No. 22-7629

IN THE
Supreme Court of the United States

JOSE LUIS NUNEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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I. The Government Highlights the Split Regarding the Scope of the "Protective Sweep" Exception.

1. The split presented here concerns whether the "protective sweep" exception to the Fourth Amendment's warrant requirement for the search of a home can be justified *only* in conjunction with an actual arrest. Pet. 1–2. Some courts have held there is no such requirement, while most have respected the special status of the home by requiring close proximity between an arrest (and its attendant dangers) and the home authorities search. *Id.*

Here, the government admits the arrest took place "blocks away" from the home police searched. BIO 2–3. Instead of acknowledging the consequences of that undeniable fact, the government asserts an arrest authorizes a search of a home blocks away because, without the search, the officers could not safely take the arrestee (Gudino, not petitioner) into custody. BIO 11–12. This argument fails to demonstrate either that no split exists or that this case is not an excellent vehicle to clarify the scope of the "protective sweep" exception. The government merely defends the minority view.

The government embraces the Ninth Circuit's sweeping position that *non-arresting* officers may enter and conduct a warrantless search of a home that is blocks away from an arrest. The warrantless intrusion of the home was supposedly justified here because the non-arresting officers remained behind, waiting outside the home the arrestee had previously entered with a gun and from which he fled without a gun. BIO 11–12. But this argument, an effort to re-

duce the Ninth Circuit's ruling to a supposedly "fact-bound" decision, BIO 7, undeniably reflects a broad rule of law.

According to the government and the Ninth Circuit, the officers who are supposedly in danger in connection with an arrest need not conduct the arrest, assist in detaining the arrestee, nor be anywhere near the arrestee. The government would allow its officials to invade the "sanctity of the home," see *Welsh* v. *Wisconsin*, 466 U.S. 740, 750 (1984), without a warrant to protect themselves against the supposed dangers posed by an arrest that is not proximate to that home. That is not a factbound ruling, but taking sides in the split.

The split arises from differing understandings of the limit to *Maryland* v. *Buie*'s protective sweep doctrine. The majority view remains true to the rationale for this warrant requirement exception: it is "aimed at protecting the arresting officers," during an "in-home arrest," based on "specific and articulable facts . . . that the area swept harbor[s] an individual posing a danger." 494 U.S. 325, 327, 333, 335 (1990) (internal quotation marks and citation omitted). The government's argument, like the Ninth Circuit's, takes the minority view that a "protective sweep" may be justified by officers uninvolved in an actual arrest. Petitioner does not need a rule that draws a strict line at the threshold of a home; but petitioner contends that the connection between the potential danger from within the home and the always-potentially-volatile moment of actual arrest remains at the doctrine's core. Whether petitioner is right is precisely what this split is about and is directly implicated by the Ninth Circuit's ruling.

Tellingly, the government's defense of the Ninth Circuit invokes only cases that apply the protective

sweep exception to arrests that occur just "outside the home."[1] BIO 8 & n.1 (quoting *United States* v. *Lawlor*, 406 F.3d 37, 41 (1st Cir. 2005)). *None* allows a sweep where the arrest occurs a few blocks from the residence. *Lawlor*, 406 F.3d at 39, 41 (arrest "just outside of the home" on driveway); *United States* v. *Paopao*, 469 F.3d 760, 763, 766 (9th Cir. 2006) (arrest in doorway); *United States* v. *Jones*, 667 F.3d 477, 485 n.10 (4th Cir. 2012) (arrest "just outside the residence, on the front porch"); *Wilson* v. *Morgan*, 477 F.3d 326, 337–39 (6th Cir. 2007) (arrest "just outside a home"); *United States* v. *White*, 748 F.3d 507, 512–13 (3d Cir. 2014) (same); *United States* v. *Davis*, 471 F.3d 938, 942, 944–45 (8th Cir. 2006) (arrest "100 yards" away on same property); *United States* v. *Cavely*, 318 F.3d 987, 995–96 (10th Cir. 2003) (arrest "just outside of the back door"); *United States* v. *Watson*, 273 F.3d 599, 601, 603 (5th Cir. 2001) (arrest "on the porch of his house"); *United States* v. *Henry*, 48 F.3d 1282, 1284–85 (D.C. Cir. 1995) ("arrest just outside the open door"); *United States* v. *Tobin*, 923 F.2d 1506, 1508, 1513 (11th Cir. 1991) (en banc) (police already lawfully in home); *United States* v. *Oguns*, 921 F.2d 442, 445–47 (2d Cir. 1990) (arrest "just outside of a two family house"). Any attempt to characterize an arrest *blocks away* as "just outside of a home" is wordplay. It is, in substance and fact, a defense of the view that the connection between the dangers of the arrest and the warrantless entry of the home is *not* required by the protective sweep doctrine. This Court should clarify that the government and the Ninth Circuit's view is wrong. *Cf. James* v. *Louisiana*, 382 U.S. 36, 37 (1965) (per curiam) ("search of the peti-

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[1] The government omits the word "just" preceding "outside the home" in the main case it cites. BIO 8 (quoting *Lawlor*, 406 F.3d at 41).

tioner's home cannot be regarded as incident to his arrest on a street corner more than two blocks away").

2. The government also confirms the Ninth Circuit created a new and separate split by allowing "an officer's *lack of knowledge* about a potential threat [to] justify a protective sweep." BIO 13 (quoting Pet. 15). Although the government insists the totality of the circumstances supported the searching officers' supposedly reasonable fear of danger, *id.*, the only two facts the government identifies have never—until now—played a part in the protective-sweep analysis: (i) the alleged gang affiliation of the in-custody residents of the now-empty home, and (ii) the presence of an abandoned firearm in the home. *E.g.*, BIO 14 (asserting "the officers here knew the house 'to be a gang residence,' that 'two men that exited' were 'gang members,' and that 'at least one firearm was still located in the Residence'" (quoting Pet. App. 19a)).

Neither factor supports the prerequisites for a sweep—that there is a person posing a danger to the arresting officers. Nor could they. If the perceived criminality of *absent* residents justified entering an empty home to perform a sweep, a warrant would never be needed to search the home of any suspected violent criminal. That is not the law. See *Jones*, 667 F.3d at 484 ("[T]he linchpin of the protective sweep analysis is not 'the threat posed by the arrestee, but the safety threat posed by . . . unseen third parties in the house.'" (alteration adopted) (quoting *Buie*, 494 U.S. at 336)); *United States* v. *Delgado-Pérez*, 867 F.3d 244, 254–55 (1st Cir. 2017) (arrestee's "ties to drug trafficking" insufficient to justify protective sweep); *United States* v. *Moran Vargas*, 376 F.3d 112, 116 (2d Cir. 2004) ("generalizations" that arrestee "was a drug courier, [the agent's] experience that

drug couriers often meet up with their contacts, and their awareness that drug traffickers are frequently armed and dangerous" "insufficient to justify a protective sweep").

Likewise, despite repeatedly invoking the abandoned firearm to justify the search, the government does not grapple with uniform caselaw that prohibits a sweep for a gun without a known person to fire it. See Pet. 18; *Brumley* v. *Commonwealth*, 413 S.W.3d 280, 286 (Ky. 2013) ("[T]he mere presence of guns in the home of an arrestee does not automatically . . . justify a protective sweep."); *United States* v. *Waldner*, 425 F.3d 514, 517 (8th Cir. 2005) ("*Buie* does not allow a protective sweep for weapons . . . .").

This case highlights how deeply the government and the Ninth Circuit's view undermines the Fourth Amendment's requirements and values. The particularity requirement cabins a search pursuant to a warrant to specified areas that are justified by probable cause. See *Horton* v. *California*, 496 U.S. 128, 141 (1990) (search "must terminate" once object of search warrant "is found" (citation omitted)). Here, though, the logic that the Ninth Circuit endorsed allowed officers to enter petitioner's home free of the particularity requirement with authorization to search the entire home precisely because they encountered nobody. The *absence* of others in the home continually expands the potential areas where others might (speculatively) be found. Indeed, petitioner's separate bedroom was accessible only through an exterior door, that no officer ever saw Gudino enter or exit. Pet. App. 3a. A warrant-based search would have been limited, by the particularity requirement, to the main house—and should have ended once Gudino's gun was found there. Instead, the government significantly expanded the scope of its search on the basis of

doubt alone, not facts, about the potential for others to be present. *E.g.*, *id.* ("it was not obvious to the deputies" who entered petitioner's room "that this was the only access point").

Unable to confine the Ninth Circuit's rationale to its facts, the government urges this Court to deny the petition because the opinion is unpublished. BIO 7, 10–11, 13–15. But the Ninth Circuit issues roughly 6,500 opinions per year, with more than 90 percent of those disposed of through memorandum dispositions. See U.S. Courts for the Ninth Circuit, *2021 Annual Report*, at 48 (508 published opinions and 5,831 unpublished decisions). And lower courts in the Ninth Circuit routinely and scrupulously *follow* those unpublished decisions. *E.g.*, *Loi* v. *Scribner*, 671 F. Supp. 2d 1189, 1201 n.10 (S.D. Cal. 2009) ("Although still not binding precedent, unpublished decisions have persuasive value and indicate how the Ninth Circuit applies binding authority."). The impact on the law remains despite the ruling's nominally unpublished status. *E.g.*, *Alaska* v. *Wright*, 141 S. Ct. 1467 (2021) (per curiam) (granting certiorari, vacating, and remanding unpublished Ninth Circuit decision); Brief in Opposition at 3, *Alaska* v. *Wright*, 141 S. Ct. 1467 (2021) (No. 20-940) (arguing that "unpublished and nonprecedential" opinion is "poor vehicle"). This Court should not pass up this excellent opportunity to clarify this confused but vital area of Fourth Amendment jurisprudence.

II. The Government Concedes the Circuits Are Split on the Inevitable Discovery Doctrine.

The government's admission that "the courts of appeals disagree about whether the inevitable discovery doctrine contains an active-pursuit requirement," BIO 18, alone justifies certiorari.

Unable to deny the split, the government contends it is not sufficiently presented "because the facts here would appear to satisfy the active-pursuit requirement even in the circuits that have applied it." BIO 19.[2] Once again, the government treats a significant legal dispute as a mere factbound application of a broad legal rule. That effort fails.

The government focuses on one case petitioner cited that requires active pursuit, *United States* v. *Johnson*, 777 F.3d 1270, 1274–75 (11th Cir. 2015), *overruled on other grounds by United States* v. *Watkins*, 10 F.4th 1179 (11th Cir. 2021). BIO 19. *Johnson* holds that active pursuit "does not require that police have already planned the particular search that would obtain the evidence," but still requires that the "government must instead establish that the police would have discovered the evidence 'by virtue of ordinary investigations of evidence or leads already in their possession.'" *Johnson*, 777 F.3d at 1274 (citation omitted). That understanding of "active pursuit" is unusually relaxed compared to other circuits recognizing the requirement.

The Second, Fifth, and Eighth Circuits require the government to "demonstrate[]" that it "was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation." *United States* v. *Jackson*, 596 F.3d 236, 241 (5th Cir. 2010); accord *United States* v. *McManaman*, 673 F.3d 841, 846 (8th Cir. 2012); *United States* v. *Eng*, 971 F.2d 854, 861 (2d Cir. 1992). And the Second and Fifth

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[2] The government also asserts that the Second Circuit case petitioner cited "as applying an active-pursuit requirement" was "decided before this Court's 'adoption' [of] the inevitable discovery doctrine in *Nix*." BIO 18. However, the Second Circuit has continued to require active pursuit post-*Nix*. *United States* v. *Eng*, 971 F.2d 854, 861 (2d Cir. 1992).

Circuits hold that "the focus of the inquiry [is] on historical fact" and "the government's mere intention to use legal means subsequently" is insufficient to satisfy the active-pursuit requirement. *Eng*, 971 F.2d at 861 (cleaned up) (quoting *United States* v. *Cherry*, 759 F.2d 1196, 1205 n.10 (5th Cir. 1985)). In these circuits, that officers "would have sought a search warrant" but had not taken any substantial steps towards doing so at the time of the illegal search, would not satisfy the inevitable discovery doctrine. Pet. App. 4a. That is the line petitioner invokes and asks this Court to recognize. The Ninth Circuit did not apply that rule, and the government's reasoning rejects it.

The wisdom of the Second, Fifth, and Eighth Circuit's approach is well illustrated by the government's efforts to justify the search here. The government maintains that active pursuit exists whenever "the police department's particular warrant-seeking policy and the existence of independent probable cause" suggest a warrant *would have been* sought. BIO 17–19.[3] That is precisely the rule three circuits have (rightly) rejected. A *policy* to seek a warrant prior to a search cannot possibly excuse failure to obtain one. That heads-I-win-tails-you-lose view of the Constitution would insulate every warrantless search conducted in Los Angeles (or in any other jurisdiction purporting to have such a toothless "policy").

Moreover, and underscoring the problems with this approach, a search warrant based on independent probable cause here would *not* have resulted in the discovery of petitioner's firearms and ammunition. The officers who conducted the warrantless search

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[3] The government omits the key word "likely" from its mistaken assertion that the Ninth Circuit found "the warrant would have been supported by 'probable cause.'" BIO 16.

declared they "would have sought a search warrant for the location *due to the firearm that GUDINO left inside* that would be recovered from the residence." ER-190, 195 (emphasis added). As noted above, a search warrant based on that cause would not have authorized the search to continue after officers located Gudino's firearm. See *Horton*, 496 U.S. at 141. Had the officers stopped after locating Gudino's firearm, petitioner's firearms—in a bedroom in a separate structure with a separate entrance—never would have been discovered.

These uncertainties are exactly why the Fourth Amendment's Warrant Clause includes a particularity requirement. *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987). "By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Id.* "Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase." *United States* v. *Ross*, 456 U.S. 798, 824 (1982).

The risks of unlawful searches here easily could have been overcome by seeking a warrant, as the departmental policy (and the Constitution) required. Seeking a warrant would have been simple. The house was secured, and its residents had exited and been handcuffed and detained. ER-88. And warrants can be obtained in as little as 15 minutes via "electronic warrant applications." *Missouri* v. *McNeely*, 569 U.S. 141, 172–73 (2013) (Roberts, C.J., concur-

ring in part and dissenting in part); see Cal. Penal Code § 1526. There is no excuse for failing to seek one, nor do the facts separate this case from the split that justifies certiorari.

III. That this Case Presents Two Issues Worthy of this Court's Review Makes It a Particularly Strong Vehicle.

The government contends that when a court of appeals takes sides in multiple splits of authority in a single case, that case is unworthy of this Court's review. Yes, petitioner will have to prevail on both questions presented for this Court's review to be "outcome-determinative." BIO 20. But that does not mean that this Court's review will fail to clarify the law. To the contrary, this Court's review might clarify the law more or less depending on how it resolves the case on the merits. If petitioner prevails on both issues, this Court will have resolved *both* splits. But win or lose, this Court's review will resolve *at least* one issue that has divided the circuits.

Moreover, the government's view, if accepted, would shield from this Court's review cases like this one where the government argues that a warrantless search is justified by *both* the protective sweep and inevitable discovery exceptions. Such cases are legion.[4] Indeed, inevitable-discovery issues arise *only* where there is a predicate Fourth Amendment violation.

The decision below would allow a warrantless search of the home whenever an officer could not confirm if it was empty, so long as there was some departmental policy that generally requires warrants

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[4] A Westlaw search produced 744 cases that contain both of the phrases "protective sweep" and "inevitable discovery."

prior to a search. That is a breathtaking erosion of the Fourth Amendment's protections of the home against unreasonable searches and seizures. Glaringly absent from the brief in opposition is any acknowledgement of the special status of the home—or of the astonishing intrusions that will now be permissible if the Ninth Circuit's decision stands. "At the very core" of the Fourth Amendment, "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U.S. 505, 511 (1961). "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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