No. 20-1505

In the Supreme Court of the United States

ZAINAB MERCHANT, ET AL., PETITIONERS

v.

ALEJANDRO N. MAYORKAS,
SECRETARY OF HOMELAND SECURITY, ET AL.

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioners' request for prospective declaratory and injunctive relief, on Fourth Amendment grounds, from policies regarding the inspection of electronic devices carried by travelers crossing U.S. borders.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 988 F.3d 8. The memorandum and order of the district court (Pet. App. 32a-91a) is reported at 419 F. Supp. 3d 142.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 2021. The petition for a writ of certiorari was filed on April 23, 2021. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE), components of the Department of Homeland Security (DHS), are authorized to inspect and examine all indi-

viduals and merchandise—including all types of personal property—entering or departing from the United States. See, *e.g.*, 6 U.S.C. 211; 8 U.S.C. 1225, 1357; 19 U.S.C. 482, 507, 1461, 1496, 1581-1582, 1589a, 1595a; 19 C.F.R. 161.2, 162.6; 22 C.F.R. 127.4. CBP and ICE enforce a wide range of federal laws at the border, such as customs laws relating to the admissibility of merchandise and collection of duties under Title 19 of the United States Code, and immigration laws under Title 8. In addition, CBP and ICE perform certain national-security functions, and are charged with protecting the Nation from "terrorists," "traffickers," smugglers, and "other persons who may undermine the security of the United States." See, *e.g.*, 6 U.S.C. 211(c)(5). And they enforce numerous other laws on behalf of various other federal agencies. See, *e.g.*, 19 C.F.R. 161.2.

With that authority, CBP and ICE enforce a wide range of federal laws at the border—including (but not limited to) laws prohibiting child-pornography possession and distribution; human-rights violations; drug smuggling; weapons trafficking; financial and trade-related crimes; and noncompliance with immigration and customs laws. CBP and ICE also enforce laws relating to national security and terrorism, and they conduct regulatory and enforcement efforts in various areas, such as intellectual-property rights, food and drug safety, agriculture, and vehicle-emissions standards. C.A. App. 221, 238-239.

2. In 2018, CBP issued a directive, and ICE promulgated a policy, that modified their then-existing procedures, respectively, for searches of electronic devices during border inspections. Pet. App. 284a-331a; see *id.* at 6a-8a. Both CBP and ICE permit border officials to conduct an "advanced search" of a device—

defined as "any search in which an [official] connects external equipment, through a wired or wireless connection, to an electronic device not merely to gain access to the device, but to review, copy, and/or analyze its contents," *id.* at 294a; see *id.* at 284a—only with reasonable suspicion of a violation of laws enforced by the agencies, or if a national-security concern exists, and only with supervisory approval, *id.* at 284a-285a, 294a. For other, "basic," searches, the directives do not require particularized suspicion. *Id.* at 284a-285a, 293a-294a, 314a.

Petitioners are eight individuals who allege that their electronic devices were searched by CBP or ICE officials. Pet. App. 8a; see *id.* at 33a, 36a; Pet. ii. Only two of them claim that their devices were searched after the relevant changes in the 2018 CBP and ICE directives took effect, and each of those searches was basic, rather than advanced. Pet. App. 8a. Petitioners collectively sued DHS, CBP, and ICE officials alleging (as relevant) that the CBP and ICE directives violate the Fourth Amendment. *Id.* at 9a. The district court granted summary judgment to petitioners on that claim. *Id.* at 48a-78a. Although it rejected petitioners' contention that basic or advanced searches require a warrant or probable cause, *id.* at 72a-78a, it concluded that any warrantless search of an electronic device at the border requires reasonable suspicion "that the electronic device[]" itself "contains contraband." *Id.* at 74a.

3. The court of appeals affirmed in part, reversed in part, and vacated in part. Pet. App. 1a-28a.

The court of appeals agreed with the district court, as well as "[e]very circuit that has faced th[e] question," that "neither a warrant nor probable cause is required for a border search of electronic devices." Pet. App. 16a; see *id.* at 13a-16a (citing *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); *United States* v. *Cano*, 934 F.3d 1002, 1015-1016 (9th Cir. 2019), petition for cert. pending, No. 20-1043 (filed Jan. 29, 2021); and *United States* v. *Vergara*, 884 F.3d 1309, 1312-1313 (11th Cir.), cert. denied, 139 S. Ct. 70 (2018)); see also, *e.g.*, *United States* v. *Wanjiku*, 919 F.3d 472, 485 (7th Cir. 2019). The court of appeals observed that the constitutionality of warrantless searches at the border has been "recognized from early in our history" and reflects "the government's 'inherent authority to protect, and a paramount interest in protecting, its territorial integrity.'" Pet. App. 14a (quoting *United States* v. *Flores-Montano*, 541 U.S. 149, 153 (2004)). The court further observed that "the Fourth Amendment balance between the interests of the Government and the privacy right of the individual," whose expectation of privacy is "less at the border than in the interior," is "struck much more favorably to the Government at the border." *Ibid.* (quoting *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 539-540 (1985)) (brackets omitted). And the court rejected petitioners' contention that *Riley* v. *California*, 573 U.S. 373 (2014), which addressed the search-incident-to-arrest exception in the context of cell phones, compelled the novel imposition of a border-search warrant requirement here. Pet. App. 14a-16a.

In addition, also in accord with every other circuit that has addressed the issue, but disagreeing with the district court, the court of appeals determined that at least some border searches—including basic searches under the CBP and ICE directives—may be conducted without any particularized suspicion. Pet. App. 16a-19a; see *id.* at 18a (citing *Cano*, 934 F.3d at 1016, and *United States* v. *Touset*, 890 F.3d 1227, 1233 (11th Cir. 2018)); *id.*

at 18a-19a (citing *United States* v. *Kolsuz*, 890 F.3d 133, 146 n.5 (4th Cir. 2018), in turn citing *United States* v. *Ickes*, 393 F.3d 501 (4th Cir. 2005)). The court of appeals observed that, under this Court's precedent, "[a]gents may perform 'routine' searches at the border without reasonable suspicion." *Id.* at 16a (quoting *Montoya de Hernandez*, 473 U.S. at 538, 541). And it explained that, in light of the limited nature of a basic search—which "do[es] not involve an intrusive search of a *person*," which "require[s] an officer to manually traverse the contents of the traveler's electronic device," and which it understood to "not allow government officials to view deleted or encrypted files"—basic searches "are routine searches." *Id.* at 18a.

Finally, the court of appeals rejected petitioners' contention "that border searches of electronic devices 'must be limited to searches for contraband.'" Pet. App. 19a. The court observed that petitioners' argument rested on two premises: first, that the border-search doctrine "extends only to searches aimed at preventing the importation of contraband or entry of inadmissible persons"; and second, that the doctrine "covers only searches for contraband itself, rather than for *evidence* of border-related crimes or contraband." *Ibid.* The court explained that both "premises are incorrect." *Ibid.*; see *id.* at 19a-22a. The court observed that "the government's interest in preventing crime at international borders 'is at its zenith,'" and that "a search for evidence of either contraband or a cross-border crime furthers the purposes of the border search" doctrine. *Id.* at 20a (quoting *Flores-Montano*, 541 U.S. at 152). The court additionally explained that petitioners' proffered distinction between contraband and "evidence of contraband or a border-related crime" is both inconsistent with this Court's

precedent and illogical on its own terms, noting that "[s]earching for evidence is vital to achieving" the border-search doctrine's "purposes of controlling 'who and what may enter the country.'" *Id.* at 21a (quoting *United States* v. *Ramsey*, 431 U.S. 606, 620 (1977)); see *id.* at 21a-22a & n.13.

The court of appeals acknowledged that its rejections of both premises of petitioners' argument for a contraband-only conception of the border-search doctrine "are contrary to the Ninth Circuit's holdings in *United States* v. *Cano*." Pet. App. 22a. In *Cano*, the Ninth Circuit, invoking its own precedent, announced that a "border search must be conducted to enforce importation laws." 934 F.3d at 1013 (citation and internal quotation marks omitted). Proceeding from that premise, the Ninth Circuit concluded that all "cell phone searches at the border, whether manual or forensic, must be limited in scope to a search for digital contraband" on the device itself—not for "mere evidence" of past, present, or future efforts to transport physical contraband or otherwise violate the laws enforced at the border. *Id.* at 1007, 1017; see *id.* at 1016-1021. The court of appeals in this case "c[ould]not agree with [*Cano*'s] narrow view" of the border-search doctrine, noting that the Ninth Circuit had "fail[ed] to appreciate the full range of justifications for the" doctrine, which extend "beyond the prevention of contraband itself entering the country." Pet. App. 22a.

DISCUSSION

Petitioners seek review (Pet. 11-35) of the court of appeals' decision rejecting their Fourth Amendment challenges to the CBP and ICE policies. They principally contend (Pet. 24-32) that the Fourth Amendment requires a warrant, or in the alternative probable cause

or reasonable suspicion, as a prerequisite to any search of an electronic device during a border crossing. The court of appeals correctly rejected that contention; its resolution of that issue does not conflict with any decision of this Court or another court of appeals; and that issue does not warrant this Court's review. As the court of appeals observed, however, its recognition that the scope of the border-search doctrine is not confined solely to searching for digital contraband on the device itself implicates an existing lower-court conflict. Pet. App. 19a-22a. That conflict is the subject of the government's pending petition for a writ of certiorari in *United States* v. *Cano*, No. 20-1043 (filed Jan. 29, 2021) (Gov't *Cano* Pet.), which was filed before the court of appeals' decision in this case. This Court should grant review in *Cano* to resolve that conflict, and hold the petition in this case pending the disposition of *Cano*. If the Court does not grant review in *Cano*, the petition in this case should be denied.

1. As the court of appeals correctly explained, under the border-search doctrine—a "longstanding, historically recognized exception to the Fourth Amendment's" warrant requirement, *United States* v. *Ramsey*, 431 U.S. 606, 621 (1977)—no warrant is required to search an electronic device that a traveler is seeking to carry across the U.S. border. See Pet. App. 13a-21a; see also, *e.g.*, Gov't C.A. Br. 15-19. The court also correctly recognized that, as with other routine searches of a person's effects at the border, the Fourth Amendment does not impose an individualized-suspicion requirement on "basic" searches of such devices during a border crossing. See Pet. App. 16a-19a; see also, *e.g.*, Gov't C.A. Br. 19-40.

The court of appeals' resolution of those issues accords with the decisions of every other court of appeals that has addressed them. As petitioners acknowledge, the Eleventh Circuit has concluded that no particularized suspicion is necessary for any border search of electronic devices, see Pet. 15 (citing *United States* v. *Touset*, 890 F.3d 1227 (2018)), and the Fourth and Ninth Circuits have required varying types of reasonable suspicion only for advanced searches, see *ibid.* (citing *United States* v. *Kolsuz*, 890 F.3d 133 (4th Cir. 2018), and *United States* v. *Cano*, 934 F.3d 1002, 1015-1016 (9th Cir. 2019), petition for cert. pending, No. 20-1043 (filed Jan. 29, 2021)). The decision below, however, did not address whether or what degree of individualized suspicion might be required for an advanced search. See Pet. App. 16a-19a (addressing only basic searches). The current CBP and ICE policies generally require reasonable suspicion or a national-security concern for such searches, and in any event, the only searches that petitioners allege to have occurred under those policies are basic searches. See *id.* at 8a, 13a.

This Court has repeatedly and recently declined to review questions concerning the degree of suspicion that may be required for border searches of electronic devices. *Williams* v. *United States*, 141 S. Ct. 235 (2020) (No. 19-1221); *Vergara* v. *United States*, 139 S. Ct. 70 (2018) (No. 17-8639); *Cotterman* v. *United States*, 571 U.S. 1156 (2014) (No. 13-186). It should follow the same course in this case, which does not implicate any circuit disagreement on that issue.

2. For the reasons explained in the government's petition for a writ of certiorari in *Cano*, the court of appeals also correctly recognized that the scope of a border search

of an electronic device is not limited solely to digital contraband on the device itself. See Pet. App. 19a-22a; Gov't *Cano* Pet. at 13-22. The government's petition in *Cano* highlighted a preexisting and entrenched circuit conflict on that issue. See Gov't *Cano* Pet. at 22-25. The decision below adds to the conflict by expressly rejecting *Cano*'s own flawed conception of the border-search doctrine. Pet. App. 22a. And the scope of that doctrine is a question of considerable practical importance that warrants this Court's review of the Ninth Circuit's outlier decision in that case. See Gov't *Cano* Pet. at 25-27.

The petition for a writ of certiorari in this case should thus be held pending the disposition of *Cano*. As just discussed, no sound basis exists for granting certiorari in this case to review petitioners' principal contentions, and *Cano* would be the superior vehicle for addressing the question that has divided the circuits regarding the scope of the border-search doctrine. Although petitioners acknowledge (Pet. 16-17) the lower-court conflict on the scope of the border-search doctrine, their arguments address that issue only indirectly, in support of reasonable-suspicion arguments. See Pet. 26-30, 34. In contrast to *Cano*, which presents only the scope issue and in which that issue would be outcome-determinative, the scope issue has not played a lead role in petitioners' broadside constitutional challenge to the CBP and ICE policies.

Furthermore, the ancillary treatment of the scope issue in the proceedings below has led to deficiencies in the record that would impede this Court's review of it. The Court has emphasized that Fourth Amendment analysis of a search or seizure requires consideration of "all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537 (1985); see, *e.g.*,

Sibron v. *New York*, 392 U.S. 40, 59 (1968) ("The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case."). The precise circumstances of the alleged searches of petitioners' devices, however, were not developed below and were of little if any relevance to the merits of their primary claim challenging the agencies' policies as facially invalid. Indeed, in the proceedings below, petitioners took the position that the district court "need not address (in discovery, briefing, or adjudication) any factual predicate for [the government's] past searches and confiscations of [petitioners] electronic devices at the border, because [they] s[ought] only prospective injunctive and declaratory relief against [the government's] policies and practices of searches and confiscations." D. Ct. Doc. 58, at 4 (July 9, 2018); see *id.* at 5-7 (similar).

As a result, although the case was decided in a summary-judgment posture, the record contains relatively little detail about the scope of any basic search, the only type of search to which any petitioner has allegedly been subject under the current policies, see Pet. App. 8a. Petitioners have instead provided only cursory descriptions of the manner in which their devices allegedly were searched; indeed, some have simply asserted, without elaboration, that that CBP officers "searched" their cell phones. See Gov't C.A. Br. 7-8 (discussing petitioners' affidavits). The record in *Cano*, in contrast, contains considerable detail about the facts and circumstances of the specific search of the defendant's cell phone, including the portions of the phone that the agents manually accessed and what they did after accessing them. See, *e.g.*, C.A. E.R. at 58-92, 120-134, 136-161, 187-189, 218-221, 214-216, 667-669, 725-732, *United States* v. *Cano*, *supra* (No. 19-50151); C.A. Supp. E.R. at

11, *United States* v. *Cano*, *supra* (No. 19-50151). That well-developed record allowed the Ninth Circuit in that case to give context to its rule by applying it to the facts of that case. See *Cano*, 934 F.3d at 1019-1021.

Here, however, the searches are largely abstractions. Plenary review of this case would therefore be neither a good substitute for, nor a useful addition to, plenary review of the more concrete and focused scope-based controversy in *Cano*. But because the disposition of the government's petition in *Cano* may affect the appropriate disposition of the petition here, the petition in this case should be held pending the disposition of the petition in *Cano*. If the government's petition in *Cano* is granted, the petition in this case should be held pending the Court's disposition of *Cano*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari in this case should be held pending the disposition of the government's petition for a writ of certiorari in *Cano*, No. 20-1043. If the government's petition in *Cano* is granted, the petition in this case should be held pending the Court's decision on the merits in *Cano*. If the government's petition in *Cano* is denied, however, then the petition in this case should also be denied.

Respectfully submitted.

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