No. _____

IN THE
Supreme Court of the United States

HECTOR SANTILLAN
Petitioner,

vs.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, per the Fourth Amendment and this Court's holdings in *Rodriguez v. United States,* 135 S.Ct. 1609, 1616 (2015) and *Reid v. Georgia*, 448 U.S. 438 (1980), an officer, during a traffic stop to issue a traffic ticket, may prolong that roadside stop to investigate other matters merely because the car's occupants have failed to satisfy the officer's curiosity about their travel itinerary and they appear nervous?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Hector Santillan, defendant-appellant below. Respondent is the United States, plaintiff-appellee below. Petitioner is not a corporation.

TABLE OF CONTENTS Page

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page

CASES

OTHER AUTHORITIES

PETITION FOR CERTIORARI

Petitioner Hector Santillan respectfully prays for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit was filed a published opinion on August 24, 2018. A divided three-judge panel of the Second Circuit issued a 30-page majority opinion (the "Opinion") affirming the judgment of the district court and a 15-page dissenting opinion (the "Dissent"). *See United States v. Santillan*, 902 F.3d 49 (2d Cir. 2018). The opinions are attached as Appendix A.

On October 19, 2018, Mr. Santillan filed a petition for rehearing and suggestion for rehearing *en banc*. The Second Circuit denied his petition on November 26, 2018. That order is attached as Appendix B.

JURISDICTION

On August 24, 2018, a divided three judge panel for the Second Circuit denied Petitioner's appeal in a published opinion. Subsequently, on November 26, 2018, the Second Circuit denied Mr. Santillan's petition for rehearing and suggestion for rehearing *en banc*.[1] This Court has

[1] The time to file a petition for a writ of *certiorari* runs from the date a timely petition for rehearing is denied. Sup. Ct. R. 13(3). A petition for a writ of *certiorari* is timely when filed within 90 days. Sup. Ct. R. 13(1). A petition is timely filed if mailed on the date for filing. Sup. Ct. R. 29.2. If the due date falls on a Saturday, Sunday, federal holiday, or day the Court is closed, it is due the next day the Court is open. Sup. Ct. R. 30.1. The petition for rehearing in this case was denied on November 26, 2018, making the petition for writ of *certiorari* due on February 25, 2018.

jurisdiction to review the Second Circuit's decision pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL & STATUTORY PROVISIONS

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, 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.

I.

STATEMENT OF THE CASE

The Opinion holds that you may be detained and interrogated during a routine traffic stop if you fail to satisfy an officer's curiosity about your travel plans and the officer perceives you are nervous. According to the Opinion, these two subjective and self-serving factors alone permit an officer to subject you to a prolonged roadside interrogation, even after the mission of ticketing you should have been completed.

By way of background, Mr. Santillan, the petitioner, was a passenger in a car driven by Mr. Junior Rivera-Vasquez when the men were stopped for traffic violations while travelling along the Hutchinson Parkway outside of New York City. Mr. Rivera- Vasquez and Mr. Santillan, both of Hispanic descent, were stopped because the officer observed Mr. Rivera-Vasquez: (1) driving 62 miles per hour in a 55 miles per hour zone, (2) following too closely and failing to signal when passing another car, and (3) allowing the tires of

his car to briefly touch the "fogline."[2]

Eight minutes into the traffic stop, the officer had all of the information he needed to complete his mission to issue traffic tickets but chose not to because he wanted to investigate other matters.

During the first eight minutes of the traffic stop, Mr. Rivera-Vasquez and Mr. Santillan responded appropriately to all of the officer's requests. At the officer's request, Mr. Rivera- Vasquez (the driver) produced his driver's license and the vehicle's registration, both quickly confirmed as valid by the officer. The officer then questioned Mr. Rivera-Vasquez about his destination to which Mr. Rivera responded he was going to Massachusetts. The officer confirmed that Mr. Rivera had a Massachusetts license and the car he was driving had Massachusetts plates. Likewise, the men were headed north toward Massachusetts, where they claimed to be traveling.

In response to further questioning, Mr. Rivera-Vasquez stated that he had come from Mr. Santillan's aunt's home but did not know the exact address. The officer then asked Mr. Santillan (the passenger) to produce identification and Mr. Santillan gave him a copy of his identification card, which was also valid and accurate. In response to more questioning, Mr. Santillan said that his aunt lived in New Jersey and gave the officer the name of a city.

Nonetheless, the officer prolonged the stop to interrogate the men further because (1) they had failed to satisfy his curiosity about their travel

2 The "fogline" is the solid white that divides the roadway from the shoulder.

plans and (2) his observation that both men seemed nervous. During the traffic stop, the officer called other officers to the scene, made both men exit the car, and conducted judicially recognized illegal searches of their persons.[3] Over an hour later, the car was searched by a narcotics detector dog called to the scene and a package of cocaine was discovered under Mr. Santillan's seat.

Mr. Santillan moved to suppress the evidence discovered during this prolonged roadside stop as violative of the Fourth Amendment. The district court denied his motion, finding reasonable suspicion. A divided Court of Appeals panel subsequently affirmed the holding that there was sufficient reasonable suspicion to prolong the stop because the men gave "inconsistent" statements about their travel plans and they were nervous during the encounter.

The Dissent held that there was no reasonable suspicion sufficient to prolong the stop beyond the eight-minute mark so the officer could investigate other matters. Without such reasonable suspicion, the Dissent reasoned, the traffic stop ran afoul of this Court's decision in *Rodriguez v. United States,* 135 S.Ct. 1609 (2015).

Mr. Santillan's petition should be granted by this Court for at least three main reasons.

First, the Opinion departs from the Supreme Court's holdings in *Rodriguez,* 135 S.Ct. at 1616 and *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam). The Opinion departs from the holding of *Rodriguez* in that it finds

3 The Opinion recognized that the officer violated Mr. Santillan's Fourth Amendment rights

reasonable suspicion based on the very type of non-mission related questions and answers that prolong a stop beyond the duration necessary to complete the initial goal of the stop. It departs from *Reid* in that, to reach reasonable suspicion, it relies on the subjective, self-serving, guilt-assuming interpretations of the officer—with no actual nexus to criminal activity—which have the potential to describe large numbers of presumably innocent travelers. This Court should grant certiorari to correct these significant departures from established Supreme Court precedent.

Second, the Opinion's conclusion that nervousness and unsatisfactory answers regarding point of origin give rise to reasonable suspicion, creates a circuit split and represents an extreme outlier in the various Courts of Appeals' decisions. That is, in cases such as this one—where the *Reid*-nexus mentioned in the "First" point above is absent—nearly every other Court of Appeals has found nervousness, even extreme nervousness, coupled with inconsistent statements fall short of the reasonable suspicion standard. *See e.g. United States v. Williams*, 808 F.3d 238, 249-50 (4th Cir. 2015) (failure to satisfy officer's queries about one's travel itinerary coupled with nervousness are insufficient bases for a finding of reasonable suspicion). Clarity of this issue is necessary because it will lead to circuit courts' uniformity in reviewing the appropriate scope and duration of road-side interrogations by aggressive drug interdiction officers patrolling our nation's thoroughfares.

Finally, empirical data indicates that African Americans and Latinos

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when the officer conducted an illegal search of Mr. Santillan's person during the traffic stop.

are pulled over and searched at a much higher rate than non-minorities. The Opinion, which gives officers unfettered discretion to prolong a stop based on their subjective, self-serving, guilt-assuming interpretations, (not supported by the record), will likely "lead to harassment of minority groups and severely exacerbate police-community tensions." *Dancy v. McGinley*, 843 F.3d 93, 111 (2d Cir. 2016) (internal quotations and citations omitted); *see also Utah v. Strieff*, 136 S.Ct. 2056, 2070 (2016) (Sotomayor dissenting) ("it is no secret that people of color are disproportionate victims of this type of [police] scrutiny") (internal citation omitted). Such external consequences crystallize the need for the specificity and particularity on the part of officers, so sorely lacking here, to justify detention.

II.

ARGUMENT

A. This Court should grant *certiorari* because the Opinion departs from the holdings of *Rodriguez* and *Reid*.

This Court held in *Rodriguez* that without reasonable suspicion of some other crime, a stop must not extend the time that is needed to complete the initial mission of the stop. *Rodriguez*, 135 S.Ct at 1616 ("[A] police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures," indicating that the critical question is whether the unrelated investigation "prolongs—*i.e.*, adds time to—the stop."). Relatedly, this Court held in *Reid* that reasonable suspicion to justify a stop should exclude factors that apply to

large categories of presumably innocent travelers and that such factors must have an objective nexus to criminal activity. *See Reid*, 448 U.S. at 441 (holding that to find otherwise would subject anyone to "virtually random seizures"). Read together, *Rodriguez* and *Reid* stand for the dual principles that: (1) reasonable suspicion cannot be acquired by prolonging a traffic stop beyond the point needed to complete its initial mission (say, for instance, by engaging in question and answer about one's travel itinerary) and (2) if a traffic stop is prolonged beyond that point, the suspicious circumstances upon which the officer relies to do so must have an objectively reasonable connection to criminal activity to avoid including large numbers of presumably innocent travelers.

The Opinion departs from the holding of *Rodriguez* by considering the officer's questioning of the defendants about their travel plans, even though that conversation prolonged the stop and was not pertinent to the traffic violations that justified the stop in the first instance. As such, that questioning violated *Rodriguez's* prohibition against "add[ing] time to the stop," *Rodriguez*, 135 S.Ct. at 1616, and should not have been considered by the majority.

The Opinion departs from the holding of *Reid* by finding reasonable suspicion based solely on two factors: (1) nervousness and (2) a failure to satisfy an officer's curiosity about one's travel plans. These factors, however, are only guilt-forming in the eye of the beholder; *i.e.*, they lack an *objective* nexus to criminal activity. Thus, these two factors have a tendency to include

large categories of presumably innocent travelers. The effect of the majority's expansive definition of reasonable suspicion "winnow[s] the protections of the Fourth Amendment to a near nullity...", *Santillan*, 902 F.3d at 63 (Pooler, J. dissenting), and subjects our citizens to "virtually random seizures." *Reid*, 448 at 441.

This Court should grant certiorari to correct these significant departures from established Supreme Court precedent. *Amnesty Int'l USA v. Clapper*, 667 F.3d 163, 179 (2d Cir. 2011) (Raggi, J., dissenting from denial of rehearing *en banc* because "The panel decision puts this court at odds with Supreme Court precedent").

B. The Opinion's conclusion makes this decision an outlier among decisions of the Courts of Appeal analyzing similar circumstances and now, absent a grant *certiorari*, there will be no relief to people suffering from impermissibly prolonged roadside interrogations residing within the geographic boundaries of the Court of Appeals for the Second Circuit.

The Dissent, by the Honorable Judge Rosemary S. Pooler, is correct when it notes, "nearly every stop will produce some answer that could be as vaguely unavailing in the mind of the officer as the answers given here." *Santillan*, 902 F.3d at 63. This is why it is so important that there be a nexus, per *Reid*, between the factors upon which an officer relies to justify prolonging the stop and actual criminal activity. Because this critical nexus is missing here, this case "is a clear example of officers acting on a 'mere hunch,' without reasonable suspicion." *Id.* at 63 (citing *Dancy,* 843 F.3d at 106).

This principle has not been lost on other Courts of Appeal which have indicated an unwillingness to find reasonable suspicion based on a suspect's nervousness during police interaction—even coupled with other factors, such as inconsistent statements that warrant some suspicion—in the absence of a sufficient nexus. The Fourth Circuit stated in *United States v. Foster,* 634 F.3d 243 (4th Cir. 2011):

> We … note our concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity. We recognize that we must look to the totality of the circumstances when evaluating the reasonableness of a stop… However, an officer and the Government must do more than simply label a behavior as "suspicious" to make it so. The Government must also be able to either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance.

Id. at 248 (internal citations omitted).

In Mr. Santillan's case, the officer recited a familiar narrative about nervousness and unsatisfactory answers regarding itinerary, but without a *Reid*-nexus, "neither police officers nor courts should sanction as 'reasonably suspicious' a combination of factors that could plausibly describe the behavior of a large portion of motorists engaged in travel upon our interstate highways." *United States v. Tapia*, 912 F.2d 1367, 1371 (11th Cir. 1990); *see also United States v. Rodriguez-Escalera*, 884 F.3d 661, 670-71 (7th Cir. 2018) (defendants' nervousness and conflicting account of their travel insufficient to prolong stop without *Reid*-nexus); *Williams,* 808 F.3d 238, 253 (4th Cir. 2015) (inconsistent travel plans, inability to provide a permanent

home address in New York even though he claimed to live there and had a New York driver's license, and inconsistent statements about traveling with the car ahead of him found insufficient to prolong stop finding that "our precedent requires that the authorities articulate or logically demonstrate a connection between the relevant facts and criminal activity"); *United States v. Macias,* 658 F.3d 509, 519 (5th Cir. 2011) (reversing after finding trooper unconstitutionally prolonged Macias's detention by asking irrelevant questions without reasonable suspicion of criminal activity and rejecting the government's claim that officer had reasonable suspicion based on Macias's "extreme signs of nervousness"); *United States v. Jenson,* 462 F.3d 399, 404-05 (5th Cir. 2006) (inconsistent answers between driver and passenger and nervousness are insufficient without "adequate evidence of a nexus" to criminal activity); *Karnes v. Skrutski*, 62 F.3d 485, 493 (3d Cir. 1995) ("[T]he factors together must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied.").

Recently, in *United States v. Bowman,* 884 F.3d 200, 208 (4th Cir. 2018), the Fourth Circuit analyzed the following factors (individually and cumulatively) related to a stop: (1) the defendants' apparent nervousness; (2) the presence of a suitcase, clothes, food and an energy drink inside of the car; (3) the driver's inability to supply the officer with the name and address of passenger's girlfriend despite having just gone to her home thirty minutes prior; (4) the driver's statements that he had been laid off recently and that he had recently purchased the car (a Lexus) via Craigslist: (5) the driver's

statement that "he bought cheap cars off of Craigslist which the officer indicated was in accord with the 'known practice of drug traffickers … [of using] multiple, different vehicles to transport narcotics.'" The Fourth Circuit found that these factors did not amount to reasonable suspicion without a *Reid*-nexus and reversed the conviction. *Id.* at 218; *see also United States v. Perkins*, 348 F.3d 965, 970 (11th Cir. 2003) (nervousness and "inconsistent statements" about who defendants were going to visit insufficient, *noting* that a traffic stop is itself is an "unsettling show of authority that may create substantial anxiety"); *United States v. Townsend,* 305 F.3d 537, 543 (6th Cir. 2002) (failure to satisfy officer's curiosity about one's purpose for late night travel and nervousness are insufficient); *United States v. Jones*, 269 F.3d 919, 928–29 (8th Cir. 2001) (nervousness and inconsistent statements about one's prior criminal history insufficient); *United States v. Salzano*, 158 F.3d 1107, 1112-14 (10th Cir. 1998) (defendant's failure to satisfy officer's curiosity about his travel itinerary and nervousness insufficient).

The cases detailed above recognize that "[m]any—if not most—traffic stops will yield nervous drivers and one or another answer that the officer could find unsatisfactory in some regard." *Santillan*, 902 F.3d at 68-69. An extreme outlier—*solely* relying on two dubious, self-serving, conclusory factors to support its reasonable suspicion conclusion—the Opinion stands in stark contrast to the Dissent and the overwhelming weight of authority from other Circuits.

Rehearing, had it been granted by the Second Circuit, would have been appropriate here because this is a case where the panel has reached a result "that would not command a majority vote of the appeals court as a whole, and thereby provoke an avoidable circuit conflict that the Supreme Court would have to resolve." *Ricci v. DeStefano*, 530 F.3d 88, 93 (2d Cir. 2008) (Jacobs, J., dissenting from denial of rehearing *en banc*). But the Second Circuit Court of Appeals grants petitions for rehearing less often than any other circuit in this nation. *See* M. Flumenbaum and B. Karp*, The Rarity of En Banc Review in the Second Circuit*, New York Law Journal, Vol. 256—No. 38 (August 24, 2016) ("Since 1979, the U.S. Court of Appeals for the Second Circuit has consistently granted fewer petitions for rehearing *en banc* than any other circuit court, both in absolute terms and relative to the court's caseload…"). It is thus unsurprising that the Second Circuit denied Mr. Santillan's petition for rehearing given the statistical unlikelihood of its grant.

Absent a grant *certiorari* here, however, there will be no relief to people suffering from impermissibly prolonged roadside interrogations residing within the geographic boundaries of the Second Circuit. Mr. Santillan's (and others like him) only hope for relief is from this Court. Mr. Santillan urges this Court to grant his petition so that the Second Circuit can be calibrated in line with this Court's precedent and resolve the circuit split this decision created in favor of the Dissent and the majority view of the sister circuits.

C. A collateral consequence of the Opinion: stops that will be prolonged based on such subjective, self-serving, guilt-assuming observations of police will disproportionately affect minority communities exacerbating police and community tensions.

Traffic stops are, overwhelmingly, the most common interaction between police and the public--an average of 20 million stops per year. *See* E. Pierson et. al., *A large-scale analysis of racial disparities in police stops across the United States*, Working Paper 2017, Stanford University Open Policing Project, p.1 (internal citation omitted).[4] A disproportionate share of those 20 million police traffic stops each year involve people of color, even though they are no more likely to break traffic laws than whites and yet, they are more likely than whites to be ticketed, searched and arrested. *Id*. This is true even though black and Hispanic motorists are no more likely than whites to be carrying contraband. *Id*. ("By examining both the rate at which searches occur and the success rate of these searches, we find evidence that the bar for searching black and Hispanic drivers is lower than for searching white drivers"). In short, "across the country, law-abiding black and Hispanic drivers are left frightened and humiliated by the inordinate attention they receive from police, who too often see them as criminals. Such treatment leaves minorities feeling violated, angry, and wary of police and their motives." *See* Michael A. Fletcher, *For Black Motorists, a Never-*

4 Found at: https://openpolicing.stanford.edu/publications/ (last visited on February 23, 2019).

Ending Fear of Being Stopped, National Geographic (March 3, 2018).[5]

Despite this empirical data, the Opinion "blinds [itself] to the reality that an individual's race and ethnicity often will affect assessments of that individual's behavior." *Santillan*, 892 F.3d at 65 (Pooler, J. dissenting); *see also Strieff*, 136 S.Ct. at 2070; *Commonwealth v. Warren*, 475 Mass 530, 538-40 (Mass. 2016).[6] Requiring "specificity in articulating the basis for a stop is necessary in part because according the police unfettered discretion to stop and frisk could lead to harassment of minority groups and severely exacerbate police-community tensions." *Dancy*, 843 F.3d at 111 (quotation marks omitted). And relying on an officer's report of generalized nervousness, as the majority does here, is simply too imprecise to meet this goal. People of color will continue to have their rights violated by law enforcement when murky descriptors like 'nervousness' or one's failure to satisfy an officer's curiosity about anything the officer decides to ask are permitted by this Court. "Such descriptors implicate biases—which are often implicit and unknown to the officer—that code one individual's behavior as more

5 Found at: https: // www.national geographic.com /magazine/2018/04/the-stop-race-police-traffic/ (last visited February 23, 2019).

6 In its recent opinion, the Massachusetts Supreme Judicial Court recognized that when a person of color flees from a police officer, such flight "is not necessarily probative of a suspect's state of mind or consciousness of guilt." *Id*. at 539-40. The court found that because members of minority communities are frequent subjects of racial profiling, when one flees from the police, it may not necessarily be because he is guilty of an underlying criminal offense. *Warren* thus clarifies the weight that should be given to an individual's behavior when making a "reasonable suspicion" determination in the context of *any* citizen-police interaction. When such a person avoids police contact, even in circumstances in which police officers may have other reasons for suspecting or stopping an individual, the flight itself does not conclusively provide an adverse inference of a suspect's guilty conscious. In its thoughtful opinion, the court explicitly recognized how race and history impact one's perception and behavioral responses.

suspicious only because of the color of her skin." *Santillan*, 902 F.3d at 65.

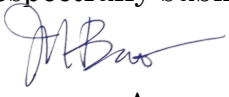
Given the gravity of the issue and its impact on our citizens, this case is a suitable vehicle for review by this Court.

III.

CONCLUSION

The Opinion regarding reasonable suspicion in the context of prolonged automobile detention allows for unconstitutional encroachment on citizens' liberty interests. It is out of line with the standards held by this Court in *Rodriguez* and *Reid*, and the overwhelming weight of precedent from other Courts of Appeal. The Opinion fails to narrow the universe of presumably innocent travelers who are subject to the government's intrusive actions. Finally, the Opinion gives police the freedom to prolong stops based not on specific, articulable suspicion, but instead based on their own subjective, self-serving, guilt-assuming impressions. The adverse effect of this freedom will disproportionately fall on the shoulders of people of color. For the foregoing reasons, the petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,



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