

No. 20-_____

IN THE
Supreme Court of the United States

ERIKA HERNANDEZ-NUNEZ,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Fourth Amendment requirement of reasonableness requires that a determination of reasonable suspicion be based upon an explicit identification of ant inculpatory and exculpatory circumstances and explication of the reasonable inferences which may be drawn from a holistic synthesis and reconciliation of the foregoing to arrive at a determination of whether an agent would reasonably perceive that a crime had been or was being committed and that the particular individual to be stopped had committed it.

Whether Petitioner's Fourth Amendment rights were violated by the District Court's denial of heirr Motion to Suppress based upon its failure to examine evidence collectively known to law enforcement officers which tended to negate suspicion or neutralize otherwise suspicious circumstances.

PARTIES TO THE PROCEEDINGS, RULE 29.6 STATEMENT AND RELATED PROCEEDINGS

The following individuals were parties to the proceedings in the United States District Court for the District (CR 17-1056-TUC-JGZ) of Arizona and Ninth Circuit Court of Appeals (Ninth Circuit CA No. 18-10285 & 18-10296):

Petitioner Erika Hernandez-Nunez. Petitioner is not a corporation.

United States of America, by and through the United States Attorney, District of Arizona

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv-viii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	2
STATEMENT OF JURISDICTION	3
CONSTITUTIONAL PROVISIONS	4
STATEMENT OF THE CASE	5-17
A. Introduction.	5
B. Overview of Proceedings before the Ninth Circuit Court of Appeals and the United States District Court for the District of Arizona.	5
C. Facts Relevant to the Justification for Stopping the Vehicle.	6-15
1. Circumstances Deemed Suspicious by Government.	6-11
a. The vehicle operated by Hernandez-Nunez traveled near a religious site for an unknown period of time.	6-7
b. The religious site was a notorious location for alien pickups and did not hold regular services.	7-8
c. The vehicle operated by Hernandez-Nunez had traveled to San Miguel, Arizona, was registered in Tucson approximately 90 minutes away, and was operated in a different manner that vehicles operated by local residents.	8-10
d. The vehicle operated by Hernandez-Nunez was observed to have a dusty trunk which could have been	

handmarks similar to those found in previous illegal alien smuggling. 10-11

2. Exculpatory Circumstances. 11-

a. Agents were not aware of previous smuggling activity at the religious site but rather at the densely vegetated wash some 400 yards away. 11-12

b. The church is surrounded by open space whereas the Vamori Wash has dense vegetation making it ideal for a pickup site. 12-14

c. The inferred duration of presence at the religious site was in fact with the legitimate religious use of the site. 14-15

d. The vehicle was not riding low when observed by agents. 15

e. Agents were aware that no mechanical or human surveillance had detected any pedestrian activity that day. 15

D. Consideration of the Motion to Suppress by the District Court and Ninth Circuit. 15-17

REASONS TO GRANT THE PETITION 18-

I. THE EDICT TO CONSIDER THE TOTALITY OF THE CIRCUMSTANCES IN ASSESSING THE EXISTENCE OF REASONABLE SUSPICION, WHILE SEEMINGLY SELF-EXPLANATORY ON ITS FACE, SHOULD BE REPLACED BY REVIEW PROCEDURE TO ENSURE THAT EXCULPATORY CIRCUMSTANCES ARE ANALYZED IN A MEANINGFUL FASHION. 18-21

II. THE NINTH CIRCUIT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND SANCTIONED SUCH A DEPARTURE BY THE DISTRICT COURT BY FAILING TO CONSIDER THE IMPACT OF EXCULPATORY INFORMATION AND BY CREDITING

TABLE OF CITED AUTHORITIES

<u>CASE</u>	<u>PAGES</u>
<u>UNITED STATES SUPREME COURT CASES:</u>	
<i>Illinois v. Wardlow</i> , 528 U.S. 119, 125 (2000).....	-25-
<i>Ohio v. Robinette</i> , 519 U.S. 33, 39 (1996).....	-20-
<i>United States v. Arvizu</i> , 534 U.S. 266, 274 (2002).....	-23-
<i>United States v. Cortez</i> , 449 U.S. 411, 417-18, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).....	-18-
<u>FEDERAL APPELLATE COURT CASES:</u>	
<i>Thomas v. Dillard</i> , 818 F.3d 864, 877 (9th Cir., 2016).....	-20-
<i>United States v. Hernandez-Alvarado</i> , 891 F.2d 1414, 1416 (9th Cir. 1989).....	-25-
<i>United States v. Manzo-Juarado</i> , 457 F.3d 928, 935 (9th Cir. 2006). .	-24-
<i>U.S. v. Monsisvais</i> , 907 F.2d 987, 991 (10th Cir., 1990).	-26-
<i>U.S. v. Palos-Marquez</i> , 591 F.3d 1272, 1278 (9th Cir. 2010).....	-19-
<i>United States v. Salinas</i> , 940 F.2d 392, 394 (9th Cir. 1991).....	-22, 25-26-
<u>STATUTES, RULES ,AND CONSTITUTIONAL PROVISIONS</u>	
U.S. Const. amend. IV.	-passim-

8 U.S.C. §§ 1324(a)(1)(A)(v)(I), 1324(a)(1)(A)(ii), and 1324(a)(1)(B)(i)...	-6-
8 U.S.C. § 1324(a)(1)(A)(ii).....	-6-
8 U.S.C. § 1324(a)(1)(B)(i).....	-6-
18 U.S.C. § 3231.	-6-
28 U.S.C. § 1254(1).	-3-

PETITION FOR WRIT OF CERTIORARI

Erika Hernandez-Nunez respectfully petitions the Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The three-judge panel's unpublished memorandum decision of the United States Court of Appeals for the Ninth Circuit (affirming the District Court's rejection of the Report and Recommendation to grant Ms. Hernandez-Nunez' Motion to Suppress) is set forth at *United States v. Arvizu*, Nos. 18-10285, 18-10296 (consolidated), (9th Cir. October 28, 2019) and reproduced below. App. A.

The Order denying Petitioner's Petition for Rehearing and Petition for Rehearing En Banc on the suppression issue filed on December 17, 2019 is unreported and reproduced below. App. D.

The judgment of the United States District Court for the District of Arizona (which rejected the Report and Recommendation to grant Ms. Hernandez-Nunez' Motion to Suppress) filed March 7, 2018 is unreported and reproduced below. App. C.

The Report and Recommendation (that Ms. Hernandez-Nunez' Motion to Suppress be granted) filed January 18, 2018 is unreported and reproduced below. App. B.

JURISDICTION

On October 28, 2019 the Ninth Circuit Court of Appeals affirmed (App. A) the District Court's order denying Ms. Hernandez-Nunez' Motion to Suppress. (App. B).

The Ninth Circuit Court of Appeals denied Ms. Hernandez-Nunez' timely filed Petition for Rehearing and Petition for Rehearing En Banc on December 17, 2019. (App. D).

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides that:

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

U.S. Const. amend. IV

STATEMENT OF THE CASE

A. Introduction.

This case presents an important question of search and seizure law that this Court has yet to directly and finally resolve: Whether the Fourth Amendment requires that the totality of the circumstances include consideration of the effect of exculpatory and neutralizing circumstances known to law enforcement.

Although a corollary of the totality of circumstances standard previously adopted, the absence of an explicit reference to incorporating exculpatory circumstances and a procedure for synthesizing the totality has led to a one-sided focus on inculpatory circumstances and a pro forma invocation of the “totality of the circumstances” which is in fact antithetical to the intended holistic analysis. This case provides this Court with the opportunity to clarify this Fourth Amendment issue and specify how all circumstances known to law enforcement officers are to be reviewed in connection with a determination of reasonable suspicion.

B. Overview of Proceedings before the Ninth Circuit Court of Appeals and the United States District Court for the District of Arizona.

This Petition for Writ of Certiorari involves review of the Ninth Circuit Court of Appeals' failure to reverse the United States District Court for the District of Arizona's denial of a Motion to Suppress filed by Ms. Hernandez-Nunez.

A judgment of conviction was entered on July 30, 2018 by the District Court. The judgment of conviction was entered subsequent to a conditional plea agreement entered into between Ms. Hernandez-Nunez, her co-defendant, and the government. The district court approved this plea prior to entering a judgment of conviction. As a condition of her plea agreement, Ms. Hernandez-Nunez reserved the right to appeal the denial of her Motion to Suppress.

Hernandez-Nunez, and co-defendant Josie Arvizu, ("Arvizu"), were arrested on June 11, 2017 by Border Patrol Agent Mark Landess, ("Agent Landess"), of the Immigration and Naturalization Service, after Agent Landess stopped a sedan driven by Hernandez-Nunez. During the stop, illegal aliens were discovered in the trunk of the vehicle. Hernandez-Nunez and Arvizu were charged by Complaint on June 11, 2017 with Conspiracy to Transport Illegal Aliens for Profit in violation of 8 U.S.C. §§ 1324(a)(1)(A)(v)(I), 1324(a)(1)(A)(ii), and 1324(a)(1)(B)(i). On July 5, 2017 they were charged by Indictment with Conspiracy to

Transport Illegal Aliens for Profit (Count 1) in violation of 8 U.S.C. §§ 1324(a)(1)(A)(v)(I), 1324(a)(1)(A)(ii), and 1324(a)(1)(B)(i), and Transportation of Illegal Aliens for Profit (Counts 2-4) in violation of 8 U.S.C. §§ 1324(a)(1)(A)(ii), and 1324(a)(1)(B)(i). The District Court had jurisdiction over these proceedings pursuant to 18 U.S.C. § 3231.

C. Facts Relevant to the Justification for Stopping the Vehicle

1. Circumstances Deemed Suspicious by Government.

The government argued below that the following circumstances when taken together gave agents reasonable suspicion that Ms. Hernandez-Nunez and her co-Defendant Arvizu had picked up a load of illegal aliens at a church:

a. The vehicle operated by Hernandez-Nunez traveled near a religious site for an unknown period of time.

Agent Landess was on patrol June 11, 2017 looking for indications of people that had crossed into the United States illegally. (App. G at pp. 62-63). At about 10:30 a.m. dispatch reported that a motion sensor activated near San Miguel church and shortly after that he heard Agent Perez, who was in a mobile surveillance vehicle about 5 miles away, make a call out over the radio.

Agent Landess testified that Agent Perez reported a vehicle leaving the area of the church and described it as a dark colored sedan. Agent Landess was north from where the church was located driving southbound on FR19 (Frontage Road 19) when he heard Agent Perez report the vehicle. He positioned himself to intercept the vehicle if it were to travel towards him and he heard Agent Perez giving briefings on the direction the vehicle was traveling as it moved on the dirt road from the church toward FR19. (App. G at pp. 69-71)

Magistrate Judge Velasco asked Agent Perez if he had any idea how long the vehicle had been at the church or when it got to the church, and he responded no to both questions. (App. G at p. 56). On re-direct government's counsel asked Agent Perez about his procedure for scanning the area and he stated than he occasionally panned the church area maybe once every 10 minutes. For the first time, based on questioning by government's counsel, Agent Perez stated it had been about 10 minutes before 10:30 a.m. that he last looked at the church area and that he did not see any vehicles at that time. (App. G at pp. 57-58).

b. The religious site was a notorious location for alien pickups and did not hold regular services.

Agent Landess testified that he was familiar with the church area, that it was about four miles north of the international border and about an hour and 30-45 minutes from Tucson and he had not witnessed it being used for religious services. (App. G at pp. 63-67).

Agent Landess had previously patrolled the church area and arrested illegal aliens in that area who had crossed. He testified that in the months prior to June, 2017 there had been a couple of arrests in the area which did not involve vehicles. He also testified that agents interview aliens they arrest and some had stated that they were in the area waiting to be picked up. (App. G at pp. 63-69).

Agent Perez also testified that prior to June, 2017 illegal aliens were arrested in the church area and that he had previously observed aliens exiting the brush from the nearby Vamori Wash to load-up onto vehicles. He stated that in April, 2017 he saw an SUV pick up four illegal aliens in the "immediate surroundings of the church" and that vehicle was stopped by border patrol agents. (App. G at pp. 18-20).

c, The vehicle operated by Hernandez-Nunez had traveled to San Miguel, Arizona, was registered in Tucson approximately 90 minutes away, and was operated in a different manner that vehicles operated by local residents.

After receiving the alert from Agent Perez, Agent Landess saw a dark colored sedan driving northbound on FR19 as he was driving southbound on that road and he turned his vehicle around to get behind the vehicle to run the plates. He observed the vehicle pass a pick-up truck, which he also passed, and when he got behind the vehicle, the closest he got was about 15 feet, he gave the plate information to dispatch.

Dispatch informed Agent Landess that the vehicle was registered to an Erika Hernandez-Nunez from Tucson, Arizona and that she had made recent crossings of the international border in Douglas, Arizona, which is located about four hours from the San Miguel area. (App. G at pp. 71-72). When asked to clarify the recent crossings of the international border Agent Landess stated that he could not recall when the crossing occurred, but based on the fact that they track crossings within a 72 hour period he stated the vehicle had crossed

within the last 72 hours in Douglas, but admitted he did not remember the exact timing. (App. G at p. 75).

Agent Landess stated that he saw the vehicle pass a slower moving pick-up truck and that when he got behind the vehicle it slowed down to the speed limit, which he said was a, "little unusual." He stated that the local residents on the reservation know that agents have no authority to stop anybody for traffic violations and that when he gets behind somebody that's speeding on the reservation, they continue to speed. (App. G at p. 73).

On cross-examination Agent Landess stated that he was not pacing the vehicles, but he stated that the pick-up appeared to be doing 35 miles an hour, which was the speed limit, and he guessed the sedan vehicle was doing about 50 miles an hour when it passed the pick-up truck and slowed down to 35 miles an hour when he got behind it. He stated that he had seen the pick-up truck before and acknowledged that it was not speeding. (App. G at pp. 94-95). The vehicle was also not driven like vehicles operated by locals because

the vehicle drove slightly faster than locals who would go slower to avoid crating dust. (App. G at p. 23).

d. The vehicle operated by Hernandez-Nunez was observed to have a dusty trunk which could have been handmarks similar to those found in previous illegal alien smuggling.

Agent Landess testified that when he was behind the sedan vehicle he saw a light dust on the trunk area and that it had, “..a disturbance that looked like it might be hand prints.” He stated that he thought it might have been hand prints because in prior arrests he had made he had seen the same type of pattern on a trunk of a vehicle, but he said he couldn’t get close enough prior to the stop to confirm it was a handprint, but that it had the same general pattern. (App. G at pp. 73-74). He did not include anything about handprints in his report regarding the stop but did mention dust on the trunk. (App. G at pp. 92-93). Agent Landess acknowledged that there are dirt roads surrounding the church area and that vehicles driving on these dirt roads will collect dust, so dust on the sedan vehicle that had been driving on the dirt road was not unusual. (App. G at pp. 85-87).

Agent Landess' "seizure report" set forth his observations after the stop occurred and in this report Agent Landess documented that as he approached the vehicle he saw hand prints in the dust around the trunk area. He testified that he did not know the disturbances were handprints before he initiated the stop but that he had seen similar disturbances on other vehicles containing aliens in the trunk. After making the stop he did identify the disturbances as handprints. (App. G at pp. 91-93). The Agents claimed that what made the prints here noteworthy was the fact that they were on top of the trunk which would be inconsistent with opening the trunk. (App. G at p. 84).

2. Exculpatory Circumstances.

a. Agents were not aware of previous smuggling activity at the religious site but rather at the densely vegetated wash some 400 yards away.

The Agents identified only a single prior pickup "in the immediate surroundings of the Church" two months earlier (App. G at pp. 18-20) and it turns out that Agent Perez (who described that incident) understood that the area "immediate surrounding the church" to encompass the Vamori Wash, a densely vegetated wash which is over

400 yards from the Church and provides coverage making it difficult for law enforcement to see into the immediately adjacent area. This evident from his testimony at another point in the hearing about activity in the area "immediately surrounding the church":

"Q. Is there any area of that immediate – is there any part of that area where a vehicle could be **immediately surrounding the church** that you would not see?

A. Yes.

Q. What is that area?

A. That would be right next to that -- the Vamori Wash, because of the brush. It's so tall that they could park there and I couldn't see them."

(App. G at p. 58) (emphasis added)

Agent Landess testified that the church is located halfway between the Vamori Wash and FR19. (App. G at p. 66). Agent Perez estimated the road was 300 meters from the Church (App. G at pp. 45-46). As this Court can plainly see from the photo exhibits (App. F) the wash is over four hundred meters (and thus over 400 yards) due west of the Church. Thus, activity near the wash can hardly be said to occur "at" the Church.

In addition, Agent Perez conceded (and the photo exhibits reflect) a number of structures to the northwest of the Church which are closer to the Wash. (App. G at p. 40; App. F).

Not only did Agents not present testimony of previous vehicle pickups at the church, Agent Perez negated this when he testified that "nobody" drives in front of the Church other than the three vehicles associated with known local citizens whom he observed visit the shrine at the Church. (App. G at pp. 15, 21, 45).

b. The church is surrounded by open space whereas the Vamori Wash has dense vegetation making it ideal for a pickup site.

The characteristics of the Wash make it conducive to smuggling activity; Agent Perez testified that the dense vegetation of the wash make it difficult to see into it and noted that a vehicle near the wash might not be visible to surveillance.

Q. And what is to the west [of the Church]?

A. It's pretty much empty all the way to the Vamori Wash.

That wash, it's a pretty large wash. There's a lot of brush,

it's pretty thick. It's maybe about 20 feet high. A lot of

times we can't see through that brush.

Q. And the brush that's located there, how does it compare to the brush on the other sides of the church?

A. On the other sides it's short, it's just regular little bushes. This is -- the vegetation is really thick and green.

You can hardly even walk through there, and it's real tall.

(App. G at pp. 12-13).

The Church does not share these characteristics. Agent Perez testified that the Church is surrounded by open space. (App. G at pp. 12-13) ("there's pretty much open space all around it.") Agent Landess also testified that the vegetation in the two areas is quite different:

Q. Tell us what the vegetation at the wash is like.

A. So at the wash itself it's very dense, a lot of trees, bigger trees, more bushes, thicker, if you will. We have a lot of trouble passing through a lot of the areas.

Q. Would it be fair to say that the vegetation in the wash is heavier than it is on the other sides of the church?

A. Very much so, yes.

(App. G at p. 66).

Testimony regarding smuggling activity was sparse. Agent Landess testified about an arrest of aliens "in the bushes" "across the

street" from the church who said they were waiting to be picked up but the investigation did not encompass any actual vehicle or driver. The only other testimony regarding smuggling in the area was testimony that foot sign would be seen near the Wash and when it could no longer be tracked agents would *assume* that the foot sign belonged to an alien that had been picked up by a vehicle. There was no testimony however that the tracking led to or toward the Church. (App. G at p. 16). There were no actual arrests described *anywhere* in the area involving actual vehicle pickups of aliens other than the aforementioned single incident involving an SUV at the Vamori Wash – not at the Church. (App. G at pp. 68-69).

c. The inferred duration of presence at the religious site was in fact consistent with the legitimate religious use of the site.

Agents did not in fact know how long the vehicle had been at the church (App. G at p. 56) and could only infer that it had been there about 10 minutes or less because it was Agent Perez' practice to scan the area every ten minutes and he had not observed the vehicle at the church before the sensor activation as it exited. (App. G at pp.

57-58). Even assuming the soundness of an inference of a visit of 10 or less minutes, the Agents would have known that such a brief visit would be *consistent* with the known religious use of the Church. Agent Perez testified that some individuals regularly came to visit a shrine there and only stayed for a “few minutes.” (App. G at pp. 24-25).

Agents had no idea what took place at the site as Agent Perez’ first observation was the vehicle exiting the Church (App. G at p. 20); the occupant(s) might have stopped to visit the shrine, to get a hat out of truck, or look for a restroom. The vehicle might have been turning around because a wrong turn visitors sometimes make; in fact, Perez testified that he never saw the vehicle *stopped* at the Church at all; the only time he saw the vehicle it was exiting the parking lot. (App. G at pp. 44, 49). In short, the presence of the vehicle at the church for a short duration was unremarkable and consistent with the duration of religious activity at that location.

d. The vehicle was not riding low when observed by agents.

Agent Landess testified and acknowledge that he did not observe the vehicle riding low in the back as he followed behind it. (App. G at p. 97).

e. Agents were aware that no mechanical or human surveillance had detected any pedestrian activity that day.

Agents knew that no pedestrians had been observed or otherwise detected that day notwithstanding the state of the art digital equipment and sensors “all over” the area parallel to international border running between Federal Route 19 and Vamori Wash. (App. G at pp. 36, 49, 55-56). Agent Perez’ surveillance truck has a radar unit which detects movement and signals him where movement occurs. The radar detects vehicles, pedestrians, and animals. He also had a camera which allows him to scan 360 degrees at a distance of up to 10 miles away. Agent Perez testified that on that day he had a clear view of the church area 5 miles away from his position with sufficient clarity to see rabbits. (App. G at pp. 6-8).

D. Consideration of the Motion to Suppress by the District Court and Ninth Circuit.

Hernandez-Nunez' Motion to Suppress was filed on October 10, 2017. An Evidentiary Hearing on the Motion to Suppress was held before Magistrate Judge Bernardo P. Velasco on November 30, 2017. The government called Border Patrol Agents Landess and Perez as witnesses.

Magistrate Velasco listened to the testimony of Agents Landess and Perez, questioned these witnesses himself during the hearing, observed their demeanor while testifying, and admitted evidence offered by the government. Magistrate Velasco issued a Report recommending that the district court grant Ms. Hernandez-Nunez' motion.

The district court rejected the Report and Recommendation and denied Ms. Hernandez-Nunez' motion to suppress. The Ninth Circuit affirmed on appeal and subsequently denied Ms. Hernandez-Nunez' Petition for Rehearing and Petition for Rehearing En Banc.

The District Court Order described the standard as follows:

"When reviewing a border patrol officer's reasonable suspicion, the Court must consider the totality of the circumstances, including characteristics of the area, proximity to the

border, usual patterns of traffic and time of day, previous alien or drug smuggling in the area, behavior of the driver, appearance or behavior of passengers, and the model and appearance of the vehicle and the agent's training and experience. See Valdes-Vega, 738 F.3d at 1079 (citing United States v. Brignoni-Ponce, 422 U.S. 873, 884–85 (1975)). Not all of these factors must be present or highly probative in every case to justify reasonable suspicion. See *id.*

See App. C at p.2.

The District Court devoted over a page to describing the inculpatory circumstances (many at odds with the actual testimony) and then held: “Under the totality of the circumstances, Agent Landess had reasonable suspicion to stop Defendants’ vehicle.” Yet not one of the exculpatory circumstances is discussed in the memorandum. *Id.*

Similarly, the Ninth Circuit Memorandum detailing its de novo review merely states “a number of facts support the district court’s finding of reasonable suspicion for stopping Defendants’ car” and goes on to list the following facts:

The San Miguel West Church is surrounded by the dense Vamori Wash, which is known to provide coverage for illegal aliens crossing the

border. There were recent incidents of alien smuggling in the area of the church. Defendants' car was unknown to the agents, was registered in Tucson, more than 90 minutes away, and had crossed the border from Mexico less than 72 hours earlier. The car only stayed at the church for a short period of time. Leaving the church the car drove faster than local traffic, kicking up dust, and, contrary to the practice of local drivers, slowed down when the agent began to follow it. The agent "observed a disturbance in the dirt on the vehicle's trunk, consistent with handprints previously found on the trunks of vehicles transporting illegal aliens in the trunk." These factors created a reasonable suspicion even if, as Defendants contend, there could be innocent reasons for each of them. The totality of the circumstances supports the finding of reasonable suspicion.

(App. A).

REASONS TO GRANT THE PETITION FOR WRIT OF CERTIORARI

I. THE EDICT TO CONSIDER THE TOTALITY OF THE CIRCUMSTANCES IN ASSESSING THE EXISTENCE OF REASONABLE SUSPICION, WHILE SEEMINGLY SELF-EXPLANATORY ON ITS FACE, SHOULD BE REPLACED BY REVIEW PROCEDURE TO ENSURE THAT EXCULPATORY CIRCUMSTANCES ARE ANALYZED IN A MEANINGFUL FASHION.

In January 1981 this Court emphasized that reasonable suspicion determinations require consideration of the “totality of the circumstances.” *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).

A search of caselaw databases reveals that between February 1981 and present there are 5391 reported and unreported United States District Court cases containing the terms “totality of the circumstances” and “reasonable suspicion.”

Adding the term “exculpatory” lowers this number to 393 cases or (7%). During the same time frame there are 3352 reported and unreported cases in federal appellate courts containing the terms “totality of the circumstances” and “reasonable suspicion.” Adding the

term “exculpatory” lowers this number to 120 appellate cases or (less than 4%).

Though admittedly this is a rough grain survey, the foregoing suggests that the totality of the circumstances are examined in only a very small fraction of cases reviewing reasonable suspicion. (Indeed a cursory review indicates that the majority of the cases use the term exculpatory in connection with other issues, e.g. *Brady* material).

In practice, the standard of reviewing the totality of circumstances known to law enforcement from the standpoint of a reasonable law enforcement agent more often than not has devolved into an exclusive focus on the circumstances creating suspicion.

A meaningful review of the suspicion reasonably arising from the totality of circumstances known to law enforcement at the time of the stop requires:

- 1) identification of the known inculpatory circumstances as well as
- 2) identification the known exculpatory circumstances, and

3) explication of the reasonable inferences which could be drawn from a holistic synthesis¹ and reconciliation of the foregoing to arrive at a determination of whether an agent would reasonably perceive that a crime had been or was being committed and that the particular individual to be stopped had committed it.

Any less explicit methodology invites a listing of circumstances to support a pre-judged conclusion; and, hence cherry-picking² to be blessed with the mantra the “totality of the circumstances.” An incomplete examination of the circumstances is not simply a less-than ideal analysis, it directly undermines the core Fourth Amendment

¹ The totality of the circumstances standard requires examination of the circumstances in a “holistic approach” rather than stringing them out in a checklist fashion or omitting some circumstances that would alter the significance of other information known to law enforcement. *U.S. v. Palos-Marquez*, 591 F.3d 1272, 1278 (9th Cir. 2010).

² See *Thomas v. Dillard*, 818 F.3d 864, 877 (9th Cir., 2016):

“In assessing the totality of the circumstances, relevant considerations may include: . . . whether the officer observes anything during an encounter with the suspect that would dispel the officer's suspicions regarding the suspect's potential involvement in a crime.

This last point is especially important. Even where certain facts might support reasonable suspicion a suspect is armed and dangerous when viewed initially or in isolation, a frisk is not justified when additional or subsequent facts dispel or negate the suspicion. Just as a suspicion must be reasonable and individualized, it must be based on the totality of the circumstances known to the officer. Officers may not cherry pick facts to justify the serious Fourth Amendment intrusion. . . .”

determination of reasonableness. See *Ohio v. Robinette*, 519 U.S. 33 (1996): “We have long held that the “touchstone of the Fourth Amendment is reasonableness. Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances.” *Id.* at 39 (internal citation omitted)

The District Court and Ninth Circuit opinions in the instant case illustrate how readily the “totality of the circumstances” phrase is invoked facile fashion without any attempt to consider the “totality” of the circumstances as this Court’s precedent clearly require.

Neither review contains any reference to the fact that the church was out in the open, far from the wash where smuggling took place, (indeed the Ninth Circuit in stating the church is “surrounded” by the wash apparently confused a wash with a moat and ignored the excerpts of record reflecting its location over 400 meters west of the church)), the fact that no pedestrian activity had been detected that day despite extensive mechanical/digital and human monitoring, and with the fact that the vehicle was not riding low. These are not

trivial circumstances. They are not innocent explanations or attempts to put a spin or gloss on incriminating circumstances.

These are exculpatory circumstances which must be considered by a court making an initial or de novo review of the sufficiency of the justification for a stop.

The Ninth Circuit has acknowledged the role of exculpatory information in the comparable totality test for probable cause: "As a corollary ... of the rule that the police may rely on the totality of facts available to them in establishing probable cause, they also may not disregard facts tending to dissipate probable cause." *U.S. v. Lopez*, 482 F.3d 1067, 1073 (9th Cir. 2007). But *Lopez* has never been cited in the Ninth Circuit in connection with the totality of the circumstances test for reasonable suspicion arising in the first instance.

II. THE NINTH CIRCUIT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND SANCTIONED SUCH A DEPARTURE BY THE DISTRICT COURT BY FAILING TO CONSIDER THE IMPACT OF EXCULPATORY INFORMATION AND BY CREDITING UNREASONABLE INFERENCES, AND BY MAKING AN ERRONEOUS FACTUAL DETERMINATION REQUIRING EXERCISE OF THIS COURT'S SUPERVISORY POWER.

As noted in Section I, *supra*, the Ninth Circuit passed over the District Court's failure to consider the exculpatory information known to the Agents and likewise failed to consider that information in its *de novo* review. In doing so, both courts below came to the wrong conclusion regarding Ms. Hernandez-Nunez' Motion to Suppress.

Most notably for a holistic analysis of the information known to the Agents relevant to a determination of whether Ms. Hernandez-Nunez had picked up an illegal alien in her vehicle, the Agents knew 1) that no pedestrians had been detected that day despite extensive mechanical/digital and human monitoring of the area; and 2) that the vehicle was *not* riding low.

Even without the above exculpatory information, there was not reasonable suspicion under *United States v. Salinas*, 940 F.2d 392, 394 (9th Cir. 1991) (heavily laden appearance of vehicle, fresh handprints in dust on trunk, defendant's Mexican appearance, and car's registration to an address in an area with a high concentration of smuggling activity insufficient to establish reasonable suspicion).

The Ninth Circuit plainly erred (as did the District Court) in finding that reasonable suspicion had been established in light of *Salinas*. Certainly with the addition of the fact that the vehicle here was not riding low and the overwhelming improbability of there being any aliens present to be picked up and transported the error becomes even more manifest.

The essence of the "totality of circumstances" standard does not allow law enforcement officers or the courts to selectively choose the facts that would establish reasonable suspicion to justify police action. Compare *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (reasonable suspicion analysis considering each factor in isolation "does not take into account the 'totality of the circumstances,' as our cases have understood that phrase"). Rather, a "totality of circumstances" standard recognizes that events and conditions giving rise to reasonable suspicion are fluid rather than fixed, and the existence of reasonable suspicion may change once new facts are observed by or become known to law enforcement.

Indeed, if law enforcement officers were allowed to cherry-pick certain facts, they would be able to operate with unbridled discretion to conduct traffic stops with impunity. *State v. Sharp*, 305 Kan. 1076, 390 P.3d 542, 548-49 (Kan., 2017).

Neither the District Court nor the Ninth Circuit explained how Agents could have a reasonable suspicion that aliens were being smuggled in the car (irrespective of the ostensible smuggling activity in the area, the fact that the vehicle was from out of town, and the fact it had been at a infrequently attended church for a short period of time, and had markings in the trunk's dust) in light of the fact that the vehicle was not riding low and the fact that there was no indication that anyone had gone on foot from the wash to the church 400 meters away – or anywhere else in the area that day.

In fact these factors were not even mentioned much less incorporated into a holistic analysis. The only reasonable inference from the totality of the circumstances is clear – a reasonable agent would infer from all the foregoing that there were *not* any aliens in the trunk of the vehicle.

In addition, the laundry-list approach to reviewing the inculpatory circumstances taken by both courts below failed to explain the inferences to be drawn individually or collectively from those circumstances.

For example, Agent Landess testified that the dust disturbance was similar to the pattern seen in other vehicles carrying aliens. But dust was common on virtually any vehicle in the area. Agent Landess testified that any car getting off the highway and driving on any of the roads in the vicinity of the church would have dust on its trunk. (App. G at pp. 85-86). Agent Landess did not testify that such marks were not seen on other vehicles. The vehicles carrying aliens would likely have all had four tires also, but this would not distinguish alien-carrying vehicles from non-alien carrying vehicles any more than the dust.

Moreover this factor was of little value given the large number of vehicles it would apply to. See *United States v. Manzo-Juarado*, 457 F.3d 928, 935 (9th Cir. 2006) (circumstance that applied to large segment of society does not establish reasonable suspicion as it merely reflects innocent conduct). See also *State v. Beckman*, 305 P.3d 912,

919 (Nev. 2013) ("Although criminals may frequently check contraband in their trunks, many law-abiding citizens also routinely utilize their trunks for non-suspect reasons, such as hauling groceries (or in Beckman's case, wine).")

Agent Landess said nothing about the disturbances being inconsistent with ordinary closing of the trunk nor did his testimony hint at how or why closing the trunk on an alien would appear different from closing it on a grocery bag. "Permissible deductions or rational inferences must be grounded in objective facts and be capable of rational explanation." *United States v. Hernandez-Alvarado*, 891 F.2d 1414, 1416 (9th Cir. 1989).

The Agents claimed that what made the prints here noteworthy was the fact that they were on *top* of the trunk which would be inconsistent with *opening* the trunk. But they would not be inconsistent with *closing* it and just as what goes up must come down, a vehicle trunk that is opened is generally closed thereafter – particularly prior to being driven down the road. A determination of reasonable suspicion must be based on common sense judgments and inferences about

human behavior. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000). See also *U.S. v. Covarrubia*, 911 F. Supp. 1409 (D. N.M., 1994) (discounting circumstances relied upon where they did not withstand rational scrutiny).

None of the Agents' testimony does anything to distinguish the import of the dust disturbance here from *Salinas*, and in fact here the agent did not know prior to the stop that the marks were indeed prints and so had less information than law enforcement in *Salinas*.

Similarly, the decisions fail to identify any reasonable inference pointing to alien smuggling from the facts that the vehicle was registered in Tucson, had crossed the Mexican border at Douglas within the previous 72 hours, and from the fact that the out of town vehicle was operated differently from local vehicles (by slowing down after accelerating to pass a vehicle when the Agent was nearby and by driving somewhat faster on a dirt road than locals who tried to avoid kicking up dust). See e.g. *U.S. v. Covarrubia*, 911 F. Supp. 1409 (D. N.M., 1994) (concluding that suspicions regarding out of county plate did not withstand rational scrutiny where there was no evidence

that out of county or out of state drivers were more likely than local drivers to have been involved in smuggling); *U.S. v. Monsisvais*, 907 F.2d 987, 991 (10th Cir., 1990):

“[T]he record does not enable us to attach any particular significance to the appearance of Arizona license plates in this area. Although Arizona cars must certainly be less common on this stretch of road than those bearing New Mexico plates, we cannot find any basis in the record from which to conclude that Arizona-plated vehicles are any more likely to be transporting aliens near Truth or Consequences than are vehicles bearing the license plates of New Mexico or, for that matter, Texas or Colorado.”

Here there was no evidence nonresidents were more likely to engage in alien smuggling or that most nonresidents were engaged in such activity. And there is no reasonable inference to be drawn from the vehicle traveling into Mexico; the Agents believed that the information reflected that aliens had crossed the border on foot through the Wash and then waited in the area to be picked up – not that the aliens had been brought across the border in a trunk and then taken to a small town for sight-seeing.

The point is not that these are incriminating circumstances susceptible to being interpreted innocently; rather it is that there was no connection made by the Agents (or subsequently by the District Court or Ninth Circuit) linking them to alien smuggling in the first place.

Finally, the evidence does not support claims that the church was a notorious and ideal location for alien smuggling. There was only testimony regarding a single incident where a vehicle was found in the area with aliens and this was at the Vamori Wash with its dense brush - not at the Church some 400 meters away. The Church does not move closer to the Wash by dint of saying it is in the "immediate" vicinity. Moreover, the same Agent testified that *only* vehicles he had ever seen in front of the Church were three pickups which were operated by known locals who went there to visit a shrine at the Church.

Indeed as described *supra*, the Church was surrounded by open space and plainly did not provide the cover available at the ideal location of the Wash where individuals could hide and vehicles could park without being seen because of the vegetation present there. But neither court below mentions this characteristic of the area or how it

should have played into a reasonable interpretation of the events. To the extent that the courts below simply credited the government's argument that the church was an ideal and notorious location for pickups they committed egregious errors of fact and sanctioned unreasonable inferences.

But not as egregious as the Ninth Circuit's statement that the Church is surrounded by the dense Vamori Wash. Again no one characterized the Wash in this manner, there was testimony and maps reflecting that the Wash is some distance to the left of the Church and that the church itself is surrounded by open space. This error alone warrants the reversal of the Ninth Circuit decision.

CONCLUSION

For the reasons set forth herein, Ms. Hernandez-Nunez requests that this Petition for Writ of Certiorari be granted and ultimately requests that this Court remand for a entry of an order granting the motion to suppress.

RESPECTFULLY SUBMITTED

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WORD COUNT CERTIFICATION

As required by Supreme Court Rule 33.1 (h), I certify that the document contains 6952 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1 (d)

I declare under penalty of perjury that the forgoing is true and correct.

Executed on January 27, 2020

By /s/Randolfo V. Lopez
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