No. 21-6191

IN THE SUPREME COURT OF THE UNITED STATES

JULIO HERNANDEZ-PACHECO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the circumstances of petitioner's vehicle stop by immigration authorities, in alleged violation of the Fourth Amendment, required the suppression of evidence of his identity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4[1]) is not published in the Federal Reporter but is reprinted at 849 Fed. Appx. 252. The opinion of the district court (Pet. App. B1-B4) is unreported.

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[1] The appendix to the petition for a writ of certiorari is not separately paginated. This brief treats the appendix as if it were separately paginated, with the court of appeals opinion as Appendix A (and the first page of that opinion as page A1) and the district court's opinion and order as Appendix B (and the first page of that opinion as page B1).

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2021. A petition for rehearing was denied on August 2, 2021. The petition for a writ of certiorari was filed on November 1, 2021 (a Monday). 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 Middle District of Alabama, petitioner was convicted on one count of reentering the United States following removal, in violation of 8 U.S.C. 1326(a). Judgment 1. The district court sentenced petitioner to time served, which was 229 days. Judgment 2. The court of appeals affirmed. Pet. App. A1-A4.

1. In August 2019, U.S. Immigration and Customs Enforcement (ICE) officers received a tip from a known informant that Ricardo Menendez-Jarquin had committed a crime and was present in the United States unlawfully. Pet. App. B2-B3; Gov't C.A. Br. 3. The informant also provided a police report identifying Menendez-Jarquin's age, height, and weight, as well as a blurry photograph of him. Gov't C.A. Br. 4.

After verifying that Menendez-Jarquin was a noncitizen, ICE officers traveled to his home address, which had two listed residents. Gov't C.A. Br. 5. After the officers arrived, a person exited the house, whom the officers stopped and determined was not

Menendez-Jarquin. Pet. App. B3. A second person then left the house and climbed into a car, which the officers then stopped. Ibid.; Presentence Investigation Report (PSR) ¶ 6. The car contained five occupants: a male driver, a female passenger in the front seat, and three passengers -- including petitioner -- in the back seat. Gov't C.A. Br. 6.

An ICE officer asked the passengers in the back seat whether they had come out of the house. Gov't C.A. Br. 6. Petitioner and a second passenger, who did not speak English, did not respond. Ibid. The third back-seat passenger stated that he had not come from the house. The officer then, in Spanish, asked the passengers for identification. Ibid. Petitioner provided a consular identification card from Mexico and stated that he did not have any U.S. state-issued identification. Ibid. The officer then asked in Spanish if the passengers were present in the country unlawfully. Ibid. Petitioner and another passenger responded affirmatively. Id. at 7.

ICE officers verified that petitioner had previously been removed from the United States, and petitioner admitted that he was present without authorization. Gov't C.A. Br. 7. Petitioner was subsequently taken into custody. Ibid.; PSR ¶ 2.

2. A grand jury in the Middle District of Alabama returned an indictment charging petitioner with reentering the United States following removal, in violation of 8 U.S.C. 1326(a).

Indictment 1. Petitioner moved to suppress the identity-related evidence obtained from the stop of the car in which he was a passenger, asserting that the stop violated the Fourth Amendment because it was not based on reasonable suspicion of illegal activity and was unduly prolonged. Pet. App. B1-B2. Following an evidentiary hearing, the district court denied the motion. Id. at B2-B4.

The district court explained that the identity-related evidence obtained by the ICE officers -- petitioner's identification card and his admission of unlawful presence -- "is not suppressible in a prosecution for unlawful reentry." Pet. App. B2. The court observed that, under Eleventh Circuit precedent, "the exclusionary rule does not apply to evidence to establish the defendant's identity in a criminal prosecution." Ibid. (quoting United States v. Farias-Gonzalez, 556 F.3d 1181, 1189 (11th Cir.), cert. denied, 558 U.S. 833 (2009)).

The district court alternatively determined that suppression was unwarranted in any event because the ICE officers had reasonable suspicion to stop the car. Pet. App. B2-B3. The court explained that, based on the informant's tip, the officers reasonably traveled to Menendez-Jarquin's house, which they "believed * * * had only two residents." Id. at B3. "After stopping the first person to leave the house without finding Menendez-Jarquin," the court further explained, "the officers

logically suspected the next person to leave the house would be their target." Ibid. The court found that, when "a second person left the house and climbed in a car, * * * it was reasonable for [the officers] to stop the car." Ibid. And the court thus determined that, "[u]nder the circumstances, it was reasonable for the officers to suspect that their target had left the house in a car." Ibid. The court rejected petitioner's contention that the ICE officers had unduly prolonged the stop, observing that "the stop lasted only three or four minutes before the officers uncovered that one of the car's passengers was present in the country illegally"; that "[d]uring th[at] interval, the officers asked the passengers routine questions"; and that their "interactions with" petitioner gave rise to a suspicion that he was present in the country without authorization, which petitioner "quickly confirmed * * * by admitting it." Id. at 4.

Petitioner entered a conditional guilty plea, reserving the right to appeal the denial of his motion to suppress. Pet. App. A3.

3. The court of appeals affirmed in an unpublished per curiam decision. Pet. App. A1-A4. The court applied its precedent recognizing "that the exclusionary rule does not apply to [identity-related] evidence when it is used 'to establish the defendant's identity in a criminal prosecution.'" Id. at A4 (quoting Farias-Gonzalez, 556 F.3d at 1189). The court noted that

petitioner had not argued, in the district court or on appeal, that any of the evidence he sought to suppress was "non-identity evidence." Id. at A4 n.3.

ARGUMENT

Petitioner contends (Pet. 11-16) that evidence of his identity and unlawful presence in the United States following removal is suppressible as the fruit of a Fourth Amendment violation. The court of appeals correctly rejected that contention; its decision does not conflict with any decision of this Court; and this case is an unsuitable vehicle for addressing any disagreement in the courts of appeals about the specific circumstances in which identity evidence is suppressible in a prosecution for unlawful reentry under 8 U.S.C. 1326. This Court has repeatedly denied review of petitions raising the question presented. See Lara v. United States, 139 S. Ct. 412 (2018) (No. 17-9310); Montes-Nunez v. United States, 137 S. Ct. 493 (2016) (No. 16-5592); Cardona-Castillo v. United States, 137 S. Ct. 298 (2016) (No. 16-5241); Hernandez-Mandujano v. United States, 572 U.S. 1102 (2014) (No. 13-8018); Andrade-Rivera v. United States, 571 U.S. 864 (2013) (No. 12-10722); Rodriguez-Castorena v. United States, 565 U.S. 830 (2011) (No. 10-9760); Farias-Gonzalez v. United States, 558 U.S. 833 (2009) (No. 08-10195); Ortiz-Hernandez v. United States, 549 U.S. 876 (2006) (No. 05-11763); Perez-Reyes v. United States, 543 U.S. 837 (2004) (No. 03-10542);

Sanchez-Sanchez v. United States, 538 U.S. 909 (2003) (No. 02-7654); Rocha-Gonzalez v. United States, 535 U.S. 906 (2002) (No. 01-7109). The same result is warranted here.[2]

1. The court of appeals correctly determined that neither petitioner's statements regarding his illegal presence nor identification should be suppressed as the fruit of a Fourth Amendment violation. This Court's precedent makes clear that the Fourth Amendment exclusionary rule does not bar the admission of identity evidence, such as statements of identity, fingerprints, or photographs taken upon detention.

In INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), this Court held that the Fourth Amendment exclusionary rule does not apply in civil deportation proceedings. In that case, one of two respondents moved to terminate his deportation proceeding because he had been summoned before the immigration court as a result of an unlawful arrest. Id. at 1040. This Court held that such a claim would not support relief from deportation. Id. at 1045-1046. In so holding, the Court explained that the "'body' or identity of a defendant or respondent in a criminal or civil proceeding is

[2] In 2010, the Court granted a writ of certiorari in a case involving the state-law prosecution of a motor-vehicle offense that presented the question whether preexisting government records are subject to the exclusionary rule when law enforcement accesses those records after ascertaining a defendant's identity in an illegal stop. Tolentino v. New York, 562 U.S. 1043 (2010). Following oral argument in that case, the Court dismissed the writ of certiorari as improvidently granted. See Tolentino v. New York, 563 U.S. 123, 124 (2011) (per curiam).

never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." Id. at 1039. Later in the opinion, the Court rejected the claim of the other respondent, who had sought to exclude certain evidence from his deportation proceeding. Id. at 1043. Referring to its earlier analysis, the Court explained that "[s]ince the person and identity of the respondent are not themselves suppressible, [immigration authorities] must prove only alienage, and that will sometimes be possible using evidence gathered independently of, or sufficiently attenuated from, the original arrest." Ibid. (citation omitted). That conclusion presupposes that evidence of a person's identity is not subject to suppression.

Petitioner provides no basis for reconciling his efforts to suppress the identity evidence at issue in this case with Lopez-Mendoza. Instead, he contends that the court of appeals erred in "determin[ing] that identity-related evidence is categorically excluded from the reach of the exclusionary rule" and that this Court has previously approved the suppression of "fingerprint evidence obtained after an illegal arrest * * * if obtaining the fingerprints was the objective of the illegal arrest." Pet. 14 (citing Davis v. Mississippi, 394 U.S. 721, 727 (1969), and Hayes v. Florida, 470 U.S. 811, 815 (1985)). But both decisions that petitioner cites are inapposite. In both Davis v. Mississippi and

Hayes v. Florida, police officers illegally detained the defendants solely to fingerprint them and then used the fingerprints as physical evidence to link the defendants to a crime by comparing their fingerprints to those found at the crime scene. See Davis, 394 U.S. at 722-723; Hayes, 470 U.S. at 812-813. The identities of the defendants were not in doubt in either case, and the police officers did not fingerprint the defendants to determine their identities. Here, in contrast, the evidence petitioner sought to suppress -- "including his ID card and statements" to officers, Pet. App. B1 -- was used to confirm petitioner's identity, not to compare his fingerprints to those found at the scene of a crime.

2. a. As petitioner observes (Pet. 12-13), some disagreement exists in the courts of appeals over the circumstances in which identity-related information is subject to the exclusionary rule in prosecutions under Section 1326. Six circuits -- including the Eleventh Circuit -- have recognized that evidence of a defendant's identity (i.e., name or fingerprints) and the contents of an "alien file" (A-file) in illegal-reentry prosecutions where the defendant's identity was ascertained is never suppressible. United States v. Farias-Gonzalez, 556 F.3d 1181, 1186-1189 (11th Cir.), cert. denied, 558 U.S. 833 (2009); see, e.g., United States v. Bowley, 435 F.3d 426, 430-431 (3d Cir. 2006); United States v. Roque-Villanueva, 175 F.3d 345, 346 (5th

Cir. 1999); United States v. Navarro-Diaz, 420 F.3d 581, 588 (6th Cir. 2005); United States v. Chagoya-Morales, 859 F.3d 411, 419-420 (7th Cir. 2017); United States v. Guzman-Bruno, 27 F.3d 420, 421-422 (9th Cir.), cert. denied, 513 U.S. 975 (1994).[3] Although petitioner asserts (Pet. 13) that several of those circuits have articulated different rationales and pointed to different decisions of this Court to support their decisions, he acknowledges (ibid.) that those courts "have reached the same general conclusion."

The Fourth, Eighth, and Tenth Circuits have taken the view that certain identity evidence is suppressible in certain circumstances. See United States v. Oscar-Torres, 507 F.3d 224, 228 (4th Cir. 2007); United States v. Guevara-Martinez, 262 F.3d 751, 754-756 (8th Cir. 2001); United States v. Olivares-Rangel, 458 F.3d 1104, 1110-1111, 1120-1121 (10th Cir. 2006); see also

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[3] Notwithstanding its earlier decision in United States v. Guzman-Bruno, supra, the Ninth Circuit has subsequently stated that Lopez-Mendoza is not an absolute bar to the suppression of identity evidence in a criminal trial. See United States v. Garcia-Beltran, 389 F.3d 864, 868 (2004). But that statement is of little practical significance because the Ninth Circuit has since recognized that, even if fingerprints taken following a Fourth Amendment violation are suppressed, the district court in an unlawful-reentry prosecution may order that a second set of prints be taken to confirm a defendant's identity. See United States v. Sandoval-Sandoval, 487 F.3d 1278, 1279 (2007) (per curiam); United States v. Garcia-Beltran, 443 F.3d 1126, 1128-1135, cert. denied, 549 U.S. 935 (2006); United States v. Ortiz-Hernandez, 427 F.3d 567, 577 (2005) (per curiam), cert. denied, 549 U.S. 876 (2006).

Pretzantzin v. Holder, 736 F.3d 641, 648-652 (2d Cir. 2013) (adopting similar view in context of immigration proceedings involving egregious Fourth Amendment violations). Those courts have read Lopez-Mendoza to preclude categorically the suppression of the defendant's identity in the sense that an unlawful arrest cannot defeat the court's jurisdiction over a defendant, but to leave open the possibility of suppressing evidence that bears on the defendant's identity. All three of those courts, however, have recognized that evidence obtained "'administratively * * * for the purpose of simply ascertaining . . . the identity' or immigration status of the person arrested" is admissible, contrasting that circumstance with one in which the evidence was obtained for an investigative purpose. Oscar-Torres, 507 F.3d at 231 (quoting Olivares-Rangel, 458 F.3d at 1112-1113); see Guevara-Martinez, 262 F.3d at 756 (relying on "[t]he absence of evidence that the fingerprinting resulted from routine booking").

b. This case, however, would be an unsuitable vehicle to address differences in approaches that the courts of appeals have taken.

First, suppression was independently unwarranted here because, as the district court correctly found as an alternative basis for its decision, the stop of the car in which petitioner was a passenger "was permissible" under the Fourth Amendment. Pet. App. B2; see id. at B2-B4. Although the court of appeals did not

itself address that issue, see id. at A4 (stating that court of appeals "[a]ssum[ed] for purposes of th[e] appeal that the stop was unconstitutional," because petitioner's argument for suppression was foreclosed by binding precedent), its judgment may be affirmed on that alternative basis. See, e.g., Dahda v. United States, 138 S. Ct. 1491, 1498-1500 (2018).

"The Fourth Amendment permits brief investigative stops * * * when a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" Navarette v. California, 572 U.S. 393, 396 (2014) (quoting United States v. Cortez, 449 U.S. 411, 417-418 (1981)); see Terry v. Ohio, 392 U.S. 1, 21-22 (1968). As the district court explained, the officers here had reasonable suspicion to stop the car in which petitioner was riding. Pet. App. B2-B3. Officers had received a tip from a known informant with a history of providing reliable information that an individual (Menendez-Jarquin) was a noncitizen present in the country without authorization. See ibid.; cf. Illinois v. Gates, 462 U.S. 213, 233-234 (1983) ("[I]f an unquestionably honest citizen comes forward with a report of criminal activity -- which if fabricated would subject him to criminal liability -- we have found rigorous scrutiny of the basis of his knowledge unnecessary."). Officers then traveled to Menendez-Jarquin's home address, where, according to an address check, two people resided. Pet. App. B3; Gov't C.A.

Br. 5. The first person the officers observed leaving the house was not Menendez-Jarquin. Pet. App. B3. Officers then observed a second individual -- whom "the officers logically suspected * * * would be their target" -- leave the house and drive away. Ibid. The district court correctly found that, "[u]nder the circumstances, it was reasonable for the officers to suspect that their target had left the house in a car and, therefore, * * * reasonable for them to stop the car." Ibid.

Second, even if the stop had violated the Fourth Amendment, suppressing any statement made by petitioner about his immigration status and his identification card would not undermine his Section 1326 conviction because petitioner's A-file would nevertheless be admissible. Petitioner's A-file is a preexisting and independent government record containing proof of his identity, and that evidence could have been introduced at trial regardless of any potential problem with the evidence collected during the stop of petitioner's car.

In United States v. Crews, 445 U.S. 463 (1980), the Court held that a victim-witness's in-court identification of the defendant was not suppressible as a fruit of the defendant's unlawful arrest. Id. at 470-471. The Court explained that the witness had based her testimony on her memory of the defendant's appearance from the crime itself. Id. at 472. A plurality of the Court reasoned that, before arresting the defendant, "the police

had already obtained access to the 'evidence' that implicated him in the robberies, i.e., the mnemonic representations of the criminal retained by the victims." Ibid. Accordingly, the "unlawful arrest served merely to link together two extant ingredients in his identification." Ibid. The unlawful arrest did not require suppression in that case, the plurality concluded, because "[t]he exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality." Ibid.[4]; see Maryland v. Macon, 472 U.S. 463, 471 (1985) (reaffirming that, under Crews, the exclusionary rule does not apply to evidence "already in the lawful possession of the police" before an illegal arrest).

Under Crews, the contents of petitioner's A-file are not suppressible. The information in the file was compiled before the challenged vehicle stop and was thus in the government's possession "prior to any illegality." 445 U.S. at 475. And the significant cost of depriving the government in a Section 1326 prosecution of

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[4] In the portion of the opinion that articulated that reasoning, Justice Brennan was joined by Justices Stewart and Stevens. Crews, 445 U.S. at 474 n.*. The other Justices did not join that portion of Justice Brennan's opinion only because they would have adopted a broader rule that a defendant's face can never be a suppressible fruit of an unlawful arrest -- an issue they believed Justice Brennan had left open -- and not based on disagreement with the plurality's reasoning so far as it went. See id. at 477 (Powell, J., concurring in part); id. at 477-478 (White, J., concurring in the result).

use of the A-file -- reliable government records compiled independently of any illegality -- outweighs any marginal deterrent benefit, especially given that the exclusionary rule is inapplicable in the deportation proceedings that are common for aliens like petitioner. See, e.g., Herring v. United States, 555 U.S. 135, 141 (2009).

"An [A-]file contains information on each time an alien has passed through the U.S. immigration and inspection process. Accordingly, an [A-]file will have evidence of prior deportations from, or lawful entries into, the United States. Additionally, the [A-]file contains the alien's fingerprints and photograph." Farias-Gonzalez, 556 F.3d at 1184 n.2; see PSR ¶ 7 (noting that documents from petitioner's prior removal proceeding had been obtained from petitioner's A-file). The information in petitioner's A-file therefore would be sufficient to prove the Section 1326 violation in this case. For example, a factfinder could determine that petitioner committed the offense by relying on the record of his prior deportation and by comparing his person in court to the photograph in the A-file. As a result, petitioner's conviction would stand without the evidence of his identification card and statements to ICE officers, and this Court need not grant review to determine whether that evidence should have been suppressed.

In addition, because petitioner may be held lawfully for removal regardless of the outcome of this criminal case, ICE may obtain "a set of untainted fingerprints * * * in the civil deportation proceedings" that could be used to prove his identity in a criminal prosecution. Guevara-Martinez, 262 F.3d at 756. Those fingerprints would constitute the product of lawful immigration detention, not the fruit of an unlawful arrest, and therefore would not be subject to suppression. Ibid.; see United States v. Ortiz-Hernandez, 427 F.3d 567, 577 (9th Cir. 2005) (per curiam) (suppressing original set of unlawfully obtained fingerprints, but observing that the government "now may bring [the defendant] to trial on the illegal reentry indictment and compel him to submit to another fingerprinting based on that arrest and arraignment and use the evidence for purposes of identification at trial"), cert. denied, 549 U.S. 876 (2006); United States v. Perez-Perez, 337 F.3d 990, 994 (8th Cir.) (fingerprints taken in deportation proceedings that had begun by time of Section 1326 prosecution were "untainted" and thus admissible), cert. denied, 540 U.S. 927 (2003); cf. New York v. Harris, 495 U.S. 14, 17-21 (1990) (statements taken at police station, after an arrest in violation of Payton v. New York, 445 U.S. 573 (1980), are the fruit of the lawful retention of custody of the defendant and not of the original illegal arrest); Navarro-Diaz, 420 F.3d at 585-588 ("If the government were forced to drop its prosecution of Navarro-

Diaz, the police could simply approach him on his way out of the courtroom door and demand that he identify himself."). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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