No. 19-1221

IN THE

Supreme Court of the United States

DERRICK LUCIUS WILLIAMS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF

On September 2, 2020, the Ninth Circuit denied rehearing and rehearing en banc in *United States v. Cano*, 934 F.3d 1002, 1007, 1020 (9th Cir. 2019) (Bybee, J.), over a dissent by Judge Bennett joined by Judges Callahan, M. Smith, R. Nelson, Bade, and VanDyke. No. 17-50151, 2020 WL 5225702. This development underscores the urgent need for this Court's intervention to resolve the four-way circuit split over the kind of suspicion, if any, that border agents need to conduct a warrantless forensic search of a digital device at the border.

The government previously acknowledged the Fourth, Ninth, Tenth, and Eleventh Circuits' "different approaches." Opp. 11; *see* Opp. 14, 24–25. It contended, however, that "[g]ranting review" in this case to resolve the circuits' "inconsistency" would be "premature" because the government had sought rehearing in *Cano*. Opp. 27. The government was mistaken because one circuit court cannot resolve a four-way split. *See* Reply 3–4. But, in any event, the Ninth Circuit's denial of rehearing confirms that no part of the split will resolve itself. Indeed, Judge Bennett's dissent acknowledges the circuit split and stresses the importance of the question presented. The Court should grant review.

1. The Ninth Circuit's denial of rehearing en banc confirms that only this Court can resolve the circuit conflict. In *Cano*, the Ninth Circuit held that "cell phone searches at the border, whether manual or forensic, must be limited in scope to a search for digital contraband." 934 F.3d at 1007. In opposing cert here, the government contended that "the *Cano* panel's

holding" represents an "outlier position." Opp. 27. Dissenting from the denial of rehearing en banc in *Cano* and quoting the government's Brief in Opposition here, Judge Bennett called the Ninth Circuit's view "that, but far more." *Cano*, 2020 WL 5225702, at *1 & n.3 (quoting Opp. 27). Yet he did not persuade a majority of his colleagues to "eliminate" *Cano*'s rule, as the government had predicted. Opp. 27. There can no longer be any question that *Cano* represents the Ninth Circuit's rule and that the question presented here is ripe for review.

2. Judge Bennett's dissent also confirms that, as the parties agree, the courts of appeals have deeply fractured on the question presented. Judge Bennett explained that the Ninth Circuit's rule in *Cano* has "already been rejected by the Fourth and Tenth Circuits" and that the Eleventh Circuit's cases also "firmly reject the panel's narrow view." *Cano*, 2020 WL 5225702, at *6–7 (Bennett, J., dissenting from denial of rehearing en banc). The dissent highlighted how each court has adopted a different rule:

- Disagreeing with the Ninth Circuit's contraband-only approach, the Fourth Circuit requires a "'transnational' nexus" only "to the sovereign interests underlying the border search exception." *Id.* at *6 & n.12 (quoting *United States v. Aigbekaen*, 943 F.3d 713, 724 (4th Cir. 2019)). Judge Bennett noted that the defendant in *United States v. Kolsuz*, 890 F.3d 133, 136–37 (4th Cir. 2018), "was arrested for violating export laws." *Cano*, 2020 WL 5225702, at *6 (Bennett, J., dissenting from denial of rehearing en banc).

- "[D]eepen[ing] that split," the Tenth Circuit in Mr. Williams' case "found that reasonable suspicion of criminal activity justified a warrantless search of a laptop and cell phone." *Id.* (citing App. 6a–9a). As Judge Bennett explained, the Tenth Circuit "rejected [Mr. Williams'] argument that 'border agents are tasked exclusively with upholding customs laws and rooting out the importation of contraband,' and thus rejected the argument that because the agents did not suspect him of these crimes the agents could not search his electronic devices." *Id.* (citation omitted). But neither the Tenth Circuit's opinion nor Judge Bennett's description of it identified *any* particular offense of which Mr. Williams was suspected, much less a border-related offense. *See id.*; Pet. 13, 34; Reply 10.
- Finally, Judge Bennett explained that the Eleventh Circuit likewise had "firmly reject[ed]" the panel's view in *Cano*, finding that "no reasonable suspicion is necessary for forensic searches of electronic devices at the border," and that *Riley v. California*, 573 U.S. 373 (2014), "has no application at the border." *Cano*, 2020 WL 5225702, at *7 (Bennett, J., dissenting from denial of rehearing en banc) (discussing *United States v. Touset*, 890 F.3d 1227, 1234 (11th Cir. 2018), and *United States v. Vergara*, 884 F.3d 1309, 1312–13 (11th Cir. 2018)).

Judge Bennett's dissent leaves no doubt that the Ninth Circuit's view conflicts with the views of the

Fourth, Tenth, and Eleventh Circuits and that the result in Mr. Williams' case would have been different in the Ninth Circuit. *See* Pet. 34; Reply 10.

Only this Court can resolve the entrenched conflict in the courts of appeals. Until then, given the lack of guidance from this Court, circuit courts' only choice is to deepen the split or skirt the issue through the good-faith exception to the exclusionary rule. *See Cano*, 2020 WL 5225702, at *7 (Bennett, J., dissenting from denial of rehearing en banc) (citing Fifth and Seventh Circuit cases decided on good-faith grounds); *United States v. Aguilar*, No. 19-40554, 2020 WL 5229687, at *3 & n.1 (5th Cir. Sept. 2, 2020) (applying good-faith exception despite *Cano* and "concerns" expressed in Judge Costa's concurrence in *United States v. Molina-Isidoro*, 884 F.3d 287, 295–97 (5th Cir. 2018), "about allowing border cell phone searches for items other than contraband"). But good-faith decisions serve neither travelers nor the government. They merely contribute to the disagreement and perpetuate the uncertainty about the Fourth Amendment's protections. Indeed, although the panel in *Cano* rejected the government's good-faith argument, 934 F.3d at 1021–22, the six dissenters agreed with it, 2020 WL 5225702, at *9 (Bennett, J., dissenting from denial of rehearing en banc). And the Fifth Circuit recently refused to consider *Cano* when applying the good-faith exception because *Cano* "was decided after the search" there in question, *Aguilar*, 2020 WL 5229687, at *3—even though *Cano* was decided after the search in *Cano* itself. In short, border officials do not know what the substantive Fourth Amendment standard is or even what range of good-faith guesses a court might

credit. Absent this Court's intervention, the outcome-determinative disagreement will persist.

3. In Judge Bennett's view, the panel in *Cano* took "a simple case" in which "Cano was found with 31 pounds of cocaine in his truck's spare tire" and reached the wrong result by incorrectly "limit[ing] the government's interest at the border." *Cano*, 2020 WL 5225702, at *7 (Bennett, J., dissenting from denial of rehearing en banc). That approach, Judge Bennett and the dissenters believed, "now *constitutionally bar[s]*" border officials "from forensically searching a traveler's cell phone at the border, even if armed with reasonable suspicion the phone contains evidence of terrorist acts the traveler is about to commit in the United States." *Id.* at *2. The dissenters' alarm, though unfounded for the reasons explained below, underscores the importance of the question presented and the unyielding disagreement among circuit judges that will continue absent this Court's guidance.

The dissenters' substantive concerns are misplaced for several reasons.

First, requiring reasonable suspicion of contraband for a forensic search of digital devices does not prevent the government from "controlling who may enter the country." *Id.* at *2 n.4. Just the opposite. A border officer *must* deny admission to any alien she "knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity." 8 U.S.C. § 1182(a)(3)(B)(i)(II). And citizens (like Mr. Williams) of course have the right to return to this country. If they are terrorists (quite unlike Mr. Williams), they can be arrested and prosecuted accordingly. Enforcing the Fourth Amendment at the border does not disable the government from

fighting crime—even serious crime—any more than enforcing the Constitution inside the United States.

Second, requiring reasonable suspicion of digital contraband does not require border agents to ignore evidence of terrorism. Even under the Ninth Circuit's rule, border agents generally can search anything but digital devices without suspicion. *Cano*, 934 F.3d at 1012. And the Ninth Circuit's rule doesn't prevent forensic searches of suspected terrorists' digital devices. It just requires a warrant. The very facts of *Cano*—where border officials "arrested Cano and seized his cell phone" and "then called Homeland Security Investigations, which dispatched two agents to investigate," 2020 WL 5225702, at *2 (Bennett, J., dissenting from denial of rehearing en banc)—show that obtaining a warrant would have been quick and straightforward, as the panel explained, 934 F.3d at 1020.

Finally, the dissenters (like the Eleventh Circuit) gave implausibly short shrift to this Court's reasoning in *Riley* that a smartphone "not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is." 573 U.S. at 396–97; *compare Cano*, 2020 WL 5225702, at *3 n.7, *5 n.9, *7 (Bennett, J., dissenting from denial of rehearing en banc), *and Touset*, 890 F.3d at 1234 (11th Cir.), *with Cano*, 934 F.3d at 1011, 1015–16, 1020, *and Aigbekaen*, 943 F.3d at 721–23 (4th Cir.). In the dissenters' view, *Riley*'s reasoning is limited "to the search incident to arrest exception." *Cano*, 2020 WL 5225702, at *3 n.7 (Bennett, J., dissenting from denial of rehearing en banc). Thus, they opined, a forensic search of digital data at the border is sufficiently similar to "a 'routine' search of a vehicle,"

or "ship searches" "by the Crown," to likewise require no particularized suspicion. *Id.* at *5 & n.9, *7 (first quoting *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004)). But that's "like saying a ride on horseback is materially indistinguishable from a flight to the moon." *Riley*, 573 U.S. at 393.

* * *

This case presents an entrenched four-way split. There can no longer be any argument that this Court should let the issue percolate. Both the Fourth and Ninth Circuits have now denied the government's rehearing requests, which themselves only confirm the government's own urgent interest in the question presented. And circuit judges—now in thirteen majority and separate opinions—have detailed every conceivable answer to the question presented.

This case is an excellent vehicle. As Judge Bennett explained, under the Ninth Circuit's rule, "the only permissible forensic search at the border is one for child pornography," and "only if agents have reasonable suspicion the phone contains child pornography." *Id.* at *1 (emphasis omitted). But there is no suggestion here that border agents suspected that Mr. Williams' digital devices contained child pornography. Nor, as Mr. Williams has explained, was there any articulable suspicion of a border-related offense, as the Fourth Circuit requires. Pet. 34; Reply 10. And there is no good-faith ruling to insulate the Tenth Circuit's decision from this Court's review.

In short, the government agrees with Mr. Williams that there is a split on an issue of indisputably great significance. There is no need—or warrant—to wait for another case, or for the government to decide

whether it has the appetite to seek review in *Cano* after this Court's decisions in *Riley*; *Carpenter v. United States*, 138 S. Ct. 2206 (2018); and *United States v. Jones*, 565 U.S. 400 (2012). This case is an unusually clean vehicle for addressing a critically important issue. The Court should grant review without delay.

CONCLUSION

The Petition should be granted.

September 8, 2020

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