No. 00-1519

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH ARVIZU

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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The court of appeals in this case "circumscribed," "as a matter of law" (Pet. App. 11a, 14a), the facts that law enforcement officers may consider when determining whether there is reasonable suspicion of illegal activity. The court of appeals' categorical exclusion of certain types of facts from the reasonable-suspicion calculus violates the totality-of-the-circumstances rule established by this Court. Pet. 11-16; see, *e.g.*, *United States* v. *Cortez*, 449 U.S. 411 (1981); *United States* v. *Sokolow*, 490 U.S. 1 (1989); *Ornelas* v. *United States*, 517 U.S. 690 (1996). The Ninth Circuit's departure from the totality-of-the-circumstances approach also has put it in conflict with other circuits that review Border Patrol stops like the stop in this case. Pet. 16-18. And, because the court of appeals failed to consider all the facts and failed to

defer to the "inferences drawn from those facts by [the] resident judge[] and local law enforcement officer[]," *Ornelas*, 517 U.S. at 699, it wrongly suppressed the evidence of drug trafficking in this case. Pet. 18-20.

1. Respondent makes no effort to defend categorical exclusion of facts from the reasonable-suspicion calculus. Rather, respondent argues that "[t]he opinion [in this case] does not hold that agents cannot consider the totality of the circumstances," and that the court of appeals merely "ruled that some of the factors [relied upon by Agent Stoddard] had no weight, *under the circumstances of this case*." Br. in Opp. 18; see also *id.* at 36. Respondent is incorrect. The court of appeals forthrightly stated its intent "to describe and clearly delimit the extent to which certain factors may be considered by law enforcement officers in making stops such as the stop involved here." Pet. App. 12a. Consistent with that intent, the court eliminated seven different facts observed by Agent Stoddard from the reasonable-suspicion calculus "as a matter of law" (*id.* at 14a), without limiting its exclusions to this one case.

The court of appeals, for instance, stated without qualification that "slowing down after spotting a law enforcement vehicle is * * * in no way indicative of criminal activity" and may not be considered. Pet. App. 12a. Similarly, when holding that a "vehicle [cannot] be stopped because children who were passengers in the car" waved at a law enforcement officer (*id.* at 14a), the court never addressed the distinctive facts of this case, in which the district court found that "the methodical way, mechanical way, abnormal way that the children waved * * * without even turning around to look at the agent * * * would certainly lead a reasonable officer to wonder why are they doing this and would certainly lend some weight to a reason for stopping" the

vehicle (*id.* at 25a). The court of appeals also flatly stated, without focusing on the facts of this case, that "one's place of residence is simply not relevant to a determination of reasonable suspicion." *Id.* at 15a.

A very recent decision of the court of appeals makes clear that it does not share respondent's narrow view of the holding in this case. In *United States* v. *Sigmond-Ballesteros*, No. 00-50408, 2001 WL 396562 (9th Cir. Apr. 20, 2001), the court cited the decision below for the proposition "that only 'certain factors may be considered by law enforcement officers in making stops'" of traffic near the border. *Id.* at *2 (quoting Pet. App. 12a). The holding in this case thus transcends particular facts.

As respondent acknowledges, "[a]gents in the field may, and should, consider everything." Br. in Opp. 18. A fact observed by an officer is relevant to reasonable-suspicion analysis if it suggests unlawful activity when viewed "in combination" with the officer's other observations. *Id.* at 19; see, *e.g.*, *Sokolow*, 490 U.S. at 7-10; *Cortez*, 449 U.S. at 417-422. The court of appeals' approach, by contrast, requires a court to assess the constitutional significance of particular facts in isolation from "the whole picture" seen by the officer. *Sokolow*, 490 U.S. at 8 (quoting *Cortez*, 449 U.S. at 417). That approach prevents consideration of the officer's action in the context of *all* the facts known to the officer, as this Court's cases require. See *id.* at 7-10; *Cortez*, 449 U.S. at 417-418.

Respondent argues that "[t]he totality-of-the-circumstances test does not obligate courts to attribute weight to a factor that has no probative value." Br. in Opp. 19. That argument misses the point. Reasonable-suspicion analysis under the Fourth Amendment requires appellate courts to draw conclusions from the "mosaic" of

facts known to the law enforcement officer, giving due weight to the inferences of the officer and the local trial court. *Ornelas*, 517 U.S. at 696, 698-700. Courts need not consider whether a particular piece of the mosaic has "weight" *standing alone*, because none of the pieces of the mosaic should be assessed apart from the others. It is "the whole picture" that matters, *Sokolow*, 490 U.S. at 8, which is why conduct that is "ambiguous and susceptible of an innocent explanation" can nevertheless support reasonable suspicion or probable cause when viewed in context, *Illinois* v. *Wardlow*, 528 U.S. 119, 125 (2000).

2. Respondent does not directly challenge our showing (Pet. 16-18) that the circuits are divided on whether particular factors that the court of appeals deemed irrelevant as a matter of law ever can contribute to reasonable suspicion. In fact, respondent notes that the Fifth and Ninth Circuits together "address a lion's share of the roving-patrol-stop cases" (Br. in Opp. 32), which underscores the importance of resolving the conflicts between those two circuits that the petition identifies.

Respondent does imply that there is no conflict with the Fifth Circuit with respect to the relevance of deceleration, invoking the Fifth Circuit's statements that it is common for a driver to slow down after seeing a marked patrol car. Br. in Opp. 24-25 (citing *United States* v. *Diaz*, 977 F.2d 163, 165 (5th Cir. 1992), and *United States* v. *Samaguey*, 180 F.3d 195, 197-198 (5th Cir. 1999)). Those statements, however, do not suggest agreement with the Ninth Circuit's rule that considering deceleration in reasonable-suspicion analysis "is squarely prohibited." Pet. App. 12a. To the contrary, the Fifth Circuit deems sudden deceleration upon see-

ing a patrol car potentially relevant to the reasonable-suspicion inquiry. See Pet. 16 & n.5 (citing cases).

3. Respondent implicitly confirms the importance of this case. He recognizes that the decision "provides explicit guidance to those involved in roving-patrol stops," and suggests that it is a "landmark decision[]." Br. in Opp. 33, 34. Although respondent also says that "[t]he Ninth Circuit has conducted factor-by-factor [reasonable-suspicion] analysis in numerous cases" (*id.* at 20), this hardly counsels against granting certiorari. In this case, the court of appeals expressly sought to provide clearer guidance than existed before, see Pet. App. 12a, and its erroneous guidance cannot be dismissed as an aberration in the Ninth Circuit's cases, see Pet. 21-22 n.9.*

Respondent emphasizes (Br. in Opp. 33) that this case—even if it is limited to the border context—will affect a large number of law enforcement officers. That fact also suggests the importance of correcting the

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* Respondent suggests that other courts of appeals exclude factors from the reasonable-suspicion inquiry in a manner akin to the Ninth Circuit's approach. Br. in Opp. 21-23. That suggestion is misplaced. Although courts routinely and properly identify and separately *articulate* the individual factors that are the ingredients of reasonable suspicion, see, *e.g.*, *Sokolow*, 490 U.S. at 8-9 (listing factors that "together * * * amount to reasonable suspicion"), the other courts of appeals do not routinely do what the Ninth Circuit did here, *i.e.*, isolate, weigh, and discard individual factors without considering them in relation to the total mix of information. The lower courts generally grasp the distinction between separate articulation and separate weighing. See, *e.g.*, *United States* v. *Edmonds*, 240 F.3d 55, 59-63 (D.C. Cir. 2001) (noting that the D.C. Circuit "does not separately scrutinize each factor relied upon by the officer conducting the search," yet discussing individual factors in the course of determining whether "the combination of several factors" gave rise to reasonable suspicion).

error below, particularly given the degree to which the decision, if allowed to stand, would compromise and confuse the work of Border Patrol agents. See Pet. 20-23. This Court recently noted that "the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Atwater* v. *City of Lago Vista*, No. 99-1408 (Apr. 24, 2001), slip op. 26. Excluding particular factors from reasonable-suspicion analysis requires officers to attempt to ignore what they know to be true and believe to be relevant based on their training and experience. See *United States* v. *Edmonds*, 240 F.3d 55, 59 (D.C. Cir. 2001) ("An officer on the beat does not encounter discrete, hermetically sealed facts."). Even if such walling-off is possible "in the heat of[] the moment," the Ninth Circuit's rule surely magnifies the difficulty of applying the Fourth Amendment, and increases the likelihood of error. See Pet. 21-22.

4. Respondent maintains (Br. in Opp. 24-31) that the result reached by the court of appeals—suppression of approximately 125 pounds of marijuana—was correct. Respondent essentially repeats the reasoning of the court of appeals. As the petition explains, however, the court of appeals disregarded key facts found by the district court, as well as inferences reasonably drawn by the officer on the scene. See Pet. 18-20; see *Ornelas*, 517 U.S. at 699 ("[A] reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers."). Together, those facts and inferences

established reasonable suspicion. See *Sokolow*, 490 U.S. at 7 (the level of suspicion needed for reasonable suspicion "is considerably less than proof of wrongdoing by a preponderance of the evidence," and also less than the probable cause standard of "a fair probability that contraband or evidence of a crime will be found") (internal quotation marks omitted).

Respondent repeatedly suggests (Br. in Opp. 3, 4, 25, 27) that his route over back roads was a common way to reach various recreation areas. But, consistent with Agent Stoddard's testimony, the district court found that respondent was neither heading toward any nearby recreation area when he was stopped, nor taking a logical route to recreation areas located farther north. Pet. App. 22a. Furthermore, while respondent disputes (Br. in Opp. 4) whether the passage of one vehicle approximately every two hours makes Leslie Canyon Road "seldom-used," the district court concluded that the portion used by respondent "certainly isn't a heavily traveled road by any stretch of the imagination." Pet. App. 23a.

Respondent's insistence that the Border Patrol's shift change did not present a seeming opportunity to run drugs or aliens around the I-191 checkpoint (Br. in Opp. 29) is flatly inconsistent with the district court's determination that the shift change left the area open to smuggling. Pet. App. 23a; see also 12/7/98 Tr. 11, 31 (Agent Stoddard's testimony that the 3 p.m. shift change "leaves the area wide open" starting at approximately 2:15 or 2:30 p.m., and that "the time of day they seem to do the most smuggling is when the agents are en route back to the checkpoint.").

Respondent also suggests (Br. in Opp. 5) that Agent Stoddard "could not have 'known'" that respondent was taking a route that would avoid the I-191 Border Patrol

checkpoint. See also *id.* at 31 (arguing that "there was no clear checkpoint evasion"). While Stoddard did not, of course, have certain knowledge of respondent's subjective intent, he could readily deduce from respondent's route that it would achieve the effect of circumventing the checkpoint, and he knew that respondent's route is notoriously used for that purpose. Respondent's Appendix A shows respondent's northbound journey over "poorly traveled road[s]" (Pet. App. 22a) parallel to the interstate highway, followed by his turn onto Kuykendall Cutoff Road (between points (3) and (4) on the map) rather than proceeding straight on the road toward the Border Patrol checkpoint (point (1) on the map). See Br. in Opp. App. A. Agent Stoddard testified without contradiction that "this is a notorious route of travel that the aliens and narcotics smugglers have been using to circumvent the checkpoint" (12/7/98 Tr. 15), and the district court noted in its decision that "this is a road used to circumvent the checkpoint" (Pet. App. 23a). Thus, while Agent Stoddard could not have been certain that respondent had planned his route in order to evade the I-191 checkpoint, respondent's route strongly supported Stoddard's decision to "detain the individuals to resolve the ambiguity" created by respondent's trip. *Wardlow*, 528 U.S. at 125.

Respondent dismisses the children's seemingly coached waving by suggesting that abnormal behavior is irrelevant to reasonable-suspicion analysis unless it is "on the part of the person suspected of engaging in criminal activity." Br. in Opp. 26. Respondent's proposed rule is plainly incorrect. For example, if police observe the occupants of two cars carry out an apparent drug transaction, and one car speeds off when the police come into view, the high-speed flight of the first car would contribute to reasonable suspicion of

(and potentially probable cause to arrest) the occupants of the second car. Respondent's suggested rule is, in any event, inapplicable, because Agent Stoddard suspected that the adults in respondent's minivan were instructing the children to engage in their unusual waving, and he considered that coaching *by the adults* to be suspicious. See 12/7/98 Tr. 20, 44.

Finally, respondent makes much of Agent Stoddard's failure to testify in so many words that respondent's minivan—which was carrying two adults and three children in addition to cargo—was "heavily laden." Br. in Opp. 6, 27; see Pet. App. 6a. Stoddard testified that the children's posture indicated that "[t]here was some type of cargo on the floor in their foot area." 12/7/98 Tr. 19. Respondent thus is suggesting a line of constitutional dimension between an officer's observation that a vehicle "appear[s] to be heavily loaded" (which supports reasonable suspicion under *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885 (1975)) and an officer's observation that a vehicle appears to be carrying cargo out of view. Such a distinction would be unworkable for law enforcement officers in the field, and inconsistent with this Court's "commonsense, nontechnical" approach to reasonable-suspicion analysis. *Ornelas*, 517 U.S. at 695.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2001