NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ARMANDO ANGELES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, when affirming the denial of Mr. Angeles' motion to suppress, the Tenth Circuit Court of Appeals erred in applying the Kansas Supreme Court's interpretation of a Kansas traffic statute governing the failure to maintain a lane, an error that also implicates divergent views of similar statutes nationwide?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Armando Angeles, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on February 16, 2018.

OPINION BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit, *United States v. Angeles,* 725 Fed. App'x 624 (10th Cir. Feb. 16, 2018) is found in the Appendix at 1.

JURISDICTION

The United States District Court for the District of Kansas had jurisdiction in this criminal action pursuant to 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and entered judgment on February 16, 2018. Justice Sotomayor extended the time in which to petition for certiorari by 60 days, to and including July 16, 2018. *See* Appendix at 12. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL PROVISIONS INVOLVED

U.S. Const. amend. IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

STATEMENT OF THE CASE

On July 27, 2014, Armando Angeles was returning home to Topeka from Wichita along Interstate 35, when he was pulled over by Kansas Highway Patrol Trooper Sage Hill. (Vol. 1 at 39.)[1] A subsequent search of the vehicle turned up a quantity of cocaine and marijuana. (*Id.* at 42.)

After being indicted on federal drug charges, he moved to suppress the evidence seized from his vehicle. (*Id.* at 22.) He argued, in pertinent part, that the traffic stop was unjustified at its inception. (*Id.* at 24-25, 27.) In response, the government proffered two bases for the constitutionality of the traffic stop; only the second is at issue here. (*Id.* at 28-34.)

First, the government argued that the stop was initiated at the direction of agents conducting electronic surveillance of suspected drug trafficking in Wichita, pursuant to a court-approved wiretap. (Vol. 1 at 29-31; Vol. 2 at 11.) Mr. Angeles was not a target of this wiretap investigation, but his cousin, Gilberto Sanchez, had fallen under surveillance based on his contacts with a target of the investigation. (Vol. 1 at 28-31; Vol. 2 at 11; Vol. 3 at 40, 45-46, 102.) And, the government argued, from monitoring Mr. Sanchez' phone, the investigation developed probable cause to believe that Mr. Angeles' vehicle contained drugs that day. (*Id.* at 30 & nn.1 & 3.)

[1] Citations are to the record on appeal in the Tenth Circuit and the page number at the bottom, right-hand side of each page. The citations are provided for the Court's convenience in the event this Court deems it necessary to review the record to resolve this petition. *See* Sup. Ct. R. 12.7.

Second, the government argued that the traffic stop was justified because Trooper Hill pulled the vehicle over only after he had reasonable suspicion that Mr. Angeles had committed a traffic infraction, specifically, after the vehicle's tires twice drifted across the white fog line. (*Id.* at 31-33.) This was, the government contended, a violation of K.S.A. § 8-1522, which statute proscribes a failure to maintain a single lane of travel on a laned-roadway. (Vol. 3 at 50.)

As pertinent here, at the evidentiary hearing Trooper Hill testified that in the late afternoon of July 27th, he had been contacted by another Highway Patrol trooper, who was assigned as a task force officer with the Drug Enforcement Administration, and was told to stop a vehicle that would be traveling through his area of responsibility on the Kansas Turnpike. (*Id.* at 48, 50.) Trooper Hill was instructed to try to find a traffic infraction to justify the stop, and to then attempt to obtain consent to search the vehicle. (*Id.* at 61, 65.) Failing that, however, he was instructed to still stop the vehicle based on the DEA's belief that adequate probable cause had been developed through the wiretap investigation. (*Id.* at 48.)

After seeing the target vehicle pass his position, Trooper Hill pulled out and accelerated quickly. (*Id.* at 50.) He was behind the vehicle in approximately two miles. (*Id.* at 50.)

But "pretty much as soon as he began to observe the vehicle," (*id.*), he said, he witnessed the passenger side tires of the vehicle cross the white fog line twice, by about a "tire width or so." (*Id.* at 56). He saw this from about 200 to 250 feet away.

(*Id.* at 60). He did not witness a loss of control over the vehicle at any time though; the vehicle's passenger side tires simply crossed over the fog line, nothing more. (*Id.* at 61.)

Nonetheless, he concluded, this gave him the justification to stop the vehicle that he was looking for. Abiding by his instructions to find a reason to stop the vehicle, he initiated a traffic stop for a violation of failing to maintain a single lane of travel on a laned-roadway. (*Id.* at 50.)

He identified the driver as Mr. Angeles, and ultimately issued him a warning for the perceived lane violations. (*Id.* at 52.) After returning Mr. Angeles' paperwork, and telling him he was free to go, he immediately re-engaged Mr. Angeles in conversation. (*Id.* at 53.) Mr. Angeles agreed to answer some questions and eventually acceded to Trooper Hill's request to "check" the vehicle for "anything illegal." (*Id.* at 53-54.) The search of the vehicle turned up some cocaine and marijuana in the front center console. (*Id.* at 54.)

Trooper Hill arrested Mr. Angeles on state charges, omitting from his arrest report all mention of the instructions from the other trooper regarding the wiretap investigation in an attempt to keep that investigation secret. (*Id.* at 58.)

The district court denied Mr. Angeles' suppression motion, concluding that the traffic stop was supported by both bases proffered by the government. Although Trooper Hill's dash-cam video was overexposed due to sunlight and did not show Mr. Angeles' vehicle's tires ever cross the fog line, the court credited Trooper Hill's

testimony that he observed the tires twice cross the fog line. (*Id.* at 41.) The court also found that the sun was bright and there was no significant wind or other condition that would have rendered it "impracticable . . . to maintain a single lane of traffic." (*Id.* at 41.)

The court then determined that this amounted to a violation of K.S.A. § 8-1522(a), and, therefore, the stop was supported by reasonable suspicion that the vehicle had committed a traffic infraction. (*Id.* at 43.) The court acknowledged, however, that the Kansas Supreme Court had interpreted § 8-1522(a) as requiring more than an incidental and minimal lane breach in *State v. Marx*, 215 P.3d 601, 612 (Kan. 2009), but offered no further indication of how Trooper Hill's observation amounted to a violation of the statute. (*Id.*)

Mr. Angeles entered a conditional guilty plea pursuant to Fed. R. Crim. P. 11(a)(2) to the two counts with which he was charged—possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a), (b)(1)(C), and use of a communication facility to facilitate the distribution of cocaine, in violation of 21 U.S.C. § 843(b). (Vol. 1 at 48-54; Vol. 3 at 86-88.) He pled openly without a plea agreement, and expressly preserved his right to appeal the district court's denial of his motion to suppress. (Vol. 1 at 49-54; Vol. 3 at 79, 81.) The district court imposed a

time-served sentence[2] along with three total years of supervised release. (Vol. 1 at 60-61; Vol. 3 at 106.)

Mr. Angeles appealed, challenging both grounds of the district court's order. In an unpublished decision, the Tenth Circuit Court of Appeals affirmed. The circuit court only reached the government's second argument, however, concluding that Trooper Hill had reasonable suspicion that Mr. Angeles had violated K.S.A. § 8-1522(a) after observing the vehicle's passenger-side tires twice cross the fog line by about a tire-width. *United States v. Angeles,* 725 Fed. App'x. 624 (10th Cir. Feb. 16, 2018).

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit misapplied the Kansas Supreme Court's construction of its "failure to maintain a lane" statute, K.S.A. § 8-1522(a), and this case presents a compelling opportunity for this Court to simultaneously correct the tension between the state and federal court regarding this statute, as well as, more generally, resolve whether such statutes, which are on the books of most, if not all, states, are being applied consistently and in accordance with the Fourth Amendment, a question that federal courts of appeal and state supreme courts have answered differently.

Here, both the District of Kansas and the Tenth Circuit erred in concluding that Trooper Hill had reasonable suspicion to make a traffic stop based on an observed traffic violation of K.S.A. § 8-1522(a). To the contrary, Mr. Angeles'

[2] Mr. Angeles had served about one week in federal custody following his arrest before he was released on bond. (Vol. 2 at 7.) He remained on bond throughout the pendency of the case, and was compliant throughout. (*Id.* at 11.)

vehicle's tires twice crossing the fog line amounted to nothing more than a minimal and incidental lane breach, which is insufficient to violate that statute as it has been interpreted by the Kansas Supreme Court. But beyond that error, most, if not all, states have similar "failure to maintain a lane" statutes, and this case presents a compelling opportunity to reconcile the varied positions that state supreme courts and federal courts of appeals have taken with respect to the enforcement of such statutes, which is important in the Fourth Amendment context.

A traffic stop is an investigative detention, and, therefore, before making the stop, the detaining officer must have objectively reasonable articulable suspicion that a traffic violation has occurred. *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014).

The Kansas statute at issue here, § 8-1522(a), provides, in full, that:

> [a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

The Kansas Supreme Court construed § 8-1522 in *State v. Marx*, 215 P.3d 601 (Kan. 2009), and that interpretation of state law must guide the federal district court and court of appeals. *See United States v. DeGasso*, 369 F.3d 1139, 1145 (10th Cir. 2004) ("[S]tate courts are the final arbiters of state law."); *Kokins v. Teleflex, Inc.,* 621 F.3d 1290, 1295 (10th Cir. 2010) (noting that a federal court must look to "recent decisions of the state's highest court" when interpreting state law) (quoting *Huddleston v. Dwyer,* 322 U.S. 232, 236 (1944)).

In *Marx*, the Kansas Supreme Court concluded that § 8-1522 creates two separate rules of the road: it is violated if a motorist fails to maintain a single lane where practicable, or, (not relevant here) changes lanes unsafely. 215 P.3d at 603. The court explained that in using the language "as nearly as practicable," the statute "contradicts the notion that any and all intrusions upon the marker lines of the chosen travel lane constitute a violation." *Id.* at 612. Rather, to support a finding of reasonable suspicion, "a detaining officer must articulate something more than an observation of one instance of a momentary lane breach." *Id.* Although this does not require a showing that the driver's actions were necessarily unsafe, it does require a showing that an officer witnessed more than an "incidental and minimal lane breach." *Id.* The *Marx* court concluded that the deputy in that case lacked reasonable suspicion to believe the statute had been violated when all he observed was a motor home momentarily cross the fog line, overcorrect, and then cross the centerline. *Id.*

Marx represented a departure from the broad reading the Tenth Circuit previously had applied to § 8-1522. *See, e.g.*, *United States v. Pulido-Vasquez*, 311 F. App'x 140, 143 (10th Cir. 2009) (unpublished) ("[W]e have previously rejected the argument that a single instance of going over the fog line cannot be a violation of the Kansas statute.").

The question here was, after *Marx*, whether the tires of Mr. Angeles' vehicle twice crossing the fog line amounted to more than an "incidental and minimal lane

breach." There is nothing in *Marx* to suggest that it was, and the Tenth Circuit erred in concluding otherwise.

For one thing, Trooper Hill appears to have been playing a numbers game. That is, *Marx* concerned "one instance where the [vehicle] did not maintain a single lane," and found that that was not enough to create reasonable suspicion under the statute. So Trooper Hill waited for Mr. Angeles' tires to *twice* cross the fog line before pulling the vehicle over for a traffic violation, as were his instructions.

But that approach, echoed by the court of appeals, Appendix at 3, reads *Marx* far too narrowly. The Kansas Supreme Court's focus was not simply on the *number* of times a vehicle crosses the line, but the *nature* of the violations.[3] That is why the *Marx* court inquired about the scope of the purported violation and the circumstances surrounding it, or, as the Kansas Court of Appeals later put it, the "magnitude of the lane breach." *State v. Miles*, 387 P.3d 866, at *7 (Kan. Ct. App. Jan. 27, 2017) (unpublished). Indeed, the lane breach in *Marx* itself was deemed minor, as, the court remarked, the vehicle "was not weaving back and forth time and time again," but, rather, only once did not maintain a single lane when it veered across the fog line and then did the same on the centerline. 215 P.3d at 612-13.

There was little more than that here. Indeed, Trooper Hill indicated that the crossings were close in time, as he witnessed the purported violation "pretty much as

[3] Moreover, and notably, the one "instance" in *Marx* actually involved the vehicle *twice* crossing the lane lines. 215 P.3d at 612.

soon as he began to observe the vehicle." (*Id.* at 50.) The record does not disclose over what distance this occurred, but it could not have been significant given that, again, he made the observation in short order, and he only traveled less than two miles total from when he identified the vehicle until he pulled it over. (Vol. 3 at 49-50.) The vehicle never lost control, and the tires crossed by at most a "tire width or so." And *Marx* made patently clear that § 8-1522(a) requires something more than an "incidental and minimal lane breach."

Here, the district and circuit courts acknowledged this limitation in theory (Appendix at 3, 9), but failed to give it effect in practice. Beyond drawing the distinction of the tires "twice" crossing the fog line, as discussed above, both courts cited the absence of any road or weather conditions which rendered the maintenance of a single lane of traffic impracticable." (Appendix at 4, 9.) But both courts read far too much legal effect into the absence of such conditions.

It is true that the *Marx* court cited such external weather and traffic conditions as a factor to be considered, but nothing in *Marx* suggests that the absence or presence of such conditions is in any way dispositive, or, importantly, would render an otherwise incidental lane breach unlawful under § 8-1522(a). Quite to the contrary, the Kansas Supreme Court's discussion of such conditions demonstrates the opposite—that is, that they are but one example and not the sine qua non of practicability or impracticability:

> As indicated in [two decisions of the Kansas Court of Appeals], one can conjure up a number of scenarios where maintaining the integrity of the lane dividing lines is impracticable, *e.g.,* weather conditions or obstacles in the roadway. However, the statute even dilutes the practicability standard. It does not say "when practicable" a vehicle will be driven entirely within a single lane. It only requires compliance with the single lane rule as *nearly* as practicable, *i.e.,* compliance that is *close* to that which is feasible. That statutory language tells us that a violation of K.S.A. 8–1522(a) requires more than an incidental and minimal lane breach.

215 P.3d at 612.

All told, Trooper Hill described minor and momentary crossings of the fog line and nothing more, and that simply is not enough to establish reasonable suspicion of a violation of K.S.A. § 8-1522(a) under *Marx*. The district court and circuit court below erred in concluding that it did.

Although correction of that clearly erroneous application of state law, by itself, favors this Court's intervention, this case also involves more than just an error by the court below.

That is, most, if not all, states have versions of the "failure to maintain a lane" statute at issue here, and they are frequently relied upon by law enforcement as the basis for making a traffic stop. *See, e.g.*, Harvey Gee, *"U Can't Touch This" Fog Line: The Improper Use of A Fog Line Violation As A Pretext for Initiating an Unlawful Fourth Amendment Search and Seizure*, 36 N. Ill. U. L. Rev. 1, 3 (2015) ("For years, law enforcement officers across the country have been initiating traffic stops of cars on

our roadways, based on allegations that the drivers crossed onto a fog line in violation of a state ordinance prohibiting such conduct. . . . While the legislative history and language of these statutes reflect their public safety purpose, the police are relying on statutes as an excuse to pull over cars which may have only momentarily crossed the fog line and where the drivers have done nothing else unlawful.").

There are, however, widely differing views about the reach of such laws that state supreme courts and federal courts of appeal have adopted, and that divergence is important because such laws frequently intersect with the Fourth Amendment in determinations of whether a traffic stop is valid at its inception. *See, e.g.*, *State v. Wolfer*, 780 N.W.2d 650, 653 (N.D. 2010) (recounting "varying standards and interpretations across the country" for failure to maintain a lane statutes); Gee, 36 N. Ill. U. L. Rev. at 3 (noting that "state and federal courts have taken divergent approaches in their analyses of fog line traffic stops"). And sometimes, that divergence may be present, as it is here, between a state supreme court's interpretation of its traffic statute, and the federal court of appeals' view of that same statute. *See also* Law Summary, Charity Whitney, *Missouri's Foggy Fog Line Law,* 11 Mo. L. Rev. 303, 303-305 (2012) (identifying tension between Missouri state courts' and the Eighth Circuit's approaches to evaluating Missouri's failure to maintain a lane statute). Such widespread practices and broad inconsistencies weigh in favor of this Court's intervention.

Finally, there is nothing in the record, nor any rule of interpretation, that counsels against granting the writ here.

For one thing, no preservation issues remain to be litigated at this stage of the proceedings. Although the parties disputed the preservation of Mr. Angeles' claim below, the Tenth Circuit did not address that question, but, rather, simply assumed that the claim was preserved and affirmed under that most favorable standard of review. Appendix at 2. Similarly, although the government had raised an alternative ground for affirmance in the district court, i.e., the wiretap investigation, the Tenth Circuit did not reach Mr. Angeles' challenge to that ground, finding it sufficient to conclude that there was reasonable suspicion for the traffic stop based on the purported violation of § 8-1522(a). Appendix at 1-2.

Thus, this Court can resolve the issue presented independently of other arguments, which would be appropriately revisited by the circuit court on remand. *See, e.g.*, *Rodriguez v. United States*, 135 S. Ct. 1609, 1616-17 (2015) (remanding for consideration by circuit court where magistrate judge and district court ruled on a suppression issue, but the circuit had not reviewed that determination).

Additionally, the issue is squarely presented given that the reasonableness of the officer's belief of what state law required is not at issue. That is unlikely to be so in many similar cases following this Court's decision in *Heien v. North Carolina*, which held that "reasonable suspicion can rest on a mistaken understanding of the scope of a legal prohibition." 135 S. Ct. 530, 536 (2014). Here, however, the government did not rely on *Heien* in the District of Kansas or in the Tenth Circuit; it has, accordingly, waived any such reliance now.

Finally, the deference that this Court often shows to lower federal courts' interpretation of state law should not bar review here. *See e.g.*, *Bishop v. Wood*, 426 U.S. 341, 346-47 & n.10 (1976) ("In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable."). That's so because the Court of Appeals' application of *Marx* was clearly erroneous, and the significance of that error is only heightened by the divergence of views regarding similar statutes nationwide discussed above. *Cf. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985) ("[W]e surely have the authority to differ with the lower federal courts as to the meaning of a state statute.").

CONCLUSION

For the foregoing reasons, Mr. Angeles respectfully requests that this Court grant a petition for a writ of certiorari.

Respectfully submitted,

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