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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the court of appeals correctly hold that the deputy sheriffs unlawfully seized and arrested Ms. Orellana Santos based on the following findings and undisputed facts: (i) they had no reasonable suspicion or probable cause to believe that she had committed a crime; (ii) they detained her prior to confirmation of what they knew or should have known was a civil immigration warrant; and (iii) they received no direction or supervision from the Federal Government prior to detaining her?

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INTRODUCTION

Petitioners seek review of a unanimous opinion of the court of appeals after their motion for rehearing or rehearing en banc was denied. The petition should be denied because the court of appeals' decision that Ms. Orellana Santos' Fourth Amendment rights were violated does not warrant review under any of this Court's traditional standards for issuing a writ of certiorari.

Contrary to Petitioners' suggestions, this case does not present the question of whether local deputies may detain an individual based on a federal criminal immigration warrant or whether local deputies may communicate with Immigration and Customs Enforcement ("ICE") during the course of their regular law enforcement duties.

Instead, the holding of the court of appeals was narrow and fact-bound. Undisputed facts established that the Frederick County Deputy Sheriffs (the "Deputies") had neither reasonable suspicion nor probable cause to believe criminal activity was afoot. Furthermore, they were not authorized or directed by the Federal Government when they detained Ms. Orellana Santos solely to verify her immigration status, or when they subsequently arrested her based on her possible removability.

The holding of the court of appeals reflects a straightforward application of this Court's decision in *Arizona v. United States*, which made clear that "the removal process is entrusted to the discretion of the Federal Government," and that "Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer." 132 S. Ct. 2492,

2506 (2012). The court of appeals correctly concluded that none of the limited circumstances in which local officers may enforce federal civil immigration law were present. Instead, the actions of the Deputies exemplify the constitutional violation that this Court warned about when it stated that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns" and that "it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision." *Id.* at 2509. The Deputies lacked reasonable suspicion to detain Ms. Orellana Santos "solely to verify [her] immigration status," *id.*; they lacked the "usual predicate for an arrest"—probable cause that Ms. Orellana Santos committed a crime—*id.* at 2505; and they lacked authority to unilaterally execute a federal civil immigration warrant.

Furthermore, the decision of the court of appeals does not establish or entrench a division in the circuits. To the contrary, "[l]ower federal courts have *universally* … interpreted *Arizona v. United States* as precluding local law enforcement officers from arresting individuals solely based on known or suspected civil immigration violations." Pet. App. 21 (emphasis added). Petitioners concede that the holding of the court of appeals is consistent with those opinions. *See* Pet. 13-14.

This case also does not raise an issue of exceptional importance. Petitioners' contention that there will be "crippling uncertainty in immigration law enforcement" as a result of the decision, Pet. 4, is more hyperbolic bluster than reality. Because federal courts have universally interpreted this Court's decision in *Arizona*

v. United States as the court of appeals did in this case, any uncertainty about the role of state and local officers in federal civil immigration enforcement is rapidly diminishing. Moreover, the holding of the court of appeals does not preclude federal officials from seeking cooperation from state and local officials to enforce federal immigration law at the Federal Government's discretion. Indeed, the means by which state and local officials may engage in such cooperation are specified by federal law, guidance, and agreements between the Federal Government and localities.

STATEMENT OF THE CASE

A. Factual Background

One morning in October 2008, Ms. Orellana Santos was eating a sandwich while sitting on a curb behind the Common Market food co-op in Frederick, Maryland, where she worked as a dishwasher. Pet. App. 3. She was looking out over a grassy area with a pond. *See* Pet. App. 3. While eating, Ms. Orellana Santos was approached by Frederick County Deputy Sheriffs Jeffrey Openshaw and Kevin Lynch (the "Deputies"), who stopped and exited their patrol car upon seeing her. Pet. App. 4.

The Deputies parked their patrol car near Ms. Orellana Santos and approached her on foot from different directions. Pet. App. 4. Deputy Openshaw asked Ms. Orellana Santos if she was on break, and she said she was. Pet. App. 4. He then asked if she worked at the Common Market, and she said yes. Pet. App. 4-5. Deputy Openshaw asked if she had identification, and she said she did not have it with her. *See* Pet. App. 5. The Deputies

then stepped away to speak privately, while Ms. Orellana Santos remained seated. Pet. App. 5.

While waiting for the Deputies, Ms. Orellana Santos remembered that she had her Salvadoran national identification card in her purse. Pet. App. 5. She showed the card to the Deputies while remaining seated, and Deputy Openshaw took the card and relayed information to local dispatch to run a warrant check on Ms. Orellana Santos. Pet. App. 5.

After local dispatch completed the warrant check, using the National Crime Information Center ("NCIC") database, it informed Deputy Openshaw that there was an outstanding "ICE warrant for 'immediate deportation'" for Ms. Orellana Santos. Pet. App. 5. Deputy Openshaw asked local dispatch to verify that the warrant was active, but he did not know what dispatch did to verify the warrant. Pet. App. 5.

While the Deputies waited for local dispatch to verify the warrant, Ms. Orellana Santos asked the Deputies if there was a problem, and Deputy Openshaw said, "No, no, no," and motioned for her to remain seated. Pet. App. 6. Ms. Orellana Santos remained seated. *See* Pet. App. 6.

Later, approximately 20 minutes after Ms. Orellana Santos handed her card to Deputy Openshaw, local dispatch informed the Deputies that the warrant was active. Pet. App. 6. Shortly thereafter, Ms. Orellana Santos attempted to stand to go into the Common Market to begin her shift, and the Deputies grabbed her by her shoulders and handcuffed her. Pet. App. 6. The Deputies placed her in their patrol car and transported her to a Frederick County detention center. Pet. App. 6.

Approximately 45 minutes after the Deputies arrested Ms. Orellana Santos, ICE Senior Special Agent S. Letares faxed an immigration detainer to the detention center. Pet. App. 6, 64-67. The immigration detainer requested that the detention center hold Ms. Orellana Santos on ICE's behalf because an "[i]nvestigation has been initiated to determine whether this person is subject to removal from the United States." Pet. App. 6, 66-67.

The Frederick County Sheriff's Office had an agreement ("287(g) Agreement") with ICE pursuant to Section 287(g) of the Immigration and Nationality Act ("INA"), codified at 8 U.S.C. § 1357(g) (1996), as amended by the Homeland Security Act of 2002, Public Law 107-296 ("287(g) Program"), which authorized certain deputies to assist ICE in immigration enforcement, including execution of immigration warrants for arrest. Pet. App. 4. The Deputies were neither trained nor authorized under the 287(g) Agreement. Pet. App. 4.

B. Procedural Background

In November 2009, Ms. Orellana Santos filed her complaint in the United States District Court for the District of Maryland, alleging, *inter alia*, that the Deputies violated her constitutional rights under the Fourth Amendment when they seized and arrested her because they had neither reasonable suspicion nor probable cause to believe that she had committed a crime, and they lacked authority to enforce federal civil immigration law. *See* Pet. App. 6-7. Defendants included the Deputies, Frederick County Sheriff Charles Jenkins, the Frederick County Board of Commissioners (the "Board"), and several federal employees of ICE and the Department of Homeland Security (the "Federal Defendants"). Pet. App. 6-7.

The district court stayed Ms. Orellana Santos' supervisory liability claims against Sheriff Jenkins, the Board, and the Federal Defendants, pending resolution of her claims against the Deputies. Pet. App. 7-8.

After learning from limited discovery that the Deputies were neither certified nor trained pursuant to the 287(g) Agreement, Ms. Orellana Santos voluntarily dismissed the Federal Defendants. *See* Pet. App. 7-8. She then filed a second amended complaint against the remaining defendants asserting essentially the same claims. *See* Pet. App. 8.

Upon completing additional, albeit limited discovery, the Deputies moved for summary judgment on all of Ms. Orellana Santos' claims. Pet. App. 8. The district court granted the motion. *See* Pet. App. 37-61. In relevant part, the district court concluded that the Deputies seized Ms. Orellana Santos when Deputy Openshaw motioned for Ms. Orellana Santos to remain seated, and she did so. Approximately 20 minutes after the Deputies seized Ms. Orellana Santos, local dispatch verified that the civil immigration warrant was still in effect. *See* Pet. App. 50. The district court concluded that the civil immigration warrant provided probable cause to arrest Ms. Orellana Santos. Pet. App. 51.

Ms. Orellana Santos moved for reconsideration pursuant to Fed. R. Civ. P. 59(e) with respect to her Fourth Amendment claims. Pet. App. 9. She argued that reconsideration was warranted because a number of federal court decisions issued after the summary judgment hearing, including *Arizona v. United States*, reinforced her argument that the Deputies did not have

authority to enforce federal civil immigration law and thus violated her Fourth Amendment rights because they also lacked probable cause or reasonable suspicion of criminal activity. The district court denied Ms. Orellana Santos' motion, holding that, irrespective of recent federal court cases regarding local enforcement of federal civil immigration law, the Deputies were entitled to qualified immunity. Pet. App. 9.

Ms. Orellana Santos timely appealed to the United States Court of Appeals for the Fourth Circuit. Pet. App. 9. Like the district court, the court of appeals held that the encounter between Ms. Orellana Santos and the Deputies was consensual until "Openshaw gestured for Santos to remain seated." Pet. App. 16 (citation omitted). The court further agreed that Ms. Orellana Santos was seized when she complied with Openshaw's show of authority by remaining seated. *See* Pet. App. 16.

The court of appeals also held that the Deputies unlawfully seized and arrested Ms. Orellana Santos when they detained her based solely on a federal civil immigration warrant. Pet. App. 23. The court of appeals explained that the "only basis for detaining Santos was the civil ICE warrant," and they "were not authorized to engage in immigration law enforcement under the [287(g) Agreement]." Pet. App. 23.

Petitioners postulate that the "Fourth Circuit supposed that … the underlying immigration violations must have been civil, rather than criminal." Pet. 7. To the contrary, the court of appeals made no assumption about the basis for ICE's issuance of the civil immigration warrant because there was no need to. The warrant was

not in the record because the Deputies never produced it, or any other documentation relating to the warrant, except the immigration detainer.[1] *See* Pet. App. 66-68. However, the court of appeals explained that "the record does indeed contain evidence" that the warrant was civil, rather than criminal: the Deputies "testified that the warrant was for 'deportation'"—a process that "has long [been] characterized … as a civil proceeding." Pet. App. 27. Thus, irrespective of the reasons ICE had for issuing the warrant, the undisputed facts established that it was a civil, not criminal, warrant. *See also* Pet. App. 28 ("[I]t was the deputies' responsibility to determine whether the warrant was for a criminal or civil immigration violation before seizing Santos. And because they did not determine that the warrant was criminal in nature (nor could they have – because it was not), her detention was unlawful.").

The court of appeals distinguished federal civil immigration law from criminal immigration law. *See* Pet. App. 20-21. In doing so, it expressly limited its holding in this case to enforcement of federal civil immigration law by local law enforcement officers: the Deputies "lacked authority to enforce *civil* immigration law and violated Santos's rights under the Fourth Amendment when they seized her solely on the basis of the outstanding *civil* ICE warrant." Pet. App. 23 (emphasis added).

The court of appeals relied extensively on this Court's decision in *Arizona v. United States*. *See* Pet. App. 19-25. The

1. Federal immigration warrants frequently ask only that ICE be contacted, *not* that the named individual be arrested. The absence of the warrant from the record makes this case a particularly poor vehicle to address issues Petitioners claim are implicated by the decision below.

court recognized that "the Court [in *Arizona v. United States*] has said that local officers generally lack authority to arrest individuals suspected of civil immigration violations." Pet. App. 21. In this case, there was no doubt that the warrant was civil. *See* Pet. App. 27-28.

The court of appeals also rejected the Deputies' argument that they acted lawfully under § 1357(g)(10)(B), which "allows state law enforcement officers to 'cooperate' with the federal government in immigration enforcement, even when officers are not expressly authorized to do so under a Section 1357(g)(1) agreement." Pet. App. 24. The court explained that "*Arizona v. United States* makes clear that under Section 1357(g)(10) local law enforcement officers cannot arrest aliens for civil immigration violations, absent, at a minimum, direction or authorization by federal officials." Pet. App. 24. The Deputies did not speak to ICE prior to arresting Ms. Orellana Santos. *See* Pet. App. 5. The Deputies did not know what local dispatch did to verify that the federal civil immigration warrant was active. Pet. App. 5. The court therefore concluded that the Deputies did not act lawfully under § 1357(g)(10)(B) because "it is undisputed that the deputies' initial seizure of Santos was not directed or authorized by ICE." Pet. App. 25.

Nevertheless, the court of appeals concluded that qualified immunity barred Ms. Orellana Santos' individual capacity claims. Pet. App. 23.

REASONS FOR DENYING THE PETITION

I. There Is No Meaningful Division In The Circuits Warranting Review By The Court.

Petitioners misconstrue prior circuit court decisions to assert the existence of a division among the circuits regarding the holding below. *See* Pet. 12-13. In fact, no circuit split exists that warrants review by the Court.

Two cases cited by Petitioners—*United States v. Salinas-Calderon*, 728 F.2d 1298 (10th Cir. 1984) and *Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987)—predate the 1996 enactment of legislation that added 8 U.S.C. §§ 1357(g)(1)-(10), 1103(a), and 1252c. Those statutory provisions were integral to the court of appeals' holding that state and local officials have limited authority to enforce federal civil immigration law and that the Deputies had no authority to detain Ms. Orellana Santos. *See* Pet. App. 19-20. *Salinas-Calderon* and *Lynch* are therefore inapposite because federal immigration law was quite different when those decisions were rendered. *Cf. Arizona v. United States*, 132 S. Ct. at 2503 (distinguishing *De Canas v. Bica* because "the Federal Government had expressed no more than a peripheral concern with the employment of illegal entrants" at the time that the Court rendered its decision in that case) (internal quotation marks, citation, and alterations omitted).

Significantly, all of the cases cited by Petitioners as being in conflict with the holding of the court of appeals predate *Arizona v. United States*. The court of appeals relied extensively on *Arizona v. United States*, as have other federal courts that "universally" agree that local

law enforcement officers may not arrest individuals "solely based on known or suspected civil immigration violations." Pet. App. 21-22. Because there is no material division in the circuits, there is no reason for the Court to take this case. In time, cases may be heard in the courts of appeals in light of *Arizona v. United States*, which may result in conflicting holdings. That is not the case now, however.

To be sure, some language in earlier cases could be read broadly to suggest that local law enforcement officers may arrest individuals for civil immigration violations. *See* Pet. App. 32 (quoting *United States v. Vazquez-Alvarez*, 176 F.3d 1294, 1296 (10th Cir. 1999)). But the facts and legal issues of this case are fundamentally different from the facts and legal issues evaluated in Tenth Circuit cases and others cited by Petitioners.

Vazquez-Alvarez, the most relevant of the cases cited by Petitioners, is distinguishable for three primary reasons. First, it involved an investigation of a crime. An Immigration and National Service ("INS") Special Agent "observed an apparent drug transaction between" Vazquez-Alvarez and another man while at a restaurant in Edmond, Oklahoma. 176 F.3d at 1295. Second, the detention was initiated and directed by a federal INS agent. After witnessing the apparent drug transaction, the INS agent "telephoned Edmond Police Officer Bob Pratt and asked him to investigate the suspicious transaction [and] to arrest [Vazquez-Alvarez] if Pratt came in contact with him and found that he was, in fact, in the country illegally." *Id.* Third, because the case involved a violation of federal criminal immigration law—"illegally reentering the United States after a deportation in violation of 8 U.S.C. § 1326," 176 F.3d at 1295—the court had

no occasion to decide whether federal law preempts enforcement of civil immigration law by local officers. *See also id.* at 1299, 1300 (evaluating preemption claim in the context of "criminal illegal aliens").

The remaining cases cited by Petitioners are similarly distinguishable. Most involved encounters in which local law enforcement officers observed a traffic violation or had reasonable suspicion or probable cause of criminal activity.[2] Many involved encounters in which federal immigration agents directed state or local officers to detain or arrest individuals.[3] And *Lynch* involved due

2. *See, e.g.*, *United States v. Quintana*, 623 F.3d 1237, 1239 (8th Cir. 2010) (traffic stop by a North Dakota Highway Patrol Trooper that all parties agreed was lawful); *United States v. Rodriguez-Arreola*, 270 F.3d 611, 616 (8th Cir. 2001) (passenger in vehicle pulled over for speeding had no standing to assert Fourth Amendment claim that "questions posed by Trooper Koltz about alienage were outside the appropriate scope of the traffic stop and impermissibly extended the stop beyond its proper duration"); *United States v. Santana-Garcia*, 264 F.3d 1188, 1191-92 (10th Cir. 2001) (investigatory stop of vehicle and subsequent arrest with reasonable suspicion and probable cause to believe that there had been a criminal violation under Utah law); *Lynch*, 810 F.2d at 1367 (Jamaican nationals "attempted to enter the United States illegally by stowing away aboard a grain barge bound for ports on the Mississippi River"—actions that constituted probable cause to believe a *criminal* offense, conspiracy to violate 8 U.S.C. § 1325, had been committed.); *Salinas-Calderon*, 728 F.2d at 1299-1301 (investigatory stop of a vehicle that all parties agreed was lawful, which uncovered evidence constituting probable cause of a criminal offense under 8 U.S.C. § 1324(a)(2)—knowing transportation of an immigrant who is unlawfully in the United States).

3. *See, e.g.*, *Quintana*, 623 F.3d at 1238 (trooper detained Diaz-Quintana only after a Border Patrol agent spoke with

process claims that framed the Fifth Circuit's analysis much differently from analysis of Fourth Amendment claims. *See* 810 F.2d at 1371 ("Neither the shipper's failure to seek approval of the Attorney General before making arrangements with the Harbor Police nor the fact that the Harbor Police took custody of the aliens and, without INS approval, temporarily removed them from the barge changes the stowaways' status or bestows upon them due process rights they otherwise would not have enjoyed.").

In contrast to all of these cases, the Deputies were not investigating a crime; they had no independent, lawful basis to detain Ms. Orellana Santos; and no federal agent directed the Deputies to detain Ms. Orellana Santos. Indeed, there was no request from a federal agent at all until Senior Special Agent S. Letares faxed an immigration detainer to the Frederick County Adult Detention Center approximately 65 minutes *after* the Deputies detained Ms. Orellana Santos, and 45 minutes *after* they arrested her. *See* Pet. App. 24-25, 64-67.

Diaz-Quintana and "told [the trooper] to take Diaz-Quintana into custody for the Border Patrol"); *Rodriguez-Arreola*, 270 F.3d at 614-15 ("At the request of the INS, Trooper Koltz placed Rodriguez into custody and took him to the nearest jail facility for processing by the INS."); *United States v. Treto-Haro*, 287 F.3d 1000, 1003 (10th Cir. 2002) (federal INS agent directed a federal agent of the Drug Enforcement Administration by radio to "inquire into the suspect's immigration status and detain him so that [the INS agent] could verify that status"); *Salinas-Calderon*, 728 F.2d at 1300 (INS investigator directed trooper to have suspected occupants of vehicle follow him to Dodge City so that the INS investigator could speak with them).

In short, consideration of Fourth Amendment cases like Ms. Orellana Santos' case is in its infancy in lower federal courts, as indicated by the conclusion of the court of appeals that the Deputies were entitled to qualified immunity. Thus, this Court should deny the petition to allow similar cases to percolate in lower federal courts in light of *Arizona v. United States*.

II. The Court Of Appeals Correctly Applied *Arizona v. United States* By Concluding That The Deputies Lacked Authority To Execute The Civil ICE Warrant.

Arizona v. United States required the court of appeals to hold, as it did, that the Deputies unlawfully seized and arrested Ms. Orellana Santos because they had no authority to execute a federal civil immigration warrant and they lacked reasonable suspicion and probable cause to believe that she had committed a crime. Petitioners mischaracterize *Arizona v. United States* and the decision of the court of appeals by arguing otherwise.

A. The Court Of Appeals Properly Applied Preemption Principles From *Arizona v. United States*.

Petitioners erroneously argue that the holding of the court of appeals conflicts with preemption doctrine in *De Canas v. Bica*, *Chamber of Commerce v. Whiting*, and *Arizona v. United States* because the "Fourth Circuit held that preemption is the default scenario." Pet. 20. The court of appeals rendered no such holding. Rather, the court traced the preemption analysis in *Arizona v. United States*, 132 S. Ct. at 2506-2507, explaining that "allowing

local law enforcement officers to arrest individuals for civil immigration violations would infringe on the substantial discretion Congress entrusted to the Attorney General in making removability decisions, which often require the weighing of complex diplomatic, political, and economic considerations." Pet. App. 22. Instead of relying on "congressional silence" to render its holding, Pet. 21, the Court pointed to specific federal law that permits state and local officials to engage in immigration enforcement, see Pet. App. 19-20 (citing 8 U.S.C. § 1357(g)(1), § 1357(g)(10)(B), § 1357(g)(3), § 1103(a)(10); § 1252c; § 1324(c)). The Deputies did not act in accordance with any of those statutory provisions. Pet. App. 22-23. By detaining Ms. Orellana Santos solely to verify her immigration status and then arresting her based on her possible removability, the Deputies ignored specific allocation of enforcement duties under federal law, and thereby created an "obstacle to the full purposes and objectives of Congress." *Arizona v. United States*, 132 S. Ct. at 2507.

De Canas v. Bica and *Chamber of Commerce v. Whiting* have no bearing on this case because the facts and laws considered in *De Canas* and *Whiting* are very different from those presented in this case. *De Canas* involved a California law assessing civil fines for knowing employment of unauthorized immigrants. Similarly, *Whiting* involved an Arizona licensing law regarding employment of unauthorized immigrants. In this case, the Deputies were not enforcing state employment law. Instead, they executed a federal civil immigration warrant that was inextricably tied to the federal removal process. This Court long ago recognized that the Federal Government has *exclusive* discretion over the process for removal of immigrants from the country, but not over

the regulation of employment. *Compare id.* at 2506-2507 (collecting cases and describing the importance of federal discretion with respect to the removal process) *with Whiting*, 131 S. Ct. 1968, 1974 (2010) ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." (quoting *De Canas*, 424 U.S. 351, 356 (1976))).

B. The Deputies Took Actions Beyond Those Permitted By *Arizona v. United States*.

Petitioners suggest that the court of appeals should have viewed this case as akin to constitutional applications of § 2(B) of "Arizona's Support Our Law Enforcement and Safe Neighborhoods Act," or "SB 1070," which "requires state officers to make a 'reasonable attempt … to determine the immigration status' of any person they stop, detain, or arrest on some other legitimate basis if 'reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.'" *Arizona v. United States*, 132 S. Ct. at 2507. In doing so, Petitioners misstate the holding of this Court with respect to § 2(B) of SB 1070 and improperly extrapolate that holding to the unique facts of this case.

Arizona v. United States involved a facial challenge to SB 1070 before it had gone into effect. The Court therefore reviewed § 2(B) of SB 1070 under the presumption that it would be interpreted by state courts to only authorize constitutional actions. *Id.* at 2510. Accordingly, the Court held that § 2(B) may be valid "*if* [it] *only* requires state officers to conduct a status check during the course of an *authorized*, *lawful* detention or *after a detainee has been released*...." *Id.* at 2509 (emphasis added). The Court

further explained that "[t]here is a basic uncertainty about what the law means and how it will be enforced," and "[a]t this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume § 2(B) will be construed in a way that creates a conflict with federal law." *Id.* at 2510.

Circumstances under which *Arizona v. United States* indicated that § 2(B) would likely be lawful are very different from this case. The Deputies did not conduct an immigration status check "during the course of an authorized, lawful detention," *id.* at 2509, because they did not have reasonable suspicion or probable cause to believe a crime had been committed. Nor did they contact ICE after a consensual encounter or after an independently lawful arrest. Instead, they detained Ms. Orellana Santos for approximately 20 minutes *solely* to verify her immigration status, and they arrested her 45 minutes before receiving a request from ICE. Other courts have similarly distinguished the limited circumstances in which § 2(B) would be constitutional. *E.g.*, *Villas at Parkside Partners v. City of Farmers Branch, Texas*, 726 F.3d 524, 535 (5th Cir. 2013); *Melendres v. Arpaio*, No. PHX-CV-07-02513-GMS, 2013 U.S. Dist. LEXIS 73869, *216-17 (D. Ariz. May 24, 2013).

This Court also warned that § 2(B) would be invalid if interpreted broadly. In particular, the Court stated that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns." *Arizona v. United States*, 132 S. Ct. at 2509 (citing *Arizona v. Johnson*, 555 U.S. 323, 333 (2009); *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). The Court further explained that "it would disrupt the federal framework

to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision." *Id.* "The program put in place by Congress does not allow state or local officers to adopt this enforcement mechanism." *Id.* Although the Court concluded that "§ 2(B) could be read to avoid these concerns," *id.*, it did "not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect." *Id.* at 2510.

Moreover, in this Court's discussion of concerns regarding the scope of § 2(B), the Court referred back to its opinion regarding § 6 of SB 1070, in which the Court determined that § 6 was preempted by federal law. *Arizona v. United States*, 132 S. Ct. at 2509 (comparing to Part IV-C). Section 6 of SB 1070 permitted warrantless arrests when state officers have probable cause to believe an individual is unlawfully present in the United States. *See id.* at 2505. In Part IV-C of its opinion, the Court concluded that § 6 violated "the principle that the removal process is entrusted to the discretion of the Federal Government." *Id.* at 2506. As part of that holding, the Court made clear that civil immigration warrants "are executed by *federal officers* who have received training in the enforcement of immigration law." *Id.* (emphasis added). The Court further identified "limited circumstances in which state officers may perform the functions of an immigration officer." *Id.*

The Deputies' seizure and arrest of Ms. Orellana Santos 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. The information that the Deputies received about the existence of a civil immigration warrant was

to the effect that a determination was made by ICE that Ms. Orellana Santos was subject to removal by the Federal Government for unlawful presence, and nothing more. Such information does *not* indicate that the Federal Government believes that the subject of the warrant should be detained pending removal proceedings.[4] Yet, after learning of the warrant, the Deputies arrested her without any direction or supervision from the Federal Government. *See* Pet. App. 25. Their actions crossed the line drawn by this Court when it held in *Arizona v. United States* that decisions about whether to detain an individual for possible removability are reserved exclusively to the Federal Government. *See* 132. S. Ct. at 2506.

C. The Deputies Acted Unilaterally, Not In Cooperation With The Federal Government.

Petitioners also mischaracterize this Court's interpretation of 8 U.S.C. § 1357(g)(10)(B) in *Arizona v. United States*. The Court quoted guidance from the Department of Homeland Security ("DHS") to identify examples of "cooperation" under § 1357(g)(10)(B), including "provid[ing] operational support in executing a warrant." *Id.* at 2507. Generally, however, federal law specifies that warrants are issued and executed by "*federal* officers who have received training in the enforcement of immigration law." *Id.* at 2506. As the Court explained, "no coherent understanding of [§ 1357(g)(10)(B)] would incorporate the unilateral decision of state officers to arrest an alien for

4. Indeed, the immigration detainer issued for Ms. Orellana Santos merely stated that an "[i]nvestigation had been *initiated to determine* whether [she was] subject to removal." Pet. App. 66 (emphasis added).

being removable absent any request, approval, or other instruction from the Federal Government." *Id.* at 2507.

Further, the Federal Government has made clear that § 1357(g)(10)(B) is not an open invitation for state and local officers to routinely execute federal civil immigration warrants. DHS guidance clearly denies authority for such unilateral action by state and local officers because federal primacy is required for state and local actions to constitute "cooperation." *See* Dep't of Homeland Security, Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters 8 (2011) ("DHS Guidance"), *available at* www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf (last visited February 6, 2013). State and local "officers must at all times be in a position to be—and, when requested, must in fact be—responsive to federal enforcement discretion, and their assistance must be rendered within any parameters set by DHS so that DHS can exercise control … and has the flexibility to respond to changing considerations." *Id.* at 8.

For example, state and local officers could provide "assistance to DHS immigration officers in the execution of a civil or criminal search or arrest warrant for individuals suspected of being in violation of federal immigration law—for example, by providing tactical officers to join the federal officials during higher risk operations, or providing perimeter security for the operation (*e.g.*, blocking off public streets)." *Id.* at 13. Relegating state and local officers to the role of providing *assistance* clearly suggests that state and local officers may not unilaterally execute a civil immigration warrant merely because they identify a warrant in the NCIC database and verify that

the warrant is active, as the Deputies did when they arrested Ms. Orellana Santos. Although 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. *See id.* at 13-14.

D. The Federal Government Permits Enforcement Of Civil Immigration Law By Local Officers In Specific And Limited Circumstances.

In *Arizona v. United States*, this Court did not hold that "Congress has encouraged" state and local officers to detain "suspected illegal aliens in order to contact ICE." Pet. 19. Although the Court recognized that Congress has encouraged *communication* between federal and local authorities, the Court rejected the proposition that states and localities may routinely assist in the *removal* of immigrants from the United States by unilaterally detaining them based on possible removability. *See* 132 S. Ct. at 2505-2507. The Deputies never communicated with ICE, but they did attempt to independently facilitate the removal of Ms. Orellana Santos by executing the civil ICE warrant without direction or supervision.

Similarly, Petitioners' reliance on legislative history is misplaced. Petitioners quote a Senate Report stating that the "acquisition, maintenance, and exchange of immigration-related information" by state and local officials is consistent with the INA, but upon examination it is clear the Senate Report does not help Petitioners. Pet. 28 (citing S. Rep. No. 104-249, at 19-20 (1996)). The Senate Report is referring to a congressional amendment intended to prohibit restrictions on communication

between government entities regarding immigration-related information. *See* 8 U.S.C. § 1373. And the House Conference Report cited by Petitioners is about the same amendment. *See* Pet. 27 (citing H.R. Rep. No. 104-725, at 383 (1996)). That amendment did not provide any authority to state and local officials to execute civil immigration warrants.

Further, the same Senate Report confirms that the amendments at issue were intended to give limited authority to state and local officials that they did not previously have, thereby suggesting that state and local officers have no general investigatory or enforcement authority with respect to federal civil immigration law. The Senate Report explains another amendment related to "Immigration emergency provisions" by stating, "Upon a declaration by the Attorney General that the mass influx of individuals to the United States is underway or imminent, provisions … allow the Attorney General to authorize any State or local law enforcement officer to perform law enforcement functions *ordinarily reserved to Federal authorities*." S. Rep. No. 104-249, at 19 (emphasis added); *see* 8 U.S.C. § 1103(a)(10). The obvious implication is that outside of these and other limited conferrals of authority, states and localities have *no authority* to enforce federal civil immigration law.

In addition, DHS guidance explains that § 1357(g)(10)(A) and § 1373 do not confer authority to "systematically assist in the 'identification, apprehension, detention, or removal of aliens not lawfully present in the United States…'." DHS Guidance at 12. Those statutory provisions "encompass only the specific act of exchanging information with DHS; [they do] not … provide a state or local officer

with additional authority to investigate an individual's immigration status so as to acquire information that might be communicated to DHS." *Id.* The decision of the court of appeals is therefore wholly consistent with federal law and guidance that this Court considered persuasive in *Arizona v. United States*.

III. The Holding Of The Court Of Appeals Is Consistent With *Terry v. Ohio*.

Although Petitioners attempt to manufacture a departure from this Court's Fourth Amendment precedents, one simply does not exist. This Court recently reiterated the long-standing rule that law enforcement officers lacking probable cause for an arrest may conduct an investigatory stop "when the police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense." *Arizona v. Johnson*, 555 U.S. at 326. Because "it is not a crime for a removable alien to remain present in the United States," *Arizona v. United States*, 132 S. Ct. at 2505, suspicion or knowledge of removability, by itself, does not give rise to an inference that "criminal activity may be afoot," *Terry v. Ohio*, 392 U.S. 1, 30 (1968). For this reason, and because the Deputies lacked authority to execute a federal civil immigration warrant, the court of appeals held that "absent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law." Pet. App. 23.

Other federal courts have reached very similar conclusions. *E.g.*, *Melendres v. Arpaio*, 695 F.3d 990, 1000-

01 (9th Cir. 2012); *Buquer v. City of Indianapolis*, No. 1:11-cv-00708-SEB-MJD, 2013 U.S. Dist. LEXIS 45084, 2013 WL 1332158, *10-11 (S.D. Ind. Mar. 28, 2013).

Contrary to Petitioners' assertions, the holding of the court of appeals would not "prohibit detentions by federal officers for civil immigration violations" or prohibit "basic state and city code enforcement of civil violations." Pet. 26-27. In accordance with *Arizona v. United States*, the court of appeals took it as a given that *federal* immigration officers may detain individuals for violations of civil immigration law and may enlist the help of state and local officers by, at a minimum, expressly directing them. *See, e.g.*, Pet. App. 19 (identifying authority permitting local law enforcement officers to assist federal immigration officers enforce civil immigration law); Pet. App. 21 (quoting *Arizona v. United States*, 132 S. Ct. at 2505); Pet. App. 22 (citing *Arizona v. United States*, 132 S. Ct. at 2506-07); Pet. App. 24 (quoting *Arizona v. United States*, 132 S. Ct. at 2507). Additionally, the court did not opine on enforcement of state and local civil codes.

Thus, there is no need for the Court to "clarify that the *Terry* phrase 'criminal activity may be afoot' does not strictly bar brief investigative stops in non-criminal contexts," Pet. 27, because the court of appeals did not misconstrue *Terry*. Instead, its holding constitutes a limited application of *Terry* based on the unique facts of this case.

IV. This Case Does Not Involve an Issue of National Importance.

Petitioners warn that the decision of the court of appeals in this case "cripples" immigration law enforcement "cooperation that is relied upon by ICE and encouraged by Congress." Pet. 30. Yet, the opinion of the court of appeals in no way hinders congressionally authorized cooperation between different levels of government. For example, the opinion of the court of appeals does not foreclose use of the Law Enforcement Support Center ("LESC") by state and local officers during the course of an authorized arrest. *See, e.g.*, *Arizona v. United States*, 132 S. Ct. at 2509 (suggesting that § 2(B) of SB 1070 could be interpreted "as an instruction to initiate a status check every time someone is arrested").

The court of appeals also recognized a number of instances in which state and local officials may act under federal law, including under the 287(g) Program, which the Frederick County Sheriff's Office was (and is) a part of. *See* Pet. App. 19-20; *accord Arizona v. United States*, 132 S. Ct. at 2506; *see also, e.g.*, Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, *available at* http://www.ice.gov/news/library/factsheets/287g.htm (last visited February 6, 2014); 287(g) Agreement, *available at* http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/frederickcountysheriffsoffice.pdf (last visited February 6, 2014). The 287(g) Program is the "principal" example of means by which state and local officers may "perform the functions of an immigration officer." *Arizona v. United States*, 132 S. Ct. at 2506. Indeed, because "[t]here are significant complexities involved in enforcing federal

immigration law, including the determination whether a person is removable," state and local officers must typically receive "adequate training [under the 287(g) Program] to carry out the duties of an immigration officer," *id.* at 2506—training that the Deputies did not have.

Moreover, there is no confusion that warrants clarification by the Court. Rather, since *Arizona v. United States*, federal courts have increasingly clarified limits on the authority of states and localities to enforce federal civil immigration law.[5] Some states have reached settlement agreements to permanently enjoin state laws permitting detentions based on suspicion that individuals are subject to removal for civil immigration violations. *See, e.g.*, *Hispanic Coal. of Ala. v. Bentley*, No. 5:11cv2484 (N.D. Ala. Nov. 25, 2013) (Doc. No. 180). And irrespective of *Arizona v. United States* and subsequent cases, police departments have issued straightforward policies requiring officers not to make arrests based solely on civil immigration violations, while clearly explaining how to distinguish civil immigration warrants from criminal warrants in the NCIC database. *See, e.g.*, District of

5. *See, e.g.*, *Villas at Parkside Partners*, 726 F.3d at 531-32 (concluding that ordinance was preempted because it gave "state officials authority to act as immigration officers outside of the 'limited circumstances' specified by federal law" and put "local officials in the impermissible position of arresting and detaining persons based on their immigration status without federal direction and supervision" (quoting *Arizona v. United States*, 132 S. Ct. at 2506)); *Valle del Sol v. Whiting*, No. CV 10-1061-PHX-SRB, 2012 U.S. Dist. LEXIS 172196, *42 (D. Ariz. Sept. 5, 2012), *aff'd*, 732 F.3d 1006 (9th Cir. 2013) ("By vesting enforcement discretion with state officials rather than federal officials, A.R.S. § 13-2929 conflicts with federal law and is preempted.").

Columbia Metropolitan Police Department, CIR-12-09 ("Administrative Warrants in NCIC") (2012), *available at* https://go.mpdconline.com/GO/CIR_12_09.pdf (last visited February 11, 2014).

To the extent that Petitioners disagree with the balance struck by Congress and the Executive, as suggested by the petition, the holding of the court of appeals is not the correct target, and review by this Court is not merited. That is the province of policymakers, not the courts.

Curiously, Petitioners also suggest that the holding of the court of appeals impedes efforts to prevent terrorism, based on the case of Ziad Jarrah—one of the September 11, 2001 airline hijackers. Pet. 32-33. But the circumstances of Ziad Jarrah's encounter with law enforcement bear no resemblance to this case. Unlike Ms. Orellana Santos, Jarrah was pulled over for a traffic violation, which provided an independent and lawful basis for a short stop and questions about Jarrah's identity and his immigration status, so long as such questions did not unreasonably prolong the stop. *See Arizona v. United States*, 132 S. Ct. at 2509; *see also* Pet. App. 25-27 (distinguishing *United States v. Guijon-Ortiz*, 660 F.3d 757 (4th Cir. 2011) and *United States v. Soriano-Jarquin*, 492 F.3d 495 (4th Cir. 2007)). However, as Petitioners acknowledge, the "Maryland trooper did not know [and did not discover] that Jarrah had been attending class in violation of his immigration status" or that his "visa had expired more than a year earlier." Pet. 33. Moreover, even an attempt to contact ICE for information on Jarrah's immigration status may not have yielded any relevant information because the INS did not know that he was

out of immigration status when he departed and returned from the country three times. *See* "Entry of the 9/11 Hijackers into the United States," National Commission on Terrorist Attacks Upon the United States, Staff Statement No. 1, at 7, *available at* http://govinfo.library.unt.edu/911/staff_statements/staff_statement_1.pdf (last visited February 6, 2014). Accordingly, the decision of the court of appeals in this case could not have altered the actions of the Maryland trooper who encountered Jarrah.

Petitioners' invocation of the specter of terrorism is especially fanciful and inappropriate in this case. Ms. Orellana Santos is just a mother trying to provide a good life for her children in this country. She was merely eating a sandwich behind her place of work when the armed Deputies approached and questioned her, detained her for at least 20 minutes while they checked her immigration status, and then arrested her solely because they learned of an outstanding civil immigration warrant in her name. She is not even close to the types of immigration law violators that the Federal Government typically seeks to use its limited resources to remove from this country.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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