

No. 20-4159

IN THE

**United States Court of Appeals
for the Fourth Circuit**

UNITED STATES OF AMERICA,
Appellee,

v.

MARCIO SANTOS-PORTILLO,
Appellant.

On Appeal from the United States District Court
for the Eastern District of North Carolina (Howard, J.)

BRIEF FOR APPELLANT

G. ALAN DuBOIS
FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF NORTH CAROLINA

ERIC BRIGNAC
CHIEF APPELLATE ATTORNEY
JAMES E. TODD, JR.
ASSISTANT FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF NORTH CAROLINA
150 Fayetteville Street, Suite 450
Raleigh, NC 27601
(919) 856-4236

June 3, 2020

Counsel for Appellant

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INTRODUCTION

Congress limits the authority of Immigration and Customs Enforcement (“ICE”) agents to arrest people without a warrant, and permits warrantless arrests only in certain defined situations. This appeal is about the widespread and openly admitted practice of ICE agents in the Eastern District of North Carolina of ignoring Congress. The agents routinely conduct warrantless arrests with no regard to their lack of authority to do so.

Here, agents arrested Santos-Portillo without a warrant. The United States then charged him with illegally re-entering the United States. Santos-Portillo moved to suppress the evidence that directly resulted from his warrantless arrest. The district court agreed that the arrest was illegal and lacked statutory authority. But it denied the suppression motion, holding that it lacked the power to suppress evidence resulting from an illegal arrest if that arrest did not also violate the Fourth Amendment.

The district court erred because courts have the supervisory authority to suppress illegally obtained evidence even if the government’s illegal conduct does not rise to the level of a Fourth Amendment violation. And courts should exercise that authority in situations like this one—where executive branch actors flagrantly disregard Congress’s instructions.

This Court should vacate Santos-Portillo’s conviction and remand this case with instructions to suppress the evidence that resulted from the illegal arrest.

STATEMENT OF JURISDICTION

The district court had jurisdiction over the criminal prosecution under 18 U.S.C. § 3231 and 8 U.S.C. § 1326. The court entered its final judgment on February 12, 2020. JA 404. Mr. Santos-Portillo timely appealed on February 21, 2020. JA 412. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

This appeal presents two issues.

Whether the district court erred by holding that an unlawful arrest must also violate a constitutional right to exercise supervisory authority to suppress evidence.

Whether widespread statutory violations or those that implicate constitutional interests warrant suppression of evidence resulting from these violations under a court's supervisory authority.

STATEMENT OF THE CASE

Procedural History

In January 2018, ICE agents arrested Santos-Portillo without a warrant. JA 36-37, 119, 146. Agents filed a criminal complaint the next day, charging him with illegal re-entry, in violation of 8 U.S.C. § 1326(a). JA 18, 142. Later that month, a federal grand jury in the Eastern District of North Carolina returned a single-count indictment for the same charge. JA 25.

Santos-Portillo moved to suppress the evidence that resulted from his warrantless arrest. JA. 63. After an evidentiary hearing, the magistrate judge issued a

Memorandum and Recommendation (“M & R”), recommending denial of the motion. JA 70-98, 230-245. Santos-Portillo objected. The Government did not. JA 12, 246. On July 10, 2019, the district court adopted the M & R. JA 257-259.

On July 30, 2019, Santos-Portillo notified the court that the Government would not consent to a conditional plea agreement that preserved the suppression issue for appeal. JA 260. He therefore entered a plea of not guilty on August 5, 2019. JA 265, 280. Following arraignment, Santos-Portillo filed a waiver of trial by jury. JA 263. The Government did not consent to a bench trial, so the case went to trial before a jury. JA 280, 288. The jury returned a guilty verdict. JA 370-372.

Before trial, Santos-Portillo raised a standing objection to the admission of evidence that was the subject of his suppression motion. JA 284-285. The Court overruled the standing objection, noting Santos-Portillo had preserved the evidentiary challenges related to the suppression motion. JA 446, 450-451.

Following the verdict, the court imposed a time-served sentence of fifteen months of imprisonment. JA 399, 405. That same day, ICE agents took Santos-Portillo into custody for deportation. JA 397-398.

This timely appeal followed. JA 412.

*Facts**A. Immigration Agents Arrested Santos-Portillo, Without a Warrant, to Obtain his Fingerprints and Pursue Criminal Prosecution for Illegal Re-entry.*

On January 9, 2018, ICE Agent Thomas Swivel observed a Hispanic male leaving a store in Wilmington, North Carolina. JA 21, 32, 35-36. According to Swivel, he mistakenly thought he had previously encountered this man. JA 32, 36, 108, 299-300. But Swivel could not later recall the identity or nationality of this other person from the previous encounter. JA 313-314. When the Hispanic male got into a car, Agent Swivel ran the license plates and registration. JA 36, 108, 299-300. This check listed Marcio Santos-Portillo as the registered owner of the vehicle, along with his American citizen wife, Bobbi Santos. JA 50, 109, 114. The vehicle registration also noted the home address of the couple. JA 21, 109, 114.

Agent Swivel then did a name-search on other law enforcement and immigration databases. JA 36. This search yielded records of a prior deportation from 2011 and a 2010 Texas conviction for fleeing to elude. JA 32-33, 108-112. Agent Swivel also accessed a database with portions of an immigration alien file (“A-File”) associated with a Marcio Santos-Portillo. JA 108, 113, 300. These portions included a 2011 deportation order and a photograph of the person deported. JA 110, 112-113.

On January 11, 2018, Agent Swivel drove to the registered address of the car he had seen January 9th. JA 113-114, 302. He saw the car but saw no one. JA 114, 134,

302. Between January 11th and 15th, Agent Swivel coordinated with other agents to arrest Santos-Portillo at this residence. JA 135-136, 138-139.

At around 6:00 a.m. on January 16, 2018, Agent Swivel, along with four other agents in two vehicles, staked out the residence. JA 114-115, 134-135, 152. A third vehicle parked in the lot of a Hardees' restaurant down the road. JA 137-138, 154-155. When the agents at the stakeout saw Santos-Portillo come out of the house, they converged on the property. JA 136-137, 153-154, 159-161. One of the agents' vehicles pulled up directly behind Santos-Portillo's car, blocking its exit. JA 136-137, 161, 167-168. Agent Swivel walked over from his vehicle parked next to the residence and confronted Santos-Portillo. JA 137.

Agent Swivel immediately asked him for his name and country of origin. JA 117, 302-303. Santos-Portillo gave his name and said he was from Honduras. JA 117, 303. Swivel then handcuffed Santos-Portillo and took him to the Wilmington ICE office. JA 118, 120, 140. Upon arrival, Agent Swivel took Santos-Portillo's fingerprints and submitted them to various law enforcement and immigration databases.¹ JA 108, 120, 140, 305. This returned a presumptive match with fingerprints from those databases that identified Santos-Portillo as a previously deported alien. JA 32-33, 120. Agent Swivel then *Mirandized* and interrogated Santos-Portillo. JA 34, 120-121, 141, 305-306. He again gave his name, date of birth, country of origin, acknowledged a

¹ Presumably, these databases used the FBI's Integrated Automated Fingerprint Identification System ("IAFIS").

prior deportation to Honduras, and admitted he had not obtained permission to return to the United States. JA 34-35, 120-121, 141-142.

Based on the presumptive match between the prints taken on January 16, 2018, and those from the immigration databases, Agent Swivel presented the case to the U.S. Attorney's Office for criminal prosecution. JA 120-122, 140-141. That Office's policy required such a biometric match before it would accept an illegal re-entry case for prosecution. JA 121-122, 141. Once agents obtained this match, policy required them to pursue criminal prosecution, rather than begin deportation proceedings. JA 121-122, 141. Thus, Agent Swivel swore out a criminal complaint on January 17, 2018, charging Santos-Portillo with illegal re-entry, 8 U.S.C. § 1326(a). JA 18, 142.

At the detention hearing on February 5, 2018, Agent Swivel testified that he neither sought nor secured an administrative warrant to arrest Santos-Portillo. JA 36-37.² He said agents never get a warrant to arrest a person believed to have a prior deportation. When asked, "Do you ever get arrest warrants? Or is it generally the nature of the crime that you do these arrests without a warrant?," Swivel answered, "Generally, we encounter people administratively. And, due to his prior deportation, there was an administrative arrest warrant in the A-File. . . . But – no." JA 36-37.³

² Santos-Portillo remained in custody until May 13, 2019, when the court released him on conditions, after he had been in custody for 15 months. JA 11-12, 373, 460, 463.

³ Referring to an I-200 warrant executed before the 2011 deportation. It authorizes an immigration officer to take an "alien into custody for proceedings in accordance with the applicable provisions of the immigration laws and regulations." JA 84.

B. The District Court Rules the Warrantless Arrest Violated 8 U.S.C. § 1357, but Denies Motion to Suppress Based Solely on Finding the Illegal Arrest did not Violate the Fourth Amendment.

1. March 7, 2018 Motion to Suppress. JA 63.

Santos-Portillo moved to suppress “all identity evidence, fingerprint evidence, post-seizure statements, and evidence of prior immigration encounters or deportations contained in the Immigration A-File linked to the fingerprints obtained following the January 16, 2018 arrest.” JA 63, 67.

Santos-Portillo contended the warrantless arrest violated 8 U.S.C. § 1357, which requires both a “reason to believe that the person so arrested is guilty of a felony,” and that “there is [a] likelihood of the person escaping before a warrant can be obtained,” § 1357(a)(4). JA 65.⁴ The statute “requires that INS must have reasonable belief both that the alien is in the country illegally *and* that the alien is likely to escape before a warrant can be obtained.” *United States v. Harrison*, 168 F.3d 483 (table), 1999 WL 26921, at *4 (4th Cir. Jan. 25, 1999) (unpublished) (emphasis in original); *United States v. Cantu*, 519 F.2d 494, 496-97 (7th Cir. 1975) (the likelihood-of-escape requirement “is always seriously applied”). JA 65.

⁴ Section 1357(a)(4) controls criminal arrests for immigration felonies. The statute also limits warrantless administrative arrests for immigration violations. *See* § 1357(a)(2) (must have “reason to believe” a person “is likely to escape before a warrant can be obtained”).

Focusing on the likelihood-of-escape requirement, Santos-Portillo contended agents had ample time to obtain a warrant, and no reason to believe he would flee from his residence prior to January 16, 2018. JA 65-66.

Anticipating the Government would argue that this statutory violation could not warrant suppression, Santos-Portillo emphasized that judicial supervisory authority permitted suppression in his case, citing supporting Supreme Court precedent. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348-49 (2006) (suppression is a proper remedy where “the excluded evidence arose directly out of statutory violations that implicated important Fourth and Fifth Amendment interests”); *Miller v. United States*, 357 U.S. 301 (1958) (suppressing evidence obtained incident to an arrest that violated 18 U.S.C. § 3109’s proscription of no-knock search warrant). JA 66.

Santos-Portillo also emphasized the importance of suppression in this case as a proper exercise of supervisory authority. JA 66. Agent Swivel’s testimony at the detention hearing highlighted a widespread warrantless arrest practice that contravened the requirements of Section 1357. JA 36-37, 66. Failing to remedy the agents’ unlawful warrantless arrest would foster an executive agency’s continued disregard of a Congressional mandate. JA 66.

The Government argued that agents did not need a warrant to arrest Santos-Portillo in 2018, asserting the 2011 deportation order “was all the agents needed to make the administrative arrest.” JA 75. The Government also asserted its agents had dual authority as customs agents to execute a warrantless arrest based on probable

cause alone, without adhering to Section 1357's likelihood-of-escape requirement. JA 96 (citing 19 U.S.C. § 1589a). In short, the Government argued, "Title 8 U.S.C. § 1357 does not apply." JA 95.

2. May 2, 2018 Suppression Hearing. JA 98.

Agent Swivel again recounted the events from January 9-11, prompting his arrest of Santos-Portillo on January 16. JA 108-114. He accessed portions of the A-File that had the deportation documents from 2011, records of the 2010 Texas conviction, and a photograph of the person deported in 2011. JA 110-112.

On direct, Swivel testified that he still needed to obtain Santos-Portillo's fingerprints, "to further confirm his identity." JA 112. He explained, "Sometimes, the pictures in the files and databases are vastly different from what people might look like currently." JA 112-113. He therefore arrested Santos-Portillo to "confirm his identity via fingerprint biometric match." JA 118-119. According to Swivel, standard practice called for obtaining "a positive biometric match prior to presenting the case for criminal prosecution." JA 121. He explained, "It is because the U.S. Attorney's Office in the Eastern District of North Carolina maintains that threshold of some type of biometric match to do a criminal prosecution." JA 121-122.

On cross, Agent Swivel was asked, "And that was part of your plan, was not just to take him into custody and deport him, but your plan was if there's a [fingerprint] match go ahead and present the case for prosecution; correct?" He confirmed this was the plan, stating, "If there's a match on re-entry, yes." JA 141, 150-

151. This policy to prosecute every re-entry case with a biometric match had increased Agent Swivel's caseload by "about 80 percent in the last six months." JA 141.

Santos-Portillo's wife, Bobbi Santos, and brother-in-law, Timothy Bannister, testified to what each observed when agents arrested him. JA 151-169. Bannister saw "these vehicles, one is pulled in, and four guys, five guys, had Marcio surrounded at his vehicle where he was starting his truck to go to work." JA 153. One of the agents' vehicles parked "right behind Bobbi and Marcio's vehicles." JA 153. Bobbi Santos explained that this agent's car blocked the couple's two vehicles, making it impossible for her husband to leave in his car. JA 160-161, 168-169.

3. District Court Denies Suppression Motion Solely Because Unlawful Arrest did not Violate the Fourth Amendment. JA 257.

On May 31, 2019, the assigned magistrate judge issued a Memorandum and Recommendation ("M & R"), finding the warrantless arrest of Santos-Portillo was unlawful, but still recommending denial of his motion. JA 230-245. The M & R determined "that the agents violated 8 U.S.C. § 1357 by failing to obtain a warrant prior to arresting Santos-Portillo." JA 241. The court found "the second prong of § 1357 – that agents had reason to believe Santos-Portillo was likely to escape before a warrant could be obtained – has not been satisfied." JA 238.

In finding that the agents violated Section 1357, the M & R relied on another case from the Eastern District of North Carolina that presented the identical

suppression issue, *United States v. Segura-Gomez*, No. 4:17-CR-65-FL, 2018 WL 6582823 (E.D.N.C. May 15, 2018). JA 236-242.

The court rejected the Government's argument "that Santos-Portillo was subject to warrantless arrest based upon the 2011 order of removal." JA 239. The court held, "the 'prior removal order is not a surrogate for an arrest warrant.'" JA 239 (quoting *Segura-Gomez*, 2018 WL 6582823, at *8). In support, the court referenced the Fourth Amendment's warrant requirement, reasoning, "To permit agents to rely on a removal order as an arrest warrant would eliminate the evaluation 'by a neutral and detached judicial officer' demanded by our Fourth Amendment jurisprudence." JA 239 (quoting *Illinois v. Gates*, 462 US 213, 240 (1983)).

The magistrate also rejected the Government's alternative argument that the arresting agents had "Title 19 authority as customs officers to make warrantless arrests even absent likelihood of escape." JA 240. The court stated, "The Government provides no caselaw or regulatory authority for its position[.]" JA 241.

Despite finding the agents unlawfully arrested Santos-Portillo, the magistrate declined to recommend suppression, based solely on the determination that a constitutional violation must accompany a statutory violation. JA 242 ("In determining whether to suppress evidence in violation of § 1357, courts must therefore look to the reasonableness of the arrest under the Fourth Amendment."). Because the court found the unlawful seizure of Santos-Portillo "was consistent with the Fourth Amendment . . ., [the] motion to suppress should be denied." JA 244.

Santos-Portillo objected to the M & R on legal grounds. JA 246-248. He contended that Supreme Court precedent on the permissible exercise of judicial supervisory authority did not mandate that a constitutional violation accompany a statutory violation as a requirement to suppress unlawfully obtained evidence. JA 246-249 (citing *Sanchez-Llamas*, 548 U.S. at 348-49; *Miller*, 357 U.S. at 306, 313; and *McNabb v. United States*, 318 U.S. 332, 341 (1943)).

Santos-Portillo also cited this Court's unpublished opinion from *United States v. Sanders*, which concluded a court could exercise supervisory authority to suppress evidence to correct "widespread or repeated violations," as in this case, 104 Fed. App'x 916, 921 (4th Cir. 2004) (quoting *United States v. Walden*, 490 F.2d 372, 377 (4th Cir. 1974)). JA 251-252.

The district court adopted the M & R "as its own," and denied Santos-Portillo's motion to suppress. JA 259. The court held, "the magistrate correctly states the law that there is 'no exclusionary rule generally applicable to statutory violations.'" JA 258 (quoting *Segura-Gomez*, 2018 WL 6259222, at *4 (E.D.N.C. Nov. 30, 2018); and *United States v. Clenney*, 631 F.3d 658, 667 (4th Cir. 2011)). The district court also held that the unlawful arrest of Santos-Portillo did not permit suppression of evidence, because "the arrest was not in violation of the Fourth Amendment." JA 258.

C. At Trial, Government Relied on Fingerprints Taken After Unlawful Arrest, Attendant Record Evidence Linked to Those Prints, and Post-Arrest Statements and Documents.

The Government relied heavily on the disputed evidence at trial.

Agent Swivel summarized the preliminary investigation he conducted January 9-11, 2018. JA 299-302. He accessed an electronic database from the immigration A-File associated with a Marcio Santos-Portillo, and retrieved a photograph and fingerprints taken before a deportation in 2011. JA 301-302, 308.

Agent Swivel also recounted the arrest of Santos-Portillo on January 16. Just after confronting Santos-Portillo outside his residence, Swivel asked for his name and country of birth. JA 303. As soon as Santos-Portillo gave his name and said he was born in Honduras, Agent Swivel said, “you have to come with us.” *Id.* Once at the ICE office, Swivel took Santos-Portillo’s fingerprints. JA 305. When asked why he took those fingerprints, Swivel explained:

Because we take fingerprints and then we submit them to various databases, and after their submission, it will return information on that person, because sometimes there’s different names for different persons. But Mr. Santos-Portillo’s fingerprints returned to a previously deported alien.

JA 310-311. On cross, when asked whether “that match that came back from the database was what started this criminal prosecution,” Agent Swivel answered, “Yes.” JA 314. Swivel testified that he later submitted the fingerprints taken January 16, 2018 and those from 2010 and 2011 to the Raleigh/Wake County City County Bureaus of Investigation (“CCBI”) for comparison and analysis. JA 313, 317.

Agent Swivel told the jury of Santos-Portillo’s post-arrest admissions – that he had been previously deported to Honduras, never requested permission to return to the United States, and knew his return was illegal. JA 305-306. Through Swivel, the

Government also entered into evidence a Honduran passport seized from Santos-Portillo after his arrest, and two documents from the A-File – the 2011 deportation order and deportation warrant. JA 317-318, 376-384 (Gov’t Exs. 2-6).

The Government’s fingerprint expert, Lukas Feldbusch, a CCBI forensic examiner, then testified. JA 317-322. He compared the prints taken by Agent Swivel on January 16, 2018, with those from two documents in the A-File -- the 2011 deportation warrant and a 2010 print card. JA 323-326, 380-384. Based on this comparison, Feldbusch opined that these three “originated from the same source.” JA 326, 385-391 (Gov’t Exs. 7 & 8). On cross, Feldbusch clarified that the prints taken on January 16, 2018 were the “known standard” used for his comparison. JA 327-328.

The Government’s last witness, ICE Agent Christopher Brant, testified about his review of certain documents from the A-File associated with Marcio Santos-Portillo. JA 329-342. These documents included a Honduran birth certificate, the 2011 deportation warrant, and a record of Santos-Portillo’s admissions to Agent Swivel. JA 333-335, 341, 375 (Gov’t Ex. 1).

In its closing argument, Government’s counsel relied on Santos-Portillo’s post-arrest statements and the fingerprints taken January 16, 2018. JA 352-355. He stressed those fingerprints, stating, “What’s important about that fingerprint is that Mr. Feldbusch told you that that fingerprint matched the known standard, which was the known from the arrest of when Agent Swivel arrested the defendant in January of 2018.” JA 353-354. Counsel repeated the importance of the post-arrest fingerprints:

And you know that it's the same person that was deported, once again, because of the fingerprints that Agent Swivel took from the defendant in January of 2018 matched the fingerprints from the 2011 incident and also matched the deportation forms, so you know that the defendant did re-enter the country.

JA 354. The jury returned a guilty verdict. JA 370-371.

On February 12, 2020, the court imposed a time-served sentence of 15 months. JA 399, 405. Right after sentencing, ICE agents took Santos-Portillo into immigration custody for deportation. JA 397-398.

This timely appeal followed. JA 412.

SUMMARY OF ARGUMENT

Congress limits an ICE agent's warrantless arrest authority. They must have probable cause of an immigration violation or offense, and probable cause that a person is likely to escape before a warrant can be obtained. 8 U.S.C. §§ 1357(a)(2),(4).

Here, the district court held the warrantless arrest of Santos-Portillo violated this statute because the ICE agents had plenty of time to secure a warrant. But the court denied his suppression motion, holding it lacked authority to suppress evidence resulting from an illegal arrest unless that arrest also violated the Fourth Amendment.

In so holding, the district court erred. The Supreme Court and this Court have recognized that in certain cases a statutory violation, standing alone, warrants suppression of evidence under a court's supervisory authority.

First, a court can exercise supervisory authority to suppress evidence resulting from a statutory violation that implicates constitutional interests, even if the statutory violation does not actually violate the constitution.

ICE's illegal arrest of Santos-Portillo meets this standard. Section 1357 has the same probable cause standard and shares the same purpose as the Fourth Amendment – to ensure a “neutral and detached” official decides probable cause, not the arresting ICE agent. The Government used the fingerprints and admissions gathered from the unlawful arrest to prosecute Santos-Portillo and to secure a conviction. Thus, this statutory violation implicates important Fourth Amendment interests.

Second, widespread statutory violations also permit the use of the judiciary's supervisory authority to suppress evidence. The illegal arrest here reflects ICE's widespread unlawful warrantless arrest practice. The agents' own testimony revealed that ICE routinely violates Section 1357 by *never* getting a warrant to arrest someone with a prior deportation. The Government's argument that Section 1357 does not apply to these warrantless arrests – an argument rejected by the court as unsupported by any authority – shows these widespread violations are also systemic.

Given ICE's widespread and systemic disregard for Congress, suppression of the unlawfully obtained evidence fulfills the purpose of supervisory authority, to remedy ICE's illegal arrest practices, and deter continued violations.

ARGUMENT

GIVEN ICE's WIDESPREAD PRACTICE OF UNLAWFUL WARRANTLESS ARRESTS, THE DISTRICT COURT ERRED BY REFUSING TO EXERCISE SUPERVISORY AUTHORITY TO SUPPRESS EVIDENCE OBTAINED FROM THE WARRANTLESS ARREST OF SANTOS-PORTILLO, BASED SOLELY ON HOLDING THIS UNLAWFUL ARREST DID NOT VIOLATE THE FOURTH AMENDMENT.

Standard of Review

This appeal challenges the district court's legal basis for denying the motion to suppress. Thus, this Court's review is de novo. *United States v. Davis*, 690 F.3d 226, 233 (4th Cir. 2012) ("We review the factual findings underlying a motion to suppress for clear error and the district court's legal determinations de novo."). A court's exercise of supervisory authority is reviewed for abuse of discretion. *Sanders*, 104 Fed. App'x at 921. A lower court abuses its supervisory authority discretion when its denial of a suppression motion was "guided by erroneous legal principles." *Id.* (quoting *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999)).

Argument

A. Supreme Court Precedent Does not Require That a Constitutional Violation Accompany a Statutory Violation to Permit Suppression of Evidence Pursuant to Supervisory Authority.

The district court agreed with Santos-Portillo that ICE agents lacked authority to arrest him. The district court still denied Santos-Portillo's motion to suppress the evidence stemming from that arrest based on the mistaken premise that a constitutional violation must always accompany a statutory violation to warrant exercise of the supervisory authority to suppress evidence. *Supra* at 11-12.

The district court was wrong. While most instances of courts suppressing evidence result from constitutional violations, the Supreme Court has recognized the authority of courts to suppress evidence that results from statutory violations. And courts should exercise that authority in cases like this one where the statutory violation implicates constitutional interests.

In *McNabb*, the Supreme Court stated, “The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution.” 318 U.S. at 341. In *Sanchez-Llamas*, the Court distinguished cases that warranted suppression based on a constitutional violation from those involving a statutory violation. The Court first noted, “We have applied the exclusionary rule primarily to deter constitutional violations.” 318 U.S. at 348. But the Court then separately addressed “[t]he few cases in which we have suppressed evidence for statutory violations[.]” *Id.*

Sanchez-Llamas explained that in cases involving a statutory violation, “the excluded evidence arose directly out of ***statutory violations that implicated important Fourth and Fifth Amendment interests.***” *Id.* (emphasis added). *Sanchez-Llamas* did not say statutory violations that *violated* Fourth or Fifth Amendment *rights*. The use of “implicated” – not violated – and “interests” – not rights – shows that a statutory violation need not amount to the violation of a constitutional right. If the Supreme Court only permitted suppression under supervisory authority where a

constitutional violation occurred, *Sanchez-Llamas* did not need to separately address cases involving a statutory violation.

The cases *Sanchez-Llamas* cites – *Miller* and *McNabb* – show that a violation of a statute or rule by law enforcement warrants suppression of evidence that “arose directly out of” that violation, and does not separately require a constitutional violation. *Sanchez-Llamas*, 548 U.S. at 348-49.

In *Miller*, the Court excluded evidence obtained from a warrantless arrest that did not comply with a ‘knock-and-announce’ rule established by the “courts of the District of Columbia.” 357 U.S. at 306. *Miller* did not address a constitutional violation, and still invoked supervisory authority to suppress evidence, explaining:

However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of criminal law proves that the tolerance of shortcut methods in law enforcement impairs its enduring effectiveness.

357 U.S. at 313.

Similarly, in *McNabb*, the Court did not rely on a constitutional violation. Rather, the Court excluded a confession because the interrogating agents violated a federal presentment statute. 318 U.S. at 341 (“Quite apart from the Constitution, therefore, we are constrained to hold the evidence elicited from the petitioners in the circumstances disclosed here must be excluded.”); *see also*, *Corley v. United States*, 556 U.S. 303, 307 (2009) (explaining that in *McNabb*, “we saw no need to reach any constitutional issue”).

In denying Santos-Portillo’s motion to suppress, the district court misconstrued the phrase, “there is ‘no exclusionary rule generally applicable to statutory violations,’” to mean a categorical bar to the exercise of supervisory authority to remedy a statutory violation. JA 258 (quoting *Segura-Gomez*, 2018 WL 6259222, at *4, and *Clenney*, 631 F.3d at 667). That the Fourth Amendment’s exclusionary rule is not “generally applicable” to statutory violations, does not mean a court can *never* exercise its distinct supervisory authority to suppress evidence absent a constitutional violation.

In sum, the court below correctly concluded that the warrantless arrest of Santos-Portillo violated 8 U.S.C. § 1357. JA 241, 258-259. But the recommended denial of his suppression motion “was guided by erroneous legal principles,” *Sanders*, 104 Fed. App’x at 921. Specifically, the district court erred by concluding a constitutional violation must always accompany a statutory violation before a court can exercise supervisory authority to suppress evidence.

Because of this legal error, the district court did not apply the proper standard to determine whether to exercise its supervisory authority. The court should have evaluated whether the unlawful arrest implicated important constitutional interests, and whether widespread violations of § 1357 permitted suppression of evidence.

B. An Arrest That Violates § 1357 Implicates Constitutional Interests.

To determine whether the unlawful arrest of Santos-Portillo permits suppression, the proper legal standard is whether that violation “implicated important

Fourth and Fifth Amendment interests.” *Sanchez-Llamas*, 548 U.S. at 348. *Sanchez-Llamas* explained this standard by noting the statute or rule violated should be “responsive to the same considerations” underlying Fourth or Fifth Amendment “constitutional polic[ies].” *Id.* (quoting *McNabb*, 348 U.S. at 463). *Sanchez-Llamas* also explained that the statutory violation should be “connected to the gathering of evidence.” *Id.* at 349. Both these components that *Sanchez-Llamas* identifies as warranting suppression for a statutory violation are present here.

First, Section 1357's warrant requirement is “responsive to the same considerations” underlying Fourth Amendment policies. The statute incorporates the same probable cause standard as the Fourth Amendment. *Morales v. Chadborne*, 793 F.3d 208, 216 (1st Cir. 2015) (“Courts have consistently held that the ‘reason to believe’ phrase in §1357 must be considered the equivalent of probable cause.”); *see also*, M & R (“[T]he phrase ‘reason to believe’ is equivalent to constitutionally required probable cause.”) (quoting *Segura-Gomez*, 2018 WL 6582823, at *6)). JA 236.⁵

Not only does the same standard apply to the statutory and constitutional warrant requirements, both share a common purpose – to ensure a “neutral and detached” official makes the requisite probable cause decisions, not the arresting

⁵ The statute’s criminal arrest provision also incorporates the presentment requirements of Rule 5(a), Fed. R. Crim. P., and the Fourth Amendment. *United States v. Chavez*, 705 F.3d 381, 384 (8th Cir. 2013) (“Rule 5(a) applies” to § 1357(a)(4) criminal arrests.); *United States v. Encarnacion*, 239 F.3d 395, 398 & n.2 (1st Cir. 2001) (“Rule 5(a) incorporates the Fourth Amendment’s requirement of prompt determination of probable cause.”).

agent. *Gates*, 462 U.S. at 240. Even the magistrate noted this connection. In rejecting the Government's argument that Section 1357 did not apply, the M & R cited the warrant requirement "demanded by our Fourth Amendment jurisprudence." JA 239-240 ("The essential protection of the warrant requirement of the Fourth Amendment" guards against judgment by "the officer engaged in the often competitive enterprise of ferreting out crime," quoting *Gates*, 462 U.S. at 240).

Second, the unlawful arrest of Santos-Portillo was "connected to gathering of evidence" used to prosecute and convict him, *Sanchez-Llamas*, 548 U.S. at 349. The fingerprints taken after the unlawful arrest provided the essential proof the agents needed to present the case for prosecution. At trial, the Government used these prints to connect Santos-Portillo to the records of the prior deportation. *Supra* at 9-10, 13-15. The Government also used his post-arrest admissions and the seized passport. *Id.*

The evidence gathered post-arrest, together with the shared standards and purposes of Section 1357 and the Fourth Amendment, show that failure to comply with the former "is responsive to the same considerations" of the latter. *Sanchez-Llamas*, 548 U.S. at 348.

The widespread and systemic disregard of Section 1357 by an executive agency, *infra* at 23-26, also implicate Fifth Amendment due process interests. *Galvan v. Press*, 347 U.S. 522, 531 (1954) (stating, "fair play . . . is the essence of due process"). ICE's disregard for a Congressional mandate is contrary to the dictates of due process.

Galvan, 347 U.S. at 531. (“In the enforcement of these [immigration] policies, the Executive Branch must respect the procedural safeguards of due process.”).

In *Bridges v. Wixon*, the Supreme Court relied on due process interests to exclude an alien’s statements in an immigration proceeding, where the immigration officials did not abide by controlling regulations. 326 U.S. 135, 150 (1945) (noting unlawfully obtained statements are a “practice which runs counter to the notions of fairness on which are legal system is founded”). The Court cautioned, “Meticulous care must be exercised lest the procedure by which he is deprived of liberty not meet the essential standards of fairness.” *Id.* at 154.

It is certainly not “fair play” for ICE to habitually violate one provision of Title 8, Section 1357, so the Government can prosecute someone for another violation of that same Title, Section 1326.

C. ICE’s Widespread and Systemic Statutory Violations Permit Exercise of the Court’s Supervisory Authority.

Though “not to be invoked in every case of illegality,” a court can suppress evidence under its supervisory authority to correct “widespread or repeated violations.” *Sanders*, 104 Fed. App’x at 921 (quoting *Walden*, 490 F.2d at 377).

This Court and the Supreme Court have recognized that judicial supervisory authority “extends to policing [search and seizure] requirements and making certain they are observed.” *Sanders*, 104 Fed. App’x at 920-21 (quoting *Rea v. United States*, 350 U.S. 214, 217 (1956)). “The command of the federal Rules . . . are designed as

standards for federal agents.” *Rea*, 350 U.S. at 217. “The obligation of the federal agent is to obey the Rules.” *Id.*

ICE’s unlawful arrest of Santos-Portillo does not represent an isolated, inadvertent violation of Section 1357’s warrant requirement. Rather, based on the agents’ own testimony, this unlawful arrest manifests a practice of widespread and repeated violations of a Congressional mandate.

At the detention hearing, Agent Swivel testified that he regularly arrested people like Santos-Portillo without a warrant. JA 37-38. At the suppression hearing, he again acknowledged the “common practice” to arrest a person who has been previously deported, without first obtaining a warrant. JA 145-146. Similarly, during the suppression hearing in *Segura-Gomez*, Agent Swivel testified that if he did get a warrant, he did so only **after** arresting someone, 4:17-CR-65-FL (E.D.N.C. Mar. 28, 2018), Docket Entry (“DE”) 34, p.51 (emphasis added). JA 250, n.1. At that same hearing, Agent Charles Kitchen – who also participated in Santos-Portillo’s arrest, JA 135 – testified that he’d “**never gotten a warrant** to arrest someone for being in this country illegally,” *Segura-Gomez*, DE 34, p.30 (emphasis added). JA 250, n.1.

The Government’s insistence that Section 1357 “does not apply” when ICE arrests people believed to have a prior deportation reveals that ICE’s widespread violations are systemic. JA 95. Representations made by Government counsel in this case and in *Segura-Gomez* further reveal that these violations are systemic nationwide, not just in the Eastern District of North Carolina. Here, counsel told the court that in

Segura-Gomez, “we did reach out to ICE Counsel to make sure we were following proper procedure.” JA 189. *See Segura-Gomez, supra* at 24, DE 34, pp.95-96. In *Segura-Gomez*, Government counsel asked ICE counsel whether agents would get a warrant before arresting “a person with a similar set of circumstances” in “immigration court.” *Id.* at 95. ICE counsel said no, it was “not possible.” *Id.* at 96. Given this disclosure about what happens in immigration court, these nationwide violations extend to immigration proceedings, not just criminal prosecutions.⁶

ICE’s unlawful arrest practice cannot be excused by calling it a “reasonable mistake of law.” *Heien v. North Carolina*, 574 U.S. 54, 66-67 (2014) (mistake must be “objectively reasonable”).

Section 1357 does not carve out an exception for warrantless arrests of persons previously deported. The statutory mandate is unambiguous. *Contrast Heien*, 574 U.S. at 70 (statute must be “genuinely ambiguous”). The controlling regulation strengthens Section 1357’s clear mandate. 8 C.F.R. § 287.8(c)(ii) (“A **warrant of arrest shall be obtained** except when the designated immigration officer has reason to believe that the person is likely to escape before a warrant can be obtained.”) (emphasis added). As the magistrate here concluded, “regulations promulgated by the Department of

⁶ In a class action suit brought by people targeted by ICE detainers, the district court determined that ICE’s warrantless arrest policies and practices violated the administrative arrest provision, § 1357(a)(2), *supra* at 6, n.3. *See Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1006 (N.D. Ill. 2016) (“ICE agents do not make any determination at all that a class member ‘is likely to escape before a warrant can be obtained for his arrest.’”) (quoting § 1357(a)(2)).

Homeland Security also support the need for a warrant absent a likelihood of escape.”

JA 240.

Over four decades of caselaw reinforce Section 1357's limits on warrantless arrests. *Contrast Heien*, 574 U.S. at 68 (ambiguous statute “had never been previously construed”).

Forty-five years ago, the Seventh Circuit emphasized that Section 1357's likelihood-of-escape requirement “is always seriously applied.” *Cantu*, 519 F.2d at 496-97.

Twenty years ago, in a similar illegal re-entry case, this Court found that a warrantless arrest by immigration agents violated Section 1357. *Harrison*, 1999 WL 26921, at *4. There, as here, well before the warrantless arrest, immigration agents had information that their target had a prior deportation. *Id.* at *1. In finding the arrest unlawful, this Court held that Section 1357 “requires that INS must have reasonable belief both that the alien is in the country illegally *and* that the alien is likely to escape before a warrant can be obtained.” *Id.* at *4 (emphasis in original).

After more than four decades, it's about time for ICE to comply with its own regulations and with a Congressional mandate.

D. Supervisory Authority's Suppression Remedy Preserves Judicial Integrity and Deters Widespread and Systemic Unlawful Arrests.

In *McNabb*, the Court “invoked the supervisory power to establish and maintain ‘civilized standards of procedure and evidence’ in federal courts,” *Corley*, 556 U.S. at 307 (quoting *McNabb*, 318 U.S. at 340). The Court cautioned:

Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in the willful disobedience of law.

McNabb, 318 U.S. at 345.

ICE's widespread and systemic disregard of Section 1357 degrades the bedrock of our Constitution, the separation of powers that requires an executive agency to faithfully execute the laws established by Congress. Continued judicial tolerance of that disregard implicates judicial integrity, and warrants the exercise of the supervisory authority to remedy and deter ICE's unlawful arrest practices. As the Supreme Court in *Rea* admonished:

Federal courts sit to enforce federal law; and federal law extends to the process issuing from those courts. The obligation of the federal agent is to obey the Rules. They are drawn for innocent and guilty alike. They prescribe standards for law enforcement. They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings.

350 U.S. at 217-18.

Here, the record shows suppression is the only way to deter widespread and systemic unlawful arrest practices. Merely declaring ICE's warrantless arrests illegal,

while permitting the Government to use the evidence obtained from that unlawful conduct in criminal prosecutions, will not deter continued violations.

Weighed against the need to remedy this persistent unlawful conduct, the detrimental impact of suppression is minimal. Even though suppression may preclude a criminal prosecution, ICE can still deport the victim of an unlawful arrest, as it did to Santos-Portillo, JA 398. In fact, deportation accomplished the pretextual basis for which ICE initially took him into ‘administrative’ custody. *See I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1047 (1984) (“When the crime in question involves unlawful presence in this country, the criminal may go free, but he should not go free within our borders.”).

E. *United States v. Oscar-Torres* Requires Suppression of the Post-Arrest Fingerprint Evidence, Attendant Records From the Immigration A-File Linked to Those Prints, and Admissions and Documents Obtained From the Unlawful Arrest.

In *United States v. Oscar-Torres*, the Fourth Circuit held that an illegal arrest motivated by “investigative” purposes requires suppression of all identity evidence, including fingerprints, and “attendant record evidence” obtained from that identity evidence. 507 F.3d 224, 230-32 (4th Cir. 2007).

The Government unlawfully arrested Santos-Portillo to prosecute him. The fingerprints taken following the unlawful arrest, the match to the attendant A-File records, and Santos-Portillo’s admissions, provided the essential evidence for this prosecution. Thus, an investigative purpose motivated the unlawful arrest. The A-File

connected to the unlawfully obtained fingerprint evidence constitutes “attendant record evidence” that was obtained by “exploitation of the initial police illegality.” *Oscar-Torres*, 507 F.3d at 230, 232. So, *Oscar-Torres* applies and requires suppression.

CONCLUSION

For these reasons, this Court should reverse the lower court’s denial of the motion to suppress, and vacate the conviction and judgment.

STATEMENT REGARDING ORAL ARGUMENT

The issue presented – whether a court may exercise supervisory authority to remedy widespread statutory violations that implicate constitutional interests – is best explored through oral argument, and best answered in a published opinion.

Respectfully submitted,

G. ALAN DuBOIS
FEDERAL PUBLIC DEFENDER

/s/ James E. Todd, Jr.

JAMES E. TODD, JR.
ASSISTANT FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF NORTH CAROLINA
150 Fayetteville Street, Suite 450
Raleigh, NC 27601
(919) 856-4236

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,721 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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/s/ James E. Todd, Jr.

James E. Todd, Jr.

N.C. Bar No. 28832
