No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO ESCOBAR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in light of *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), *Rehaif v. United States*, 139 S. Ct. 2191 (2019), and *Alleyne v. United States*, 133 S. Ct. 2151 (2013), and the Due Process Clause, the "knowingly or intentionally" mens rea contained in 21 U.S.C. § 841(a) applies to the offense elements of drug type and drug quantity found in 21 U.S.C. § 841(b).

2. Whether the Fourth Amendment standards for traffic stops articulated in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), apply to immigration-checkpoint stops.

PARTIES TO THE PROCEEDINGS

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

LIST OF DIRECTLY RELATED CASES

None.

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PRAYER

Petitioner Antonio Escobar prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Westlaw version of the opinion of the United States Court of Appeals for the Fifth Circuit in Mr. Escobar's case is attached to this petition as Appendix A. The district court's order is attached to this petition as Appendix B.

JURISDICTION

The Fifth Circuit's judgment and opinion was entered on September 5, 2019. *See* Appendix A. This petition is filed within 90 days after entry of the judgment. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

> 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.

21 U.S.C. § 841 is attached as Appendix C.

STATEMENT OF THE CASE

This case began with a warrantless, suspicionless seizure at the fixed interior checkpoint established by the U.S. Border Patrol in Sarita, Texas. The checkpoint is located on U.S. Highway 77 North, one of two major routes from the Rio Grande Valley, about 65 to 90 miles from the nearest points of the U.S.-Mexico border. The Sarita checkpoint is one of 34 fixed interior checkpoints along the southern border.

A. Mr. Escobar was stopped at an immigration checkpoint and, after questioning unrelated to citizenship status, agents found cocaine concealed in his tractor-trailer.

On August 8, 2017, Mr. Escobar was stopped at the U.S. Border Patrol checkpoint in Sarita, Texas, driving a tractor-trailer. Border Patrol Agent Damien Guerrero was the agent in the primary inspection lane.[1] Agent Guerrero testified that the primary purpose of the Sarita checkpoint is "[i]mmigration and narcotics and money and human smuggling." Put another way, the agent agreed that the checkpoint's primary purpose is "to detect any sort of illegal activity that somebody may be engaged in."

When Mr. Escobar pulled into the checkpoint, the agent perceived "a small sign of nervousness" from Mr. Escobar "bouncing in his chair, almost antsy." The agent did not ask Mr. Escobar whether he was a citizen or to produce identification documents. Rather, the agent asked non-immigration-related questions about where Mr. Escobar was headed, where he had loaded his tractor-trailer, and what he was hauling. Mr. Escobar responded to these questions. In response to the third question, Mr. Escobar said, "I think I have

[1] These facts were established by Agent Guerrero's testimony at the suppression hearing before the district court.

windows." The agent considered that response to be "[v]ery unusual" because truck drivers know what they are hauling since they are responsible for the load. The agent suspected Mr. Escobar was hiding something.

Still, Agent Guerrero did not ask Mr. Escobar about his citizenship status or to produce identification documents. Instead, he asked for Mr. Escobar's bill of lading. Agent Guerrero testified that bills of lading are documents related to the trucking industry that have nothing to do with citizenship or lawful permanent residency. The agent further asked non-immigration-related questions about whether the truck Mr. Escobar was driving was his assigned truck and how long he had worked for the company. Mr. Escobar produced the bill of lading and answered these additional questions. Regarding the bill of lading, Agent Guerrero testified that he noticed three things: that the seal number was handwritten, that it had white-out on it, and that the trailer number was handwritten. Agent Guerrero testified that, in his nine years of experience, he had never seen a handwritten trailer number and had never seen a handwritten seal number except when law enforcement had broken the seal. Agent Guerrero further testified that he had previous cases where a bill of lading was handwritten, misplaced, or whited-out, and the trailer contained narcotics or aliens.

At this point in the detention of Mr. Escobar, Agent Guerrero attempted to summon a canine handler, but the handler did not respond. So the agent walked toward the handler to get his attention. Without Mr. Escobar's permission, the handler ran his dog around the tractor and trailer for about a minute. During this time, the agent did not ask Mr. Escobar any questions. He stood off to the side and then walked with the handler around the trailer.

The dog did not alert.

After the dog did not alert, Agent Guerrero returned to the tractor and looked in the cab area to make sure no one was hiding there. He did not see anyone. The agent then asked Mr. Escobar if he could take a closer look at the tractor and trailer. Mr. Escobar agreed on the condition that the agent give him paperwork saying that the agent opened the trailer.

Only after all of that—about three minutes into the stop—did Agent Guerrero ask Mr. Escobar whether he was a citizen. Mr. Escobar responded, truthfully, that he was. Mr. Escobar's tractor-trailer was moved to the secondary inspection area. The canine sniffed the tractor-trailer again and this time alerted to the tractor. A search uncovered cocaine hidden in the cab. Agent Guerrero never asked Mr. Escobar any follow-up questions about his citizenship. Nor did the agent ever ask him for identification, where he was born, or whether his parents were citizens.

B. Motion to suppress and the district court's ruling.

Mr. Escobar moved to suppress the drugs found in his tractor-trailer, arguing that his detention at the immigration checkpoint was unconstitutional under this Court's decision in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), because the agent went well past the permissible scope of an immigration inspection by never asking about Mr. Escobar's citizenship until after he had detained him for reasons unrelated to the programmatic purpose of the checkpoint. After the suppression hearing, the district court issued a written order denying the motion to suppress. *See* Appendix B. The court found that the stop's length of three minutes fell "reasonably within the range of time the Fifth Circuit has approved for border stops." Appendix B.

C. Trial.

Mr. Escobar was charged by indictment with knowingly and intentionally possessing with intent to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(A). The indictment alleged that the violation involved more than five kilograms of cocaine, that is, approximately 13.03 kilograms of cocaine, a Schedule II controlled substance.[2] He pleaded not guilty, and a jury trial was held.

The key dispute at trial was whether Mr. Escobar knew about the drugs. The government's case rested entirely on circumstantial evidence. The government's theory of the case, as argued to the jury in closing, was that three pieces of evidence supported the inference of knowledge: (1) Mr. Escobar's demeanor at the checkpoint, (2) the pre-trip inspection process, and (3) Mr. Escobar's side trip to a location near his residence after picking up the truck at S&M Transport, the trucking company.

The evidence at trial included Agent Guerrero's testimony about his interactions with Mr. Escobar at the Sarita checkpoint on August 8, 2017. This testimony differed in some respects from the testimony at the suppression hearing. Agent Guerrero testified at trial that Mr. Escobar tried to hand him his bill of lading right away, without being asked, and that the agent perceived Mr. Escobar as nervous because he was biting his lip, he was avoiding eye contact by looking down or straight, and his hand was shaking when he handed the agent the bill of lading.

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[2] The superseding indictment also charged Mr. Escobar with a conspiracy offense, but the district court granted Mr. Escobar's motion for judgment of acquittal under Federal Rule of Criminal Procedure 29.

Agent Guerrero offered more detailed testimony than he had at the suppression hearing about where the drugs were located. The canine handler found the narcotics in a cardboard box underneath the tractor's bed. The box contained 13 bundles of narcotics that weighed about 13.9 kilograms and had an approximate value of just under $1 million. Nothing except cargo was found in the trailer.

On cross-examination, the agent testified that he sometimes encounters nervous people at the checkpoint and does not arrest all of them. Although he thought the handwritten seal was suspicious, he never verified whether the seal on the bill of lading matched the seal on the trailer. The agent had never been a commercial truck driver. A seal is important to a truck driver because it shows the integrity of the load.

The government further offered the testimony of Border Patrol Agent Gregorio Reyes, the canine handler, and Dr. Xiu Liu, a DEA chemist. Agent Reyes testified that the canine did not alert on the tractor-trailer in the primary inspection area. In secondary, the canine alerted to the tractor underneath the bed area. Below the mattress, there was a cardboard box. A vinyl curtain completely covered the cardboard box, concealing the box from view. After the canine alerted, Agent Reyes pulled the vinyl curtain aside, which revealed the box. Agent Reyes testified that humans cannot detect the odor of drugs, and he could not smell the drugs in the tractor. Dr. Liu testified that the net weight of the drugs was 13.03 kilograms, a test of 10 randomly selected bundles determined the bundles to contain cocaine hydrochloride, and he did not remember the drugs having a detectable odor before he opened the packaging.

To develop evidence related to the pre-trip inspection process and Mr. Escobar's

side trip, the government called Jorge Gutierrez, an employee of Sprint, and Esequiel Silva, the owner of S&M Transport. Mr. Gutierrez testified that he installed devices on S&M Transport's tractors that record GPS location and other data. The devices transmitted the tractor's location within about 15 feet. The devices recorded stops when the tractor was placed in park. Customers could access the data by logging into a web-based portal.

Mr. Silva testified about his company policy as well as U.S. Department of Transportation ("DOT") regulations, which both prohibited truck drivers from using their phones while driving. Company policy prohibited drivers from going out of route or using the company vehicle for personal stops or deliveries, and drivers would be charged for, or have deducted from payroll, fuel and additional costs if this policy was violated up to termination. DOT regulations required drivers to keep a daily log book to ensure that drivers got enough sleep. Drivers could drive for 14 hours in a 24-hour period with a 30-break and a two-hour break. Drivers were allowed to stop to eat, use the bathroom, and make phone calls or to stretch their legs, rest their eyes, to check on a strange noise.

Mr. Silva's company did not give drivers specific routes to follow. His company hired professional drivers who determined the appropriate truck route after the company gave them the delivery time and place. Before hitting the road, drivers had to perform a 15-minute pre-trip inspection to check over the tractor-trailer for safety and maintenance issues. None of the items of the inspection checklist were under the tractor's sleeper berth.

Finally, the government presented evidence of Mr. Escobar's stops while driving tractor-trailers for S&M Transport on July 8, July 29, August 2, and August 8, 2017. On July 8, Mr. Escobar's first "stop" was at S&M Transport, his second stop was for about

five minutes at a scale house where he weighed his tractor-trailer, his third stop for about nine minutes was near his residence, his fourth stop for about 11 minutes was near the Gonzalez Fruit Market, and his fifth stop for 30 minutes was in an HEB parking lot. Mr. Escobar's log book did not include the second, third, or fourth stops, at the scale house, near his residence, or near the Gonzalez Fruit Market. His log book did list the fifth stop. The log book was marked in 15-minute increments. On July 29 and August 2, Mr. Escobar made similar stops and did not mark them in his log book, including stops at the scale house. On August 8, the day of his arrest, Mr. Escobar stopped at S&M Transport, at the scale house for nine minutes, and near his residence for seven minutes. The case agent, DEA Special Agent Stacey Slater, testified that he drove the highways of South Texas frequently for investigations, and there was nothing unusual about seeing a truck idling on the side of the road or pulled over in an empty lot. Agent Slater further testified that Mr. Escobar's side trip comprised only 1% of the total distance Mr. Escobar would have driven in one day of a three-to-four-day trip.

Before Mr. Escobar drove the tractor-trailer on August 8, another man, Victor Villanueva, had driven that tractor unit to Brownsville, Texas, and back to S&M Transport. Mr. Villanueva was a former driver for Mr. Silva who had come and gone. Mr. Villanueva quit at some point after Mr. Escobar's arrest.

The jury was instructed that the government did not have to prove that the defendant knew the kind of controlled substance that he possessed, if he did, nor its weight. Mr. Escobar objected to that instruction, arguing that the government should be required to prove knowledge as to drug quantity and weight. That objection was overruled. The jury

returned a verdict of guilty.

D. Sentencing and appeal.

On July 31, 2018, the district court sentenced Mr. Escobar to the mandatory minimum term of 120 months in the custody of the Bureau of Prisons, recognizing that its "hands are tied here." The court imposed a five-year term of supervised release, no fine, and a $100 special assessment.

Mr. Escobar timely filed notice of appeal on July 31, 2018. On appeal, Mr. Escobar argued, among other things, that the district court erred in denying his motion to suppress and in denying his requested jury instruction on knowledge as to drug weight and quantity.

The Fifth Circuit rejected these arguments. *See United States v. Escobar*, No. 18-40717, ___ Fed. Appx. ___, 2019 WL 4232957 (5th Cir. 2019) (unpublished). The court found that "[t]he less-than-three-minute immigration stop was sufficiently brief under the Fourth Amendment . . . ." *Id.* at *1. Relying on its published decision in *United States v. Tello*, 924 F.3d 782 (5th Cir. 2019), the court concluded that this Court's decision in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), "does not alter this calculus." *Escobar*, 2019 WL 4232957, at *1. On the jury instruction issue, the court found the argument to be foreclosed under Fifth Circuit precedent in *United States v. Betancourt*, 586 F.3d 303 (5th Cir. 2009), and *United States v. Gamez-Gonzalez*, 319 F.3d 695 (5th Cir. 2003). *Escobar*, 2019 WL 4232957, at *2.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

I. Whether the government must prove knowledge of drug type and drug quantity in a prosecution under 21 U.S.C. § 841 is an important issue for this Court to decide, especially in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

The Court should grant certiorari to address the important issue whether, in light of *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), *Rehaif v. United States*, 139 S. Ct. 2191 (2019), *Alleyne v. United States*, 133 S. Ct. 2151 (2013), and the Due Process Clause, the "knowingly or intentionally" mens rea contained in 21 U.S.C. § 841(a) applies to the offense elements of drug type and drug quantity found in 21 U.S.C. § 841(b). *See* Sup. Ct. R. 10(c).

A. *Flores-Figueroa* and *Rehaif* cast serious doubt on how the lower courts have interpreted the mens rea requirement of 21 U.S.C. § 841.

In *United States v. Betancourt*, 586 F.3d 303 (5th Cir. 2009), the Fifth Circuit—notwithstanding this Court's intervening decision in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009)—adhered to its pre-*Flores-Figueroa* precedent[3] holding that the "knowingly or intentionally" mens rea found in 21 U.S.C. § 841(a) does not apply to the offense elements of drug type and drug quantity found in 21 U.S.C. § 841(b). *See Betancourt*, 586 F.3d at 308-09. In petitioner's case, the Fifth Circuit followed *Betancourt* (and hence its pre-*Flores-Figueroa* precedent) to reach the same holding. *See* Appendix A (citing *Betancourt* and *Gamez-Gonzalez*). Every other circuit had, before *Flores-Figueroa*, agreed with this interpretation of 21 U.S.C. § 841. *See, e.g.*, *United States v. Branham*,

[3] *See United States v. Gamez-Gonzalez*, 319 F.3d 695, 700 (5th Cir. 2003).

515 F.3d 1268, 1275-76 & n.3 (D.C. Cir. 2008) (so holding and collecting cases so holding from the other 11 circuits). However, in other circuits that have considered this issue post-*Flores-Figueroa* and have adhered to their pre-*Flores-Figueroa* holdings, two circuit judges have voiced vigorous disagreement with those holdings and opined that the government must prove a defendant's mens rea with regard to the type and quantity of drugs. *See United States v. Jefferson*, 791 F.3d 1013, 1019-23 (9th Cir. 2015) (Fletcher, J., concurring); *United States v. Dado*, 759 F.3d 550, 571-73 (6th Cir. 2014) (Merritt, J., dissenting). For the reasons that follow, this Court should grant certiorari to decide the important question whether the "knowingly or intentionally" mens rea contained in 21 U.S.C. § 841(a) applies to the offense elements of drug type and drug quantity found in 21 U.S.C. § 841(b).

In *Flores-Figueroa*, the Court was tasked with deciding whether the "knowingly" mens rea of 18 U.S.C. § 1028A(a)(1) (the federal aggravated-identity-theft statute) applied to the statutory requirement that the means of identification unlawfully used was "of another person."[4] *See Flores-Figueroa*, 556 U.S. at 647-48. The Court concluded that it did. *See id.* at 647, 657. Significantly for present purposes, the Court explained that "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Id.* at 652 (citing *United*

[4] As the Court explained in *Flores-Figueroa*, "[the] federal criminal statute forbidding '[a]ggravated identity theft' imposes a mandatory consecutive 2-year prison term upon individuals convicted of certain other crimes ***if*** during (or in relation to) the commission of those other crimes, the offender "'***knowingly*** transfers, possesses, or uses, without lawful authority, ***a means of identification of another person***.'" *Flores-Figueroa*, 556 U.S. at 647 (quoting 18 U.S.C. § 1028A(a)(1); emphasis added by the *Flores-Figueroa* Court).

States v. X-Citement Video, 513 U.S. 64, 79 (1994) (Stevens, J., concurring)).[5] Moreover, the Court implicitly rejected the government's argument[6] that such a rule should be limited only to elements that mean the difference between innocent conduct and wrongful conduct. *See United States v. Burwell*, 690 F.3d 500, 529-30 (D.C. Cir. 2012) (*en banc*) (Kavanaugh, J., dissenting) (noting that this Court has not cabined the presumption of mens rea so that it applies only when necessary to avoid criminalizing apparently innocent conduct and that the government's argument for such a limitation in *Flores-Figueroa* garnered zero votes). Indeed, had the Court accepted that argument, *Flores-Figueroa* could not have been decided as it was.

This Court recently applied *Flores-Figueroa*'s presumption—that a statutory mens rea applies to all the offense elements that follow it—in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). In that case, the Court applied *Flores-Figueroa*'s presumption to hold that, in a prosecution under 21 U.S.C. §§ 922(g) and 924(a)(2), the government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing the firearm. *See* 139 S. Ct. at 2195-2200. The Court reasoned that "[a]pplying the word 'knowingly' to the defendant's status in § 922(g)

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[5] In his concurring opinion in *Flores-Figueroa*, Justice Scalia read this statement, with its citation to Justice Stevens's concurring opinion in *X-Citement Video*, as representing a holding about how courts should normally interpret "knowingly"-type statutes. *See Flores-Figueroa*, 556 U.S. at 657-58 (Scalia, J., concurring in part and concurring in the judgment); *see also id.* at 659-60 (Alito, J., concurring in part and concurring in the judgment) ("suspect[ing] that the Court's opinion will be cited for the proposition that the mens rea of a federal criminal statute nearly always applies to every element of the offense," but agreeing with a rebuttable "general presumption that the specified mens rea applies to all the elements of an offense").

[6] *See* Brief for the United States, *Flores-Figueroa v. United States*, No. 08-108 (O.T. 2008), at 5-8, 18, 33-36, 39-40, *available at* 2009 WL 191837.

helps advance the purpose of scienter, for it helps to separate wrongful from innocent acts," *id.* at 2197 (emphasis added), but did *not* state that that *Flores-Figureroa*'s presumption should be limited only to elements that mean the difference between innocent conduct and wrongful conduct. The Court did note, however, that there is an exception to the presumption in favor of scienter "in cases involving statutory provisions that form part of a 'regulatory' or 'public welfare' program and carry only minor penalties." *Rehaif*, 139 S. Ct. at 2197.

Flores-Figueroa's presumption is consistent with the Model Penal Code.[7] The Model Penal Code provides that, generally, "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." Model Penal Code § 2.02(1) & Explanatory Note, ¶ 2. The Model Penal Code is skeptical of any form of strict liability, even where that strict liability is only for part of a criminal offense (*i.e.*, a "material element"). Indeed, the Model Penal Code countenances whole or partial strict liability for criminal statutes only where, in the statute defining the offense, "a legislative purpose to impose absolute liability for such offenses[,] or with respect to any material element thereof[,] plainly appears." Model Penal Code § 2.05(1)(b).

The rule that emerges from *Flores-Figueroa*, *Rehaif*, and the Model Penal Code is

[7] The Court has several times cited the Model Penal Code's culpability provisions in interpreting mens rea requirements. *See, e.g.*, *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 68 n.18 (2007); *Holloway v. United States,* 526 U.S. 1, 11 n.11 (1999); *Liparota v. United States*, 471 U.S. 419, 423 n.5 (1985); *United States v. United States Gypsum Co.*, 438 U.S. 422, 437-38 (1978).

that courts should presume that a statutory mens rea applies to every material element of the offense that follows it, unless the statutory provision forms part of a "regulatory" or "public welfare" program carrying only minor penalties, *see Rehaif*, 139 S. Ct. at 2197, or a legislative purpose to impose strict liability with respect to that element plainly appears. *See Burwell*, 690 F.3d at 537 (Kavanaugh, J., dissenting) (explaining that this Court's case law, including *Flores-Figueroa*, "demonstrates that the Court has applied the presumption of mens rea consistently, forcefully, and broadly . . . to statutes that are silent as to mens rea . . . [and] to statutes that contain an explicit mens rea requirement for one element but are silent or ambiguous about mens rea for other elements") (citations omitted); *see id.* (concluding that this "Court has established and applied a rule of statutory interpretation for federal crimes: A requirement of mens rea applies to each element of the offense unless Congress has plainly indicated otherwise").

Nevertheless, the Fifth Circuit has not applied this rule to 21 U.S.C. § 841, but rather distinguished *Flores-Figueroa* on the basis of the differing structure of the statutes at issue. *See, e.g.*, *Betancourt*, 586 F.3d at 309 ("Unlike in § 1028A(a)(1), where it would be 'natural' to apply the word 'knowingly' to all 'subsequently listed elements,' in § 841 it would not be natural to apply the word 'knowingly' used in subsection (b), especially because a period separates the two subsections") (citation omitted); *see also United States v. Zuñiga-Martinez*, 512 Fed. Appx. 428, 428-29 (5th Cir. 2013) (unpublished) (applying *Betancourt* to 21 U.S.C. § 960).

The Fifth Circuit's analysis of *Flores-Figueroa* and *X-Citement Video* is problematic. Its assertion that—in contrast to the statutory language at issue here—"it

would be natural to apply the modifier 'knowingly' to the language at issue in *X-Citement Video*," *Betancourt*, 586 F.3d at 309, is directly contrary to *X-Citement Video* itself. In *X-Citement Video*, the Court acknowledged that "[t]he most natural grammatical reading" would ***not*** extend the "knowingly" mens rea in 18 U.S.C. § 2252(a)(1) to the offense elements there in question, because the word "knowingly" and the offense elements in question "[were] set forth in independent clauses separated by interruptive punctuation." *X-Citement Video*, 513 U.S. at 68. But, notwithstanding that "most natural grammatical reading," *id.*, the Court "d[id] not think this [was] the end of the matter," *id.*, and, in fact, the Court went on to eschew that reading in favor of a reading that extended the "knowingly" mens rea to the offense elements in question. *See id.* at 78.

Taken together, *Flores-Figueroa*, *Rehaif*, and *X-Citement Video* cast serious doubt upon the decisions in *Gamez-Gonzalez*, *Betancourt*, and petitioner's case. *Flores-Figueroa* and *Rehaif* confirm that there is a presumption that a statutory mens rea will apply to all material elements that follow it, except in cases involving statutory provisions that form part of a "regulatory" or "public welfare" program and carry only minor penalties. *See Rehaif*, 139 S. Ct. at 2195-96; *see also Burwell*, 690 F.3d at 537 (Kavanaugh, J., dissenting). Also, *X-Citement Video* demonstrates that this presumption is not defeated by Congress's use of "independent clauses separated by interruptive punctuation." *X-Citement Video*, 513 U.S. at 68.[8] And, if any doubt remained, that interpretation is also compelled

[8] And, in fact, the Fifth Circuit itself has, relying in part on *X-Citement Video*, previously found that the "knowingly" mens rea found in 33 U.S.C. § 1319(c)(2)(A) of the Clean Water Act ("CWA") applied to offense elements found in other sections of the CWA. *See United States v. Ahmad*, 101 F.3d 386, 390 (5th Cir. 1996) (noting that "the phrase 'knowingly violates' appears

by the principle of constitutional doubt[9] and the rule of lenity.[10]

B. After *Alleyne v. United States*, § 841(b) must be read to include a knowledge requirement as to the type and quantity of the drugs involved in an offense.

The Fifth Circuit's position that "knowingly" in § 841(a) does not apply to § 841(b) relies on the two-part structure of the statute and holds that a violation of § 841(a) requires only an intent to distribute or respectively import a "controlled substance" and that § 841(b) then creates "strict liability punishment" based on the type and quantity of the drug "involved" in the offense. *See Gamez-Gonzalez*, 319 F.3d at 700 (citing *United States v. Valencia-Gonzales*, 172 F.3d 344, 346 (5th Cir. 1999)); *see also Zuñiga-Martinez*, 512 Fed. Appx. at 428-29 (applying *Betancourt* to 21 U.S.C. § 960).

This reading of § 841 cannot survive *Alleyne v. United States*, 133 S. Ct. 2151

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in a different section of the CWA from the language defining the elements of the offenses") & *id.* at 391 (holding that "knowingly" mens rea applied to offense elements in question).

[9] "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court's] duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) (citation omitted). Thus, "'[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.'" *United States v. LaFranca*, 282 U.S. 568, 574 (1931) (citations omitted). Petitioner's proposed reading avoids the constitutional concerns raised by a strict liability approach to drug type and drug quantity. *See generally United States v. Cordoba-Hincapie*, 825 F. Supp. 485 (E.D.N.Y. 1993) (discussing, in the context of drug type and drug quantity, some possible constitutional concerns about strict criminal liability).

[10] "Even if the [Court] does not consider the issue to be as clear as [petitioners] do, [the Court] must at least acknowledge . . . that it is eminently debatable – and that is enough, under the rule of lenity, to require finding for [petitioners]." *Smith v. United States*, 508 U.S. 223, 246 (1993) (Scalia, J., dissenting). "The rule of lenity requires ambiguous laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality op.) (citations omitted). Because petitioner's interpretation is more "defendant-friendly," to the extent there is any ambiguity, "the rule of lenity dictates that it should be adopted." *Id.*

(2013). In *Alleyne*, this Court held that any fact that imposes or increases an applicable mandatory minimum sentence must be found by a jury beyond a reasonable doubt. 133 S. Ct. at 2155 (overruling *Harris v. United States*, 536 U.S. 545 (2002)). The Court held that "the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury." *Alleyne*, 133 S. Ct. at 2161. The Court reasoned that "every fact which is in law essential to the punishment sought to be inflicted" is an inseparable "element" of the crime. *Id.* at 2159 (internal quotation marks and citation omitted). In other words, § 841(a) and (b) "together" create a "new, aggravated" crime distinguishable from a violation of § 841(a) alone. *See id.* at 2161-62.

Once drug type and quantity are properly understood as elements of a "new, aggravated" offense under § 841(b)(1) and (2), *Alleyne*, 133 S. Ct. at 2161, ordinary principles of statutory construction, reinforced by logic and due-process considerations, require that the "knowingly or intentionally" language of § 841(a) be read as modifying those elements. *See Jefferson*, 791 F.3d at 1019-23 (Fletcher, J., concurring); *Dado*, 759 F.3d at 571-73 (Merritt, J., dissenting). As previously discussed, this Court has recognized that "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Flores-Figueroa*, 556 U.S. at 651-53 (citing *X-Citement Video*, 513 U.S. at 79 (Stevens, J., concurring)).

In light of *Alleyne*'s recognition that the facts like drug type and quantity are elements of a separate, aggravated offense, failing to apply a mens rea requirement to these elements results in the creation of an entire class of "strict liability" offenses—a category

of offense strongly disfavored in the law and which raises due-process concerns. *See Jefferson*, 791 F.3d at 1020-21 (Fletcher, J., concurring); *Dado*, 759 F.3d at 572 (Merritt, J., dissenting); *see also, e.g.*, *X-Citement Video, Inc.*, 513 U.S. at 78; *United States v. Bailey*, 444 U.S. 394, 404 n.4 (1980). Moreover, and counterintuitively, it would only be the "aggravated" offenses of § 841(b) that require a mandatory minimum sentence which would be stripped of the requirement of knowledge or intent. Yet, "[h]istorically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with mens rea." *Staples v. United States*, 511 U.S. 600, 616 (1994) (reading mens rea requirement into statute providing for up to ten years of imprisonment); *see also X-Citement Video*, 513 U.S. at 72 (same); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 442 n. 18 (1978) (reading mens rea requirement into statute providing for up to three years of imprisonment); *Morissette v. United States*, 342 U.S. 246, 260 (1952) (reading mens rea requirement into statute providing for up to one year of imprisonment). If the penalties in those cases were considered sufficiently "harsh" so as to implicate constitutional considerations, then the ten-year and five-year mandatory minimums of § 841(b)(1) and (2) must be described as drastic, and cannot be imposed based on strict liability as to its key elements.

This Court has sometimes said that the default rule requiring a mens rea to be read into a statute applies only when it is necessary to distinguish guilty conduct from innocent conduct. *See Elonis v. United States*, 135 S. Ct. 2001, 2010 (2015); *see also Rehaif*, 139 S. Ct. 2196 ("The cases in which we have emphasized scienter's importance in separating wrongful from innocent acts are legion."). Yet this principle is not controlling, or *Flores-*

Figueroa could not have been decided as it was. In *Flores-Figueroa*, this Court held that 18 U.S.C. § 1028A(a)(1) requires proof that the defendant "knew that the 'means of identification' he or she unlawfully transferred, possessed, or used, in fact, belonged to 'another person.'" *Flores-Figueroa*, 556 U.S. at 647. The defendant in *Flores-Figueroa* did not dispute that he knew the Social Security Number he used during his immigration-document-fraud offense was false, but only disputed whether he knew it was actually a number assigned to another identifiable person. *Id.* at 649. And the penalty provided for by the statute applied only if the defendant used the fraudulent means of identification during the commission of another offense. Thus, reading a mens rea into the identity-theft statute was not necessary to distinguish guilty conduct from wholly innocent conduct. Nonetheless, the Court applied the default rule and read a mens rea requirement into all the elements of the aggravated-identity-theft statute. *Id.* at 652-53.

In *Rehaif*, this Court applied that default rule to hold that, in a prosecution under 21 U.S.C. §§ 922(g) and 924(a)(2), the government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing the firearm. *See* 139 S. Ct. at 2195-2200. Although the Court noted that "[a]pplying the word 'knowingly' to the defendant's status in § 922(g) *helps advance* the purpose of scienter, for it helps to separate wrongful from innocent acts," *id.* at 2197 (emphasis added), it did not state that *Flores-Figureroa*'s default rule should be limited only to elements that mean the difference between innocent conduct and wrongful conduct.

But even assuming *arguendo* that the rule extending a mens rea requirement throughout a statute applies only to distinguish innocent conduct from guilty conduct, after

Alleyne, § 841(b) must still be read to incorporate a knowledge requirement as to all key elements of the offense, including drug type and quantity. Under the *Alleyne* view of a § 841(b) offense as a new and separate crime with distinct elements from a § 841(a) offense, the mens rea as to type and quantity of drugs makes the difference between the less culpable offense under § 841(a), and the distinct, aggravated offense under § 841(b). The defendant is legally innocent of the "new, aggravated" offense created by § 841(b), *Alleyne*, 133 S. Ct. at 2161, if he did not in fact know the type and quantity of drugs involved in the offense.

C. If § 841(b) is not read to include a knowledge requirement as to the type and quantity of drugs involved in an offense, then the statute creates a strict liability crime that violates the Due Process Clause.

Alternatively, if § 841(b) does not require proof of knowledge of drug type and quantity, then the statute violates the Due Process Clause by creating a strict liability offense punished by a mandatory minimum of ten (or five) years of imprisonment and the possibility of life (or 40 years) in prison.

Due process principles create at least some constitutional limits on the penalties that can be imposed for strict liability crimes. At the very least, a lengthy term of imprisonment warrants a state of mind requirement. *See United States v. Wulff*, 758 F.2d 1121, 1123, 1125 (6th Cir. 1985) (holding that the felony provision of the Migratory Bird Treaty Act violated due process by allowing for a maximum of two years of imprisonment without a mens rea requirement); *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960) (explaining that elimination of mens rea requirement does not violate due process where, among other things, "the penalty is relatively small" and the "conviction does not gravely

besmirch"); *see also United States v. Heller*, 579 F.2d 990, 994 (6th Cir. 1978) ("Certainly, if Congress attempted to define a *malum prohibitum* offense that placed an onerous stigma on an offender's reputation and that carried a severe penalty, the Constitution would be offended.").

Although this Court has upheld the constitutionality of some strict liability crimes, none have carried penalties as severe as a mandatory minimum of ten (or five) years and a maximum of life (or 40 years) in prison. *See, e.g.*, *United States v. Freed,* 401 U.S. 601 (1971) (possession of unregistered firearm; fines up to $10,000 and/or imprisonment up to ten years); *Williams v. North Carolina*, 325 U.S. 226 (1945) (bigamous cohabitation; up to ten years' imprisonment); *United States v. Dotterweich*, 320 U.S. 277 (1943) (shipment of misbranded or adulterated drugs; fines up to $1,000 and/or imprisonment up to one year for first offense, $10,000 and/or three years for subsequent offense); *United States v. Balint*, 258 U.S. 250 (1922) (unlawful drug sale; imprisonment up to five years); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910) (cutting timber on state land; fines up to $1,000 and/or imprisonment up to two years).

"The elimination of the element of criminal intent does not violate the due process clause where (1) the penalty is relatively small, and (2) where conviction does not gravely besmirch." *Wulff*, 758 F.2d at 1125 (citing *Holdridge*, 282 F.2d at 310); *cf. Rehaif*, 139 S. Ct. at 2197 ("[W]e have typically declined to apply the presumption in favor of scienter in cases involving statutory provisions that form part of a 'regulatory' or 'public welfare' program and carry only minor penalties."). Sections 841(b)(1) and (2) satisfy neither of these factors. The penalty under each statute is a mandatory minimum of ten years or five

years of imprisonment, with a maximum of life or 40 years in prison, which cannot be classified as "relatively small" by any standard. Moreover, "a convicted felon loses his right to vote, his right to sit on a jury and his right to possess a gun, among other civil rights, for the rest of his life," and "a felony conviction irreparably damages one's reputation." *Wulff*, 758 F.2d at 1123, 1125. Thus, if § 841(b) is not read to include mens rea as to the type and quantity of drugs—the very elements that make it distinct from a violation of § 841(a) under *Alleyne*—then the imposition of strict liability for that separate, aggravated crime violates due process.

D. The Court should grant certiorari.

As mentioned previously, two circuit judges have voiced vigorous disagreement with their circuits' adherence to pre-*Flores-Figueroa* precedent and have opined that the government must prove a defendant's mens rea with regard to the type and quantity of drugs. *See Jefferson*, 791 F.3d at 1019-23 (Fletcher, J., concurring); *Dado*, 759 F.3d at 571-73 (Merritt, J., dissenting). Concurring in *Jefferson* only due to prevailing circuit precedent, Judge Fletcher relied on: (1) the cardinal rule that the existence of mens rea is the rule rather than the exception in Anglo-American jurisprudence; (2) the fact that nothing in the Anti-Drug Abuse Act overcomes the presumption of mens rea; and (3) this Court's Sixth Amendment jurisprudence, which gives increasing attention to statutory sentencing schemes and emphasizes that any fact that increases the mandatory minimum sentence must be submitted to the jury. *Jefferson*, 791 F.3d at 1020-22. Judge Fletcher noted that he did not believe that Congress intended for "a defendant who reasonably believed that he is importing a relatively small quantity of marijuana into the country [to] be sentenced to the

ten-year mandatory minimum prison term that applies to a defendant who knowingly imports the same quantity of methamphetamine." *Id.* at 1019.

In his dissent in *Dado*, Judge Merritt similarly emphasized that this Court's Sixth Amendment jurisprudence has "held that 'the core crime and the fact triggering the mandatory minimum sentence'—here, the drug quantity—'together constitute a new, aggravated crime, each element of which must be submitted to the jury.'" *Dado*, 759 F.3d at 571 (quoting *Alleyne*, 133 S. Ct. at 2161). He noted that "[t]he key word is 'together' – sections 841(a) and (b) 'together' create a 'separate, aggravated possession crime distinguishable from a violation of section 841(a) alone.'" *Dado*, 759 F.3d at 571 (quoting *Alleyne*, 133 S. Ct. at 2162). According to Judge Merritt, the majority's holding "runs against the strong presumption against strict liability crimes, . . . disregards the presumption that the more serious the penalty at issue, the more important intent is to guilt," and punishes a defendant with "two mandatory minimum sentences of 20 years triggered by a fact that he did not necessarily even know about." *Dado*, 759 F.3d at 572. Moreover, one commentator has urged this Court to address and reaffirm the clearly workable and practical mens rea interpretive principles of *Flores-Figueroa* and apply them to analogous federal statutes with traditional strict liability elements, because the lower courts have proven reluctant to do so. Leonid Traps, Note, *"Knowingly" Ignorant: Mens Rea Distribution in Federal Criminal Law After Flores-Figueroa*, 112 Colum. L. Rev. 628, 628-44 (Apr. 2012).

In addition to these persuasive opinions and commentary, the question of mens rea for drug type and drug quantity is an oft-recurring question in federal drug prosecutions,

which are a large part of the federal criminal docket throughout the country.[11] Indeed, courts are confronted with some frequency with "blind mule" drug cases, in which persons know that they are carrying ***some*** type of drugs, but plausibly claim that they do not know the type and/or quantity of drugs they are carrying. In fact, in this case, petitioner received a mandatory minimum 10-year prison sentence even though the jury was expressly instructed that the government need not prove his knowledge of drug weight or quantity.

Finally, the importance of the issue presented here is underscored by the fact that drug type and drug quantity may elevate the statutory maximum for a drug trafficking offense under § 841 all the way up to life imprisonment. *See* 21 U.S.C. § 841(b)(1). "Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to [the type and quantity gradations found in § 841(b)], the distinction . . . between [those gradations] may be of greater importance than the difference between guilt or innocence for many lesser crimes." *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975). That being the case, the offense elements of drug type and drug quantity in § 841(b) are truly the tail wagging the dog of the "verb" elements found in § 841(a) (manufacturing, distributing, etc.), and it is perverse to assign a mens rea to the latter but not to the former.

In sum, as one commentator has noted,

> [t]he Court's decision [in *Flores-Figueroa*] shows that lower courts should not automatically interpret any criminal statute in a broad manner, totally disregarding defendants' relative degrees of culpability. Thus, the Court's holding has the potential to bring punishment closer to the defendant's

[11] According to the United States Sentencing Commission, in fiscal year 2016 there were 19,222 defendants sentenced for drug trafficking offenses nationwide out of the total of 67,742 defendants sentenced in federal courts, which constituted 23.94%. *See* United States Sentencing Commission, *Quick Facts: Drug Trafficking Offenses* (June 2017).

> blameworthiness. Lower courts should follow the Court's lead in *Flores-Figueroa* and examine a statute's language to determine the type of behavior targeted by the statute at issue to ensure that harsh minimum sentences are not applied more broadly than conduct requires.

Mens Rea Requirement, 123 Harv. L. Rev. 312, 322 (2009). Because, however, the lower courts remain unclear about how to apply the teachings of *Flores-Figueroa* and *Alleyne* (and now *Rehaif*) to the interpretation of other criminal statutes, this Court should grant certiorari in this case to bring needed clarity to the field.

II. What Fourth Amendment standards govern immigration-checkpoint seizures is an important question that should be decided by this Court given that the Fifth Circuit's resolution of the issue conflicts with this Court's decisions.

The Court should grant certiorari on the second question presented to decide an important question of federal law—the standards governing the scope of checkpoint seizures—that has not been decided by this Court and that has been resolved by the Fifth Circuit in a way that conflicts with relevant decisions of this Court. *See* Sup. Ct. R. 10(c).

A. This Court approved of warrantless, suspicionless seizures at fixed interior checkpoints only because the stops are brief, minimally intrusive, and limited to the narrow programmatic purpose of conducting an immigration inspection.

More than four decades ago, this Court held that warrantless, suspicionless seizures at fixed interior checkpoints comported with the Fourth Amendment. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). At issue were two fixed checkpoints, one in San Clemente, California, and the other in Sarita, Texas. At the San Clemente checkpoint, all vehicles were stopped for an agent to visually screen them, but most drivers were allowed to leave without any questioning or careful visual examination. *Id.* at 546. Agents, without

any articulable suspicion, referred a small number of vehicles "to a secondary inspection area, where their occupants [were] asked about their citizenship and immigration status." *Id.* The average secondary inspection lasted three to five minutes. *Id.* at 546-47. At the Sarita checkpoint, nearly all drivers were stopped for brief questioning, except local inhabitants recognized by the agents were waved through. *Id.* at 550.

To evaluate the constitutionality of the warrantless, suspicionsless stops, the Court weighed the public interest in controlling illegal immigration near the border against the limited nature of the intrusion upon individuals resulting from the checkpoint stops. *See id.* 556-60. Previous cases on Border Patrol traffic-checking operations provided background for the Court's balancing in *Martinez-Fuerte*. The Fourth Amendment prohibits Border Patrol from searching vehicles for illegal aliens while conducting roving patrols, absent probable cause to believe that the vehicle contains illegal aliens, because "searches by roving patrols impinge[] so significantly on Fourth Amendment privacy interests." *See id.* at 555 (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 268 (1973)). The same limits govern searches of vehicles at fixed checkpoints. *United States v. Ortiz*, 422 U.S. 891, 893-97 (1975); *see Martinez-Fuerte*, 428 U.S. at 555. Roving patrols may stop, but not search, a vehicle based on mere reasonable suspicion that the vehicle contains illegal aliens, however, because "the interference with Fourth Amendment interests involved in such a stop was 'modest.'" *Id.* at 555-56 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975)).

Against that backdrop, the Court concluded that no suspicion was needed for stops at fixed interior checkpoints. At checkpoints, unlike the intrusive searches in *Almeida-*

Sanchez and *Ortiz*, "all that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States." *Martinez-Fuerte*, 428 U.S. at 558 (cleaned up) (quoting *Brignoni-Ponce*, 422 U.S. at 880). "Neither the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search." *Martinez-Fuerte*, 428 U.S. at 558. Selectively diverting drivers to secondary inspection at the San Clemente checkpoint, without any suspicion, passed constitutional muster as well because the intrusion was "sufficiently minimal" and involved "brief questioning." *Id.* at 563-64.

The checkpoints' brevity and limited purpose of curbing illegal immigration are critical to their constitutionality. The Court reinforced this point many years later in its decision concluding that fixed checkpoints to stop drivers without individualized suspicion for the purpose of interdicting illegal drugs violated the Fourth Amendment. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (describing *Martinez-Fuerte* as approving of "brief, suspicionless seizures of motorists at a fixed Border Patrol checkpoint designed to intercept illegal aliens"). The key feature that distinguished a constitutional immigration checkpoint from an unconstitutional drug-interdiction checkpoint was the difference in each checkpoint's "primary purpose." *Id.* at 38. Because drug-interdiction checkpoints advanced the government's "'general interest in crime control'" and operated "primarily for the ordinary enterprise of investigating crimes," they lacked the limiting features that saved the immigration checkpoints from running afoul of the Fourth Amendment. *Id.* at 40 (quoting *Delaware v. Prouse*, 440 U.S. 648, 659 n.19 (1979)).

B. The Fifth Circuit evaluates the constitutionality of checkpoint seizures based on their duration and refuses to scrutinize the questions Border Patrol agents ask during the seizures.

Since its seminal decision in *Martinez-Fuerte*, the Court has provided no further guidance on the permissible scope of Border Patrol agents' activities at fixed interior checkpoints. The Fifth Circuit, however, has developed a body of case law evaluating the reasonableness of a checkpoint stop based on "the length of the detention, not the questions asked." *United States v. Machuca-Barrera*, 261 F.3d 425, 432 (5th Cir. 2001). This is because, says the Fifth Circuit, "the Fourth Amendment prohibits only unreasonable seizures, not unreasonable questions." *Id.*

In *Machuca-Barrera*, the Fifth Circuit acknowledged that an immigration stop's brevity was "a principal rationale" for this Court's conclusion that the checkpoints were constitutional. *Id.* at 433. The court decided, however, that it would "not scrutinize the particular questions a Border Patrol agent chooses to ask as long as in sum they generally relate to determining citizenship status." *Id.* Instead, the court concluded that policing the duration of stops was the most practical way to enforce the limited purpose of the stop. *Id.* at 434. "To scrutinize too closely a set of questions asked by a Border Patrol agent would engage judges in an enterprise for which they are ill-equipped and would court inquiry into the subjective purpose of the officer asking the questions." *Id.*

Applying its length-based test to the case before it, the Fifth Circuit found that the agent's "few questions took no more than a couple of minutes; this is within the permissible duration of an immigration checkpoint stop." *Id.* at 435. The agent asked about drugs and guns—subjects that clearly have nothing to do with citizenship status. But the court would

"not second-guess [the agent's] judgment" in asking those questions. *Id.*

The Fifth Circuit's traffic-stop decision in *United States v. Shabazz*, 993 F.2d 431 (5th Cir. 1993), inspired its policy of not scrutinizing questions at checkpoints. There, the court explained that "detention, not questioning, implicates the Fourth Amendment" in the context of a traffic stop based on reasonable suspicion where the officer "asked a motorist questions about contraband *while waiting for the results of a computer check* of the motorist's license and registration." *Machuca-Barrera*, 261 F.3d at n.21 (emphasis added) (citing *Shabazz*, 993 F.2d at 437). But the Fifth Circuit did not acknowledge the lack of a simultaneous on-purpose computer check during off-purpose questioning at a checkpoint.

Since *Machuca-Barrera*, the Fifth Circuit has repeatedly held that the reasonableness of checkpoint stops turns on their length, not the agent's questions. In *United States v. Jaime*, 473 F.3d 178 (5th Cir. 2006), for example, the court explained *Machuca-Barrera* as holding that a "suspicionless detention at the checkpoint was legal *because* its *duration*, up to the time [the driver] gave his consent to search, was objectively reasonable." 473 F.3d at 184 (emphasis in original). As a result, the 30-second stop in *Jaime*, which was less than the two-minute stop in *Machuca-Barrera*, was of a permissible duration, even though the agent asked questions unrelated to citizenship. *Id.* at 184-85.[12]

[12] The Fifth Circuit has applied its length-based analysis in numerous other checkpoint cases. *See, e.g.*, *United States v. McMillon*, 657 Fed. Appx. 326 (5th Cir. 2016) (unpublished) (a 30-to-40-second stop was permissible because it was "an objectively reasonable duration," regardless of whether the agent was satisfied that the driver and passenger were United States citizens); *United States v. Hinojosa-Echavarria*, 250 Fed. Appx. 109, 113 (5th Cir. 2007) (unpublished) (a stop lasting a minute and a half was "within the time approved in *Machuca-Barrera*" and therefore "did not exceed the permissible duration of an immigration stop," without regard to the agent's questioning about proper towing equipment); *United States v. Villarreal*, 61 Fed. Appx. 119 (5th Cir. 2003) (unpublished) (an agent's questions about a vehicle's ownership

C. This Court squarely rejected a length-based test for the constitutionality of traffic stops in *Rodriguez*.

Similar to the Fifth Circuit's length-based treatment of checkpoint stops, the Eighth Circuit used to measure the constitutionality of traffic stops against a length-based benchmark created by its prior caselaw. *See Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015) (the Eighth Circuit approved of the seven-to-eight-minute delay as consistent with previous delays that court had found to be permissible). Likewise, the government advocated for comparing "the overall duration of the stop" to "the duration of other traffic stops involving similar circumstances." *Id.* at 1616. But in *Rodriguez*, this Court expressly rejected those approaches based on several important principles regarding the limitations on a stop made for a particular investigatory purpose.

First, the Court emphasized that the permissible duration of any non-arrest detention is firmly linked to its justifying purpose, and is limited to "the time needed to handle the matter for which the stop was made." *Rodriguez*, 135 S. Ct. at 1612. "The scope of the detention must be carefully tailored to its underlying justification" and "may last no longer than is necessary to effectuate that purpose." *Id.* at 1614 (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)); *see also Terry v. Ohio*, 392 U.S. 1, 20 (1968) (an officer's action must be "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place"). Authority for the seizure ends when tasks tied to the original purpose of the stop "are—or reasonably should have been—

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did not impermissibly extend a stop because the overall length of 40 to 50 seconds fell within the couple of minutes approved by *Machuca-Barrera*).

completed." *Rodriguez*, 135 S. Ct. at 1614.

Second, this Court held that an officer may not investigate crimes different from the original purpose of the stop in a way that extends the stop. *See Rodriguez*, 135 S. Ct. at 1615-16. Instead, "[o]n scene investigation into other crimes," different from the original justification for the stop, "detours from that mission" and renders a stop unlawful if such a detour "adds time to the stop." *Id.* at 1615. Although an officer may perform unrelated tasks during an otherwise lawful stop, "he may not do so in a way that prolongs the stop," absent independent reasonable suspicion to do so. *Id.* at 1615. Importantly, this no-detour principle applies regardless of the length of the time added to the stop. *See id.* at 1615-16.

Lastly, the Court specifically rejected the idea that the reasonableness of the length of a stop could be judged by reference to some objective standard of the length of time a particular stop should take, but rather must be judged by the officer's actual diligence in pursuing the purpose of the stop. *See id.* at 1616. The Court dismissed the Eighth Circuit's reasoning, which approved of traffic stops as reasonable regardless of what actions the officer took unrelated to the purpose of the stop, so long as the overall stop lasted approximately as long as other stops of that kind and treated any additional intrusion as "de minimis." *See id.* at 1615-16. Instead, the Court emphasized that an officer "always has to be reasonably diligent" in his investigation, and held that "[t]he reasonableness of a seizure . . . depends on what the police in fact do." *Id.*at 1616 (citing *Knowles v. Iowa*, 525 U.S. 113, 115-17 (1998)).

In rebuffing the government's approach, the Court explained that, if an officer can complete inquiries about the underlying justification for the stop "expeditiously," then

"that is the amount of 'time reasonably required to complete the stop's mission.'" *Rodriguez*, 135 S. Ct. at 1616 (citing *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). An officer may not earn "bonus time" to investigate whatever he wants by completing the original mission of the stop more quickly than usual, and then using additional time to pursue an unrelated investigation. *See Rodriguez*, 135 S. Ct. at 1616.

D. Despite *Rodriguez*, the Fifth Circuit continues to apply its length-based analysis of checkpoint stops.

After *Rodriguez*, the Fifth Circuit has reaffirmed its length-based analysis of checkpoint stops. In *United States v. Tello*, 924 F.3d 782 (5th Cir. 2019), the court emphasized that the 30-second duration of an immigration-checkpoint stop was "significantly less than or comparable to the time frames [the court had] found acceptable for [other] immigration stops." *Tello*, 924 F.3d at 787 (collecting cases). The court expressly acknowledged, but rejected, the argument that the length-based approach "cannot survive *Rodriguez*." *Id.* The court distinguished *Rodriguez* as a case involving a traffic stop, and relied on this Court's *Martinez-Fuerte* decision as "recogniz[ing] that an immigration stop may take up to five minutes[.]" *Id.* at 788-89.[13] In petitioner's case, the Fifth Circuit relied on *Tello* to conclude that the "less-than-three-minute immigration stop was sufficiently brief under the Fourth Amendment" and that "*Rodriguez* . . . does not alter this calculus." *Escobar*, 2019 WL 4232957, at *1. In addition to petitioner's case, the Fifth

[13] *Martinez-Fuerte* reported that the "the average length of an investigation in the secondary inspection area [of the San Clemente checkpoint in 1976] is three to five minutes." *Martinez-Fuerte*, 428 U.S. at 546-47. Nothing in the Court's opinion indicates that any of those three-to-five minutes involved non-immigration-related activity.

Circuit has already applied its *Tello* decision, and its reaffirmance of the length-based approach, in two other checkpoint-stop cases. *See United States v. Vega-Torres*, ___ Fed. Appx. ___, No. 18-40441, 2019 WL 3761643, at *3 (5th Cir. Aug. 8, 2019), *cert. filed*, No. 19-6414 (U.S. Oct. 24, 2019); *United States v. Vallejo*, 772 Fed. Appx. 129, 130 (5th Cir.) (unpublished), *cert. denied*, No. 19-5953, 2019 WL 5150727 (U.S. Oct. 15, 2019).

E. This case presents an ideal vehicle for the Court to decide an important issue of federal law and to resolve the conflict between its decision in *Rodriguez* and the Fifth Circuit's approach to checkpoint stops.

This case presents an important issue of federal law on which this Court has offered little guidance. As the Fifth Circuit itself has recognized, since authorizing warrantless, suspicionless fixed checkpoints in 1976, this Court "has not explained the constitutional boundaries of individual stops at immigration checkpoints." *Machuca-Barrera*, 261 F.3d at 432; *see also Rynearson v. United States*, 601 Fed. Appx. 302, 305 (5th Cir. 2015) (unpublished) (checkpoint agents were entitled to qualified immunity because an encounter lasting 34 minutes, during which the driver had produced his military identification and passports but the agents still did not allow him to leave, did not violate clearly established law). This Court said in *Martinez-Fuerte* that "[t]he principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the *scope* of the stop." *Martinez-Fuerte*, 428 U.S. at 566-67 (emphasis added). Establishing appropriate limitations is crucial, as these checkpoints "detain thousands of motorists" in "a dragnet-like procedure," and "[t]he motorist whose conduct has been nothing but innocent . . . surely resents his own detention and inspection." *Id.* at 571 (Brennan, J., dissenting). But the Fifth Circuit has said that "policing the *duration* of the stop is the most practical

enforcing discipline of purpose." *Machuca-Barrera*, 261 F.3d at 434 (emphasis added).

Further guidance from this Court is especially appropriate given the "strong hints that the Constitution is being routinely violated at these checkpoints." *United States v. Soyland*, 3 F.3d 1312, 1320 (9th Cir. 1993) (Kozinski, J., dissenting); *see also id.* ("There's reason to suspect the agents working these checkpoints are looking for more than illegal aliens. If this is true, it subverts the rationale of *Martinez-Fuerte* and turns a legitimate administrative search into a massive violation of the Fourth Amendment . . . Given the strong hints that the Constitution is being routinely violated at these checkpoints, we owe it to ourselves and the public we serve to look into the matter."). Troublingly, but candidly, the agent in petitioner's case testified that the primary purpose of the checkpoint was not limited to immigration but rather "[i]mmigration and narcotics and money and human smuggling" and "to detect any sort of illegal activity that somebody may be engaged in."

Indeed, as was reported in *The New York Times* earlier this year,

> . . . [t]he agents at [these interior checkpoints] arrest relatively few unauthorized migrants . . . The agents at the checkpoints deal largely with seizures of marijuana and other drugs from motorists.
>
> The checkpoints have emerged as a source of contention with human rights groups, which have contended that Border Patrol agents routinely ignore their legal authority during the traffic stops to search people without warrants. By law, agents must have probable cause to search the interior of a vehicle, though an alert from a drug-sniffing dog 'legitimately' alerts to the presence of drugs, according to the American Civil Liberties Union.

Simon Romero, *Border Patrol Takes a Rare Step in Shutting Down Inland Checkpoints*, N.Y. Times (March 25, 2019), *available at* https://www.nytimes.com/2019/03/25/us/border-checkpoints-texas.html (last visited Dec. 2, 2019).

Other news sources have similarly reported that in recent years a primary use of these fixed interior immigration checkpoints has been drug interdiction. *See, e.g.*, Robert Moore, *Border Patrol Inland Checkpoints Shut Down So Agents Can Help Process Asylum Seekers*, Texas Monthly (March 23, 2019), *available at* https://www.texasmonthly.com/news/border-patrol-inland-checkpoints-shut-down-so-agents-can-help-process-asylum-seekers/ (last visited Dec. 2, 2019) ("The primary use of the checkpoints in recent years has been drug seizures . . . In fiscal year 2018, the Border Patrol reported seizing 41,863 pounds of marijuana, 2,717 pounds of cocaine[,] 405 pounds of heroin, 6,366 pounds of methamphetamine[,] and 200 pounds of fentanyl at its checkpoints.[14]"); Cedar Attanasio, Associated Press, *U.S. Shuts Interior Checkpoints to Focus on Mexico Border*, *available at* https://www.foxnews.com/us/us-shuts-interior-checkpoints-to-focus-on-mexico-border (last visited Dec. 2, 2019) ("While [interior immigration] checkpoints account for only a sliver of Border Patrol arrests—2 percent from 2013 to 2016, they also handled 43 percent of drug busts during that time, according to the GAO.[15]"); Eric Westervelt, National Public Radio (NPR), *As Migrants Stream in at the Border, Inland Checkpoints Feel the Strain*, available at: https://www.npr.org/2019/06/12/731797754/as-migrants-stream-in-at-the-border-inland-

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[14] *See* U.S. Customs and Border Protection, *U.S. Border Patrol Nationwide Checkpoint Drug Seizures in Pounds*, https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/usbp-drug-seizures-sector (last visited Dec. 2, 2019) (reporting these drug seizures).

[15] *See* U.S. Government Accountability Office, Report to Congressional Requesters (GAO-18-50), *Border Patrol, Issues Related to Agent Deployment Strategy and Immigration Checkpoints* (Nov. 2017), *available at* https://www.gao.gov/assets/690/688201.pdf.

checkpoints-feel-the-strain (last visited Dec. 2, 2019) ("Agents [at the Falfurrias checkpoint in Texas] are also on the lookout for illegal drugs. The new checkpoint has more drug-detecting dogs and new state-of-the-art technology to detect contraband or people.").

This case presents an ideal vehicle for the Court to resolve the conflict between its decision in *Rodriguez* and the Fifth Circuit's approach to checkpoint stops. The issue was preserved in the district court and squarely decided by the Fifth Circuit on appeal. The facts of the case cleanly pose the question presented. The agent did not ask any questions about petitioner's citizenship until after the agent conducted a substantial amount of off-purpose investigation into where petitioner was driving and what he was hauling.

Further percolation of the issue will not resolve the conflict. The Fifth Circuit's length-based analysis is firmly established, as evidenced by the longevity of the court's length-based approach. *See supra*, text at 30-32 & n.12. And the court has rejected the argument that *Rodriguez* governs checkpoint stops in not only a published decision, but also three unpublished opinions. *See supra*, text at 34-35.

The conflict between *Rodriguez* and the Fifth Circuit's length-based approach is glaring. This Court said in *Rodriguez*: "How could diligence be gauged other than by noting what the officer actually did and how he did it?" *Rodriguez*, 135 S. Ct. at 1616. Yet the Fifth Circuit refuses to scrutinize what questions an agent asks during a checkpoint stop. *Rodriguez* firmly rejected the Eighth Circuit's and government's length-based approach. But the Fifth Circuit uses that same approach for checkpoints and routinely approves of any stop lasting up to five minutes.

Finally, the Fifth Circuit's approach of giving less scrutiny to checkpoints than

Rodriguez requires of traffic stops has got it backwards. If anything, checkpoint stops should be more limited and subject to more court scrutiny than traffic stops because checkpoints stops are suspicionless, whereas traffic stops are at least based on individualized suspicion of wrongdoing. *See Martinez-Fuerte*, 428 U.S. at 560 ("some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure" but checkpoint stops "made in the absence of any individual suspicion" are constitutional because "the resulting intrusion on the interest of motorists [is] minimal."). In addition, officers conducting traffic stops have a broader mission than checkpoint agents because traffic-stop officers are "enforc[ing] the traffic code" by "ensuring that vehicles on the road are operated safely and responsibly." *Rodriguez*, 135 S. Ct. at 1615. That broader mission permits traffic-stop officers to "check[] the driver's license, determin[e] whether there are outstanding warrants against the driver, and inspect[] the automobile's registration and proof of insurance." *Id.* A traffic-stop officer may also "need to take certain negligibly burdensome precautions in order to complete his mission safely" since traffic stops are "especially fraught with danger to police officers." *Id.* at 1616. By contrast, checkpoint agents are supposed to be limited to immigration and immigration only because that narrow focus is a major part of what makes an otherwise unreasonable, warrantless-and-suspicionless seizure constitutional. *Compare Martinez-Fuerte*, 428 U.S. at 556-59 (fixed immigration checkpoints are constitutional because the government's need to curb illegal immigration is great and the intrusion is minimal), *with Edmond*, 531 U.S. at 37-38, 41-44 (fixed checkpoints for general crime interdiction are unconstitutional). For all of these reasons, the Court should grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: December 4, 2019

Respectfully submitted,

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