No. 00-1519

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH ARVIZU

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

REPLY BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution:

In the Supreme Court of the United States

No. 00-1519

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH ARVIZU

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

REPLY BRIEF FOR THE UNITED STATES

Respondent's brief is founded on a contradiction. On the one hand, respondent argues that in reviewing reasonable-suspicion determinations, courts of appeals must provide "guidance" to law enforcement officers by identifying factors the officers may and may not consider; this, he asserts, will provide "uniformity across cases." Resp. Br. 18-23. On the other hand, respondent maintains that the court of appeals did nothing more than conduct an unremarkable analysis of whether, on the totality of the circumstances in this case, reasonable suspicion existed. *Id.* at 23-31. Respondent is wrong on both counts. De novo appellate review of reasonable-suspicion determinations does entail an independent analysis of each case, but it does not require, as the court of appeals thought, the establishment of categorical rules about the factors that officers may and

may not consider. And the court of appeals did self-consciously purport to lay down categorical rules for future cases, thereby departing from this Court's totality-of-the-circumstances test. See Pet. App. 12a ("Thus we attempt here 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."). Neither respondent's effort to raise the threshold for reasonable-suspicion determinations nor his argument against the validity of the stop in this case has merit. The judgment of the court of appeals should be reversed.

A. A Basic Principle of Fourth Amendment Law Is That Facts Consistent With Innocent Conduct Can, In Combination, Give Rise to Reasonable Suspicion Of Criminal Activity

1. Respondent attempts to justify the court of appeals' exclusion of certain types of facts from its analysis by making two observations about the nature of reasonable suspicion that are uncontroversial, but also inapplicable to the question of whether categories of facts may be put off-limits to officers. First, respondent notes that "the degree of suspicion that attaches to conduct may be so low that no reasonable officer would rely on that fact * * * in deciding to make an investigative stop." Resp. Br. 14. It is self-evident that not every fact known to an investigating officer will contribute to a suspicion of illegal activity. There doubtless were many facts about respondent and his passengers that Agent Stoddard observed but that did not add to his suspicion. See, *e.g.*, J.A. 68 (testimony of Agent Stoddard that nothing in the appearance of the occupants of the minivan was suspicious). That does not mean, however, that categories of facts can be ruled

irrelevant in the abstract. Officers making investigative stops and courts reviewing stops must consider "the totality of the circumstances—the whole picture" of the particular case. *United States* v. *Cortez*, 449 U.S. 411, 417 (1981). The Ninth Circuit violated that rule when it "circumscribed" the "factors law enforcement officers may consider." Pet. App. 11a.

Second, respondent notes that some facts "*standing alone*" will not support an investigative stop. Resp. Br. 14-15 (emphasis added). That observation likewise has no application to this case, because Agent Stoddard's reasonable suspicion of illegal smuggling arose from the collective significance of all the facts known to him. See Pet. App. 21a-25a. There is nothing novel about the principle that a fact that would not alone establish reasonable suspicion may nevertheless support reasonable suspicion in conjunction with other facts. In *Illinois* v. *Wardlow*, 528 U.S. 119 (2000), for instance, the Court held that an individual's presence in an area known for drug trafficking could be a factor supporting an investigative stop, notwithstanding that, under *Brown* v. *Texas*, 443 U.S. 47, 52 (1979), such presence is not sufficient grounds for a stop. 528 U.S. at 124. Similarly, the fact that an individual is driving a minivan would not alone justify an investigative stop, but, in the border context, driving a minivan that is capable of carrying concealed aliens or a large quantity of hidden drugs is potentially relevant to reasonable-suspicion analysis—particularly where, as here, the vehicle is out of character for the dirt road and smugglers have used minivans in the same area in the past. Pet. App. 22a, 23a; U.S. Br. 6; see *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885 (1975) (noting that "[a]spects of the vehicle itself may justify suspicion" and specifically mentioning station wagons).

2. Starting from those propositions that (1) some facts may be immaterial in some contexts and (2) some facts will never alone justify an investigative stop, respondent suggests a new Fourth Amendment test. Although "ordinary, innocuous facts" may contribute to reasonable suspicion, respondent states, "there must be 'other information or surrounding circumstances of which the police are aware'" before an investigative stop may be made. Resp. Br. 24 (quoting Pet. App. 10a); see *id.* at 27 (same); *id.* at 13 (arguing that "[o]bservations of neutral and common facts" are insufficient to support reasonable suspicion and that there must be a particular factor that "objectively single[s] out a person from the general law-abiding population"); see also Brief of DKT Liberty Project (DKT Br.) 16-18 (making similar argument).

This Court's analysis in *United States* v. *Sokolow*, 490 U.S. 1 (1989), forecloses respondent's approach. In *Sokolow*, the Ninth Circuit had held that characteristics that are not unique to drug couriers (such as the individual's itinerary, luggage, or method of payment for his ticket) cannot justify an investigative stop unless other facts indicate ongoing criminal activity. See *id.* at 6 (summarizing court of appeals' holding). This Court disagreed, noting that such evidentiary rules have no place in reasonable-suspicion analysis, which should instead involve a commonsense assessment of the whole picture seen by the investigating officer. *Id.* at 7-9. Each of the factors supporting the airport stop, the Court explained, was "quite consistent with innocent travel," but "taken together," the facts nevertheless amounted to reasonable suspicion. *Id.* at 9; see also *id.* at 9-10. Other decisions of this Court are to the same effect. *Wardlow*, 528 U.S. at 125 (lawful conduct that is "ambiguous and susceptible of an innocent explanation"

can nevertheless contribute to reasonable suspicion); *Reid* v. *Georgia*, 448 U.S. 438, 441 (1980) (per curiam) ("there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot"); cf. *Illinois* v. *Gates*, 462 U.S. 213, 244 n.13 (1983) ("innocent behavior frequently will provide the basis for a showing of probable cause").

As the Court indicated in *Sokolow*, respondent's proposed approach of classifying potentially relevant facts would "create[] unnecessary difficulty" in applying the Fourth Amendment. 490 U.S. at 7. Judge Kozinski has described the sort of approach urged by respondent as establishing "different classes of factors—regular and jumbo." *United States* v. *Montero-Camargo*, 208 F.3d 1122, 1142 (9th Cir.) (en banc) (Kozinksi, J., concurring), cert. denied, 531 U.S. 889 (2000). Judge Kozinski noted that he "ha[s] no clue" how those classifications bear on the Fourth Amendment's reasonableness standard, "which makes [him] think that cops on their beats * * * will have some trouble figuring it out as well." *Ibid.*

B. Reasonable Suspicion Analysis That Is Grounded In The Contextual Significance Of All The Facts Protects Against Arbitrary Stops

1. Respondent next maintains that, if the stop in this case is upheld, investigative stops will be immune from effective judicial review and "anything an officer says [in support of a stop will be] sufficient" to pass Fourth Amendment muster. Resp. Br. 14; see *id.* at 33-34; see also Brief of National Association of Criminal Defense Lawyers, *et al.* (NACDL Br.) 6-11. That argument is unfounded.

The United States has not suggested that "all reasons agents offer [for a stop] are entitled to incriminatory weight." Resp. Br. 33. Instead, this Court's decisions require courts to review each case on its facts and to consider the significance of each fact known to an officer in light of the other facts known to the officer. See U.S. Br. 15-31. There is no inconsistency between that approach and effective judicial review. A court's role is to determine whether the officer considered all of the relevant circumstances, and whether, in light of those circumstances, the officer had a particularized and objective basis for suspicion. See *Cortez*, 449 U.S. at 417-418; *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996). The records of those judicial inquiries constitute a body of "unif[ied] precedent," *id.* at 697, and guide law enforcement officers as they face analogous and related situations. That process lends predictability to reasonable-suspicion analysis despite its inherently fact-specific character. See *id.* at 697- 698.

The district court in this case performed the requisite analysis. "View[ing] the case in the context of what was going on out there" and what was known to Agent Stoddard (Pet. App. 22a), the district court culled the relevant facts from the testimony (*id.* at 22a-25a) and found "reasonable and objective and articulable facts to support the stop of the vehicle" (*id.* at 25a). The district court determined that some of the facts on which Agent Stoddard had relied, such as respondent's route around the Border Patrol's I-191 checkpoint and the minivan's capacity for carrying a large amount of concealed cargo, were particularly "important" parts of the total picture. *Id.* at 22a, 23a. And it gave specific reasons for rejecting respondent's argument that "there [wa]s really nothing to separate [respondent] and his vehicle from a law-abiding citizen." J.A. 134 (argument of respon-

dent's counsel); see Pet. App. 22a-25a. In sum, the district court's proceedings confirm the correctness of this Court's longstanding assessment that a "'practical,' 'nontechnical,' and 'common sense'" approach to Fourth Amendment analysis need not be "overly permissive," and that lower courts can be trusted "to 'hold the balance true.'" *Gates*, 462 U.S. at 241 (quoting Brennan, J., dissenting, *id.* at 290).

2. The totality-of-the-circumstances rule also does not suggest that courts of appeals will rubber-stamp district courts' determinations of reasonable suspicion. In *Ornelas*, the Court held that although appellate courts should "review findings of historical fact only for clear error and * * * give due weight to inferences drawn from those facts by resident judges and local law enforcement officers," 517 U.S. at 699, they must decide de novo whether the officer did or did not have reasonable suspicion, *id.* at 695-699. The *Ornelas* Court reaffirmed the totality-of-the-circumstances test and that reasonable suspicion cannot "readily, or even usefully, [be] reduced to a neat set of legal rules" (*id.* at 695-696) (internal quotation marks omitted), even as it instructed the courts of appeals to undertake the "thorough, plenary review" that respondent urges (Resp. Br. 34). Respondent does not suggest, much less show, that the courts of appeals have been unable to undertake the independent review required by *Ornelas* while adhering to the totality-of-the-circumstances approach.

3. Respondent represents that the United States contends that a reviewing court should consider only the totality of the facts that the investigating officer identified as significant, "not the whole picture" (Br. 26), and, further, that the quantity of factors identified by the officer has primary importance (Br. 34). Respon-

dent is again incorrect. As noted above, the first responsibility of a court undertaking reasonable-suspicion analysis is to identify all of the relevant circumstances. See *Cortez*, 449 U.S. at 417; *Ornelas*, 517 U.S. at 696. Whatever their number, those circumstances *collectively* form the basis for reasonable-suspicion analysis.

4. Respondent's amici suggest that this case has some bearing on the issue of "racial profiling." NACDL Br. 15-16; DKT Br. 6-15. Yet, as respondent notes (Br. 6), Agent Stoddard testified that his decision to stop the minivan was not influenced by the physical appearance of its occupants. See J.A. 68. Unlike the circumstances of a stop that is based solely on broad and unjustified generalizations about the targeted racial group, each of the ten factors that the district court deemed supportive of the stop in this case relates to specific activities of respondent or his passengers, or particular facts about their vehicle. See U.S. Br. 8-10 (listing factors).[1]

---

[1] Relying primarily on arguments made by the class-action plaintiffs in *Hodgers-Durgin* v. *De La Vina*, 174 F.R.D. 469 (D. Ariz. 1997) (No. Civ. 95-029 TUC-JMR), aff'd in part, 199 F.3d 1037 (9th Cir. 1999), amicus DKT Liberty Project maintains that the Border Patrol makes a high percentage of groundless stops. See DKT Br. 8; DKT App. 1a-2a. Although the *Hodgers-Durgin* case was dismissed on standing grounds, the government introduced evidence rebutting the assertions on which DKT relies. The government's analysis of the radio logs used by the plaintiffs showed that out of 682 vehicle stops, 101 (approximately 15%) resulted in an arrest. Border Patrol agents, moreover, do not always make an arrest when they uncover illegal activity. For example, agents may allow illegal aliens to return voluntarily to Mexico, or they may allow aliens who are authorized to work only in a particular area of the United States to return voluntarily to that area. More generally, the miscellaneous reports on which amicus relies (DKT Br. 7-12) cannot be accepted as reliable indications of the percentage of suspects who are stopped on proper *Terry* grounds

C. The Totality Of The Facts Of This Case Supported A Reasonable Suspicion Of Criminal Activity And Was Not, As Respondent Argues, Indicative Of A Family Outing

Turning to the facts of this case, respondent argues that they "indicated only a family in a minivan on a holiday outing, not criminal behavior." Resp. Br. 34. That argument is untenable in light of the "essentially undisputed" (*ibid.*) record evidence and the district court's findings of historical fact. See U.S. Br. 31-35.

Like the court of appeals (Pet. App. 12a-18a), respondent attempts (Br. 35-46) to show that each factor cited by the district court is not *independently* suspicious. The relevant question, however, is whether "the whole picture" created by all the facts "taken together" supported a reasonable suspicion of illegal activity. *Sokolow*, 490 U.S. at 8, 9. When forming his suspicions, Agent Stoddard thus was entitled to rely on the mutually reinforcing character of respondent's route, timing, and vehicle, and the behavior of respondent and his passengers.

To the limited extent that respondent considers the interrelationship of the facts, he suggests that, even if some of the facts might independently have aroused suspicion, Agent Stoddard should have disregarded them because, in other respects, the minivan had the appearance of carrying a family on an outing. For instance, respondent argues (Br. 43) that Agent Stoddard should have ignored the raised position of the children's knees on the assumption that it indicated the presence of camping equipment or suitcases. Respondent similarly contends that his route around the I-191 check-

---

(rather than in a consensual stop or otherwise) and later are subject to arrest.

point (*id.* at 35), his use of a minivan capable of carrying a large amount of concealed cargo (*id.* at 38), and Agent's Stoddard's failure to recognize the minivan (*id.* at 42) should have carried no weight because they were consistent with a family trip. See also *id.* at 2-3, 35 (arguing that respondent's route of travel was customary for recreation vehicles).

Respondent's arguments depend on his assertion (Br. 3 n.5) that his "route of travel would not have been unusual" for a family attempting to reach a camping or picnic site. But that is nothing more than a challenge to the factual findings of the district court. The district court determined that respondent was not taking a logical route to any recreation area when he was stopped. See Pet. App. 22a; see also U.S. Br. 33. Respondent made no effort on appeal to show that the district court's findings about that "distinctive feature[] * * * of the community" were clearly erroneous, *Ornelas*, 517 U.S. at 699, and the court of appeals did not make any such determination. The trial court, moreover, amply explained why it found petitioner's reliance on the existence of the Chiricahua National Monument and other recreation areas north of Rucker Canyon Road (see Resp. Br. 2 n.4, 3 n.5) unpersuasive. Those recreation areas, the court noted, are "accessible through paved road I-[1]91 and then taking paved road 181. And picking up the road from there, paved I-181, all the way to that area does not require * * * a 40-mile trip at least, through a dirt road." Pet. App. 22a; see J.A. 157 (map). The very limited traffic on the back roads used by respondent makes it apparent that the vast majority of innocent travelers do in fact take the

highway when going from Douglas to the northern recreation areas. See U.S. Br. 4.[2]

The district court therefore was correct that respondent's route around the Border Patrol checkpoint colored the other facts known to Agent Stoddard. See Pet. App. 23a; see also U.S. Br. 32-33. "It would have been poor police work indeed," *Terry* v. *Ohio*, 392 U.S. 1, 23 (1968), for Agent Stoddard to ignore the implications of respondent's route and to presume conclusively that respondent was on an innocent family outing, just because respondent was in the vicinity of recreation areas and had a woman and three children in his vehicle.

That is all the more true because respondent tripped the first sensor on Leslie Canyon Road at approximately 2:15 p.m., around the time when the agents who patrolled the area suspended their surveillance and began returning to the I-191 checkpoint for a 3 p.m.

---

[2] Respondent observes that a driver who lives on Leslie Canyon Road might go north on the dirt roads rather than heading south to Douglas and taking the highway from there. See Resp. Br. 3, 35; J.A. 26. But Agent Stoddard did not recognize respondent's minivan as a local vehicle, and he knew that it was registered to an address in Douglas. See Pet. App. 24a; U.S. Br. 32-33. Agent Stoddard therefore had compelling reasons to believe that the minivan started its trip in Douglas, rather than along Leslie Canyon Road. In that regard, respondent argues (Br. 42) that Agent Stoddard's failure to recognize the minivan was insignificant because Stoddard supposedly "was not 'real familiar' with the area." What Agent Stoddard actually said (J.A. 52) was that he was "[n]ot real familiar" with the Chiricahua National Monument, which, as the district court explained, is "quite a few miles to the north" and not logically accessed by the roads Agent Stoddard patrolled (Pet. App. 22a). Agent Stoddard specifically testified that he had "spen[t] enough time out there" to be familiar with "the normal traffic, which is ranchers and so forth." J.A. 37.

shift change. See U.S. Br. 4, 32 n.17. Respondent suggests (Br. 37) that it "makes no sense" for smugglers to step-up their activity during a shift change, because Border Patrol agents returning to the checkpoint might see them. The district court, however, did not question and apparently accepted (Pet. App. 23a) Agent Stoddard's testimony that smugglers "seem to do the most smuggling * * * when the agents are en route back to the checkpoint." J.A. 26; see J.A. 47-48. Respondent also ignores that a smuggler traveling north on the back roads before 3 p.m. would be traveling in the same direction as a Border Patrol agent returning to the I-191 checkpoint, which would minimize the smuggler's chances of meeting the agent on the road. Finally, a smuggler could see the dust trail of a moving Border Patrol vehicle a half-mile away (see J.A. 31), whereas a parked Border Patrol vehicle monitoring the road would not give an early warning of its position.

Contrary to respondent's argument (Br. 36-37), *Reid* v. *Georgia*, 448 U.S. 438 (1980) (per curiam), does not undermine Agent Stoddard's reliance on the time of respondent's trip. In *Reid*, the early morning hour and other factors that the officers deemed suspicious collectively described "a very large category of presumably innocent travelers." *Id.* at 441. Here, respondent's unusual path over a "notorious" (J.A. 30) smuggling route, the precise time of his trip, his atypical use of a minivan rather than a four-wheel-drive vehicle (see U.S. Br. 6), the indication that he was carrying cargo even though he was not headed toward a local recreation area, the fact that the minivan was not a famil-

iar local vehicle, and the Douglas registration of the minivan all cast particularized suspicion on respondent.[3]

Agent Stoddard's suspicion appropriately increased when respondent slowed dramatically and appeared nervous as he drove by. See U.S. Br. 5-6, 34. Respondent asserts that his sharp deceleration from approximately 50 miles per hour to approximately 25 miles per hour "was not even unusual." Resp. Br. 39. But Agent Stoddard testified that it is not common for drivers in that area to cut their speed in half when they see an officer, J.A. 57, and respondent did not introduce any contrary evidence. Agent Stoddard, moreover, did not cause respondent to slow down by parking "in the roadway" (Resp. Br. 46). Rather, Agent Stoddard parked his vehicle in "a little area" "off to the side of the road." J.A. 32.[4]

Agent Stoddard reasonably became still more suspicious when the children in respondent's van engaged in their unusual and apparently coached waving. See U.S. Br. 6-7, 34. Far from resting on an "inchoate and unparticularized suspicion or 'hunch,'" *Reid*, 448 U.S. at 441 (quoting *Terry*, 392 U.S. at 27), as respondent sug-

---

[3] Respondent argues (Br. 45-46) that the minivan's registration had no legitimate significance. Elsewhere, however, respondent recognizes (*id.* at 42) that the registration to a Douglas address—like Agent Stoddard's failure to recognize the minivan—suggested that respondent was not on a local trip. The address of the registration was relevant because it reinforced particularized suspicion that respondent was on a smuggling run from the border to the interior of Arizona. See U.S. Br. 31.

[4] The point of respondent's argument that there was no posted speed limit (Br. 39) is unclear, since respondent maintains (*id.* at 40) that he was obeying all traffic laws. In any event, the roads used by respondent do have speed-limit signs. See J.A. 171, 179, 181 (showing signs).

gests (Br. 44 & n.44), Agent Stoddard's belief that the children were not waving on their own initiative was based on first-hand experience with the way that children normally wave to Border Patrol agents. J.A. 61; see *Brignoni-Ponce*, 422 U.S. at 885 ("In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling.").

Respondent thus is incorrect when he asserts (Br. 9) that "[t]he factors [Agent Stoddard] relied upon would describe a large number of law-abiding citizens." It is hard to imagine an "innocent traveler[]," *Reid*, 448 U.S. at 441, who would traverse the back roads around Douglas under the same suspicious circumstances. And the totality of the circumstances certainly gave Agent Stoddard the requisite "minimal level of objective justification for making the stop." *Wardlow*, 528 U.S. at 123.

* * * * *

For the reasons given above, as well as those in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

SEPTEMBER 2001