noted, it is indeed “unfortunate” that in the Eleventh Circuit there is no mechanism to deter police misconduct in these circumstances. (*See* doc. 46 at 4).

III. This case presents an ideal vehicle.

Mr. Hernandez-Pacheco’s case presents an ideal vehicle to resolve this issue, because it is pellucidly clear from the record that the Eleventh Circuit: (1) assumed that the vehicle stop was unconstitutional; and (2) affirmed the district court’s decision based *solely* upon *Farias-Gonzalez* and the prior panel precedent rule. *Hernandez-Pacheco*, 849 Fed. App’x at 253-54. Mr. Hernandez-Pacheco challenged the validity and reasoning of *Farias-Gonzalez* both in the district court and on appeal. Therefore, the question presented is squarely at issue under the facts of this case.

Moreover, it is worth noting that this Court has once before granted (and then later dismissed as improvidently granted) a petition for certiorari on a similar issue. *Tolentino v. New York*, 562 U.S. 1043 (2010), *dismissed as improvidently granted* by 563 U.S. 123. Specifically, in *Tolentino*, this Court granted certiorari to address “[w]hether pre-existing identity-related governmental documents, such as motor vehicle records, obtained as the direct result of police action violative of the Fourth Amendment, are subject to the exclusionary rule?” *Tolentino v. New York*, No. 09-11556, Petition for Certiorari at i. However, in *Tolentino*, the only evidence sought to be

suppressed consisted of pre-existing DMV records independently compiled by the government and maintained in its possession prior to the unlawful search or seizure. *See Tolentino v. New York*, No. 09-11556, Brief for Respondent at *13. In contrast, Mr. Hernandez-Pacheco sought to suppress all physical, *testimonial*, and identity evidence obtained as a result of the warrantless vehicle stop, which would include the ICE officers' testimony as to who and what he observed in the truck after pulling it over. Accordingly, Mr. Hernandez-Pacheco's case does not present the same vehicle problem as *Tolentino*, and this Court should grant certiorari to resolve the circuit split.

CONCLUSION

For the above reasons, this Court should grant this petition for writ of *certiorari*.

Respectfully submitted,

Christine Freeman, Executive Director
Mackenzie S. Lund, Assistant Federal Defender*
Federal Defenders
Middle District of Alabama
817 S. Court Street
Montgomery, AL 36104
Telephone: 334.834.2099
Facsimile: 334.834.0353

*Counsel of Record