No. 14-14027

IN THE
SUPREME COURT OF THE UNITED STATES

MANUEL ARZOLA,
PETITIONER

v.
COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

REPLY BRIEF FOR PETITIONER

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The Brief in Opposition is unpersuasive. First, respondent claims that there is no disagreement between the SJC's decision below and the Fourth Circuit, ignoring the fact that the SJC expressly acknowledged its disagreement with the Fourth Circuit. Next, respondent speculates that *Maryland v. King,* 133 S.Ct. 1958 (2013), might lead the Fourth Circuit to overturn its binding caselaw on what is a search, ignoring the fact that *King* is a decision on when searches are reasonable rather than what is a search. Finally, respondent argues that this case is a poor vehicle because it presents only a single pure issue of law for the Court to decide, ignoring the fact that this is an argument in favor of certiorari rather than against it.

Notably, respondent does not question the national importance of the question presented. Just over two years ago, Justice Alito commented that the Court's first decision on how the Fourth Amendment applies to DNA collection, *Maryland v. King*, was "perhaps the most important criminal procedure case that this Court has heard in decades." Oral Arg. Trans. in *Maryland v. King,* No. 12-207, at 35. This case raises a follow-up question to *King* that is equally important: Are there any constitutional limits *at all* on the collection of DNA, and the creation of an identity profile, from seized evidence? The Court should grant certiorari to answer this important question.

I. The Lower Courts Are Divided On the Question Presented.

Respondent disputes the split between this case and *United States v. Davis*, 690 F.3d 226 (4th Cir. 2012). *See* BIO at 7-8. Respondent briefly offers three possible grounds for reconciling *Davis* and this case. None are persuasive.

1. Respondent first tries to reconcile *Davis* by speculating about what the defendants in the two cases might have been thinking. According to respondent, Davis must have known that it was his blood on his clothing while Arzola didn't know whose blood was on his. According to respondent, this means that "the interests asserted" in the two cases are "disparate." BIO at 8.

Respondent's distinction ignores established law. Fourth Amendment rights are "not defined by the subjective intent of those asserting the rights." *Hudson v. Palmer*, 468 U.S. 517, 525 n.7 (1984). The Court has explained its "refusal to adopt a test of subjective expectation" as "understandable" given the "self-evident" problems with trying to base Fourth Amendment rights on what a criminal suspect knows or believes. *See id.* (citing *Smith v. Maryland*, 442 U.S. 735, 740-741 n.5 (1979)). In light of that established principle, speculation about what defendants may have been thinking – speculation that appears for the first time in the Brief in Opposition, of all places – provides no basis to deny the SJC's acknowledged disagreement with the legal reasoning of the Fourth Circuit.[1]

[1] Respondent hints that this case may be different from *Davis* because the government obtained a court order before conducting a different search for DNA. *See* BIO at 7. But as respondent concedes, *see* BIO at 12, the order obtained to force Arzola to submit to a swab of his cheek for DNA did not also authorize the scraping and testing of the blood from his shirt.

2. Respondent next argues that *Davis* is distinguishable because Arzola "was not a crime victim at liberty when his bloodstained clothing was seized." BIO at 9. But that has no relevance to whether a search occurred, which is the only issue raised by the petition. If Arzola's arrest on an unrelated warrant is legally relevant, it goes to the different question of whether the search was constitutionally reasonable. Indeed, in the Court's many cases on whether evidence collection from an arrested suspect satisfies the Fourth Amendment, the evidence collection has always been deemed (or assumed to be) a search. The only disputed issue for the Court has been whether, because of the arrest, the search was constitutionally reasonable. *See, e.g., Maryland v. King*, 133 S.Ct. 1958, 1969 (2013) (buccal swab for DNA on arrest is a search; Court then ruled on whether search was reasonable); *Riley v. California*, 134 S.Ct. 2473, 2489 n.1 (2014) (access to cell phone incident to arrest conceded to be a search; Court then ruled on whether warrantless search was reasonable); *Florence v. Board of Chosen Freeholders*, 132 S.Ct. 1510 (2012) (inspection of arrestee on entry into jail assumed to be a search; Court then ruled on whether suspicionless search was reasonable).

In light of these cases, it is unsurprising that *Davis* factored the defendant's freedom into the totality-of-the-circumstances balancing of reasonableness after first ruling that a search occurred. *See Davis*, 690 F.3d at 249 ("When considering the magnitude of the intrusion upon Davis' privacy, we think it very significant that these DNA searches were conducted in 2004, at a time when Davis was a free citizen and had

never been convicted of a felony."). But that is irrelevant for purposes of the threshold question presented in the petition, which only addresses what is a search.[2]

3. Respondent's third effort to distinguish *Davis* rests on the government's alleged motivation behind collecting the blood and testing it. According to respondent, the officers' motivation in *Davis* was to see if Davis had committed unrelated crimes; in this case, the officers' motivation was to see whose blood was on Arzola's clothing. *See* BIO at 8.

Respondent's position again conflicts with basic Fourth Amendment principles. As the Court has frequently explained, "the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment." *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000). "[T]he issue is not [the officer's] state of mind, but the objective effect of his actions." *Id. See also* Pet. at 8-9 (citing cases). The motivation behind the collection and testing of Arzola's DNA, whatever it was, is irrelevant.

II. *Maryland v. King* Cannot Resolve the Conflict Between the Fourth Circuit and the Maryland and Massachusetts High Courts.

Respondent next argues that "[e]ven if there is some tension between the SJC's decision and *Davis*, any such conflict may well resolve itself once the Fourth Circuit has an opportunity to implement this Court's guidance in *King*." BIO at 9. This argument

[2] It is noteworthy that at what *Davis* says is the relevant time, when the evidence was seized, *id.* at 244, Arzola was in custody only on an unrelated warrant. Because search powers on arrest can hinge on whether the search is for evidence of the crime of arrest, *see Arizona v. Gant*, 556 U.S. 332, 343-44 (2009), Arzola was not under arrest with respect to the assault on Arevalo.

should be rejected because nothing in *King* suggests that the Fourth Circuit should revisit the search holding of *Davis*.

First, and most obviously, *King* concerned a different part of the Fourth Amendment. As the petition explains, *Davis* and the SJC's decision below disagree on what is a Fourth Amendment search. Pet. at 6-10. In *King*, however, the parties agreed that a search had occurred; the only disputed issue was whether the search was reasonable. *See* Brief for Petitioner in *Maryland v. King*, 2012 WL 6755127 at 8 ("The arrestee provisions of the DNA Collection Act authorize a constitutionally reasonable search under a totality of the circumstances analysis[.]"); Brief of Amicus Curiae United States, 2013 WL 50686, at 14 ("Maryland unquestionably searched respondent when it obtained his DNA sample and generated a DNA fingerprint.").

It is true that *King* discussed the diminished expectations of privacy of an arrestee, *see* 133 S.Ct. at 1979. But whether existing expectations of privacy are "diminished" is an issue of reasonableness, not whether a search occurred. *See Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (noting that "diminished expectations of privacy . . . may render a warrantless search or seizure reasonable.") (quoted in *King*, 133 S. Ct. at 1969). Because *King* was about reasonableness, it is hard to understand how it might inspire the Fourth Circuit to go en banc and overturn *Davis*'s ruling on what is a search.

Second, even if *King* is misread as addressing the expectation of privacy test for what is search, *King* has nothing to say about whether scraping blood from clothing is a search under the trespass principles of *United States v. Jones,* 132 S.Ct. 945 (2012). A Fourth Amendment search can occur in two different ways: (1) if the government's conduct is a trespass on to the suspect's "persons, houses, papers, and effects," or (2) if

the government's conduct violates a reasonable expectation of privacy. *See Florida v. Jardines*, 133 S.Ct. 1409, 1414 (2013). Whatever *King* means for expectations of privacy, it cannot alter outcomes under the trespass test.

Third, additional percolation is improper in light of the federal/state split. The *amicus curiae* brief filed in this case by the Maryland Public Defender shows that the existing split is causing mischief right now. *See* Amicus Brief of Maryland Public Defender (filed July 27, 2015). Because the Fourth Circuit has held that blood scraping and DNA testing is a search, but the high court of Maryland (inside the Fourth Circuit) has held that it is *not* a search, "the government may seek out the more favorable Fourth Amendment forum within Maryland for prosecution of cases involving the extraction and analysis of DNA from lawfully seized evidence." *Id*. at 2. Amicus Maryland Public defender explains: "The lack of constitutional constraints on the state side creates opportunities for the government to exploit searches of local DNA databases—particularly in Baltimore City and Prince George's County where crime victim DNA and other non-offender DNA samples are routinely retained and searched." *Id*.

III. Respondent's Vehicle Objections Are Meritless.

Respondent next argues that this case is a poor vehicle because the respondent has confidence it will prevail on other grounds on remand if this Court grants certiorari and reverses. *See* BIO at 11-14. According to respondent, the problem with the petition is that it isolates a pure question of law. Because respondent believes it can win on other grounds in the event of reversal, it claims that any decision of this Court would be "merely advisory." BIO at 11.

Respondent has it backwards. It is a strength, not a weakness, that the petition presents a pure and discrete issue of law. It allows the Court to decide whether there are *any* Fourth Amendment limits on scraping blood from seized clothing and creating a DNA profile. Settling that disagreement will then lead lower courts to consider what the constitutional limits may be (if the Court reverses) or will lead legislatures to consider what statutory privacy protections may be necessary (if the Court affirms). *See generally Riley*, 134 S. Ct. at 2497 (Alito, J., concurring in part and concurring in the judgment) (noting the important role of legislatures in protecting privacy in new technologies).

A Supreme Court decision is not made "merely advisory" because of how lower courts might rule on remand. *See Davis v. United States,* 131 S.Ct. 2419, 2430-32 (2011). *Davis* squarely rejected the argument that a criminal defendant's ultimate prospect of prevailing on a motion to suppress renders a decision on the Fourth Amendment an advisory opinion. *See id.* at 2432 n.7. Because suppression of evidence is only a "last resort," *id.* at 2427, the Court must develop Fourth Amendment law regardless of its impact on the specific case before it. *Id.* at 2433. *See also Camreta v. Greene*, 563 U.S. 692 (2011) (permitting Fourth Amendment merits review sought by an immunized official even when it could not impact the outcome of the case).

Arzola also vigorously disputes respondent's assertion that respondent will likely prevail on remand if this Court reverses the SJC. Respondent's defense of reasonableness is strikingly weak. It rests on the claim that the court order authorizing a swab of Arzola's cheek signals an implicit authorization to seize the blood from Arzola's shirt and test that, as well. *See* BIO at 12. This is meritless, as court orders can only authorize what they say they authorize. Respondent's subsequent suggestion that the

failure to obtain a warrant should be excused because prosecutors would have obtained one if Arzola had only asked for it, *see id*., is simply unrecognizable as a Fourth Amendment claim. In addition, Massachusetts rejects the good-faith exception. *See generally Commonwealth v. Maingrette*, 20 N.E.3d 626, 629-30, n.3 (Mass. 2014).

Respondent briefly suggests that the SJC applied a deferential standard of review in its search analysis. *See* BIO at 12 n.2. That is incorrect. In Massachusetts, plain error review has two prongs: first, whether an error occurred; and second, whether the error created a substantial risk of a miscarriage of justice. *See Commonwealth v. Arzola*, 470 Mass. 809, 814 (2015). The SJC opted to rule "on the merits" under the *de novo* first prong, *id*. at 815, ultimately "find[ing] no error," *id*. at 820, because the record was complete and the issue fully briefed. *Id*. at 814-815.

IV. The Weakness of Respondent's Merits Argument Demonstrates the Need for Supreme Court Review.

The need for Supreme Court review is highlighted by the weakness of respondent's defense of the decision below. First, respondent suggests that individuals must 'plead the Fourth' and affirmatively assert their Fourth Amendment rights in order to retain them, as otherwise (respondent contends) courts should infer that individuals have opted to waive their rights. *See* BIO at 14-15. The law is to the contrary, *see Hudson*, 468 U.S. at 525 n.7.

Second, respondent defends the decision below by focusing on a question not presented, the constitutional reasonableness of conducting a test of Arzola's clothing. *See* BIO at 15-17. By contrast, in *King*, the amicus brief of the United States apparently conceded that generating a DNA identity profile is a Fourth Amendment search. *See*

Amicus Curiae Brief for the United States in *Maryland v. King*, 2013 WL 50686, at 14 ("Maryland unquestionably searched respondent when it obtained his DNA sample and generated a DNA fingerprint.") (citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989)).

Finally, respondent simply fails to respond to the point that scraping blood from a person's clothing is a search because it trespasses on to his "effects" with intent to obtain information. *Compare* Pet. 13 (applying the trespass test) *with* BIO 14-17 (ignoring the trespass test). Importantly, although lower courts have not addressed the trespass argument, this does not provide a reason to deny certiorari. In the last five years, this Court has twice granted certiorari to settle lower court disagreement on what is a search when the lower courts had not applied the trespass test. *See United States v. Jones*, 131 S.Ct. 3064 (2011); *Florida v. Jardines*, 132 S.Ct. 995 (2012). Upon granting certiorari, the Court applied the trespass test and held that the government conduct was a search. *See Jones*, 132 S.Ct. at 949; *Jardines*, 133 S.Ct. at 1415. The Court should do the same in this case.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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