No. 13-706

In The Supreme Court of the United States

FREDERICK COUNTY BOARD OF COMMISSIONERS, SHERIFF CHARLES JENKINS, and DEPUTY SHERIFFS JEFFREY OPENSHAW and KEVIN LYNCH,

Petitioners,

v.

ROXANA ORELLANA SANTOS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF

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PETITIONERS' REPLY

I. Respondent Repeatedly Ignores that She Was Detained Pursuant to a Warrant.

"[N]o dispute" exists that Immigration and Customs Enforcement ("ICE") wanted Santos detained. App. 24. ICE issued a warrant for her and entered that warrant into the National Crime Information Center ("NCIC") database. App. 28. Santos was detained only after the Deputies discovered her outstanding warrant. App. 6, 16-17. Subsequent to informing the deputies via the warrant that it wanted Santos detained, ICE also filed a formal "detainer" for the continued holding of Santos so that ICE could take custody of her. App. 25. The question before the Court is whether a police officer may temporarily detain an alien pursuant to an ICE warrant for the alien's arrest, when the officer does not know whether the underlying immigration violation is civil or criminal, and the officer's purpose is contacting ICE for further instruction.

Yet, throughout her Brief, Respondent obscures the issue by downplaying the fact that she was detained pursuant to a warrant. Instead, in an attempt to liken this case to Section 6 of the law at issue in *Arizona v. United States*, 132 S. Ct. 2492 (2012), which concerned *warrantless* arrests, she asserts that the Deputies "were not authorized or directed by the Federal Government when they detained [her] solely to verify her immigration status, or when they subsequently arrested her based on her possible removability."

Resp. 1; *see also id*. at 9, 18, 19. But this statement is incorrect. The Deputies did not detain Respondent "to verify her immigration status." They detained her "solely" because ICE had issued a warrant for her arrest. App. 23. They then asked dispatch to contact ICE to confirm that the warrant was still active, and to find out what ICE wanted them to do next. *See* App. 5-6.[1]

Respondent asks this Court to ignore the fact that she was a "wanted person," subject to a federal warrant for her arrest. This is reflected in the text of the subsequent detainer that ICE issued: "Roxanna ORELLANA-Santos . . . NCIC WANTED PERSON NIC WARRANT #: N060255090." App. 64. Indeed, virtually all aliens listed in NCIC fall into one of two categories: "criminal aliens whom immigration authorities have deported and aliens with outstanding administrative warrants of removal."[2] The former are criminals who have already been deported once and may not re-enter the United States; the latter are

[1] This is standard operating procedure with NCIC arrest warrants. "NCIC policy requires the inquiring agency to make contact with the entering agency to verify the information is accurate and up-to-date. Once the record is confirmed, the inquiring agency may take action to arrest a fugitive, return a missing person, charge a subject with violation of a protection order, or recover stolen property." http://www.fbi.gov/about-us/cjis/ncic.

[2] http://www.fbi.gov/about-us/cjis/ncic/ncic_files. A warrant for an alien may also be listed in the NCIC because he is a suspected terrorist, suspected regarding a non-immigration-related federal crime, or wanted by a foreign government. *See id*.

"absconders" who have ignored an order of removal issued by an immigration court and have become fugitives within the United States. ICE seeks the arrest of aliens in both categories and uses the NCIC to enlist the help of local law enforcement in making those arrests.

Granting the writ is necessary to ensure that NCIC is not crippled. If the decision of the Fourth Circuit stands, the federal government will be unable to effectively utilize the eyes and ears of local law enforcement to find the subset of illegal aliens that ICE seeks to arrest.

II. Respondent Cannot Obscure the Deep Circuit Split Regarding Whether State Police May Make Arrests for Any Violation of Immigration Law, or Only for Criminal Violations of Immigration Law.

The Fourth Circuit below acknowledged the disagreement between its holding and the holdings of the Tenth Circuit. App. 32. As explained at length in the Petition, the Fifth, Eighth, and the Tenth Circuits permit officers to initiate detentions based on reasonable suspicion of *any* immigration violation, civil or criminal, in order to contact ICE for further instructions. Pet. 11-15. The Sixth, Ninth, and now the Fourth Circuits only permit detention for criminal violations. *Id.* Santos's arguments to obscure this pronounced split fall short.

A. The Dates of the Cases Do Not Erase the Circuit Split.

Respondent first attempts to obscure this split by declaring that two of the decisions on the opposite side of the split were rendered before 1996, when a number of amendments were made to federal immigration laws. Resp. 10 (*citing* 8 U.S.C. §§ 1357(g)(1)-(10), 1103(a), and 1252c). This argument fails for two reasons.

First, the statutory provisions mentioned by Respondent have no preemptive content. On the contrary, they both represent efforts to *increase* the assistance that state and local police provide in the enforcement of federal immigration laws. "[I]n the months following the enactment of § 1252c, Congress passed a series of provisions designed to encourage cooperation between the federal government and the states in the enforcement of federal immigration laws." *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999), *cert. denied*, 528 U.S. 913 (1999) (*citing* 8 U.S.C. §§ 1103(a)(9), (c), 1357(g)(1)). And in the case of 8 U.S.C. § 1357(g), Congress specifically pointed out that the creation of specially-trained local law enforcement units under that section should not be construed to preempt other assistance that state and local police might provide in making immigration detentions: "Nothing in this subsection shall be construed to require an agreement under this subsection for any officer . . . to cooperate with the Attorney general in the . . . *apprehension*, *detention*, or removal of aliens not lawfully present in the United

States." 8 U.S.C. § 1357(g)(10)(B) (emphasis supplied).

Second, the Eighth and Tenth Circuits continued to construe state arrest authority in the same manner even *after* the cited statutory amendments. *See, e.g., Vasquez-Alvarez*, 176 F.3d at 1296; *United States v. Treto-Haro*, 287 F.3d 1000, 1006 (10th Cir. 2002); *United States v. Quintana*, 623 F.3d 1237, 1242 (8th Cir. 2010). Therefore, even if Respondent's argument were correct, it would only apply to two of the cases cited by Petitioners, the ones decided prior to 1996, out of the seven cited cases on the other side of the circuit split. Resp. 10; *see* Pet. at 12-13.

B. The Fact that Some of the Cases in the Other Circuits Began with a Traffic Stop Does Not Mitigate the Circuit Split.

Respondent also attempts to distinguish some of the cases in the other circuits by pointing out that they began with traffic stops. Resp. 12. However, this argument also fails for two reasons. First, the traffic stops in those cases did not justify the continued detention of the alien after the traffic citation was written. It was the suspicion that the alien had committed an immigration violation, without distinction between criminal and civil violations, that justified the detention of the alien thereafter. *See, e.g.,*

United States v. Santana-Garcia, 264 F.3d 1188, 1192-94 (10th Cir. 2001).

Second, the fact that the encounter in the instant case began with general questioning of the alien does not render it unlawful or distinguish it in any meaningful way from the traffic stop cases. Notably, Respondent omits any mention of *Muehler v. Mena*, 544 U.S. 93 (2005), where this Court unanimously held that local police officers may ask an alien general questions and may request identification without implicating the Fourth Amendment. This Court rejected the Ninth Circuit's holding to the contrary:

> This holding, it appears, was premised on the assumption that the officers were required to have independent reasonable suspicion in order to question Mena concerning her immigration status because the questioning constituted a discrete Fourth Amendment event. But the premise is faulty. We have "held repeatedly that mere police questioning does not constitute a seizure . . . [E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage."

Id. at 100-01 (citations omitted). *Muehler* also rejected the Ninth Circuit's attempt to read a reasonable suspicion requirement into the holding of *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). "We certainly did not, as the Court of Appeals suggested,

create a 'requirement of particularized reasonable suspicion for purposes of inquiry into citizenship status.'" *Muehler*, 544 U.S. at 101 n.3.

Thus, as the Fourth Circuit acknowledged, the Deputies were entirely within their authority to initiate their conversation with Respondent and ask her questions. App. 6, 16-17. Regardless of whether the encounter begins with general questioning or a traffic stop, the discovery of an ICE warrant for the alien's arrest should be sufficient to justify the detention of the alien for the purpose of contacting ICE.

C. Respondent Unwittingly Highlights Another Disagreement Between the Circuits.

Respondent next argues that certain provisions of federal law serve to preempt state police from assisting ICE. Resp. 15. Listing the same provisions discussed in Section II.A, *supra*, Respondent claims that any local assistance "not in accordance with any of those statutory provisions" is preempted through conflict preemption principles. *Id*. What Respondent omits is the fact that the Tenth Circuit considered and rejected precisely the same argument in *Vasquez-Alvarez*, 176 F.3d 1294.

The Tenth Circuit's holding was unequivocal: 8 U.S.C. § 1252c "does not limit or displace the preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration laws. Instead,

§ 1252c merely creates an additional vehicle for the enforcement of federal immigration law." 176 F.3d at 1295. The court rejected the argument that all arrests by local police not authorized by § 1252c are prohibited by it. *Id*. at 1299. The court also reviewed the legislative history of § 1252c and concluded that the purpose of the section was to overcome a perceived federal limitation on the states' arrest authority. *Id*. at 1298-99. However, neither the legislative history, the parties in *Vasquez-Alvarez*, nor the court could identify any such limitation. *Id.* at 1299 n.4. As the Tenth Circuit concluded, the "legislative history does not contain the slightest indication that Congress intended to displace any preexisting enforcement powers already in the hands of state and local officers." *Id*. at 1299.

This Court denied a petition for a writ of certiorari in *Vasquez-Alvarez* when no clear circuit split existed on the question. 528 U.S. 913 (1999). Now, fifteen years later, the Fourth Circuit has adopted the very argument that the Tenth Circuit rejected. *See* Pet. App. 19-20. And the Sixth and Ninth Circuits have also contributed to the circuit split. Granting the writ is warranted, now that such a deep division among six circuits has developed.

III. Respondent Distorts the Holding of *Arizona*.

Like the Fourth Circuit below, Respondent attempts to stretch one portion of the *Arizona* holding

far beyond its actual meaning. Respondent does so to try and fit her case into one narrow, inapposite holding of *Arizona* – that state officers may not, *based on their own, independent calculation of aliens' immigration statuses*, make "warrantless arrest of aliens based on possible removability." *Arizona*, 132 S. Ct. at 2508. That holding concerned Section 6 of the Arizona law, which authorized state officers to make warrantless arrests of aliens based on the officers' independent determination of aliens' removability "without any input from the federal government. . . ." *Id*. at 2506.

However, this is not a warrantless arrest case; there *was* an ICE warrant for Santos's arrest and the Deputies did not attempt to make any independent determination of Santos's immigration status. App. 5. Nevertheless, Respondent insists that this case "is much more akin to an unconstitutional application of § 6 of SB 1070, as distinguished from the limited circumstances in which § 2(B) is likely constitutional." Resp. 18.

Yet, Respondent pointedly fails to mention the most pertinent example that *Arizona* offered of a plainly permissible action by a state officer: "provid[ing] operational support in executing a warrant." *Arizona*, 132 S. Ct. at 2507. That is exactly what happened in the instant case.

Granting the writ is necessary to stop the Fourth Circuit (as well as the Ninth Circuit) from continuing to distort this Court's *Arizona* decision. This Court

took pains in *Arizona* to distinguish what was impermissible (attempts by state officers to independently determine removability), *id*. at 2506-07, from what was permissible (executing federal warrants and contacting ICE where reasonable suspicion exists). *Id*. at 2507-10. The decision below obliterates that distinction.

IV. Respondent Manufactures a Line of Preemption Out of Whole Cloth.

Respondent invents a new line of preemption that no court has endorsed in order to justify the circuit court's holding. Citing only a DHS guidance memorandum, Respondent declares that "[a]lthough state and local officers may serve in a participatory and supportive role in federal operations, they may not engage in independent action to enforce federal civil immigration law." Resp. 21 (*citing* Dep't of Homeland Security, Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters 13-14 (2011)). Respondent suggests that local police are limited to such tasks as providing perimeter security when ICE officers make immigration arrests. Resp. 21. This novel theory goes beyond what the court below held. It is also contrary to the text of 8 U.S.C. § 1357(g)(10), which recognizes the unpreempted authority of local police to participate in the "identification, apprehension, detention or removal" of illegal aliens.

Respondent's theory also incorrectly assumes that a mere DHS guidance memorandum can have preemptive effect. The executive branch cannot unilaterally preempt the states. Only *Congress* can displace the states through the constitutionally-momentous act of preemption. The Supremacy Clause of Article VI of the Constitution gives preemptive force to *only* the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the Authority of the United States." U.S. Const. Art. VI, cl. 2. The executive branch cannot, by itself, preempt the States. "It is Congress – not the [Department of Defense] – that has the power to pre-empt otherwise valid state laws. . . ." *North Dakota v. United States*, 495 U.S. 423, 442 (1990).

V. Respondent Argues that the Fourth Amendment Applies Differently Against State Officers than Federal Officers.

The court below held that state and local police cannot make *Terry* stops on suspicion of immigration violations generally, but instead must first determine that the immigration violation is a criminal one.[3] App. 22-23, 27-28. Yet, as Petitioners pointed out, this Court has held that "from almost the beginning of the Nation" no Fourth Amendment violation occurs when federal officers detain individuals on suspicion of

[3] *See Terry v. Ohio*, 392 U.S. 1 (1968).

either criminal or civil violations of the immigration laws. Pet. 24-27 (*quoting Abel v. United States*, 362 U.S. 217, 234 (1960); *see also Brignoni-Ponce*, 422 U.S. at 883 (border patrol agents may stop a vehicle upon reasonable suspicion of the unlawful immigration status of the vehicle's occupant)).

Respondent does not deny that federal *Terry* stops can be made where the suspected violation is a civil, rather than criminal, one. Rather Respondent asserts that the Fourth Circuit "took it as given that *federal* immigration officers may detain individuals for violations of civil immigration law. . . ." Resp. 24. As for the resulting anomaly that the Fourth Amendment therefore applies differently to federal officers than it does to state and local officers under the court's reasoning, Respondent simply declares: "its holding constitutes a limited application of *Terry* based on the unique facts of this case." Resp. 24.

But that is no answer. If a holding applies the Fourth Amendment differently to state and local officers through the Fourteenth Amendment than the Fourth Amendment is applied to federal officers, then the court must explain how such a fissure in constitutional law can be justified. The Fourth Circuit offered no such explanation. Neither does Respondent.

VI. This Scenario Recurs Constantly Across the Nation.

Finally, Respondent argues that this case is "fact-bound" with little relevance to other immigration

encounters. Resp. 1; 25-27. However, during fiscal year 2012 alone, the Law Enforcement Support Center ("LESC") responded to 177,043 calls from law enforcement officers across the country and confirmed 5,258 NCIC hits by those law enforcement agencies.[4] In other words, the LESC confirmed, on average, over 14 NCIC hits *a day*. As in the instant case, after confirming a hit in the NCIC, "[LESC] agents and specialists place immigration detainers on aliens suspected of residing in the country unlawfully."[5] In hundreds, if not thousands, of those cases the scenario is likely similar to the instant case: an officer becomes aware of the fact that the alien is a "wanted person" by ICE, but does not know whether the alien's underlying immigration violations are criminal or civil in nature.

It would defeat the purpose of the NCIC system to require a state or local police officer to divine the history of the illegal alien's activities in the United States prior to acting on the NCIC warrant. In many scenarios, distinguishing between civil and criminal violations at the time of arrest is impossible. For example, an alien may be unable to understand the officer's questions in English or may be unwilling to discuss his violations of federal immigration law. Furthermore, neither the alien nor the police officer

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[4] The LESC "administers and validates all ICE criminal and administrative records" in the NCIC database. http://www.ice.gov/lesc/.

[5] *Id*.

is likely to understand the arcane distinctions between criminal and civil violations of federal immigration law. For these reasons, maintaining a criminal-civil distinction in arrest authority is unworkable in practice. Review is warranted to ensure that the federal government can continue to utilize the help of state and local police by listing arrest warrants in the NCIC system.

CONCLUSION

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

Respectfully submitted,

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February 25, 2014