NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

PHILLIP SERAPIO BACA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Other Authorities

REPLY ARGUMENT

A. The Tenth Circuit's view of a passenger's Fourth Amendment rights conflicts with this Court's decision in *Brendlin*.

The government all but ignores Mr. Baca's argument that the Tenth Circuit's heightened factual nexus requirement, as announced in *United States v. DeLuca*, 269 F.3d 1128 (10th Cir. 2001) and used through today, is inconsistent with both the outcome of *Brendlin v. California*, 551 U.S. 249 (2007), and this Court's reasoning underlying that decision. Instead, the government protests that "*Brendlin* does not address whether, if an initial stop is lawful but its duration is unreasonable, a passenger can obtain suppression of evidence found in the car." (BIO at 7.) That's true—and the point. *Brendlin* doesn't expressly address the question presented in this case—but what it *does say* about a passenger's seizure during a traffic stop entirely undermines the Tenth Circuit's approach to when a passenger may seek to suppress evidence resulting from the seizure of a vehicle and its occupants. This is so for two reasons.

First, *Brendlin* unanimously held that all occupants in a vehicle are seized when a vehicle is stopped for a traffic violation, because when an officer initiates a traffic stop a reasonable passenger would not believe they could simply ignore the officer's directions (whether to remain seated, show hands, or exit the vehicle) or believe they were free to leave the car and start walking away. 551 U.S. at 255-58. But as Mr. Baca explained in his petition, this reasoning is completely contrary to what the Tenth

Circuit requires to satisfy its *DeLuca* heightened nexus requirement: that is, that the defendant must "show that had he requested to leave the scene of the traffic stop, he would have been able to do so in [the driver's] car." 269 F.3d at 1133. That requirement, articulated before *Brendlin*, can no longer stand after it.

Second, *Brendlin* explained that *any* occupant of the vehicle that is subsequently charged with a crime based upon evidence seized during a search of the vehicle may challenge the reasonableness of the stop and seek suppression of evidence obtained as a result of it. *Id.* at 263. There is no rational distinction to be drawn—and certainly the government does not offer one—between a seizure of a vehicle's occupants that is unreasonable *at* its inception, and one that becomes unreasonable shortly *after* its inception. Quite to the contrary, this Court observed in *Brendlin* that it had rejected such a result, reiterating that it "ha[d] said over and over in dicta that during a traffic stop an officer seizes everyone in the vehicle, not just the driver." 551 at 255-56. The Court further noted that it had repeatedly declined to "indicate any distinction between driver and passenger that would affect the Fourth Amendment analysis." *Brendlin*, 551 at 255-56. Because the Tenth Circuit's heightened factual nexus requirement rests entirely on drawing such a "distinction between driver and passenger" in the Fourth Amendment analysis, it cannot survive after *Brendlin*.

So while the government is right that *Brendlin* does not address this exact scenario, it is wrong in thinking that facts weighs against review. *Brendlin* addresses a

closely-related, and temporally-antecedent, situation to that presented here—the initial stop, as opposed to the ongoing detention, of a vehicle and its occupants—and this Court's reasoning in that case directly informs the question presented here. That the Tenth Circuit's approach so patently conflicts with *Brendlin* thus favors this Court granting review.[1]

B. Contrary to the government's assessment, the ability of passengers to seek suppression as a remedy for their unlawful seizures varies widely across the circuits.

The government suggests that there isn't much of a circuit split on the question presented. It understates the tension across the circuits on this issue.

To be sure, not every circuit has directly addressed the question. But that's because many simply assume (correctly) that a passenger who is subjected to an unlawful seizure of a vehicle and its occupants may seek suppression whether that seizure is unlawful because it is impermissibly prolonged or impermissibly initiated. *See, e.g.*, *United States v. Rodriguez-Escalera*, 884 F.3d 661, 672 (7th Cir. 2018) (affirming

[1] The government passingly suggests (BIO at 5) that certiorari is unwarranted here because this Court once—in 2006—denied review of this issue. *See Pulliam v. United States*, 549 U.S. 952 (2006) (denying certiorari). But it goes without saying that a prior denial of certiorari is never dispositive of a subsequent grant. *See, e.g.*, *Rehaif v. United States*, 17-9560, Brief in Opposition at 7 (recounting "repeated[] declined requests to review the question presented and similar questions"); *Rehaif v. United States*, 139 S. Ct. 914 (2019) (granting certiorari). Moreover, this lone denial predates this Court's decision in *Brendlin* a year later, making it not only old but inapposite. Put simply, the legal landscape has changed significantly in the nearly 18 years since this issue was last considered by this Court, and the denial in *Pulliam* should carry no weight in the analysis here.

district court's suppression of evidence against passenger unlawfully detained in violation of *Rodriguez*); *United States v. Davis*, 943 F.3d 1129, 1131, 1134 (8th Cir. 2019) (reversing district court's suppression of evidence against a passenger after concluding that reasonable suspicion existed to extend the stop, and remarking that such seizure would have been only basis for passenger to have "standing to challenge" subsequent search); *United States v. Jones*, 234 F.3d 234, 242–43 (5th Cir. 2000), *abrogated in part on other grounds by United States v. Pack*, 612 F.3d 341 (5th Cir. 2010) (reversing district court's denial of suppression of evidence against a passenger and driver who were both unlawfully seized during a stop extended for investigation without reasonable suspicion).

The government problematizes (BIO at 7-8) whether the Third and Sixth Circuits actually disagree with the Tenth Circuit's approach. But given that *other* circuits plainly *do* employ a contrary approach, that point is somewhat immaterial; it's also inaccurate.

For example, the government observes that in *United States v. Mosley*, the Third Circuit declined to take a definite position on *DeLuca*'s approach. *See United States v. Mosley*, 454 F.3d 249 (3d Cir. 2006). True enough, except that *Mosley* itself cautioned against too restrictive a reading of its ruling, and subsequent decisions make clear that the circuit disagrees with the Tenth Circuit's approach. Specifically, the *Mosley* court expressly remarked that "We will not be overly coy, though: we recognize that the

rationale for our holding might be thought to undermine the *DeLuca* rationale even on *DeLuca* facts. But the preceding sentence is dicta; when an appropriate case arises, the parties may do what they will with our decision here." 454 F.3d at 256 n.11. More pointedly, after *Brendlin*, the Third Circuit appears to have followed the *Mosely* Court's not-so-subtle suggestion, and evaluates a passenger's ability to seek suppression for an unlawful seizure under *Rodriguez* in the same vein as a driver's. *See, e.g.*, *United States v. Garner*, 961 F.3d 264, 272 (3d Cir. 2020) (affirming denial of suppression in challenge by both driver and passenger to their seizure because it was not unlawful under *Rodriguez*).

The Sixth Circuit, in turn, appears to have an intra-circuit split on the issue. *Compare United States v. Ellis*, 497 F.3d 606, 612 (6th Cir. 2007) (explaining that although a passenger does not have a legitimate expectation of privacy in the searched vehicle, "as a passenger [a defendant] may still challenge the stop and detention and argue that the evidence should be suppressed as fruits of illegal activity") *and United States v. Torres-Ramos*, 536 F.3d 542, 549 n.5 (6th Cir. 2008) (concluding that "both a driver and passengers have standing to contest their illegal detention" and "suppress the fruits of any illegal seizure" after *Brendlin*) *with United States v. Figueredo-Diaz*, 718 F.3d 568, 576 & n.5 (6th Cir. 2013) (applying *DeLuca*'s heightened factual nexus requirement). This discord, however, only *favors* review here, rather than weighing against it.

On the other side, the Tenth and Ninth Circuits do continue to apply the heightened factual nexus requirement that a passenger establish that evidence sought to be suppressed from a seizure of a vehicle and all its occupants would not have been discovered but for his—*and only his*—detention. *DeLuca*, 269 F.3d at 1132-33; *United States v. Pulliam*, 405 F.3d 782, 787791 (9th Cir. 2005).

There is, simply put, a clear split in the approach taken by circuits to the same question. *See also* Nadia B. Soree, *The Hitchhiker's Guide to the Fourth Amendment: the Plight of Unreasonably Seized Passengers under the Heightened Factual Nexus Approach to Exclusion*, 51 Am. Crim. L. Rev. 601, 609-622 (2014) (recounting assessment of circuit split on this issue at the time). By way of example, take a group of friends traversing I-70, which runs from Maryland to Utah. As their vehicle passes through Pennsylvania (Third Circuit), Ohio (Sixth Circuit), Indiana and Illinois (Seventh Circuit), and Missouri (Eighth Circuit), and into Kansas, Colorado, and Utah (Tenth Circuit), the driver and her passengers will be subject to different Fourth Amendment standards. *See supra*. In some states, all will enjoy the same Fourth Amendment 'standing'—if unlawfully detained, both the driver and passengers will be able to seek suppression of any evidence the government may seek to use against them. But when they cross into Kansas and the Tenth Circuit, suddenly that ability will be dramatically diminished for the passengers. That result—differing Fourth Amendment standards along the same roadway—is not only constitutionally intolerable, but also precisely the type of

situation in which this Court's intervention is warranted to ensure the Fourth Amendment has consistent application nationwide. *See, e.g.*, *Byrd v. United States*, 584 U.S. 395, 402 (2018) (noting grant of certiorari to address the conflict among the Courts of Appeals over whether an unauthorized driver has a reasonable expectation of privacy in a rental car).

C. Whatever may happen on remand has no bearing on the need for this Court's consideration of the important and recurring question presented.

Finally, the government argues (BIO at 9) that even if the question presented warrants review (and it does), this case would be a bad vehicle in which to consider it. But the only reason it can provide for that assessment is not one on which this Court can rely.

Specifically, the government contends that the traffic stop here was not unreasonably prolonged under *Rodriguez v. United States*, 575 U.S. 348 (2015) because officers *could* have made the driver and passengers immediately exit the vehicle for safety reasons under *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). There are a number of problems with relying on that possibility here, however.

For one thing, this issue was never litigated below. The district court never found that officers' removal of the men was for safety reasons, and no facts relevant to that determination ever were presented. That's *because*—as the government, the district court, and Mr. Baca recognized—*DeLuca* foreclosed Mr. Baca from seeking to

suppress evidence based on his unlawful seizure under *Rodriguez*. Far from an alternative basis for affirmance, the government's theory is just that—an argument it *could* make down the road, but one currently devoid of any factual findings and legal conclusions to support it at this stage. To be sure, were this Court to grant review and ultimately remand, these questions would be answered through an evidentiary hearing and ruling by the district court. Perhaps the district court would find the seizure reasonable; perhaps not. But that's a question to be answered on remand, not a reason for withholding review now.

For another thing, the government's argument presumes a legal conclusion that is far from inevitable. That's because in *Rodriguez* this Court made plain that "safety precautions taken in order to facilitate" the "[o]n scene investigation into other crimes than the reason for the traffic stop" represent a detour from the mission of a traffic stop, and are, therefore, unreasonable seizures under the Fourth Amendment. 575 U.S. at 356. Put another way, if an evidentiary hearing demonstrated that the removal of the men was, in fact, to enable an unrelated investigation and *not* for safety reasons to investigate a traffic infraction, *Rodriguez*, not *Mimms*, would not control the outcome. The inquiry then would turn instead on whether reasonable suspicion existed for that non-traffic-related detention. And again, that question would turn on evidence adduced at a hearing, a hearing Mr. Baca was not able to have below because

of *DeLuca*. All told, the government's contention that this case is not a good vehicle falls flat.

It is also irrelevant. The possible outcomes of a remand should have no bearing on this Court's decision to grant review. To the contrary, this Court routinely grants writs of certiorari to address important Fourth Amendment questions even where the Petitioner may not prevail on remand; indeed, it did precisely that in both *Brendlin* and *Rodriguez*, by way of just two examples. *See Brendlin*, 551 U.S. at 263 (remanding suppression question "for the state courts to consider in the first instance"); *Rodriguez*, 575 U.S. at 358 (remanding "for further proceedings consistent with this opinion").[2] It should do the same here.

Finally, it bears mention that the government does not contest Mr. Baca's argument that this question is important and recurring, and it provides no response to the troubling incentives the Tenth Circuit's rule creates for law enforcement. As Professor LaFave's leading treatise explains those problems:

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[2] Incidentally, in both cases the Petitioner criminal defendant did not ultimately prevail in suppressing evidence on remand. *See People v. Brendlin*, 195 P.3d 1074, 1081 (2008), *cert denied*, *Brendlin v. California*, 556 U.S. 1192 (2009) (concluding that discovery of an outstanding arrest warrant attenuated taint of unlawful stop such that suppression was not warranted); *United States v. Rodriguez*, 799 F.3d 1222, 1224 (8th Cir. 2015), *cert denied*, *Rodriguez v. United States*, 578 U.S. 907 (2016) (concluding that officer's reliance on binding circuit precedent meant that suppression was not warranted). This possible outcome, of course, did not prevent this Court from granting certiorari in those cases, and it similarly should present no bar to doing so here.

> It is unquestionably true . . . that the *DeLuca* approach 'undermines the rationale for the exclusionary rule'; indeed, *DeLuca* provides positive encouragement for Fourth Amendment violations by telling the police that there are potential law enforcement benefits to be derived, at least against the passengers, in extending lawful stops even when, as in *DeLuca*, such action is 'flagrantly illegal.'

Wayne R. LaFave et al., *Search & Seizure: A Treatise on the Fourth Amendment*, § 11.4(d) (6th ed., Oct. 2022 Update (West)). (citations omitted). But, as Mr. Baca observed in his petition, preventing *precisely* those incentives was one of the principal concerns that animated this Court in *Brendlin*. Specifically, the Court's explanation warrants repeating:

> The consequence to worry about would not flow from our conclusion, but from the rule that almost all courts have rejected. Holding that the passenger in a private car is not (without more) seized in a traffic stop would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal. The fact that evidence uncovered as a result of an arbitrary traffic stop would still be admissible against any passengers would be a powerful incentive to run the kind of 'roving patrols' that would still violate the driver's Fourth Amendment right.

Brendlin, 551 U.S. at 263. Accordingly, because the Tenth Circuit's approach to a passenger's ability to contest his or her unlawful seizure invites the very problem this Court sought to avoid in *Brendlin*, the Court should grant review.

CONCLUSION

The leading Fourth Amendment treatise describes the Tenth Circuit's heightened factual nexus requirement for vehicle passengers who are unlawfully detained as "ludicrous." *See* LaFave, *Search and Seizure* at § 11.4(d). It is aslo inconsistent with both this Court's Fourth Amendment jurisprudence which *Brendlin* made clear has consistently sought to avoid a "distinction between driver and passenger that would affect the Fourth Amendment analysis," as well as the approach taken by other circuits. For these reasons, this Court should grant the writ of certiorari and address the important and recurring constitutional question presented.

Respectfully submitted,

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