No. 20-1043

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

MIGUEL ANGEL CANO

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

## REPLY BRIEF FOR THE UNITED STATES

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**REPLY BRIEF FOR THE UNITED STATES**

The need for this Court's intervention has become even more apparent since the petition for a writ of certiorari was filed, as another circuit has recently rejected the Ninth Circuit's unprecedented and unjustified restriction on the scope of the United States' sovereign authority to protect its borders. See *Alasaad* v. *Mayorkas*, 988 F.3d 8, 20-21 (1st Cir. 2021), petition for cert. pending *sub nom. Merchant* v. *Mayorkas*, No. 20-1505 (filed Apr. 23, 2021). This Court should grant review and resolve the circuit conflict by rejecting the Ninth Circuit's approach. The "longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless 'reasonable' has a history as old as the Fourth Amendment." *United States* v. *Ramsey*, 431 U.S. 606, 619 (1977). Respondent's defense of the decision below, like the decision itself, construes the border-search doctrine "far too narrowly," based on a fundamentally flawed conception of the principles on which it rests. Pet. App.

77a (Bennett, J., dissenting from the denial of rehearing en banc). And respondent's suggestion that the Court forgo or delay review of that decision—which he bases primarily on unpreserved assertions of *further* border-search limitations that even the Ninth Circuit rejected—fails to appreciate the focused nature of the circuit conflict, the harm that it causes, and the importance of a swift resolution.

**A. The Ninth Circuit's Decision Is Incorrect**

1. For the reasons explained in the petition (Pet. 13-22), the Ninth Circuit's conclusion that the border-search doctrine "authorizes warrantless searches of a cell phone only to determine whether the phone contains contraband," Pet. App. 26a, cannot be reconciled with this Court's precedent. As the First Circuit recently recognized, that conclusion is based on two independently mistaken premises—that the border-search doctrine is limited solely to enforcement of "importation laws," *id.* at 15a (citation omitted), and that importation interests justify only a search for contraband contained within the article being searched, *id.* at 23a-26a, 29a; see *Alasaad*, 988 F.3d at 19-22. Respondent fails to meaningfully support either proposition.

The first premise disregards the "inherent"—indeed, "axiomatic"—authority of "the United States, as sovereign, * * * to protect * * * its territorial integrity." *United States* v. *Flores-Montano*, 541 U.S. 149, 153 (2004). Respondent's citations (Br. in Opp. 26-27) of "[c]olonial-era" and "Founding Era" law authorizing customs-related searches show only that the government's "paramount interest" in territorial integrity, *Flores-Montano*, 541 U.S. at 153, *includes* an interest in intercepting contraband and enforcing customs duties,

not that it is *limited* to such interdiction. To the contrary, the Court has recognized that territorial integrity encompasses a separate "interest in preventing the entry of unwanted *persons*," which is likewise "at its zenith at the international border," see *id.* at 152 (emphasis added). Nor do respondent's citations cast doubt on the principle that an individual's "expectation of privacy [is] less at the border than in the interior." *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 539-540 (1985).

The Ninth Circuit's second premise relies on an unsound and unworkable dichotomy that this Court abandoned long ago. See Pet. 17-22; *Alasaad*, 988 F.3d at 19-20 & n.13. As respondent acknowledges (Br. in Opp. 28), this Court's decision in *Warden* v. *Hayden*, 387 U.S. 294 (1967), interred the distinction between "contraband" and "evidence of crime." See *id.* at 301-309 (abrogating *Boyd* v. *United States*, 116 U.S. 616 (1886), in relevant part). He would nonetheless resurrect the distinction "at the border"—where "the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is * * * struck much *more* favorably to the Government" than elsewhere, *Montoya de Hernandez*, 473 U.S. 539-540 (emphasis added)—asserting that "a warrantless search 'must be strictly tied to and justified by the circumstances which rendered its initiation permissible.'" Br. in Opp. 28 (citation omitted). But even assuming that interdicting contraband were the sole justification for the border-search doctrine, that justification would logically permit (at least) searches for evidence of past, present, or future smuggling activity. See Pet. 20-22. And a border-specific version of the contraband/evidence distinction is no more sound or workable than

the original one, which the Court found to be both atextual and arbitrary. See *Hayden*, 387 U.S. at 301-309.

2. Respondent separately contends (Br. in Opp. 29-31) that the court of appeals' judgment can be affirmed on other grounds. But the arguments that he advances—that all border searches of electronic devices (or at least border searches that occur post-arrest) require a warrant, or alternatively "reasonable suspicion of digital contraband," *id.* at 30—are both procedurally and substantively flawed.

Respondent cannot advance those alternative contentions in this Court because, if adopted, they would "enlarg[e] his own rights" under the judgment below, and he did not file a cross-petition for a writ of certiorari. *Jennings* v. *Stephens*, 574 U.S. 271, 276 (2015) (citation omitted); see, *e.g.*, *Federal Energy Admin.* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976). The decision below does not necessarily foreclose the introduction of all evidence from the searches of respondent's phone in a retrial. Specifically, the decision leaves open the possibility of admissible evidence from the early part of the manual searches, which the court of appeals recognized were at least valid "at their inception." Pet. App. 27a (emphasis omitted). And the decision further hinges the lawfulness of the logical-download search on the deliberately unresolved issue of whether it "qualifie[d] as a forensic search." *Id.* at 30a & n.12. An even more restrictive approach, such as the blanket warrant requirement urged by respondent, could thus preclude evidence that the decision below might allow.

In any event, respondent's alternative contentions lack merit and have been uniformly rejected by the courts of appeals. "Every circuit that has faced th[e]

question" has correctly recognized that "neither a warrant nor probable cause is required for a border search of electronic devices." *Alasaad*, 988 F.3d at 17-18 (citing, *inter alia*, *United States* v. *Aigbekaen*, 943 F.3d 713, 719 n.4 (4th Cir. 2019), petition for cert. pending, No. 20-8057 (filed Apr. 22, 2021); and *United States* v. *Vergara*, 884 F.3d 1309, 1312-1313 (11th Cir.), cert. denied, 139 S. Ct. 70 (2018)); see Pet. App. 20a. Similarly, every court of appeals to consider the issue has rejected the claim that such searches invariably require reasonable suspicion. See *Alasaad*, 988 F.3d at 19 (citing *United States* v. *Touset*, 890 F.3d 1227, 1233 (11th Cir. 2018), and *United States* v. *Kolsuz*, 890 F.3d 133, 146 n.5 (4th Cir. 2018)); Pet. App. 19a-20a.

Respondent identifies no reason to question the circuits' consensus. Dating back even "before the adoption of the Fourth Amendment," border searches "have been considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside." *Ramsey*, 431 U.S. at 619. Respondent cites Founding-era laws requiring a warrant "to search *homes* as part of investigations of border-related crimes," Br. in Opp. 30 (emphasis added), but historical practice in the context where Fourth Amendment protections are at their apex, see, *e.g.*, *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013), sheds no light on searches at the border, where the opposite is true, see, *e.g.*, *Flores-Montano*, 541 U.S. at 152. And respondent's heavy reliance (Br. in Opp. 15-16, 29-30) on *Riley* v. *California*, 573 U.S. 373 (2014), which addressed whether a domestic arrest alone justifies a warrantless cell-phone search, likewise fails properly to account for the government's unique and historic authority to safeguard the Nation's borders.

**B. The Question Presented Warrants Immediate Review**

Respondent cannot refute the existence of an entrenched circuit conflict on the question presented. See Pet. 22-25. And his efforts to diminish its importance, or to delay this Court's review of it, are unsound.

1. As the petition demonstrates, the decision below directly conflicts with decisions of the Fourth and Tenth Circuits, both of which have rejected the Ninth Circuit's narrow view of the border-search doctrine. Pet. 22-24 (discussing *United States* v. *Williams*, 942 F.3d 1187 (10th Cir. 2019), cert. denied, 141 S. Ct. 235 (2020), and *United States* v. *Kolsuz*, *supra*); see Pet. App. 73a-74a (Bennett, J., dissenting from the denial of rehearing en banc). Respondent fails to show otherwise. He does not dispute that the Fourth Circuit in *United States* v. *Kolsuz* explicitly rejected the defendant's claim that the border-search doctrine is "limited to intercepting contraband as it crosses the national border," 890 F.3d at 143-144, and affirmed the defendant's conviction, see *id.* at 148. And contrary to respondent's suggestion (Br. in Opp. 9), the Fourth Circuit's choice to forgo definitive resolution of the defendant's "fallback" argument that certain forensic searches require heightened suspicion, and to rely instead on the good-faith exception to the exclusionary rule to dispense with that issue, see 890 F.3d at 144-148, does not indicate that the Fourth and Ninth Circuits might in fact agree on the question presented here.

Respondent correctly recognizes (Br. in Opp. 10) that the Tenth Circuit in *United States* v. *Williams* likewise rejected the contention that "border agents are tasked exclusively with upholding customs laws and rooting out the importation of contraband," and applied the border-

search doctrine accordingly. 942 F.3d at 1191. Respondent cites the government's observation in its brief in opposition to a petition for a writ of certiorari in *Williams* that certain facts found by the lower courts in that case would also have sufficed to support the search there even under the more restrictive test the defendant principally advocated in this Court. Br. in Opp. 10 (citing Gov't Br. in Opp. at 22, *Williams*, *supra* (No. 19-1221)). That brief noted, however, that the Ninth Circuit's approach here is inconsistent with other courts' decisions, Gov't Br. in Opp. at 26-27, *Williams*, *supra*, (No. 19-1221), and it simply explained that the particular arguments the defendant made in this Court in *Williams* either would not call the Tenth Circuit's judgment into doubt or were not properly preserved. See *id.* at 19-27.

2. The First Circuit has also now repudiated the Ninth Circuit's outlier approach. In *Alasaad* v. *Mayorkas*, which was issued after the petition in this case was filed, the First Circuit upheld agency policies for border searches of electronic devices. 988 F.3d at 12-13, 16-21. The First Circuit rejected arguments identical to the ones accepted in the decision below—namely, that the border-search doctrine "extends only to searches aimed at preventing the importation of contraband or entry of inadmissible persons" and "covers only searches for contraband itself, rather than for *evidence* of border-related crimes or contraband." *Id.* at 19; see *id.* at 19-21.

The First Circuit explained that both of those "premises [we]re incorrect," and recognized that the border-search doctrine authorizes not only "search[es] for contraband," but also "for evidence" of smuggling and various other illegal activity. *Alasaad*, 988 F.3d at 19, 21. In so doing, the court expressly "acknowledge[d] that [its] holdings * * * [we]re contrary to" the Ninth Circuit's

decision in this case, and emphasized that it "c[ould ]not agree with" the Ninth Circuit's "narrow view of the border search exception because [it] fails to appreciate the full range of justifications for the border search exception beyond the prevention of contraband itself entering the country." *Id.* at 20-21. Accordingly, even respondent acknowledges (Br. in Opp. 11) that *Alasaad* "diverge[s] from the Ninth Circuit's decision in this case."

Seeking to minimize the conflict, respondent notes (Br. in Opp. 12) that, unlike respondent, none of the civil plaintiffs in *Alasaad* were arrested before their devices were allegedly searched. But that factual distinction has no bearing on the conflict. The decision below considered respondent's arrest only in assessing the level of suspicion it deemed necessary for the logical-download search, Pet. App. 30a—an issue that is outside the question presented in this Court. On the question presented, the Ninth Circuit made clear that respondent's "arrest d[id] *not* affect [its] analysis," recognizing that the border-search doctrine applies the same way to pre- and post-arrest searches. *Id.* at 28a n.11 (emphasis added).

The continued expansion of the preexisting circuit conflict on the question presented—which subjects border officials in different regions to starkly different constitutional strictures in searching electronic devices of international travelers—heightens the need for this Court's review. And this case is an ideal vehicle for resolving the issue. See Pet. 22-27; Gov't Cert. Br. at 9-11, *Merchant* v. *Mayorkas*, No. 20-1505 (May 25, 2021).

3. Respondent errs in contending (Br. in Opp. 23-26) that the question presented lacks practical importance. He posits (*id.* at 24-25) that border officials may be able to obtain consent or a warrant authorizing a particular search. But he provides no reason to suppose that

border-crossers who threaten the Nation's territorial integrity—*e.g.*, by entering with unlawful articles or the intent to cause domestic harm—will willingly, let alone commonly, consent to the exposure of their schemes. And given the volume of inspections that border officials perform on a daily basis, the burden of requiring a judicial warrant just to flip manually through a phone would be overwhelming.

To the extent that the Ninth Circuit continues to allow some warrantless manual searches, it has provided no significant guidance as to how far a border official may go in conducting one. See Pet. 26-27. The decision below forecloses many searches that clearly implicate the doctrine's justifications—like the search of respondent's phone for evidence of potentially ongoing smuggling activity related to the discovery of more than 30 pounds of cocaine concealed in his spare tire—simply because they involve otherwise-unremarkable investigative steps like writing down phone numbers properly viewed on a device. The arbitrariness of that outcome, and the uncertainties that follow in its wake, leave officials with little sure footing in their daily efforts to identify and stop border-related threats.

The result is an amorphous and onerous regime that limits and deters border officials from relying on a critical protective measure. Respondent's underdeveloped reference (Br. in Opp. 24) to anecdotal reports that border agents have sometimes sought post-arrest warrants does not demonstrate the feasibility of seeking pre- and post-arrest warrants in every case, or the efficacy of a regime that requires it. Nor does legislation directing the Department of Homeland Security to "develop" and submit to Congress "a plan" for digitally scanning certain vehicles at certain land ports of entry, Securing

America's Ports Act, Pub. L. No. 116-299, Pmbl., 134 Stat. 4906, suggest that the problems created by the decision below "will soon disappear," Br. in Opp. 26. Among other things, that directive does not address searches of individual border-crossers, or of passengers arriving at airports and seaports. And even if it were 100% applicable and effective, it would not address the investigation of past or future contraband, or any of the other interests reflected in the border-search doctrine.*

4. Respondent urges the Court (Br. in Opp. 13-23) to defer review while lower courts wrestle with a range of related issues and new technological developments, or to facilitate legislative action. But such delay is not warranted.

Respondent notes (Br. in Opp. 13-14) that the Ninth Circuit's decision leaves certain subsidiary issues unresolved, including what precisely constitutes "digital contraband" and "which apps on a phone are subject to searches." But for reasons just discussed, that lack of clarity militates in favor of, not against, immediate review. Such fraught line-drawing difficulties—which the contrary approach followed by the First, Fourth, and Tenth Circuits avoids—are themselves inherently harmful, see Pet. 26-27, and if they are unnecessary, they should not be allowed to persist. See *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001) ("[T]he object in implementing [the Fourth Amendment's] command of reasonableness is to draw standards sufficiently

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* As respondent notes (Br. in Opp. 24), the government does not construe the decision below to foreclose reliance on national-security (or immigration-enforcement) interests. Pet. 19 n.*. But it significantly impairs the government's ability to conduct searches based on other law-enforcement interests—including the customs-enforcement interest that was the focus of the decision below.

clear and simple to be applied with a fair prospect of surviving judicial second-guessing.").

Similarly, respondent's observation (Br. in Opp. 14-22) that lower courts have not yet extensively addressed a range of related issues that might arise in applying the border-search doctrine in specific contexts—such as searches of cloud-storage systems, *id.* at 21—is not a sound basis to delay clarification of the doctrine's scope. To the contrary, lower courts' consideration of how the doctrine applies in specific circumstances would likely be aided by definitive guidance about when it applies and why.

Finally, respondent's contention (Br. in Opp. 22-23) that deferring review would facilitate congressional efforts to address border-search practices has matters backward. The decision below in fact impedes legislative efforts by preemptively declaring unconstitutional in the Nation's largest circuit any statutory measure authorizing searches that the decision does not permit. See *Kolsuz*, 890 F.3d at 148 (Wilkinson, J., concurring in the judgment). Leaving the circuit conflict in place would thus not afford Congress additional "breathing space," Br. in Opp. 22 (emphasis omitted), but instead suffocate legislative efforts. The "longstanding historical practice in border searches of deferring to the legislative and executive branches," *Kolsuz*, 890 F.3d at 153 (Wilkinson, J., concurring in the judgment), is therefore yet another reason to grant review and reverse the Ninth Circuit's erroneous decision.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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