No. 21-5352

IN THE SUPREME COURT OF THE UNITED STATES

VERNON D. NELSON,
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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PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

Petitioner, Vernon D. Nelson, submits this reply to the Brief in Opposition ("BIO") filed by the United States. None of the United States's reasons for denying the petition are persuasive.

The United States suggests that the Court already resolved the question presented against petitioner in *United States v. Arvizu*, 534 U.S. 266 (2002). BIO 6-9. Not so. In *Arvizu*, it was undisputed that the Border Patrol agent was initially investigating suspected "alien smuggling" and was not limiting his investigation solely to suspected drug trafficking. *Id.* at 269-72. Although the agent's *Terry* stop yielded evidence of illegal drugs rather than illegal aliens, *see id.* at 272, the Border Patrol agent possessed authority under 8 U.S.C. § 1357(a)(5) to seize the drugs and arrest the defendant for the drugs; that statute allows for a warrantless arrest on drug charges while a Border Patrol agent "is performing duties relating to the enforcement of the immigration laws at the time of the arrest . . . ." 8 U.S.C. § 1357(a)(5). For that reason, neither the parties nor this Court in *Arvizu* had a reason to address the issue of whether Border Patrol agents possess authority to engage in *Terry* stops solely related to suspected narcotics offenses. Any broad language in *Arvizu* concerning law enforcement officers' authority to engage in *Terry* stops based on "'reasonable suspicion to believe that criminal activity is afoot,'" *Arvizu*, 534 U.S. at 273 (citation omitted), certainly cannot be interpreted—as the United States erroneously suggests—as having addressed the very specific issue raised in petitioner's case.

Equally unpersuasive is the United States's attempt to argue that there is no circuit split between the Fifth and Ninth Circuits after *Arvizu*. The United States points to *United*

States v. Valdez-Vega, 738 F.3d 1074 (9th Cir. 2013) (*en banc*), *cert. denied*, 573 U.S. 912 (2014), and *United States v. Juvenile Female*, 566 F.3d 943 (9th Cir. 2009), *cert. denied*, 558 U.S. 1134 (2010). BIO 9-11. But in *Valdez-Vega*, the defendant did not raise any argument related to the question presented that Border Patrol agents lacked authority to investigate solely drug-related, as opposed to immigration-related, offenses. Rather, the issue before the court was simply whether the particular facts in that case gave Border Patrol agents reasonable suspicion that ***any*** criminal activity was afoot. *See Valdes-Vega*, 738 F.3d at 1076-81; *id.* at 1081 (Pregerson, J., dissenting) (explaining his view that the facts did not create reasonable suspicion of any criminal activity); *see also United States v. Valdes-Vega*, 685 F.3d 1138, 1141-42. 1147-48 (9th Cir. 2012) (original panel opinion concluding that the totality of the circumstances did not give rise to reasonable suspicion and describing the Border Patrol agent's justification for the stop as "the driver's behavior 'was consistent with the behavior of alien ***and*** drug smugglers who encounter law enforcement in this area'") (emphasis added), *vacated on reh'g en banc*, 738 F.3d 1074 (9th Cir. 2013).

In relying on *Juvenile Female*, the United States overlooks a key factual difference. There, the Border Patrol agent "was stationed about a quarter of a mile away from the United States-Mexico border" when he heard a radio dispatch about a suspicious vehicle that he encountered a few minutes later. *Juvenile Female*, 566 F.3d at 944. The Ninth Circuit found that the agent was acting within the scope of his duties when he stopped the vehicle for suspected drug smuggling because he was acting under the authority of 19 U.S.C. § 482, which grants the authority to "stop, search, and examine . . . any vehicle, beast, or person, on which or whom he or they shall suspect

there is merchandise . . . ***introduced into*** the United States in any manner contrary to law." *Id.* at 950 (emphasis added). But in petitioner's case, the Border Patrol agent first encountered petitioner at an interior checkpoint many miles from the border, and then stopped petitioner's tractor-trailer a further six miles north of that checkpoint, and there was no indication that petitioner's tractor-trailer originated at the border. *See*, *e.g.*, *United States v. Escamilla*, 560 F.2d 1229, 1231 (5th Cir. 1977) (recognizing that a "vital" element of the test under *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), is whether the agents had reason to believe that the vehicle in question had come from the border). Moreover, the court in *Juvenile Female* noted that, even after the changes to agency structure brought about by the dissolution of the Immigration and Naturalization Service and creation of the Department of Homeland Security, "every relevant mention of the Border Patrol in the Code of Federal Regulations continues to appear solely under the Immigration Regulations." *Juvenile Female*, 566 F.3d at 949 n.3 (citations omitted).

Finally, the government claims that this Court's decision in *Virginia v. Moore*, 553 U.S. 164 (2008), supports denial of the petition. BIO 10-11. But that case involved a ***state*** police officer's violation of a ***state*** statute governing arrest procedures. *Moore*, 553 U.S. at 166-67. State law dictated that the officer should have issued a summons rather than arrested the respondent for the misdemeanor offense of driving on a suspended license. *Id.* at 167. Respondent argued that, because his arrest was in violation of state law, the Fourth Amendment required that the evidence recovered during the officer's search incident to arrest be suppressed. *Id.* at 167-68. Ruling for the respondent would have required the Court to hold that Fourth Amendment protections vary according to idiosyncrasies of state law. The Court rejected that idea: "It would be strange to construe a constitutional provision that did not apply to the States at all when it was adopted to now restrict state officers more than federal officers, solely because the States have passed search-

and-seizure laws that are the prerogative of independent sovereigns." *Id.* at 176. No such considerations are present in petitioner's case.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in Mr. Nelson's petition for writ of certiorari, this Court should grant certiorari in this case.

Date: October 22, 2021

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