No. 00-1519

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA
Petitioner.

v.

RALPH ARVIZU
Respondent.

BRIEF FOR THE RESPONDENT

Filed Aug 28TH , 2001

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

QUESTIONS PRESENTED

1. Whether the court of appeals conducted appropriate review by correctly articulating this Court's Fourth Amendment principles, explicitly basing its decision upon those principles, carefully considering all of the facts and circumstances existing in this case, determining that the objective facts with their rational inferences did not have incriminatory weight, and expressly limiting its ruling to "stops such as the stop involved here."

2. Whether, under the totality of the circumstances in this case, the border patrol agent's suspicion was not reasonable because it was based upon subjective interpretations that were not supported by objective facts and reasonable inferences of criminal activity, but rather upon the agent's unexplained supposition that innocuous-appearing conduct describing large numbers of law-abiding citizens was suspicious.

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STATEMENT

1. On Monday, January 19, 1998, Martin Luther King Day, Ralph Arvizu was driving a minivan along Leslie Canyon Road, which leads north from the border city of Douglas, Arizona. His sister, Julie Arvizu, and her three children were passengers. J.A. 104. United States Border Patrol Agent Stoddard was on duty. He had been a border patrol agent for approximately fourteen months by that time. J.A. 18. This arrest was the agent's first narcotics smuggling arrest in this area.[1] J.A. 21, 56.

The van activated a sensor while on Leslie Canyon Road. At approximately 2:15 in the afternoon, the agent learned of the sensor hit. J.A. 24. Because the sensor does not detect border crossing activity, J.A. 51, the agent had no reason to believe the vehicle had recently crossed the border, only that it was traveling north along Leslie Canyon Road. Shortly afterward, a second sensor indicated the van had turned onto Rucker Canyon Road. J.A. 51. Agents typically learned of sensor hits every couple of hours in this area.[2] J.A. 57.

The van traveled along public unpaved roads: Leslie Canyon, Rucker Canyon, and Kuykendall Cutoff,[3] all of

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[1] The agent had only been on roving patrol "several times." J.A. 21.

[2] That means about 4300 cars travel these roads per year.

[3] The agent claimed the roads are normally traveled by four-wheel-drive vehicles and Kuykendall Cutoff Road was unsuitable for passenger vehicles because it is only maintained occasionally and there are washouts when it rains. J.A. 36, 63-64. But Kuykendall was well-maintained and none of the roads were restricted. J.A. 54, 80. The district court found it was a "road a vehicle sedan could travel on." Pet. App. 23a.

which accessed recreational areas in the Coronado National Forest and Chiricahua National Monument.[4] J.A. 54, 88-89, 157.

Although the agent admitted he was not "real familiar" with Chiricahua National Monument and knew only "that it exists in the area," he conceded it is a scenic location visited by many people. J.A. 52.

Kuykendall Cutoff is the natural route any Douglas resident would take to continue traveling north or northeast from Leslie Canyon Road. Leslie Canyon Road ends at Rucker Canyon Road and in order to continue northward one would have to travel along Rucker Canyon Road to Kuykendall Cutoff Road.[5]

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[4] Some of the destinations accessible along the route Arvizu traveled included: camping and picnic areas; houses, ranches, and schools; and several smaller settlements; J.A. 88-89. The area includes Chiricahua National Monument, which is popular amongst Douglas area residents. J.A. 89.

[5] See map, J.A. 157. There were many destinations along the route Arvizu traveled, even after the turn onto Kuykendall Cutoff Road, including the northern portion of Chiricahua National Monument, campgrounds in Turkey Creek, Onion Saddle, and Buena Vista Peak, and scenic locations such as Rock Canyon and Lookout Tower. J.A. 157. Kuykendall Cutoff Road is a shortcut for all motorists traveling northeast toward Willcox and New Mexico. J.A. 96. Thus, Arvizu's route of travel would not have been unusual for anyone traveling north or northeast. Petitioner's argument that vehicles turning right onto Kuykendall Cutoff Road would "circumvent the I-191 checkpoint and could proceed to cities such as Tucson or Phoenix," Pet. Br. 5, mistakenly assumes that all cars would turn west along I-10 toward Tucson and Phoenix, and not east toward Willcox or Lordsburg, or into one of the camping areas or picnic sites along the route.

The agent found 2:15 in the afternoon was significant because there is a 3:00 p.m. shift change when agents on roving patrol return to the checkpoint.[6] J.A. 26. But when agents return to the checkpoint for shift change depends upon how far they are away from it. J.A. 48-49. And, agents might use Leslie Canyon Road – the very road Arvizu was on – to return to the checkpoint at shift change. J.A. 49.

The agent drove along Rucker Canyon Road until he saw a minivan approaching from the other direction. J.A. 31. The agent waited for the van, by moving to the side of the road, along the shoulder, and turning his car to face Arvizu's van "at a slant," toward the middle of the road. J.A. 32.

The van slowed to approximately 25-30 mph, then turned right, onto Kuykendall, following a fork in the road. J.A. 32, 36. The agent was not using radar but guessed the van's original speed was 50-55 mph. J.A. 57. Arvizu's driving was not hazardous, did not obstruct traffic, and did not violate any traffic laws. J.A. 58. Although the agent did not recognize the van as belonging to a local resident, J.A. 37, he did not claim to recognize all the vehicles in the area and did not dispute that Douglas residents and tourists use the roads. The agent knew of an unrelated incident involving a minivan transporting marijuana in the same general area about one month earlier. J.A. 55-56. He claimed it was significant the vehicle was a Toyota minivan because they are

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[6] Shift changes occur three times per day. J.A. 47.

commonly used vehicles for smuggling,[7] J.A. 33, even though there was nothing at all unusual about it, such as obscured windows or the appearance of being heavily laden.

The agent testified Arvizu's posture was rigid, with both hands on the steering wheel, and Arvizu did not look at him and acted "as if he was ignoring me, trying to pretend I wasn't there." J.A. 33. The agent also claimed a passenger appeared "fairly uptight." J.A. 33-34. He claimed "[m]ost [law-abiding citizens in that area] look . . . [and] would give us a friendly wave." J.A. 59. To the agent, a rigid posture meant "they were trying to hide something." J.A. 60.

The agent observed the children in the back seat as the vehicle slowed from about 50 mph, throwing a dust trail so substantial he first noticed it half a mile away. J.A. 31. He saw their knees were "at seat level." J.A. 34. From this, he believed they were sitting as if their feet were resting on something, with their knees slightly higher than normal, but lower than chest level. J.A. 34, 60-61.

The agent followed the van. He testified that the children began waving at him. J.A. 35, 61. Although the agent had found it suspicious that the adults did not wave, he then became suspicious when the children began waving. J.A. 35, 61. The agent believed the children were waving at him even though they continued to face

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[7] According to the latest U.S. Census, the minivan is one of almost ten million minivans estimated to be registered to U.S. drivers in 1997. United States Census Bureau, *Statistical Abstract of the United States:* 2000, at 644.

forward, were motioning forward with their hands, and did not look at him. J.A. 35. He testified the waving was not normal and "it looked like they were instructed" to wave at him. J.A. 35, 61.

The vehicle signaled a turn onto Kuykendall Road "kind of early," briefly turned the indicator off, then turned it back on and turned. J.A. 36, 62. Driving from Rucker Canyon Road onto Kuykendall Road does not require a turn, but is a sharp right-hand fork or "T." J.A. 82, 165. The agent then checked the van's registration. It was not stolen, it had valid Arizona license plates, and it was registered to Leticia Arvizu at 403 4th Street in Douglas, Arizona. J.A. 37, 65-66. The agent labeled the 400 block of 4th Street in Douglas, Arizona as "one of the most notorious areas" for smuggling in the Douglas area. J.A. 38. Nothing suggested any illegal activity at the 4th Street address, with Leticia Arvizu, Ralph Arvizu, or the van. J.A. 66-67.

Nothing about the appearance of the van's occupants led him to suspect they were illegal aliens. J.A. 68. Nevertheless, he decided to stop the van to perform an immigration check on its occupants. J.A. 68. The van promptly stopped. J.A. 68. The agent found marijuana inside the van and arrested Arvizu.

2. Arvizu filed a motion to suppress the marijuana because the agent lacked reasonable suspicion to stop and detain the van. The district court denied the motion to suppress, finding the stop was lawful and identified ten factors that contributed to its decision. Pet. App. 21a-27a.

Arvizu pleaded guilty to Title 21, United States Code, § 841(a)(1), possession with the intent to distribute marijuana, J.A. 11, while reserving his right to appeal the denial of the motion to suppress evidence.

The court of appeals unanimously reversed, finding there was no reasonable suspicion to stop the van. See *United States* v. *Arvizu*, 232 F.3d 1241 (9th Cir. 2000). The opinion articulated and followed the legal principles this Court has set forth for assessing reasonable suspicion, *id.* at 1247-48 (citing *Sokolow, Terry, Cortez, Wardlow,* and *Brignoni-Ponce),*[8] then examined each factor and addressed the totality of the circumstances.

The court of appeals found that slowing down could not contribute to reasonable suspicion, absent other circumstances, *id.* at 1248, then ruled the opposite factors of failure to acknowledge and suspicious waving had no incriminatory weight in this case because, without special circumstances, they were too ordinary. *Id.* at 1249. Next, the court determined the remaining factors had such low probative value "that they have little or no weight under the circumstances," *id.* at 1249-51, or were relevant and "probative to *some* degree." *Id.* at 1251. After examining all of the circumstances, the court of appeals found there was no reasonable suspicion for the investigative stop.

[8] *United States* v. *Sokolow*, 490 U.S. 1 (1989); *Terry* v. *Ohio*, 392 U.S. 1 (1968); *United States* v. *Cortez*, 449 U.S. 411 (1989); *Illinois* v. *Wardlow*, 528 U.S. 119 (2000); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975).

After Petitioner requested rehearing, the panel added the words "in this case," to clarify that it had not created *per se* rules. *Id.* at 1244, 1248.

SUMMARY OF ARGUMENT

1. The Fourth Amendment is the only buffer between citizens and unlimited, unfettered law enforcement discretion. Not every suspicion is reasonable and some stops are unreasonable, as a matter of law, whenever no reasonable officer would rely on certain facts, either singly or in the aggregate, as a basis for making the stop. This simple truth is the basis of the opinion. The reasonable suspicion test is meaningful only when subjected to the neutral scrutiny of the courts. *Ornelas* v. *United States*, 517 U.S. 690 (1996), teaches that appellate courts should ultimately decide these questions. The court followed *Brignoni-Ponce, Cortez, Sokolow,* and *Ornelas* and examined the totality of the circumstances. Using common sense and logic, it found certain factors were suspicionless in this case and others had little weight.

Petitioner seeks a tautological test eviscerating the reasonable suspicion requirement. Petitioner would require each factor to have some incriminatory weight in the reasonable suspicion calculus and seeks a rubberstamp review, not a reasoned *de novo* review. Petitioner would provide law enforcement officials *carte blanche* to seize any individual traveling in the border region without meaningful judicial review.

2. The court of appeals correctly held there was no reasonable suspicion to stop Mr. Arvizu's vehicle. The

facts examined in the context of the totality of the circumstances objectively pointed to a family on a holiday outing in a recreational area, not to criminal activity. The agent offered no objectively reasonable grounds for his subjective beliefs. The factors the agent relied upon would describe a large number of law-abiding citizens and do not sufficiently narrow the stop-eligible class.

ARGUMENT

I. The Tautological Test the Government Seeks Is Unreasonable and Would Subject Innocent Persons to Random, Discretionless Stops.

A. The Fourth Amendment Protects Against Unfettered Police Discretion.

The Framers did not enact the Fourth Amendment to further the investigative powers of law enforcement officers but to curtail them. Its central purpose is the control of police discretion. Every vehicle stop this Court has decided since *Carroll* v. *United States*, 267 U.S. 132 (1925), requires a discretion-limiting feature, such as probable cause,[9] reasonable

[9] *Carroll*, 267 U.S. at 153-54, established the automobile exception, but tempered the exception with this observation: "[i]t would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search." Although law enforcement faced the enormous task of enforcing the Prohibition laws, this Court resisted pressure of "official expedience" against the Fourth Amendment. See *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 274 (1973).

suspicion,[10] or defined-purpose checkpoints.[11] Thus, individualized objective suspicion is the bedrock of protection against unjustified and arbitrary police action.[12]

This Court's precedent teaches that eliminating opportunities for unfettered police discretion is essential.[13] In criminal law, the reasonable suspicion standard

[10] *Terry*, 392 U.S. at 20-24, first allowed detentions without probable cause, holding officers may temporarily detain a person whom they reasonably suspect has committed or is about to commit a crime.

[11] See *United States* v. *Ortiz*, 422 U.S. 891, 895-96 (1975) (holding officers must have probable cause to search vehicles at checkpoints because checkpoints do not meaningfully limit the officer's discretion to select cars for search); *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976) (ruling fixed-checkpoint stops are constitutional). *Cf. City of Indianapolis* v. *Edmond*, 531 U.S. 32, 41 (2000) (holding suspicionless drug checkpoints violated the Fourth Amendment, reasoning the interest in general crime control does not justify suspicionless stops).

[12] See *Delaware* v. *Prouse*, 440 U.S. 648, 661, 663 (1979) (extending the reasonable suspicion requirement to all automobile users, ruling officers cannot randomly stop automobiles to check the driver's license and automobile registration, thereby protecting automobile users from standardless and unconstrained government discretion).

[13] See *Chicago* v. *Morales*, 527 U.S. 41, 62 (1999) (striking down a Chicago ordinance as vague because its language was inherently subjective, resulting in unlimited discretion for officers to abuse their power); *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) (striking down a California statute because it could result in "a standardless sweep").

divests officers of unlimited discretion. In particular, this Court has repeatedly recognized the intrusiveness of roving patrol stops and their potential for abuse.[14]

In order to fetter discretionary police intrusions upon individuals, this Court held in *Terry* that officers must "point to specific and articulable facts which, taken together with rational inferences from those facts, warrant the intrusion." *Id.* at 21. *Terry* responded to the tension between law enforcement interests and the Fourth Amendment, striking an appropriate balance.

Petitioner's brief invokes law enforcement interests, contending that this Court has long recognized the "formidable law enforcement problems" along our border with Mexico and the difficulties of patrolling the border. Pet. Br. 3 n.2. The government has repeatedly tried to persuade this Court to carve a border exception allowing roving patrols to perform suspicionless, discretionary vehicle stops and this Court has repeatedly declined to do so, tempering its recognition of the difficulties faced by law enforcement with the requirement of reasonable suspicion followed by independent judicial review.

In *Almeida-Sanchez*, 413 U.S. at 268, the government sought to dispense with the probable cause requirement for automobile searches within one hundred miles of the border. This Court refused and held roving border patrol

[14] See *Ortiz*, 422 U.S. at 891, 895-96; *Martinez-Fuerte*, 428 U.S. at 559; *Prouse*, 440 U.S. at 657 (finding that both random and roving-patrol stops involve officers signaling a vehicle to pull over "by means of a possibly unsettling show of authority," interfere with freedom of movement, are inconvenient, time-consuming and may create "substantial anxiety").

agents cannot search automobiles for illegal aliens without probable cause or consent to search. *Id.* at 266. This Court commented that "[t]he needs of law enforcement stand in constant tension with the Constitution's protections of individuals against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." *Id.* at 273.

In *Brignoni-Ponce*, 422 U.S. at 876-78, the government again sought unlimited and unbridled discretion for border patrol agents to stop vehicles. This Court ruled agents must have reasonable suspicion for roving-patrol stops, *id.* at 881-82, and the reasonable suspicion standard "allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference," *id.* at 883.

In *Cortez*, this Court again recognized the difficulties of patrolling border areas, but nevertheless emphasized the need for specificity of information. *Cortez*, 449 U.S. at 411. Although agents may assess facts in light of their experience, hunches or instincts cannot support reasonable suspicion. *Id.* at 418-19. Reasonable suspicion depends upon the content of information and its degree of reliability – both quantity and quality are important; and, although their background provides a backdrop to assess the relevant facts, agents must draw objectively reasonable inferences. *Id.* at 418.

Thus, this Court continues to reject the government's attempts to secure unbridled discretion to stop motorists in border areas. Yet, the real thrust of Petitioner's argument is to limit appellate review of police conduct.

B. The Reasonable Suspicion Test Requires an Objective and Rational Basis for any Intrusion on Liberty.

Probable cause means a "fair probability that contraband or evidence of a crime will be found"; reasonable suspicion is a less demanding standard. *Sokolow*, 490 U.S. at 7 (internal citations omitted). Reasonable suspicion is less than a preponderance of the evidence, *id.*, but more than an unparticularized suspicion or hunch, *Terry*, 392 U.S. at 27. This Court has characterized it as a relatively simple concept " 'not readily reduced to a neat set of legal rules.' " *Sokolow*, 490 U.S. at 7 (quoting *Illinois* v. *Gates*, 462 U.S. 213, 232 (1983)). But the lack of neat legal rules does not mean that reasonable suspicion is impossible for a court to apply. Courts must ensure that reasonable suspicion determinations are based on rational, common-sense judgments and inferences about human behavior. *Wardlow*, 528 U.S. at 124-25. The Fourth Amendment demands accountability by those making decisions in the field. Officers must offer objectively reasonable explanations for seizing individuals. Particularized proof serves the dual functions of constraining police discretion and facilitating judicial review of police decisions. Not only must a factor objectively single out a person from the general law-abiding population, there must be a nexus between the observations and the suspicion of criminal activity. Observations of neutral and common facts do not meaningfully narrow the stop-eligible class in any way.

Although reasonable suspicion eludes precise definition, its essence is an examination of the totality of the

circumstances – looking at the whole picture.[15] *Cortez*, 449 U.S. at 417. First, courts examine whether officers have made objective observations and whether there are rational inferences to be drawn from those facts. Second, assessment of the whole picture must yield a particularized suspicion that the individual being stopped is engaged in wrongdoing. If the test is, as Petitioner advocates, that anything an officer says is sufficient, then there can be no deterrence of police action, no matter how arbitrary or abusive.

This Court has provided guidance for evaluating reasonable suspicion and assessing the weight of various factors. Courts must examine the totality of the circumstances, including behavior "quite consistent with innocent travel." *Sokolow*, 490 U.S. at 9. Courts must also consider "the degree of suspicion that attaches to particular types of non-criminal acts," *id.* at 10, and require " 'some minimal level of objective justification' for making a stop," *id.* at 7 (citations omitted). Sometimes, the degree of suspicion that attaches to conduct may be so low that no reasonable officer would rely on that fact, singly or in combination with other facts, in deciding to

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[15] *Brignoni-Ponce*, 422 U.S. at 884-85, set forth a non-exhaustive list of factors for agents to consider: (1) characteristics of the area; (2) the agent's previous experience with criminal activity; (3) proximity to the border; (4) unusual traffic patterns; (5) information about recent smuggling in the area; (6) the driver's behavior; (7) the vehicle's appearance; and (8) the number, appearance, and behavior of the passengers. The opinion did not set forth a minimum number of factors necessary for reasonable suspicion or any outcome-determinative criteria.

make an investigatory stop. This Court has determined that certain facts, standing alone, are always insufficient to support reasonable suspicion, such as presence in a high-crime neighborhood, *Brown* v. *Texas*, 443 U.S. 47, 52 (1979), and apparent Mexican ancestry, *Brignoni-Ponce*, 422 U.S. at 885-87. While Petitioner's brief discusses innocent conduct, Pet. Br. 25-26, it ignores that something more than an innocent factor – experience or an inference – must point to the suspect and to criminal conduct. Purely subjective hunches or purely innocuous conduct cannot provide reasonable suspicion.

This Court's cases upholding reasonable suspicion determinations exemplify the type of careful observation and objective inferences necessary to support a stop. The conduct in *Terry* may have been "ambiguous" and "susceptible of an innocent explanation" but it pointed to illegal activity. The officer had thirty years of experience patrolling downtown Cleveland. He carefully watched Terry and a companion, two men he had never seen before, while they took turns repeatedly looking into a store window (approximately 24 times), conferring with each other after each time. Although the officer suspected a "stick-up," he waited and followed the men as they joined a third man with whom they had earlier conferred. Only then did the officer approach the men and ask their names; when they mumbled a response, he patted down Terry, finding a pistol. *Terry*, 392 U.S. at 5-7. Objectively reasonable facts implicated the men in criminal activity and failure to further investigate would have been "poor police work indeed." *Id.* at 23. *Terry* involved good police work – surveillance, investigation, and connecting the dots.

Cortez is an example of very good police work. Agents followed distinctive "chevron" footprints on numerous occasions, deducing "chevron" was an alien smuggler; they identified a nearby load site and deduced a pattern of transport; then they stopped a pickup with a camper which they believed "chevron" might be driving and which had made an early morning round trip in the area. *Cortez*, 449 U.S. at 412-14. This Court ruled that the agents had reasonable suspicion for the stop, that courts should take into account all of the circumstances, and that there must be a particularized showing that this person is engaged in wrongdoing. *Id.* at 418-19.

And, in *Sokolow*, the circumstances were more than merely unusual, they were also suspicious of criminal activity when viewed in context. This Court examined reasonable suspicion based upon a combination of factors, including a drug courier profile and other evidence casting particularized suspicion upon defendant. Agents stopped Defendant in a Hawaii airport, relying upon these factors: Defendant had just returned from a three-day trip to Miami, a source city for drugs; he paid for his $2100 ticket with a large wad of twenty-dollar bills; he did not check any luggage; he changed planes; he dressed in a black jumpsuit and wore a lot of gold jewelry; and he apparently used an alias (Sokolow's telephone number was listed under another person's name). Also, Defendant appeared nervous and was looking all around the waiting area during a layover in Los Angeles. *Sokolow*, 490 U.S. at 3-5. Although each of the factors did not, standing alone, prove illegal conduct and were consistent with innocent travel, in sum they provided reasonable

suspicion because some factors pointed to criminal activity, such as using an alias and purchasing the tickets with 105 twenty-dollar bills. *Id.* at 8-9.

Thus, it was objectively reasonable for the officers in *Terry*, *Cortez*, and *Sokolow* to suspect criminal activity and temporarily detain the suspects because objective facts and rational inferences drawn from those facts focused suspicion of criminal activity upon the individuals. The net was not so broad as to sweep in ordinary citizens.[16] But there is no reasonable suspicion when officers rely upon hunches or generalized facts describing a large number of innocent people.

In *Reid* v. *Georgia*, 448 U.S. 438 (1980), this Court ruled there was no reasonable suspicion for the airport stop of a traveler, because the factors the agent relied on described a large number of "presumably innocent travelers, who would be subject to virtually random seizures" were the Court to find reasonable suspicion for the stop.[17] *Id.* at 441. This Court did not accept the agent's subjective

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[16] Compare *Brown*, 443 U.S. at 52 (presence of a suspicious-looking man in an alley in neighborhood notorious for drug trafficking does not furnish reasonable suspicion). Thus, requiring specific, articulable facts for stops does not give officers free rein to act on their own suspicions.

[17] The factors included: arrival from Fort Lauderdale, a cocaine source city; early morning arrival, when law enforcement activity is diminished; the travelers appeared to be trying to hide the fact they were traveling together; defendant traveled ahead, occasionally looking back toward his companion; and they carried no luggage except shoulder bags. *Id.* at 440-41.

belief as a rational inference, finding "as a matter of law" that:

> [t]he agent's belief that the petitioner and his companion were attempting to conceal the fact that they were traveling together, a belief that was more an "inchoate and particularized suspicion or 'hunch,' " than a fair inference in the light of his experience, is simply too slender a reed to support the seizure in this case.[18]

Id. at 441 (internal citation omitted).

C. Plenary Appellate Review Ensures *Terry*'s Protections Remain Meaningful.

Because even a limited search is a severe intrusion, the reasonable suspicion determination is meaningful only when "the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of the particular search or seizure in light of the particular circumstances." *Terry*, 392 U.S. at 21. Petitioner would have courts of appeals ignore the context in which they receive cases.

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[18] Similarly, *Florida* v. *Royer*, 460 U.S. 491, 497-98 (1983), held when there is no reasonable suspicion, a person may refuse to cooperate, ignore the police, and go about his business. One Justice found that the facts "considered individually or collectively . . . are perfectly consistent with innocent behavior and cannot possibly give rise to any inference supporting a reasonable suspicion of criminal activity." *Id.* at 512 (Powell, J., concurring).

In *Ornelas*, this Court established a *de novo* standard of review for reasonable suspicion and probable cause issues. Independent *de novo* review is necessary for appellate courts to maintain control of and clarify legal principles, guide police, and unify precedent:

> *de novo* review tends to unify precedent and will come closer to providing law enforcement officers with a defined " 'set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.' "

Ornelas, 517 U.S. at 697-98 (internal citations omitted). The opinion noted this Court has never expressly deferred to the trial court's determination when reviewing reasonable suspicion. *Id.* at 697. Moreover, the opinion warned:

> A policy of sweeping deference would permit, "[i]n the absence of any significant difference in the facts," "the Fourth Amendment's incidence [t]o tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." Such varied results would be inconsistent with the idea of a unitary system of law. This, if a matter-of-course, would be unacceptable.

Id. at 697 (internal citations omitted). After noting the problems inherent in treating similar facts differently, this Court concluded that "[i]ndependent review is necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Id.* Thus, appellate opinions

should guide lower courts in order to provide consistency.

Although the reasonable suspicion inquiry is so fact-specific that " 'one determination will seldom be a useful precedent for another,' " *id.* at 698 (internal citation omitted), there are exceptions, such as *Sokolow* and *Royer*. And, even where one case does not control another, multiple decisions add to the applicable body of law. *Id.* Because courts of appeals have uncovered abusive patterns, their opinions offer guidance for future encounters.

Although *Ornelas* instructs courts of appeals to review findings of historical fact for clear error and to give due weight to inferences drawn from those facts by local judges and law enforcement officers, *id.* at 699, deference is not blind: an officer's perceptions must be reasonable under an objective standard. Inferences about why observed facts create suspicion of wrongdoing must be rational.

The courts of appeals can best monitor law enforcement operating along the border. Because districts vary in the number and types of cases they hear, any one district court will not hear a large number of Fourth Amendment cases, will not encompass a large geographic area, and cannot monitor potential patterns of abuse. Because courts of appeals take mandatory appeals on a circuit-wide level, they hear cases in far greater numbers than any one district court and, therefore, are in a unique position to monitor and halt abuses of power. They review both good police work, upholding appropriate

law enforcement techniques, and poor police work, striking down improper and discretionless stops. Only appellate courts can meaningfully prevent unreasonable police practices.[19]

Petitioner seeks to undermine *de novo* review. By criticizing the court of appeals' approach of determining whether a reasonable officer would rely on a particular fact, the government seeks to erode this Court's requirement of particularized suspicion for investigatory stops.

Petitioner wants past abuses, even when repeated, to become merely history, not precedent. Thus, Petitioner criticizes the court of appeals for recognizing when factors have been repeatedly abused in a "heads I win, tails you lose" manner. Yet this analysis is essential to the circuit court's role in determining whether it is reasonable to rely on certain facts under the totality of the circumstances in any given case. Although Petitioner insists courts give officers the benefit of their experience, it apparently does not want appellate judges to benefit from theirs. Petitioner's argument would allow officers to stop vehicles in a standardless and unconstrained manner, eviscerating reasonable suspicion and expanding the powers of law enforcement.[20]

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[19] No one can dispute that border patrol agents sometimes stop innocent drivers. See *Almeida-Sanchez*, 413 U.S. at 273 n.5. As the number of border patrol agents increases, the stops of law-abiding citizens will only increase.

[20] *Brent* v. *Ashley*, 247 F.3d 1294 (11th Cir. 2001), is an alarming example of how unfettered discretion can lead to abuse of innocent citizens' rights. An African-American woman arrived in Miami after a trip to Nigeria. When she shook her head disapprovingly at customs officials searching the luggage of the only other black passenger, they decided to detain her for further inspection. *Id.* at 1297. Agents claim she fit a smuggling profile: her ticket was purchased with a friend's credit card from the same travel agency as the other black passenger's; she wore inexpensive clothes; she was nervous; and she became agitated when confronted. *Id.* Female agents conducted a body pat-down and strip search by ordering her to pull down her clothes, removing and examining her sanitary napkin, and squeezing her abdomen. *Id.* at 1298. When she asked to use the bathroom, an agent watched her and told her not to flush the toilet. *Id.* A TECS search revealed no negative information. *Id.* Despite finding no signs of contraband, agents transported her to a hospital for an x-ray and pelvic exam. *Id.* The report indicated the reasons for the search were her nervousness and arrival from a source city. *Id.* at 1297. She signed a consent form after being told she could be detained up to 35 days if she refused. *Id.* at 1298. The examinations revealed no contraband. *Id.* The Eleventh Circuit found the agents lacked reasonable suspicion. *Id.* at 1302. Although the appeal was from a summary judgment order and there were disputed facts, it is undisputed that the woman was *not* smuggling drugs. *Id.* at 1298.

Plenary review is appropriate where there is a need for uniformity across cases or when issues are so important that there is a need to review the first-line decision-maker. Using an objective standard allows police to determine in advance whether their conduct implicates the Fourth Amendment. *Michigan* v. *Chesternut*, 486 U.S. 567, 574 (1988). Thus, uniformity gives officers clear guidance in the field.

A sacrifice in freedom inevitably flows from any expansion of unreviewable law enforcement powers. The reasonable suspicion standard should not be turned into

a police suspicion standard.[21] Without independent judicial review the reasonable suspicion standard would be meaningless.

Ever since its inception, the exclusionary rule has been recognized as a principal mode of discouraging lawless police conduct. 4 Wayne R. LaFave, *Search and Seizure* § 11.4(j), at 459-60 (2d ed. 1987). *Ornelas* teaches that appellate courts ultimately make these determinations. *Terry*'s command is that conduct, to be reasonable, must pass muster under objective standards applied to specific facts; *Ornelas* enforces it.

D. The Court of Appeals Correctly Followed Applicable Law and Conducted a Thorough Review.

The court of appeals followed this Court's precedent, reaching a conclusion only after considering all of the facts. It expressly limited its analysis to the facts of "this case" and to "stops such as the stop involved here,"

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[21] The problem with this approach is obvious. "Just as a man with a hammer sees every problem as a nail, so a man with a badge may see every corner of his beat as a high crime area. . . . Police are trained to detect criminal activity and they look at the world with suspicious eyes. This is a good thing, because we rely on this suspicion to keep us safe from those who would harm us. But to rely on every cop's repertoire of war stories to determine what is a 'high crime area' – and on that basis to treat otherwise innocuous behavior as grounds for reasonable suspicion – strikes me as an invitation to trouble." *United States v. Montero-Camargo*, 208 F.3d 1122, 1143 (9th Cir. 2000) (Kozinski, J., concurring).

thereby confirming that it had not created any *per se* rules. *Arvizu*, 232 F.3d at 1248.

The court correctly recited this Court's standards for reasonable suspicion, including: there must be "articulable facts that criminal activity may be afoot" (citing *Sokolow* and *Terry*), emphasizing that while "we must take into account the totality of the circumstances" (citing *Sokolow* and *Gates*), "inchoate and unparticularized suspicions and hunches" do not furnish reasonable suspicion (citing *Wardlow*); and "reasonable suspicion exists only when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for *particularized* suspicion," meaning that "*the particular person being stopped* has committed, or is about to commit a crime." *Arvizu*, 232 F.3d at 1247.

The opinion correctly recited *Sokolow*, recognizing that courts may properly consider "conduct that may be entirely innocuous when viewed in isolation" in assessing reasonable suspicion. *Id.* at 1247. Nevertheless, there must be "other information or surrounding circumstances of which the police are aware, considered together with the otherwise innocent conduct" to provide a sufficient basis to suspect criminal activity. *Id.* at 1248.

The court correctly stated that officers are always entitled to assess the facts in light of their experience, *id.* at 1247 (citing *Brignoni-Ponce*), and that "an officer's experience may furnish the background against which the relevant facts are to be assessed, as long as the inferences he draws are objectively reasonable," *id.* at 1248.

The court also recognized that some factors "have so little probative value that no reasonable officer would rely on them in deciding to make an investigative stop." *Id.* at 1247. Without this, *Terry*'s protections are meaningless.

Then, the court explained how it evaluated this case:

> In reaching our conclusion, we find that some of the factors on which the district court relied are neither relevant nor appropriate to a reasonable suspicion analysis in this case, and that the others, singly and collectively, are insufficient to give rise to reasonable suspicion.

Id. at 1248. The court's unequivocal language "in this case" limits its rulings to these facts.

Although the opinion states that slowing down is "squarely prohibited by our precedent," the court explains the factor is not categorically prohibited, but needs something more to make it suspicious, such as evasive or erratic driving. *Id.* The court next ruled that Arvizu's failure to acknowledge the agent had little or no incriminating weight absent "special circumstances," and the children's waving had no such weight, in light of the contradictory inferences drawn from the border patrol's repeated use of opposite factors. *Id.* at 1249. The court also determined that other factors (the previous stop of a minivan, the officer did not recognize this minivan, registration to an address in a neighborhood notorious for smuggling, and the children's knees were slightly raised) carried little or no incriminating weight "absent other circumstances." *Id.* at 1249-50. In other words, the factors had so little rationally incriminating weight under the circumstances of this case that a reasonable officer could

not have relied upon them in making a stop. Thus, Petitioner's argument that the opinion "eliminated seven different facts . . . from the reasonable suspicion calculus 'as a matter of law,' . . . without limiting its exclusions to this one case," Pet. Br. 21, is simply wrong.

Petitioner also claims the court considered the three "relevant" factors in isolation and "disaggregated" factors the agent deemed collectively significant, turning isolated facts into a series of hurdles. Pet. Br. 12, 31. This is not so. For example, the fact of not recognizing a minivan, when an area is known for recreation and tourism, shows how the court of appeals placed an isolated fact in the context of all of the circumstances and determined from the totality of facts that it was not suspicious of criminal activity. Although Petitioner admits that reasonable suspicion is "inherently contextual," Pet. Br. 13, 19, it objects when the court of appeals fits the agent's observations into their context, and determines they are not suspicious. In Petitioner's view, reviewing courts should consider only the totality of facts the agent deemed significant, not the whole picture.

When the court of appeals reviewed the remaining three factors (smugglers sometimes use the road, smugglers have used minivans, and shift change), it did not do so in isolation but in the context of all of the circumstances. The court determined that, although they had some level of suspicion, and thus were probative "to *some* degree," they did not furnish reasonable suspicion, "either singly or collectively." *Arvizu*, 232 F.3d at 1251.

The opinion did not categorically prohibit any factor. It determined, based on this Court's teachings, that ordinary, innocuous facts, without more, do not provide particularized suspicion of criminal activity. There must be another circumstance or something in light of the officer's experience, but it must be more than a hunch. For example, slowing down upon seeing a marked patrol car, without something more, is not at all indicative of criminal activity. *Id.* at 1248-49. Petitioner mischaracterizes the opinion by saying it "deemed only three factors relevant to reasonable suspicion analysis." Pet. Br. 12. The court did not create *per se* rules but found, in this case, that certain factors lacked any suspicion, given the circumstances.

The court's review of the entire record directly contradicts Petitioner's claim that it fashioned *per se* rules. The language "as a matter of law," "in this case," "under the circumstances," and "absent other circumstances" is shorthand for the painstaking *de novo* review the court of appeals conducted, carefully examining the tapestry of facts, observations, and suppositions.

Similarly, Petitioner complains the opinion creates "specific" rules that are "too numerous and too complicated for officers to apply when they make the split-second decision whether to stop." Pet. Br. 13. Petitioner overlooks that the opinion, just as *Ornelas* teaches, offers guidance, instructing that officers must explain the objective bases of their inferences of criminal activity. While *Terry* street encounters may often involve split-second decision-making, the vehicle stop here was not based on such rapid determinations. The agent did not wait for

reasonable suspicion to develop, but instead acted upon his subjective impressions.

Petitioner wrongly characterizes the opinion as departing from the totality of the circumstances approach and as "suggesting" that some types of activity should be excluded from the reasonable suspicion inquiry, such as activities that are almost always innocent, factors inviting subjective application by officers, and factors placing groups of law-abiding citizens at a heightened risk of being stopped. Pet. Br. 24-25. This oversimplifies the opinion. The court of appeals followed this Court's precedent and reached legal conclusions only after considering all of the facts. This is nothing more than the *de novo* review *Ornelas* requires.

The court searched the record for the objective facts and rational inferences of criminal activity that *Terry* requires, but found none. The agent merely reported his subjective impressions and facts that did not give rise to rational inferences of wrongdoing. Missing was testimony about how the observed behavior, in the agent's experience, correlated with criminal conduct. The factors the agent relied upon fail because they do not indicate criminal activity. The record does not place the agent's observations in a context that demonstrates why the observations reasonably led to suspicion. These are the "other circumstances" the court of appeals found were lacking.

Agents cannot merely list their observations because reasonable suspicion "is not a numbers game." *Arvizu*, 232 F.3d at 1247 n.8. This common-sense observation reflects the teachings of *Terry* and *Ornelas*.

The probative force of the inferences drawn from the factors the agent offered to support the stop is a function of all of the circumstances, not just the ones the agent mentioned. The court of appeals conscientiously considered everything. But it did not attribute incriminatory weight to everything the agent observed. Instead, the court followed this Court's *Terry* analysis, critically analyzing whether the agent's inferences and suppositions were objective and rational, and examined each factor in the context of *all* of the facts. The court followed *Ornelas* by thoroughly analyzing each factor in light of its experience with similar cases, determining several factors failed to contribute to reasonable suspicion – either singly or collectively, in this case.

The court of appeals' approach in *Arvizu* was not novel. The *Arvizu* opinion falls squarely within this Court's jurisprudence. Following this Court's instruction, the Ninth Circuit declines to find reasonable suspicion when agents present subjective, rote, and contradictory factors[22] and upholds stops when agents present objective and rational factors and inferences that point towards criminal activity.[23] The "library analysis" the government complains of, Pet. Br. 24, is nothing other than common-sense analysis.

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[22] See, *e.g.*, *United States* v. *Garcia-Camacho*, 53 F.3d 244, 249 (9th Cir. 1995); *United States* v. *Jiminez-Medina*, 173 F.3d 754 (9th Cir. 1999).

[23] See, *e.g.*, *United States* v. *Michael R.*, 90 F.3d 340 (9th Cir. 1996); *United States* v. *Rodriguez-Sanchez*, 23 F.3d 1488 (9th Cir. 1994).

In 1979, then Judge Kennedy criticized a stop, based on rote and contradictory factors, and did so using a common-sense approach which examined the component factors:

> It is an innocuous circumstance that two vehicles are traveling in tandem on a hot summer day, one with a child in the front between two adults in bucket seats. . . . The failure of the occupants to look at the agents adds little to the case in light of the questionable value of the factor generally, the reliance in other cases on the fact that the suspect did look at the agent, and the testimony of the agent that he considered it suspicious that Ortiz did watch him in the rear view mirror.

United States v. *Munoz*, 604 F.2d 1160, 1161 (9th Cir. 1979). One need only peruse Fifth, Ninth, and Tenth Circuit opinions to discern oft-repeated factual patterns; therefore, precedent guides both officers in the field and district courts. Petitioner wrongly suggests that reasonable suspicion cases cannot be useful precedent. Pet. Br. 23.

Echoing this Court's teachings in *Ornelas*, 517 U.S. at 697-98, the court of appeals emphasized the need for guidance, noting that "no one can be sure whether a particular combination of factors will justify a stop until a court has ruled on it." *Arvizu*, 232 F.3d at 1248. The opinion did not suggest, as Petitioner claims, that "contextual application" of the reasonable suspicion standard results in too much uncertainty. Pet. Br. 13. Instead, the court carefully reviewed and synthesized previous cases

and examined all of the facts in order to issue an instructive opinion.[24]

The Ninth Circuit's approach is consistent with its sister border circuits, the Fifth[25] and Tenth Circuits.[26] In

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[24] The Ninth Circuit's approach is consistent with the role *Ornelas* defined for appellate courts. Indeed, the Ninth Circuit's statements that multi-factored balancing tests can introduce uncertainty, *Arvizu*, 232 F.3d at 1248, reflects the same concern this Court expressed about "varied results" in *Ornelas*, 517 U.S. at 697, and is not in any way a rejection of the totality of the circumstances test. Consistent with providing guidance to "unify precedent" and to provide officers with a "defined set of rules" which apply in "most instances," as discussed in *Ornelas*, *id.* at 697-98 (internal quotes and citations omitted), the Ninth Circuit sought 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.*" *Arvizu*, 232 F.3d at 1248 (emphasis added). Far from creating *per se* rules, the Ninth Circuit went out of its way to announce that its analysis was limited to the facts of "this case" and was to provide guidance for future encounters.

[25] See, *e.g.*, *United States* v. *Jones*, 149 F.3d 364, 368 (5th Cir. 1998) (finding no reasonable suspicion where several factors were too common to be suspicious, ruling factors consistent with smuggling will not support reasonable suspicion if they occur even more commonly among law-abiding citizens – a common sense observation); *United States* v. *Escamilla*, 560 F.2d 1229, 1232-35 (5th Cir. 1977) (conducting analysis similar to the Ninth Circuit's analysis here, finding certain factors deserve no consideration and it would take "mental gymnastics" to find reasonable suspicion).

[26] See, *e.g.*, *United States* v. *Salzano*, 158 F.3d 1107, 1111-15 (10th Cir. 1998) (finding no reasonable suspicion; ruling "some facts must be outrightly dismissed as so innocent or susceptible to varying interpretations as to be innocuous;" individually examining each of the enumerated factors; and noting "[a]lthough the nature of the totality of the circumstances test

fact, most circuits have engaged in analyses that are similar in whole or in part, including criticism of the use of rote and contradicting generalized factors.[27]

Petitioner complains that the ever-increasing body of judicial precedent regarding investigative stops burdens officers, who should not be expected to recall so many cases, Pet. Br. 23-24, but also complains about this opinion, which usefully synthesizes past cases into an instructive opinion. In doing so, Petitioner overlooks this Court's admonition in *Mincey* v. *Arizona*, 437 U.S. 385, 393 (1978):

> [T]he Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.

Similarly, Petitioner argues the opinion would leave officers having to "guess about what degree of suspicion would exist in the absence of the forbidden fact." Pet. Br.

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makes it possible for individually innocuous factors to add up to reasonable suspicion, it is impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation"); *United States* v. *Wood*, 106 F.3d 942, 946 (10th Cir. 1997) (outrightly rejecting wholly innocent factors that do not suggest criminal activity at all, such as fast food wrappers and maps).

[27] See, *e.g.*, *United States* v. *Bayless*, 201 F.3d 116, 133-34 (2nd Cir. 2000) (finding reasonable suspicion but cautioning that factors vary in their weightiness); *Karnes* v. *Skrutski*, 62 F.3d 485, 496 (3d Cir. 1995) (ruling a combination of wholly innocent factors cannot combine into reasonable suspicion, unless there are concrete reasons for such an interpretation).

24. This is wrong. The opinion eliminates guesswork because it instructs. *Ornelas* clearly explains that lack of guidance creates confusion and leaves both officers and courts guessing.

Petitioner's position, followed to its logical end, is tantamount to giving officers unlimited discretion by prohibiting courts from carefully reviewing investigative stops. Petitioner's brief seeks indirectly what it has failed to obtain directly – unfettered discretion for roving patrols to stop vehicles in border areas. Petitioner seeks a tautological test. But this would eviscerate *Terry*'s reasonable suspicion requirement. Under Petitioner's argument, all reasons agents offer are entitled to incriminatory weight, no matter how empty of objectivity and rationality. Petitioner's approach is unreasonable and would give field officers unfettered discretion and courts no meaningful way to guide agents as to what is reasonable. Petitioner's approach would not allow courts of appeals to conduct a thorough, plenary review or to individually consider each factor to determine whether, together, they provide reasonable suspicion. The "unrealistic second guessing" Petitioner complains about is simply plenary review holding officers to no less and no more than reasonable suspicion. Petitioner's argument is contrary to *Terry* and *Ornelas*, which require police to have reasonable suspicion and courts to independently and carefully review their claims.

II. The Court of Appeals Correctly Determined that, Without More, the Factors the Agent Offered Were Not Objectively Suspicious and Did Not Cast Particularized Suspicion Upon Arvizu.

The facts are essentially undisputed. Yet, the facts do not objectively give rise to inferences of criminal activity. The court of appeals conscientiously examined each fact in the context of the totality of the circumstances and determined there was no reasonable suspicion. Although Petitioner wants each factor to have incriminatory weight, the court of appeals ruled that some factors merited no consideration, and others merited little. While the government focuses upon quantity, the court of appeals focuses upon quality.

In this case, the rational inferences based on the objective facts indicated only a family in a minivan on a holiday outing, not criminal behavior. The government merely repeats the agent's recitation of a number of observations and his subjective determinations and does not explain how the facts the agent observed rationally pointed to suspicion of criminal activity. The court of appeals examined everything in determining the agent's suspicion was not reasonable.

Route of travel/checkpoint evasion

The opinion correctly ruled this factor carried some suspicion, but was only of moderate significance in this case.

Although Petitioner claims the route Arvizu traveled would have added forty or fifty miles to the trip and was

not the most direct route to northwest destinations, a glance at the map (J.A. 157) shows the route was a shortcut from Douglas to many destinations (including campground and picnic areas along the northern part of Chiricahua National Monument, all destinations northeast of Douglas, and eastbound I-10 travel). Moreover, even if it were not shorter in time or distance, motorists need not take the quickest route of travel to a given destination and avoid a scenic route, or else risk a stop, interrogation, and search.[28]

The turn onto Kuykendall was the natural path to take for anyone traveling north along Leslie Canyon. For such travelers, passing through the checkpoint would have been unusual and out of the way.

The road's use by smugglers is not particularized to Arvizu and any road in Southern Arizona could be and has been so characterized.[29] Moreover, an individual may choose not to submit to a checkpoint inspection. See *Martinez-Fuerte*, 428 U.S. at 549. This Court has consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure. *INS* v. *Delgado*, 466 U.S. 210, 216-17 (1984); *Royer*, 460 U.S. at 498; *Brown*, 443 U.S.

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[28] The Fifth Circuit found that "it simply is not unusual that the particular route chosen by a driver does not coincide with a route border patrol agents consider more direct or common." *Escamilla*, 560 F.2d at 1232.

[29] The Fifth Circuit has repeatedly held that merely being on a road frequently used for illegal activity cannot justify a stop, since that would include virtually all roads along the Texas-Mexico border. See, *e.g.*, *United States* v. *Diaz*, 977 F.2d 163, 165 (5th Cir. 1992).

at 52-53. Petitioner's argument that Arvizu did not take the fastest available route also fails because it ignores an individual's right to travel.[30]

Shift change

The opinion correctly found this factor carried some level of suspicion but was of little probative value, especially without other factors showing evasive behavior. This common-sense conclusion follows *Reid*, which rejected agents' claims that an early morning arrival was suspicious because it coincided with diminished law enforcement activity. Just as it is unreasonable to characterize early morning flights as suspicious, it is unreasonable to characterize traveling from Douglas, Arizona through an adjacent recreational area at 2:15 p.m., in broad daylight, as suspicious.[31] Yet the agent paired this time with the 3:00 p.m. shift change, which he claimed smugglers use to avoid border patrol. This conclusion makes no sense given that agents might use Leslie Canyon Road to return to the checkpoint, making the route more likely to draw the attention of border patrol. Also,

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[30] The right to travel has been firmly embedded in this Court's jurisprudence for more than a century. See *Saenz* v. *Roe*, 526 U.S. 489, 498 (1999). See also *United States* v. *Lopez*, 564 F.2d 710, 713 (5th Cir. 1977) ("We would have thought it obvious that citizens may leave their state or county without having their purposes questioned.").

[31] See *United States* v. *Hernandez-Alvarado*, 891 F.2d 1414, 1419 (9th Cir. 1989) (Alarcon, J., concurring) (noting Border Patrol agent considered traveling in the morning suspicious because "drug smugglers travel at that time to *blend in* with the work force") (emphasis added).

the fact that Arvizu was traveling in the area forty-five minutes before shift change undermines any rational inference he was trying to avoid the border patrol. Petitioner would have area residents not travel anywhere within one hour of shift changes, some six hours per day, lest their activities be interpreted as suspicious.[32]

Minivans are used by smugglers.

The opinion correctly found this factor carried some level of suspicion but was of little probative value in this case. It would be difficult to find a make or model of vehicle that has not been used for smuggling.[33] Smugglers prefer whatever vehicle is roomy enough to hide aliens or contraband. Case law abounds with vehicle descriptions preferred by smugglers – Chevrolets, Fords, vans, trucks, Suburbans, and vehicles with roomy

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[32] See *United States* v. *Moreno-Chaparro*, 180 F.3d 629, 633 (5th Cir. 1999) ("we are not willing to sacrifice the constitutional protections of drivers to lessen the perceived adverse impact resulting from the decision of the Border Patrol to change shifts at the same time every day").

[33] See *Salzano*, 158 F.3d at 1107-13 (dismissing the kind of vehicle used as a factor because large quantities of drugs can be, and have been, hauled in vans, U-Hauls, tractor trailers and any large vehicle, and because there was no evidence the vehicle appeared heavily loaded or had been modified in any way); *Karnes*, 62 F.3d at 495 (finding argument that smugglers use mid- to full-size, average-looking cars to "blend in" turns notion of reasonable suspicion "on its head" by using factors that make the person searched look more like an ordinary, innocent person).

trunks.[34] Because minivans are one of the most popular family cars, this factor adds little, if nothing, to the equation, particularly if, as the court of appeals concluded, the vehicle did not appear to be heavily weighted, the absence of which negated suspicion here.

Another minivan containing marijuana was stopped within the last month.

The opinion correctly ruled this factor was of such low probative value that no reasonable officer would have relied upon it. Different agents had stopped one minivan containing marijuana along the same route one month earlier. As the court of appeals ruled, a single previous stop of a similar vehicle cannot taint all minivans – another common-sense observation. Rather than create a *per se* rule, the court of appeals noted that the result could have been different if the totality of the circumstances had provided "more than a single, isolated incident." *Arvizu*, 232 F.3d at 1249. This factor does nothing to suggest criminal activity in this case or to cast particularized suspicion on Arvizu.

The minivan slowed when it approached the agent's vehicle.

The opinion states this factor "is squarely prohibited by our precedent" because the agent observed no evasive,

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[34] Adding together only the vehicles that the Census Bureau classified as either pickup, minivan, panel or van, utility vehicles, and station wagons yields a total of 67,135,600 vehicles. See United States Census Bureau, *supra* at 644.

erratic, or unlawful driving and "slowing down after spotting a law enforcement vehicle is an entirely normal response that is in no way indicative of criminal activity."[35] *Id.* at 1248-49. Despite the language, the court's application reveals this is not a categorically prohibited factor, but only that, without more, there is nothing suspicious about slowing down. This is a common-sense conclusion. Rationally, one could not infer illegal activity from the van's decrease in speed in this case, which was not even unusual.[36] Instead of creating a *per se* rule, the court considered the whole picture, including: there is no posted speed limit; the agent only guessed Arvizu's speed; and Arvizu was not driving unsafely, erratically, evasively, or unlawfully. Slowing down when encountering an officer is a perfectly normal response – a common-sense fact appellate courts have long recognized.[37]

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[35] See, *e.g.*, *Garcia-Camacho*, 53 F.3d at 247 (arguing both increases and decreases in speed are "suspicious," creating a "heads I win, tails you lose" trap for drivers who do not maintain constant speed); *Hernandez-Alvarado*, 891 F.2d at 1419 (Alarcon, J., concurring).

[36] Compare *Hodgers-Durgin* v. *De la Vina*, 199 F.3d 1037, 1048 (9th Cir. 1999) (in which Judge Reinhardt made a contrary conclusion on different facts: "Ms. Hodgers-Durgin's sole stop occurred immediately after her car slowed suddenly on the freeway, stopped for several minutes at an empty intersection, and then continued extremely slowly over a highway overpass. In light of her erratic behavior on the road, it is not surprising that she was stopped by a law enforcement officer.").

[37] See, *e.g.*, *Diaz*, 977 F.2d at 165 ("there is nothing suspicious about a speeding car slowing down after a marked patrol car turns to follow, with or without flashing lights . . . that is the expected reaction"); *United States* v. *Robert L.*, 874 F.2d 701 (9th Cir. 1989) (finding *de minimis* departures from normal

The agent did not explain why slowing down was suspicious here. Especially under these circumstances, slowing down was not a furtive act, such as flight,[38] but was almost the opposite. Petitioner correctly notes that other courts have found speeding up or slowing down suspicious if the driver is trying to distance himself from the officer or if the driver is so distracted that he stops paying attention to the road. Pet. Br. 26 n.12. But none of these factors were present here.

Arvizu, by slowing down, having a stiff posture,[39] gripping the steering wheel, and keeping his eyes on the road, demonstrated the good, cautious behavior one would expect when suddenly encountering any vehicle on a rural, dirt road, especially a marked law enforcement vehicle.

As the court of appeals concluded, non-dangerous and non-evasive driving, such as the slowing down here, without more, does not rationally indicate criminal activity.

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driving do not provide reasonable suspicion); *United States* v. *Bloomfield*, 24 F.3d 1043, 1048 (8th Cir. 1994) (nervousness does not suggest criminal conduct as few innocent people would be calm after being stopped and ordered to sit in patrol vehicle).

[38] *Wardlow*, 528 U.S. at 124-26 (holding unprovoked flight is the "consummate act of evasion").

[39] This behavior does not show nervousness. See *United States* v. *Fernandez*, 18 F.3d 874, 881 n.5 (10th Cir. 1994) (discounting nervousness, characterized as the startled awakening and stiff demeanor of the passenger, finding the officer relied upon a hunch).

The driver failed to acknowledge the agent and appeared nervous.

The opinion ruled this factor has questionable value and carries weight, if at all, "only under special circumstances." Rather than create a *per se* rule, the court correctly noted there was nothing "out of the ordinary" to convert this fact into a suspicious circumstance.[40] Petitioner wrongly characterizes the opinion as excluding this factor from a *Terry* analysis. Pet. Br. 28. This was not a case where "a pedestrian looked at an officer just before he rushed to a car and drove away," or where a person would not look at an agent in order to conceal his face. Pet. Br. 29 (citing cases where these additional facts were present). Even the district court agreed the factor "doesn't mean a whole lot." Pet. App. 24a.

Clearly, lack of eye contact should not give rise to reasonable suspicion because choosing not to wave at or make eye contact with a law enforcement officer, without more, is not evasive or furtive conduct and cannot be suspicious of criminal activity.[41] The agent did not explain why this was suspicious. Although this factor is particularized to Arvizu, it is meaningless.

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[40] The conclusion that the court of appeals did not create a *per se* rule excluding this factor is evident from a subsequent case where it considered this factor as suspicious under differing circumstances. *United States* v. *Murillo*, 255 F.3d 1169, 1174 (9th Cir. 2001) (concluding "lack of eye contact" was suspicious when it occurred "at crucial moments in the[ ] conversation" between the driver and agent).

[41] It is a logical step from *Reid*, which acknowledged citizens have a right to go about their business, to say that it is not suspicious for citizens to not wave or smile at police officers.

The agent did not recognize the van as a local vehicle.

Petitioner incorrectly asserts that the lower court "barred consideration" of this factor. Pet. Br. 27. The court of appeals correctly ruled this factor was of such low probative value that no reasonable officer would have relied on it under the circumstances of this case, properly taking into account that the van was traveling through scenic and recreational areas. Indeed, this factor's relevance vanishes in light of the fact the agent discovered the vehicle belonged to a Douglas resident.

The agent admitted he was not "real familiar" with the area, conceded non-locals use the road, and never said this factor was suspicious to him. He never testified that he knew all of the local residents and recognized their vehicles. Although this factor might make sense in another setting, this factor signifies nothing here.[42] Basing reasonable suspicion upon this factor would also impinge upon the right to travel.

The children's knees were raised as if resting on cargo.

Contrary to Petitioner's brief, the court of appeals properly considered this factor and did not create a *per se* rule. The court correctly ruled this fact was of such low probative value that no reasonable officer would have relied on it under the circumstances of this case. Given the circumstances here – a family in a minivan, likely on a

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[42] Compare *United States* v. *Garcia-Barron*, 116 F.3d 1305, 1306-08 (9th Cir. 1997) (finding reasonable suspicion where defendants avoided a checkpoint at 3:00 a.m, driving on a road no one used for any legitimate purpose at that hour).

sightseeing or camping trip in the middle of the afternoon on a public holiday – there was nothing suspicious about the children's feet appearing to rest upon something on the floor. The opinion contrasted these facts with other cases involving vehicles that appeared heavily loaded. *Arvizu*, 232 F.3d at 1250. The children's knees were not even chest high – and the opinion made a common-sense observation that this position was as suggestive of resting on pillows, camping supplies, or suitcases as of resting on cargo. *Arvizu*, 232 F.3d at 1250-51. The fact the agent could see into the vehicle shows there was no attempt to obscure the view inside it with window coverings or tarps. The position of the children's knees does not support an inference of alien smuggling in this case.

The children waved oddly as if coached.

The opinion correctly ruled the children's conduct carries no weight in this case, recognizing it as a classic case of "damned if you do, equally damned if you don't."[43] *Arvizu*, 232 F.3d at 1249. The agent had barely finished criticizing the adults for not waving, when he

[43] Several circuits have identified the use of opposites as a particularly troubling pattern See, *e.g.*, *Gonzalez-Rivera* v. *INS*, 22 F.3d 1441, 1446-47 (9th Cir. 1994); *Lopez*, 564 F.2d at 713 (criticizing agents' claims of vehicles riding high or riding low as suspicious: "the border patrol's position seems to be '[r]iding high or riding low, either way a searching we will go' "); *United States* v. *De la Cruz-Tapia*, 162 F.3d 1275, 1278 n.1 (10th Cir. 1998) (agent undermined his credibility by testifying that both eye contact and lack of eye contact were suspicious).

testified it was suspicious that the children were waving. The opinion notes this incongruity, then remarks that because children are well-known to act impetuously and in ways that embarrass their parents, the children's waving here did not contribute to reasonable suspicion. *Arvizu*, 232 F.3d at 1249. To rule otherwise would mean the vast majority of parents might be regularly stopped. Totality of the circumstances analysis does not circumvent these common-sense observations.

There was no basis for the agent's supposition that the children had been coached to wave. This is a purely subjective impression.[44] In fact, there is no basis for the agent's supposition that the children were waving at him because "[i]t looked like the children were waving forward" and they were not even looking at him. J.A. 35. Moreover, waving, coached or not, does not imply criminal activity.

The van was registered to a resident of a block notorious for smuggling.

The opinion correctly ruled this factor was of such low probative value in this case that no reasonable officer would have relied on it. The van was registered to Leticia Arvizu, a resident of Douglas. There were no reports of illegal activity relating to either Leticia Arvizu, the van, or her Douglas address.

[44] See *Reid*, 448 U.S. at 441 (determining agent's claim that people were trying to hide the fact they were walking together was subjective).

Presence in a high crime area does not provide reasonable suspicion, but is a relevant factor.[45] But living in a high-crime area is a different consideration altogether. Presence in an area suggests an action within an individual's control. Residence in a high crime area relates to a person's status, is likely a function of poverty, and casts suspicion upon too many innocent people. Without more, merely living in a high crime area does not rationally suggest criminal activity. The district court concluded this fact "doesn't mean a lot." Pet. App. 25a. It is difficult to imagine an area in a border city that has not been so characterized.[46]

In addition, the court of appeals notes the agent "did not explain the factual basis for this assertion, nor did he identify the source of his information" and finds the district court's reliance upon it was misplaced. Petitioner's argument that the Douglas address meant the van's trip started from a smuggling area, Pet. Br. 31, is circular; after all, most trips start from home. Petitioner's argument still uses residence as a basis for suspicion.

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[45] *Brown*, 443 U.S. at 52.

[46] Compare *United States* v. *Grant*, 920 F.2d 376, 386 (6th Cir. 1990) (noting "our experience with DEA agent testimony in other cases makes us wonder whether there exists any city in the country which a DEA agent will not characterize as either a major narcotics distribution center or a city through which drug couriers pass on their way to a major narcotics distribution center").

The Totality of Circumstances the Agent Observed was of a Family Holiday Outing, Not Suspicious Criminal Activity.

The totality of the circumstances the agent observed was that of a family on an outing. The agent saw a man, a woman, and three children traveling in a minivan – a popular family car – at 2:15 p.m. on a holiday, adjacent to a recreational area. The vehicle did not appear heavily laden, was not riding low, and no attempt had been made to conceal its contents. No one in the van made furtive movements, took evasive action, or tried to hide. The van slowed down as it approached the patrol vehicle, and the driver held the wheel tightly as he approached and passed the agent's vehicle, which was angled in the roadway. The driver did not violate any traffic laws and did not create a road hazard or obstruction. He drove carefully, with both hands on the wheel. Although the adults did not look at the agent, the children began waving oddly.

The agent did not suspect either the driver or the passengers were illegal aliens. Because of the location of the sensor, he also had no reason to suspect the van had recently crossed the border. When the agent checked the van's registration, he learned that it was registered to a Douglas address. Although smuggling activity occurs in Douglas (as in all border towns), the agent had no suspicious information about the Douglas address, the van, or its owner. None of the agent's observations and subjective impressions supported a rational inference Arvizu was engaged in criminal activity. No objectively reasonable factors or inferences pointed towards smuggling

activity. Nothing negated this picture of innocent conduct, which describes a large group of law-abiding citizens.

Although officers may perceive conduct as suspicious that appears innocent to untrained observers, they must articulate any special meaning to the courts, which assess reasonableness independently of the police officers' subjective assertions. This ensures that the courts, rather than the police, are the ultimate enforcers of the Fourth Amendment. The agent lacked a reasonable, objective basis for believing the van's occupants were involved in criminal activity and instead relied upon subjective factors and unreasonable inferences. There was no reasonable suspicion for the investigative stop.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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