

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KAREN MACKEY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. The Fifth Circuit erred in holding that a driver's gender may be a factor in the U.S. Border Patrol's decision to stop and search the person's vehicle and that the use of gender as a factor in the traffic stop and search does not violate due process.
- II. The Fifth Circuit erred in holding that a driver's gender may be a factor in the U.S. Border Patrol's decision to stop and search the person's vehicle and that the use of gender as a factor in the traffic stop and search does not violate the fourth amendment's protection against unreasonable searches and seizures.

LIST OF PARTIES

KAREN MACKEY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

The undersigned counsel certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

1. Karen Mackey, Petitioner.
2. Claudia V. Balli and Roberto Balli, Counsel for Petitioner.
3. United States of America, Respondent.
4. Carmen Castillo Mitchell, Counsel for Respondent.
5. The Honorable Noel J. Francisco, Jr., Office of the Solicitor General of the United States.

/s/ Claudia V. Balli

CLAUDIA V. BALLI

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A copy of the Fifth Circuit's unpublished opinion issued in this case on May 18, 2018, is attached as Appendix A. A copy the District Court's written opinions regarding the motion to suppress and the motion to dismiss are attached as Appendix B and Appendix C, respectively. A copy the District Court's judgment is attached as Appendix D.

JURISDICTION

The jurisdiction of this Court to review the Judgment of the Fifth Circuit Court of Appeals is invoked in 28 U.S.C. § 1254(1), as an appeal from final judgment of conviction in the United States Court of Appeals for the Fifth Circuit on May 18, 2018. Pursuant to Supreme Court Rule 10(a), the United States Fifth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the U.S. Constitution reads as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

Fourth Amendment to the U.S. Constitution reads as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

STATEMENT OF THE CASE

On June 21, 2016, Karen Mackey was the subject of a multi-defendant and a four-count indictment. ROA.42-45. Count One (1) of the indictment charges Karen Mackey and her co-defendants with conspiracy to transport and attempt to transport aliens within the United States, in violation of Title 8 U.S.C. § 1324(a)(1)(A)(ii) and (v)(I). ROA.42. Counts Two, Three, and Four (2, 3, and 4) of the indictment charge Karen Mackey and her co-defendants with transporting and attempting to transport aliens for the purpose of commercial advantage and private financial gain, in violation of Title 8 U.S.C. § 1324(a)(1)(A)(ii) and (v)(I). ROA. 43-44.

Karen Mackey filed a pre-trial Motion to Suppress Stop and Evidence on July 21, 2016, challenging the validity of the stop of her vehicle. ROA.55-61. Counsel for the Government filed a response to the Motion to Suppress Stop and Evidence. ROA.64-83. A suppression hearing was held on August 26, 2016, before the Magistrate Judge. ROA.319-515.

At the hearing for the motion to suppress stop and evidence, Border Patrol Agent Monterojas gave testimony contrary to his written report, summarized in the

criminal complaint (ROA.16-23); Agent Monterojas testified that he became "highly suspicious" because "three females, driving three sedans," drove through the checkpoint and that's when he decided to search the vehicle of co-defendant Ashley Flores, the third female to drive through the checkpoint. ROA.333. Agent Montejoras further testified that he instructed other agents that he was highly suspicious that the previous two sedans were "associated" to Flores's smuggling attempt because "there were three females . . . one after the other. . . . [T]he vehicles on the inside . . . looked like, . . . a little bit, you know, dirty, you know, trashy somehow, and . . . the smugglers, you know, use the females, you know to distract also." ROA.335-336. Monterojas added that he believed it was suspicious that the females were friendly and polite. ROA.337. However, he later retreated from this statement when testifying that only driver 1 was friendly. ROA.367-368. Monterojas also stated that he believed that the females were not appropriately dressed to cross the checkpoint: "It's not the usual, you know, dress code" ROA. 365. Monterojas testified that after the other agents left the checkpoint to pursue the first two sedans that crossed the checkpoint, he, Monterojas had no more involvement with the investigation. ROA.337-338.

Based on the testimony presented at the hearing on the motion to suppress, Defendant-Appellant Mackey: (1) moved the Court to suppress the stop and the evidence derived from the stop based the agent's violation of Mackey's Fourth Amendment protections; and (2) made an oral motion to dismiss the indictment based on the agent's gender profiling and gender discrimination, a violation of due

process under the Fifth Amendment, and a violation of her freedom of expression under the First Amendment. ROA.494-500, 505-509. Mackey requested the court grant time to brief the motion to dismiss. ROA.499-500.

On August 31, 2016, Defendant-Appellant filed a motion for leave to file motion to dismiss the indictment based on a due process violation related to gender profiling by a border patrol agent. ROA.87-89. Simultaneously, Defendant-Appellant filed her Motion to Dismiss Indictment with Prejudice based on Government's Violation of Karen Mackey's Due Process Rights (Gender Profiling) and Violation of Her First Amendment Right of Freedom of Expression. ROA.91-100. On August 31, 2016, Defendant-Appellant Mackey also filed Supplemental Authorities for Motion to Suppress Stop and Evidence. ROA.102-104.

The Magistrate Judge filed his Report and Recommendation stating that Defendant-Appellant's motion to suppress the stop and evidence be denied. ROA.190-203, 204-217. Mackey filed objections to the Magistrate's Report and Recommendations. ROA.241-243. The District Court accepted the Magistrate's Report and Recommendation. ROA. 251-257.

The Magistrate Judge filed his Report and Recommendation stating that Defendant-Appellant's motion to dismiss and motion for leave be denied. ROA.218-231. Mackey filed objections to the Magistrate's Report and Recommendations. ROA.244-247. The District Court accepted the Magistrate's Report and Recommendation. ROA. 258-266.

On January 12, 2017, Mackey entered a guilty plea to count 1 of the indictment on the condition that she reserved her right to appeal the District Court's ruling on the Motion to Suppress Stop and Evidence, the Motion for Leave to File Out of Time, the Motion for Brady Materials, and the Opposed Motion for Hearing. ROA.578-589. On July 18, 2017, Mackey was sentenced to 24 months imprisonment, three years of supervised release and other conditions. ROA.307-312.

The Fifth Circuit affirmed the district court in *United States of America v. Mackey*, ____ F. App'x ____, 2018 WL 22932331 (5th Cir. May 18, 2018).

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT ERRED IN HOLDING THAT A DRIVER'S GENDER MAY BE A FACTOR IN THE U.S. BORDER PATROL'S DECISION TO STOP AND SEARCH THE PERSON'S VEHICLE AND THAT THE USE OF GENDER AS A FACTOR IN THE TRAFFIC STOP AND SEARCH DOES NOT VIOLATE DUE PROCESS.

A. Review Is Warranted Because the United States Fifth Circuit Court Of Appeals Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings, or Sanctioned Such a Departure By A Lower Court, As To Call For An Exercise Of This Court's Supervisory Power.

The Supreme Court held in *Bolling v. Sharpe*, that Equal Protection requirements apply to the federal government through the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

The Due Process Clause of the U.S. Constitution protects individuals against such invidious use of irrelevant individual characteristics by law enforcement. In *United States vs. Whren*, the United States Supreme Court held that “the

Constitution prohibits selective enforcement of the law based on considerations such as race.” 517 U.S. 806, 813 (1996). The proper remedy for such discriminatory application of laws is the Equal Protection Clause. *Id.* Thus, targeting specific protected classes of people, even if there is reasonable suspicion of that crime does not insulate the Government from an equal protection challenge.

During the hearing at the district court, Agent Monterojas freely admitted that Mackey, Trevino, and Flores were detained because of their gender. ROA.333, 335-336. Because Agent Monterojas freely admitted his discriminatory conduct in stopping Trevino, Mackey, and Flores, the Government confessed to gender profiling. ROA.333, 335-336. The agents’ behavior, and the Government’s behavior, in this case is so outrageous that it shocks the conscience and it offends the community’s sense of fair play and decency. Therefore, because the agents’ conduct is so atrocious, it requires that the detention be suppressed along with all and any evidence and/or statements obtained as a result of Mackey’s detention. This improper gender profiling violates a person’s protections under the Due Process Clause.

B. Gender is a Protected Class Under the Equal Protection Clause

Gender is a protected class and the Government may make no differences in gender classification except when “gender realistically reflects the fact that the sexes are not similarly situated.” *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981).

The Equal Protection Clause forbids intentional discrimination in the selection of jurors on the basis of gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S.

127, 128–29 (1994). The Court in *J.E.B.* reasoned that the State’s reliance on gender stereotypes in striking jurors ratifies and “reinforces prejudicial views of the relative abilities of men and women.” *Id.* at 140. Women have historically been discriminated against and the Equal Protection Clause prohibits that reasoning. *Id.* at 136.

In 2015, the Court held that the Due Process Clause gives any two individuals the right to marry, regardless of gender, a concept that was unthinkable in 1981, when *Rostker* was decided. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

Where the Government's misconduct is so outrageous that it violates the principles of "fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment[,]" dismissal of the criminal charges is required. *United States v. Russell*, 411 U.S. 423, 431-432 (1973).

C. Relief Sought

The Court should grant this Writ and order briefing to consider whether considering a driver's gender in deciding to stop and search the driver's vehicle violates the driver's protections under the equal protection clause and the due process clause.

II. THE FIFTH CIRCUIT ERRED IN HOLDING THAT A DRIVER'S GENDER MAY BE A FACTOR IN THE U.S. BORDER PATROL'S DECISION TO STOP AND SEARCH THE PERSON'S VEHICLE AND THAT THE USE OF GENDER AS A FACTOR IN THE TRAFFIC STOP AND SEARCH DOES NOT VIOLATE THE FOURTH AMENDMENT'S PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES.

A. Review Is Warranted Because the United States Fifth Circuit Court Of Appeals Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings, or Sanctioned Such a Departure By A Lower Court, As To Call For An Exercise Of This Court's Supervisory Power.

The Fourth Amendment provides that the “right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated” U.S. CONST. Amend. IV. Consequently, basic to an individual’s rights under the Fourth Amendment of the United States Constitution is the principle that the Government may not conduct a search or seizure without a warrant supported by probable cause.

Warrantless seizures are “per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exception.” *Katz v. United States*, 389 U.S. 347, 357 (1967). One such exception comes from *Terry v. Ohio*, 392 U.S. 1 (1968). The *Terry* Court held that under the Fourth Amendment, it is “reasonable” for a law enforcement officer without a warrant to temporarily detain and question a person when the officer has a “reasonable suspicion” that the person is about to engage in, or is engaging in, criminal activity. *Terry*, 392 U.S. at 16. An officer can stop and briefly detain a person only to investigate if and only if the officer has a reasonable suspicion,

supported by articulate facts, that a criminal activity may be afoot, even if the officer lacks evidence rising to the level of probable cause. *Terry*, 392 U.S. at 29.

In the case of Mackey, the U.S. Border Patrol Agents stopped Mackey because she was a female driving through the checkpoint, another female in a sedan drove by before her, and a female in a sedan drove into the checkpoint after her. At the hearing in the district court, the prosecutor and the agents repeatedly testified to and made reference to the gender of the drivers and referred to them as "females," thus confessing their reason for targeting Mackey and the other drivers, for example:

(1) "Here we have three sedans with three solo females, . . ." ROA.387
(opening statement).

(2) ". . . do you see a lot of single females driving through the checkpoint at 1:00 a.m. in the morning?" ROA.395-396 (witness examination).

(3) "I'll just note for the record it's a silver sedan with a female driver." ROA.399 (witness examination).

(4) "It's also a silver sedan with a female driver." ROA.399 (witness examination).

(5) ". . . it is a . . . brownish sedan with a female driver; . . ." ROA.400 (witness examination).

(6) "Did [Agent Guevara] tell that they were all three female drivers?" ROA.448 (witness examination).

(7) "... having three female solo drivers at that time of night on 83, is that usual, unusual?" ROA.448-449 (witness examination).

(8) "... is it usual to see single female drivers ..." ROA.481 (witness examination).

(9) "Just having one single, female driver is unusual; having three show up right after the other ..." ROA.493 (closing argument).

The Court held in *Brignoni-Ponce* that ethnicity cannot be the one factor giving rise to reasonable suspicion of criminal activity. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886 (1975). Whereas in *Brignoni-Ponce*, the officers relied on Mexican ancestry of the occupants of a vehicle to stop the vehicle (*Id.* at 885-86), the agents in Mackey's case used gender alone to target Mackey and her co-defendants. ROA.401.

The *Brignoni-Ponce* Court held that neither Mexican ancestry nor the officer's belief that the occupants were undocumented satisfied the constitutional minimum for an investigatory stop. *Id.* at 886. Therefore, the Court held that a roving Border Patrol stop relying on the apparent Mexican ancestry of the occupants was illegal under the Fourth Amendment and must be suppressed. *Id.* at 885-86. Just like race, the Supreme Court has held that gender is a protected class. *Rostker*, 453 U.S. at 79. Consequently, the fact that the agents in Mackey's case admitted to having pursued Mackey based on her gender is insufficient to justify the stop of Mackey's automobile, given that: (1) it has no objectively reasonable connection to criminality, (2) it is a violation of Mackey's protections against

unreasonable searches and seizures under the Fourth Amendment to the Constitution; and (3) it is a violation of Mackey's due process rights under the Fifth Amendment to the Constitution.

B. Relief Sought

The Court should grant this Writ and order briefing to consider whether considering a driver's gender in deciding to stop and search the driver's vehicle violates the driver's protections against reasonable searches and seizures under the Fourth Amendment.

CONCLUSION

The Court should grant this Writ and order briefing to consider whether gender profiling in conducting a traffic stop is a violation of a person's protections under the Fourth Amendment and the Fifth Amendment to the U.S. Constitution.

Date: August 13, 2018.

Respectfully submitted,

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