No. 23-199

In the Supreme Court of the United States

GEORGE ANIBOWEI, PETITIONER

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 FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
SARAH CARROLL
SARAH N. SMITH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court abused its discretion in determining that, in light of the undeveloped evidentiary record, petitioner had failed to establish that he was entitled to a preliminary injunction that would preclude warrantless searches of his cell phone when he crosses the U.S. border.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

In the Supreme Court of the United States

No. 23-199

GEORGE ANIBOWEI, PETITIONER

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 FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 70 F.4th 898. The opinions and orders of the district court (Pet. App. 14a-22a, 23a-41a, 54a-59a) are not published in the Federal Supplement but are available at 2018 WL 1477242, 2019 WL 623090, and 2020 WL 208818. The findings, conclusions, and recommendation of the magistrate judge (Pet. App. 60a-78a) and supplemental findings, conclusions, and recommendations (Pet. App. 42a-53a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 2023. The petition for a writ of certiorari was filed on August 30, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner practices immigration law in Texas and frequently travels abroad. Pet. App. 17a, 123a. Petitioner sued several federal agencies in the United States District Court for the Northern District of Texas, alleging that certain searches and seizures of his cell phone at Dallas-Fort Worth International Airport violated the First and Fourth Amendments. *Id.* at 3a, 123a-125a. Specifically, petitioner alleged that when he returned to the United States from abroad in October 2016, U.S. Customs and Border Protection (CBP) agents searched his cell phone and copied data from his phone without a warrant. *Id.* at 2a, 123a. Petitioner further alleged that government agents searched his cell phone without a warrant on at least four occasions after October 2016. *Id.* at 3a, 123a. He also alleged that it is "virtually certain" that agents viewed and copied privileged attorney-client communications during these searches. *Id.* at 123a.

Before the government's response to petitioner's second amended complaint was due—and before any development of the record—petitioner moved for partial summary judgment, seeking vacatur of the CBP and U.S. Immigration and Customs Enforcement (ICE) policies that he claimed had authorized the searches "because they empower searches and seizures of cell phone data at the border without probable cause and a search warrant." Pet. App. 19a-20a; see *id.* at 4a, 21a-22a. In the alternative, petitioner sought a preliminary injunction to prevent the government from searching his cell phone at the border without a warrant and to require the government to return or destroy the data it had allegedly copied from his cell phone. *Id.* at 4a.

The district court denied both motions. Pet. App. 14a-22a. The court found that petitioner had failed to establish that summary judgment was appropriate, noting that no precedent of this Court or the Fifth Circuit required probable cause and a warrant in the context of a border search. *Id.* at 20a. With respect to petitioner's motion for a preliminary injunction, the district court observed that the evidentiary record consisted only of petitioner's second amended complaint and that the government had not yet had an opportunity to respond to petitioner's allegations. *Id.* at 20a-21a. The court accordingly found the record before it to be "insufficient for the court to conclude that [petitioner] ha[d] satisfied each of the four essential elements for obtaining [preliminary] relief." *Id.* at 20a; see *id.* at 21a (noting that a plaintiff would typically "pursue development of the record" before moving for a preliminary injunction or seeking summary judgment).

2. The court of appeals affirmed. Pet. App. 1a-13a.

The court of appeals observed that petitioner had failed to show that he was entitled to a preliminary injunction, because he had not shown a substantial likelihood that he would suffer irreparable harm absent an injunction. Pet. App. 6a. The court rejected the proposition that "retention of unlawfully seized property [i]s per se an irreparable injury" and thus looked to whether petitioner had "specifically show[n] how the government's retention of his seized information causes him harm." *Id.* at 8a; see *id.* at 7a-8a. And it found that, even assuming that the retention of *privileged* information would constitute irreparable harm, petitioner's "scant and circumstantial evidence [wa]s insufficient to establish that the government copied and retained attorney–client privileged information from his cell phone. *Id.* at 8a.

The court of appeals also rejected petitioner's claim that he would suffer irreparable harm in the form of future warrantless searches of his cell phone at the border. Pet App. 10a. The court noted that it had "never recognized a warrant requirement for any border search." *Ibid.* But even "assuming arguendo that a warrantless search of [petitioner]'s cell phone at the border would violate his constitutional rights," the court of appeals found that "the district court did not abuse its discretion in determining that [petitioner]'s evidence is insufficient to establish it is likely that he will be subject to a warrantless search in the future." *Id.* at 10a-11a.

The court of appeals observed that the limited evidentiary record—which consisted only of petitioner's second amended complaint—did not establish that petitioner "will be stopped by border agents in the future and that the agents will search his cell phone without a warrant." Pet. App. 11a. Having found that petitioner had failed to demonstrate irreparable harm, the court declined to decide whether petitioner had satisfied the other criteria necessary for a preliminary injunction. *Ibid.* And the court explained that "without [having] reach[ed] a dispositive ruling on [petitioner's] underlying Fourth Amendment claim," it would be inappropriate to exercise its discretion to assert pendent jurisdiction over petitioner's interlocutory appeal of the denial of summary judgment. *Id.* at 13a; see *id.* at 12a-13a.

ARGUMENT

The court of appeals correctly affirmed the district court's denial of injunctive relief based on petitioner's failure to establish irreparable harm. Petitioner does not contend that that factbound decision conflicts with any decision of this Court or any court of appeals. Instead, petitioner asks this Court to grant a writ of certiorari to consider the Fourth Amendment's application to cell phone searches at the border. But the court of appeals found consideration of that issue unnecessary to the disposition of this case, because even assuming that a warrantless search of petitioner's cell phone at the border would violate his Fourth Amendment rights, petitioner still was not entitled to injunctive relief. Accordingly, this case does not properly present the scope of the border-search exception. The petition for a writ of certiorari should be denied.

1. Petitioner does not claim that the court of appeals erred in declining to exercise pendent jurisdiction over his interlocutory appeal of his summary judgment motion. Instead, the question presented (Pet. i), and the vast majority of the petition (Pet. i, 2, 12-29), argue that petitioner's Fourth Amendment rights were (or would be) violated by warrantless searches of his cell phone at the border. But the court of appeals saw no need to address that question in this case, because even assuming that petitioner were right on the merits of that issue, the district court did not abuse its discretion in denying a preliminary injunction. See Pet. App. 5a-11a. The court of appeals' decision is correct, and the undecided merits issue does not warrant this Court's review in this case.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Instead, a preliminary injunction "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.*

at 22. In particular, a plaintiff seeking a preliminary injunction must show "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* at 20. And on the second requirement, a plaintiff must "demonstrate that irreparable injury is *likely* in the absence of an injunction"—not simply "possib[le]." *Id.* at 22. The court of appeals correctly applied that standard to find that the district court here did not abuse its discretion in denying petitioner's motion for a preliminary injunction.

Although petitioner claimed that the government's retention of privileged attorney-client communications caused him ongoing irreparable harm, the court of appeals observed that petitioner had not presented any evidence establishing "what information was seized from [his] cell phone, or evidence addressing whether the allegedly seized information is subject to attorney-client privilege." Pet. App. 9a-10a. Indeed, notwithstanding petitioner's "knowledge and access to the information that could have been copied by the government," he nonetheless failed to identify any "specific information * * * the copying of which resulted in irreparable harm"—let alone substantiate that claim with evidence. *Id.* at 10a. And as the court explained, without such evidence, petitioner "cannot establish that he is suffering irreparable injury due to the government's retention of information from his cell phone." *Ibid.*

The court of appeals likewise correctly found that the district court did not abuse its discretion in determining that petitioner had not offered sufficient evidence to support a claim of irreparable harm in the form of future warrantless searches of his cell phone at the border. As the court of appeals observed, "the only evidence before the district court was [petitioner's] verified complaint," which did not "establish that he will be stopped by border agents in the future and that the agents will search his cell phone without a warrant." Pet. App. 11a.

Petitioner does not dispute that injunctive relief is inappropriate absent a showing that irreparable harm is otherwise likely. Petitioner instead simply asserts (Pet. 30) that "the undisputed record—five warrantless searches in an unbroken pattern spanning multiple years—*obviously* establishes the requisite threat that petitioner would 'likely' be subject to future unconstitutional searches." But he does not meaningfully elaborate on that assertion or identify any way in which the lower courts' contrary determination conflicts with a decision of this Court or another court of appeals.

Petitioner argues (Pet. 29-30) that irreparable harm need only be "likely" to warrant a preliminary injunction, but that is the standard that the court of appeals applied. See Pet. App. 6a (explaining that irreparable harm must be "likely" but need not be "inevitable") (citations omitted). Petitioner also claims (Pet. 30) that "[a]t minimum," he is irreparably harmed by his decision to leave his work cell phone behind when he travels abroad, but petitioner did not present this argument in the court of appeals. See Pet. C.A. Br. 61.

This Court is one "of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). And even if that argument were preserved, petitioner's dispute with the lower courts' resolution of the irreparable-harm issue is factual, not legal. That resolution was based on evidentiary deficiencies resulting from petitioner's own failure to "develop the record prior to moving for a preliminary injunction or summary judgment." Pet. App. 4a; see *id.* at 21a-22a (noting that this case arises in an "unusual procedural posture" because "only a thin record (i.e., the second amended complaint) has been developed" and "defendants by agreement have not been obligated (or able) to deny [petitioner]'s allegations"; moreover, petitioner "has moved for a preliminary injunction only as an alternative form of relief, which was insufficient to trigger entry of a scheduling and procedural order").

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10; see, *e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (explaining that the Court ordinarily does not "grant * * * certiorari to review evidence and discuss specific facts"). And under what the Court "ha[s] called the 'two-court rule,' the policy has been applied with particular rigor" where, as here, the "district court and court of appeals are in agreement as to what conclusion the record requires." *Kyles* v. *Whitley*, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting); see *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). Further review is accordingly unwarranted here.

2. At a minimum, the procedural posture of the case, and the need to reverse the lower courts' irreparable harm determination—which is not included in the question presented, see Pet. i—would impede this Court's review and render it an inappropriate vehicle for addressing the Fourth Amendment issue on which the petition focuses. Thus, although the government sought a

writ of certiorari on a similar issue in *United States* v. *Cano*, 141 S. Ct. 2877 (2021), this case would be an unsuitable vehicle in which to address the application of the Fourth Amendment to warrantless border searches of electronic devices.

Indeed, the specific ground on which the lower courts found petitioner's claim deficient—the absence of a sufficient record—would be an additional impediment to review of the Fourth Amendment issue here. And as the district court noted, petitioner may continue to litigate his claims in district court on "a more typical course." Pet. App. 22a. But further review in this case, at this point, is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
SARAH CARROLL
SARAH N. SMITH
Attorneys

DECEMBER 2023