No. _____

In the

Supreme Court of the United States

FABIAN SANCHEZ, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Tenth Circuit

Petition for Writ of Certiorari

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Question Presented

Once objective facts have dispelled the officer's suspicions, may a person still be detained on a hunch?

Related Proceedings

United States Court of Appeals for the Tenth Circuit

United States v. Fabian Sanchez, Case No. 19-2092

Initial Opinion Entered: December 29, 2020

Initial Opinion Withdrawn and Revised Opinion Entered after Petition for Rehearing Granted: September 14, 2021

Mandate Entered: October 6, 2021

United States District Court for the District of New Mexico

United States v. Fabian Sanchez, Case No. 17-CR-1231-JAP

Judgment Entered: May 30, 2019

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In the

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Petition for Writ of Certiorari

Fabian Sanchez petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in his case.

Opinions Below

The decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Sanchez*, Case No. 19-2092, is published at 13 F.4th 1063.[1] The district court's memorandum opinion and order is available at 2018 WL 3747821.[2]

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[1] App. 1a-33a. "App." refers to the attached appendix. The record on appeal contained three volumes. Sanchez refers to the documents and pleadings in those volumes as Vol. __ followed by the bates number on the bottom right of the page (e.g. Vol. I, 89). He refers to materials in the Supplemental Record as 'Supp.R.', followed by the bates page number.

[2] App. 34a-53a.

Jurisdiction

On September 14, 2021, the Tenth Circuit entered its judgment.[3] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). According to this Court's Rule 13.1, this petition is timely if filed on or before December 13, 2021.

Pertinent Constitutional Provision

The Fourth Amendment to the Constitution of the United States

The Fourth Amendment to the United States Constitution provides:

> 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.

Statement of the Case

A. Factual background relevant to the question presented.

Sanchez's 18 U.S.C. § 922(g)(1) conviction was based on a gun officers took from his jacket pocket after they unlawfully detained him.

After dark in late November, undercover officers, Brown and Cordova, noticed a Hyundai sedan in a Rio Rancho hotel parking lot. Vol. 1 at 112-14, 243 . The license plate did not match the vehicle's VIN but the plate and

[3] App. 1a-33a. The Tenth Circuit's initial decision was published on December 29, 2020. Sanchez filed a petition for rehearing, which was granted on September 14, 2021. The court withdrew its December 29, 2020 opinion and replaced it with the revised opinion attached to this petition.

vehicle had not been reported stolen. *Id.* at 112-14, 172-74. The car had a tow strap attached and sat close to its space's painted line. *Id.* at 105, 244.

Brown had started to leave his unmarked truck to check the VIN when Sanchez arrived. *Id.* at 242. He backed a Lexus SUV into a spot beside the Hyundai. *Id.* He got out and left the door open with the dome light on. *Id.* at 128. The officers watched him get a toolbox and crouch down in the 2 foot space between the vehicles. *Id.* at 120-21. The officers did not see or hear anything else. *Id.* at 247. They decided to confront him. *Id.* at 123.

Donning tactical vests and bearing firearms, the officers appeared in front of, and behind, Sanchez. *Id.* at 125-26. Sanchez had not heard them coming. *Id.* Brown said, "police department" and shut the door of the Lexus. *Id.* at 126, 128, 183. Now standing with toolbox in hand, Sanchez was ordered to put it down. *Id.* at 248, 271-72. He complied. *Id.* It was a cold night. *Id.* at 164-65. He put his hands in his jacket pockets. *Id.* at 131, 274. The officers saw nothing to confirm their suspicion Sanchez was trying to steal the Hyundai. *Id.* at 247-48. They proceeded to question him.

The officers asked Sanchez what he was doing. *Id.* at 248. Sanchez said he was working on his girlfriend's sedan. *Id.* They questioned the ownership of the Lexus. *Id.* The record is equivocal about what followed but Brown contends Sanchez dissociated himself from the Lexus. *Id.* at 185. He told Sanchez to put his hands on his head for a search. *Id.* at 186, 249. Sanchez said he had done nothing wrong, then ran. *Id.*

The officers chased him. They say they saw him trying to put his hand in his jacket pocket. *Id.* at 137-38. Cordova shot him in the back with his taser. *Id.* Sanchez's body contorted and his jacket fell off. *Id.* at 140-41, 196-97. He turned and headed back toward his jacket. *Id.* at 145. Before he could reach

it, the officers grabbed him, fell on him, and handcuffed him. *Id.* at 143. They believed Sanchez had evaded an officer, violating N.M. Stat. Ann. 30-22-1(B). *Id.*

Cordova searched Sanchez and found nothing. *Id.* at 233, 235. Brown retrieved the jacket. *Id.* at 143. When he searched the pockets, he called, "we have a gun." *Id.* at 146-47. To that Sanchez replied, "that's why I ran." *Id.*

B. Procedural history relevant to the question presented.

Sanchez was indicted for unlawfully possessing a firearm as a felon in violation of 18 U.S.C. § 922(g)(1). App. 2a; Vol. 2 at 390. He filed a motion to suppress Brown's seizure of the gun and his statement. App. 2a;Vol. 1 at 15, 54, 69.

The district court denied Sanchez's motion. App. 2a, 34a-53a. It made several findings. It said the initial confrontation was consensual. App. 39a-41a. The officers then developed reasonable suspicion, including an apprehension Sanchez was armed and dangerous. App. 41-43a. A protective search was warranted. App. 43a. When Sanchez ran, they had cause to detain and arrest him. App. 44a. Sanchez voluntarily abandoned his jacket so its search was authorized. App. 46a-48a. When Brown said he found a gun, it was not a question mandating a response. App. 50a-52a.

Sanchez agreed to plead guilty to the charged count. Vol. 2 at 390-92. His conditional plea preserved his right to appeal the denial of his suppression motion. *Id.*

In the Tenth Circuit, Sanchez argued the government did not prove the officers' encounter with him was consensual rather than an unlawful detention. He also argued that the government did not show the officers had the necessary reasonable suspicion to detain Sanchez before they confronted

him. The Tenth Circuit sidestepped the issue of detention and held that the officers had reasonable suspicion of criminal activity the moment they confronted Sanchez. App. 11a.

The court said the officers knew the hotel parking was "a repository for stolen vehicles since they had recovered stolen vehicles from the lot before." App. 11a. Brown had requested information on the Hyundai's license plate and was told it was not assigned to that car. This made him suspect the car was stolen. *Id.* The officers then saw Sanchez pull into the parking lot and back the Lexus SUV he was driving into the space next to the Hyundai in the back of the lot. They watched Sanchez get out, get a toolbox from the hatch and crouch down by the driver's side door of the Hyundai. *Id.*

According to the court, these "facts support the rational inferences that the Hyundai was stolen and that Mr. Sanchez was either attempting to break into it or was associated with a stolen vehicle." App. 11a-12a. The court added that "common sense and ordinary human experience lead to the rational inference that someone late at night in a hotel parking lot with a toolbox by the driver's side of a vehicle door may be attempting to break into the vehicle." App. 12a. This inference also is supported, said the court, by "the fact that the officers had recovered stolen vehicles from this parking lot before." *Id.*

The court acknowledged that there "may have been an innocent explanation for Mr. Sanchez's conduct." *Id.* But, even so, it was not relevant to a reasonable suspicion analysis. The court said officers did not have to consider circumstances that seem to refute their suspicions; they "did not have to rule out innocent conduct to have reasonable suspicion." App. 12a. Thus, it concluded, "even if Mr. Sanchez's conduct was 'ambiguous and

susceptible of innocent explanation,' it was objectively reasonable for Officer Brown and Officer Cordova 'to detain [Mr. Sanchez] to resolve the ambiguity.'" *Id.* (quoting *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (brackets in original)). It did not mention, much less suggest, any alternatives to resolving ambiguity than the confrontational and traumatic detention that occurred.

Reasons for Granting the Writ

There are several reasons the Court should grant Sanchez's petition for writ of certiorari. First, the Tenth Circuit's decision in this case is in direct conflict with the Fourth Amendment principles set forth by this Court in *Terry v. Ohio*, 392 U.S. 1 (1968), *Florida v. Royer*, 460 U.S. 491 (1983) and *Kansas v. Glover*, 140 S.Ct. 1183 (2020).

This case also presents an opportunity to resolve the conflicts among jurisdictions concerning the proper interpretation of *Terry*, *Royer* and *Glover*. Moreover, the Tenth Circuit's decision is incorrect and the issues presented by this case are important.

A. The Tenth Circuit's decision in this case is incorrect and conflicts with this Court's precedent which holds that once an officer's suspicions have been objectively dispelled he may not detain a person on a hunch.

To detain a person upon first approach, an officer must reasonably suspect that person was committing, or about to commit a criminal act. *Glover*, 140 S.Ct. at 1191; *see also United States v. Cortez*, 449 U.S. 411, 417-18 (1981) ("detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.") (citations omitted); *Brown v. Texas*, 443 U.S. 47, 51 (1979) (detention requires "reasonable suspicion, based on objective facts, that the individual is involved

in criminal activity"). Reasonable suspicion requires specific and articulable facts that objectively demonstrate the *particular person* is committing a crime. See *Terry*, 392 U.S. at 21 (court must judge facts "against objective standard" to assess reasonableness of officer's behavior). The lawfulness of the officer's detention is contingent on his use of the "least intrusive means reasonably available to verify or dispel [his] suspicion in a short period of time." *Florida v. Royer*, 460 U.S. 491, 500 (1983). In other words, a court reviewing the legality of an officer's detention must determine whether, under the totality of the circumstances, the officer "diligently pursued a means of investigation that was likely to confirm or dispel [his] suspicions quickly. . . ." *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985). If a person is held after the officer's suspicions dissipate, that detention is not valid according to this Court's precedent and evidence the officer derives from this seizure must be suppressed.

The Tenth Circuit did not follow the above legal principles. Under its erroneous interpretation, the fact that the officers' suspicions were dispelled or were never reasonable to begin with did not matter. Hence its conclusion that although Sanchez's conduct was "susceptible of innocent explanation," it was still "objectively reasonable" for the officers to detain him. The circuit court completely ignores the objective fact that neither the plate nor the car was stolen. Moreover, nothing implicated Sanchez in the car's mismatched plate. The officers' own observations of Sanchez and the car revealed no criminal acts. *See Glover*, 140 S.Ct. at 1191, 1193-94 (additional facts can dispel suspicion). No contemporaneous objective facts supported reasonable suspicion.

Undeterred, the Tenth Circuit declared the car's mismatched plate supported reasonable suspicion. App. 11a. It said because of this mismatch, Brown reasonably concluded the car was stolen. *Id.* But Brown's stolen car check proved it was not and he never mentioned which criminal statute the mismatched plate violated. Furthermore, he made no inquiry in the hotel about the 'suspicious' car - was it a guest's? How long had it been there? What about the tow strap? The officers' only investigation was to confront Sanchez. *See United States v. Sokolow*, 490 U.S. 1, 10 (1989) ("relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts.") (citation, quotations omitted).

The Tenth Circuit next contended the officers reasonably believed Sanchez intended to steal the Hyundai, a car suspicious above for being "stolen" already. App. 11a. To enhance this possibility, the court made careful note of the car's environment: it was parked in the "back" of a hotel parking lot from which officers had "recovered stolen vehicles [] before." App. 11a. Interestingly, exhibits at the suppression hearing show an entrance to the hotel two car lengths from the Hyundai. Supp.R. 28, 34, 40. Windows from hotel rooms look out on the lot. *Id.* According to officer Cordova, street lamps throughout the parking lot made it "easy to see." Vol. 1 270. Rather than confirm the suspicions of the court and the officers, the car's location makes it highly unlikely it was a target and Sanchez a thief. Notably, the Hyundai was one of numerous cars in a hotel's lot, where guests, like Sanchez, were permitted to park. There it was close to the hotel entrance, where it was quite visible given the lighting and the many room windows overlooking the lot. Further, the record shows no official call or police pursuit directed the

officers to the hotel lot. And the officers watched but did not see Sanchez do anything criminal before they approached. Objective, particularized facts are needed to support suspected criminality. The aggregate objective facts here contradicted the idea that Sanchez was stealing the car.

Despite objective facts that refuted suspicions the car was stolen or Sanchez was stealing it, the Tenth Circuit asserted both were still reasonable because the officers believed the lot was a "repository for stolen vehicles." App. 11a. This conclusion necessarily asks that subjective belief or past acts replace objective fact. To decide requisite reasonable suspicion in Sanchez's case, it is irrelevant if stolen cars were found in the lot in the past. *Cf. Sokolow*, 490 U.S. at 12 (Marshall, J., dissenting) (suspicion does not become reasonable because person "committed crimes in the past, harbors unconsummated criminal designs, or has the propensity to commit crimes."). When the officers confronted Sanchez, they knew the car had not been reported stolen. While they watched him, they did not see him try to steal it. Nor were there signs of attempted theft to the trained eye after they approached Sanchez and the car. Furthermore, no one had reported a stolen car in the lot and the lot was not in a high crime area.[4] Vol. 1 190, 225.

Bereft of factual support for its arguments, the court was left to say that "common sense and ordinary human experience lead to the rational inference that someone late at night in a hotel parking lot with a toolbox by the driver's side of a vehicle door may be attempting to break into the vehicle." App. 12a.

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[4] The current hotel manager had been with the chain since April 2017. He stated he has never seen a stolen car in the lot and has never had to call or assist police with one. Vol. 1 293-94.

No objective evidence supports the court's damning inferences. According to this Court's precedent, the Tenth Circuit was expected to identify the particularized and objective basis the officers had for suspecting Sanchez of criminal activity. Instead, it connected the officers' suspicions to speculative premises to inflate their significance.

For example, the court postulated, without proof, that Sanchez had a toolbox by the driver's side door to "attempt[] to break into the [car.]" App. 12a. Simply making a claim something is suspicious does not make it plausible, let alone true. After all, no degree of suspicion can legally attach to a premise without some factual support. The court's supposition assumes Sanchez's singular purpose was theft while dismissing the objective record's proof that he needed the toolbox to "attempt to" repair a car that evidently needed work. App. 12a. Unseen by Sanchez just opposite the Hyundai, the officers watched him park, get out, and open his toolbox on the ground between the two cars. They watched for ten minutes. Neither reported seeing him touch the Hyundai. Neither reported hearing its locks being "punched." When they decided to confront him, Sanchez was standing up with the toolbox closed in his hand. They saw no specific evidence to support their suspicions. The Hyundai's locks were intact. The windows were intact. The interior was intact. The car had not been breached. Thus, nothing the officers observed objectively supported a link between Sanchez's placement of the toolbox and any criminal activity. The Tenth Circuit's finding that there was such a link was incorrect.

In *Terry*, this Court stressed that warrantless intrusions on Fourth Amendment interests must be "narrowly drawn." 392 U.S. at 27. Abiding by this standard means generalized hunches are not enough to detain. For

inferences and deductions to be reasonable requires a "minimal level of objective justification" that can be articulated. *Sokolow*, 490 U.S. at 7. Without objective support, what remains is "inchoate and unparticularized suspicion or hunch." *Id.* (citation omitted). Requiring factual support to make suspicion actionable is to protect innocent citizens from "overbearing or harassing" police conduct based only on mere suspicion or wild hunch. *Terry*, 392 U.S. at 14-15 & n. 11. In other words, at a minimum, reasonable suspicion must rest on particular activity that is objectively "out of the ordinary." *Sokolow*, 490 U.S. at 8; *see also Reid v. Georgia*, 448 U.S. 438, 440-41 (1980) (arriving from Ft. Lauderdale, a source city for cocaine, with only a shoulder bag in early morning when law enforcement presence diminished and ostensibly traveling alone describes numerous innocent travelers and is not so objectively suspicious as to warrant detention).

Contrary to the Tenth Circuit's belief, the objective facts do not support the officers' inferences the car was stolen or that Sanchez intended to steal it. A "reasonable and prudent" person using the "common sense [of] ordinary people" to evaluate the same evidence would understand both inferences had been "dispelled." *Glover*, 140 S.Ct. at 1191, 1193-94. The officers' hunch a mismatched plate indicated the car was stolen was dispelled once information reported it was not. Suspicion Sanchez meant to steal the car was dispelled when he did not try while officers watched unnoticed. Nor was there physical evidence he had when the officers had opportunity to look at the car. With these objective facts known to the officers, what had happened in the lot before has no bearing on Sanchez. And the validity of the factual record outweighs a lower court's theory on toolbox and car placement based on assumptions. *See id.* at 1193 (Kagan, J., concurring) (if basis for assumption

questionable, case for relying on it "hardly self-evident."); *see also id.* at 1193-94 (presence of additional facts and circumstances can "dispel" reasonable suspicion). Absent reasonable objective support, a "hunch" cannot justify a seizure. *Terry*, 392 U.S. at 27.

Innocent behavior is not objectively suspicious criminal behavior. The lower courts should not excuse an otherwise illicit detention by holding up an officer's subjective conclusion that evidently innocent facts are suspicious and suggest criminal conduct. Although courts may accept certain reasonable inferences based on the officer's experience, "the fact that an officer is experienced does not require a court to accept all of his suspicions as reasonable, nor does mere experience mean that [his] perceptions are justified by the objective facts." *United States v. Buenaventura-Ariza*, 615 F.2d 29, 36 (2d Cir. 1980); *see also United States v. Garcia-Camacho*, 53 F.3d 244, 246 (9th Cir. 1995) (while officer can rely on training and experience to draw inferences from what he observes, the inferences must still "be grounded in objective facts and capable of rational explanation."). Here, any interest or concern the officers had in the car or Sanchez could have been addressed in other ways.

The Tenth Circuit's decision to approve the officers' choice to aggressively confront Sanchez is not supported by this Court's precedent. The Fourth Amendment demands that police action be "predicated" on "specificity." *Cortez*, 449 U.S. at 418. It is missing here. When they were watching Sanchez, the officers knew neither the car nor its plate had been reported stolen. This knowledge plus what was witnessed for ten minutes does not objectively conjure a crime. It only may appear that way when a subjective, and perhaps overeager, hunch is introduced. Rather than an immediate and

premature confrontation, a reasonable officer would know more was required before acting.

By ignoring certain inconvenient, yet objective facts, "available to the officer at the moment of the seizure," the Tenth Circuit has "invite[d] intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches." *Terry*, 392 U.S. at 21-22. This Court should grant Sanchez's petition to ensure that courts across the country remain "faithful to the Fourth Amendment principle that law enforcement officers must reasonably suspect a person of criminal activity . . . at that moment . . . before they can detain him." *Sokolow*, 490 U.S. at 12, 17-18 (Marshall, J., dissenting).

B. The Tenth Circuit's decision that objectively dispelled suspicions may still justify a person's detention conflicts with the decisions of other jurisdictions.

The Tenth Circuit's novel approach neatly sidesteps the case where objective facts dispel an officer's initial suspicions. Without objective support, reasonable suspicion fades to mere hunch - an impermissible basis for detention. But now, facts that allay suspicion only make conduct "ambiguous and susceptible of innocent explanation." Focusing on "ambiguity" over "innocent explanation," the court held still detaining Sanchez is "objectively reasonable." Thus, by bifurcating the meaning of facts, the court provides a second but preordained chance for officers. Even worse, by putting facts' meaning in doubt, the court invites reasonable suspicion in the absence of objective facts to support it. New Mexico and other circuits reject such reckless artifice.

In contrast to the Tenth Circuit, other jurisdictions considering similar circumstances have concluded that once the suspicions prompting an

investigatory stop have been dispelled, continued detention is illegal. In the Fourth Circuit, "officers must consider the totality of the circumstances and, in doing so, must not overlook facts that tend to dispel reasonable suspicion." *United States v. Drakeford*, 992 F.3d 255, 257 (4th Cir. 2021).

In *Drakeford*, the Fourth Circuit disagreed with the district court's conclusion the officers had reasonable suspicion to detain Drakeford. The district court enumerated five grounds for its decision. 992 F.3d at 263. First, the officers had information from an informant that Drakeford was selling drugs. Second, they saw what they believed was a drug deal at a gas station and subsequently found syringes in a truck allegedly involved in the deal. Third, they saw Drakeford pull into another gas station and park. Fourth, the officers saw Drakeford go into a residence and leave with a bag he did not have before, only to tell the informant later he had drugs to sell. Fifth, an officer believed he saw a handshake "hand-to-hand" drug transaction between Drakeford and an acquaintance outside a car stereo store. *Id.*

The Fourth Circuit held the totality of the circumstances did not support the district court's conclusion. 992 F.3d at 264-65. It said the officers either misinterpreted innocent conduct or ignored objective facts that dismissed their suspicions. *Id.* First, the informant had only nonspecific information and her reliability was unknown. *Id.* at 264. The officers never tried to confirm her information by setting up a controlled buy between the informant and Drakeford. *Id.* Indeed, they waited a week after seeing Drakeford leave the residence with a bag purported to be a "re-supply of drugs" before they stopped him at the stereo store. They took no action in the interim. *Id.*

Second, the officers never witnessed drugs or money change hands during the deal they saw at the gas station. The same was true for the handshake transaction outside the stereo store. Third, the officers watched several addresses of Drakeford's for months and did not see "suspicious behavior or drug transactions." *Id.* at 265. From the aggregate circumstances, the Fourth Circuit concluded that none of the district court's grounds "elevate[d] the officers' hunch that [Drakeford] was engaged in drug trafficking to reasonable suspicion." *Id.*

More importantly, the court emphasized that an officer's "bare suspicion" of illicit behavior does not "allow even an experienced officer to reasonably conclude that [] benign and common gesture[s] can be viewed as [criminal]." *Id.* at 264. Otherwise innocent behavior cannot amount to "reasonable, particularized suspicion." *Id.* "The Fourth Amendment does not allow the Government to label a person as a drug dealer and then view all of their transactions through that lens." *Id.* Yet, that is precisely what the Tenth Circuit allows with its approach to objective facts.

According to the Tenth Circuit, facts do not dispel suspicions; they make them "ambiguous and susceptible of innocent explanation." Had it decided Drakeford's appeal, its decision would directly oppose the one actually made. For behavior deemed "benign and common" in the aggregate would accord with "innocent explanation" in the Fourth Circuit. In other words, objective facts "dispelled the notion that [Drakeford] was engaged in a drug transaction." 992 F.3d at 265. But the Tenth Circuit weights "ambiguity" and officers need not consider "innocent explanation." Their suspicions, even if dispelled, remain "reasonable." App. 12a. In other words, "ambiguity" will always provide them legal cover to detain. Thus, in the Tenth Circuit,

Sanchez may be labeled a criminal and all his actions viewed "through that lens."

Judge Wynn's concurring opinion in *Drakeford* further highlights the problem with the Tenth Circuit's idiosyncratic analysis. Deferring to the officer, despite objective evidence to the contrary, "incentivizes veteran officers to lean on their 'impressions' instead of doing the hard work of building a case, fact by fact." 992 F.3d at 267. This deference is unnecessary, Judge Wynn said, because "it is not a heavy burden for officers to 'articulate' *why* a particular behavior is suspicious.'" *Id.* (emphasis in original) (quoting *United States v. Foster*, 634 F.3d 243, 248 (4th Cir. 2011). Without such an expectation of officers, "variability" is "inject[ed] into the Fourth Amendment." *Id.* Similar scenarios lead to disparate results when objectively innocent behavior is weighted differently from one circuit to another. Indeed, that variability is illustrated by the different outcomes in *Drakeford* and *Sanchez*.

The Sixth Circuit too takes the position that refuted suspicions matter in the detention analysis. In *Harris v. Klare*, 902 F.3d 630, 636-37 (6th Cir. 2018), the court held that once the officers' suspicions were "dispelled," continued detention became unlawful. The officers tried to justify holding Harris, stating that in addition to her mother driving with a suspended license and without insurance, the van contained "worker's tools" and its license plate was obstructed. That, in the aggregate, led them to believe the family was "manufacturing or transporting contraband." *Id.* at 636. But the Sixth Circuit maintained that after a drug dog failed to alert to the van, the officers' suspicions had been dispelled. *Id.* at 637. They no longer had reason to hold Harris. Unlike in the Tenth Circuit, the dog's failure did not create

another opportunity for the officers. It extinguished reasonable suspicion and made continued detention unlawful as a matter of law. *Id.* at 637.

New Mexico state courts are aligned with the Fourth and Sixth Circuits. They also have held that objective facts can reduce an officer's suspicion to "nothing more than a generalized suspicion," which, in turn, cannot justify a detention. *State v. Aguilar*, 141 N.M. 364, 367-69 (Ct. App. 2007); *State v. Neal*, 142 N.M. 176, 182-83 (2007).

In *Aguilar*, the court held an officer's "generalized suspicion or unparticularized hunch that an individual is committing a crime is not enough to justify stopping [him]." 141 N.M. at 367. There, an officer stopped Aguilar who was driving at 2 a.m. with the temporary plates that dealers use when "demonstrating" a car. The officer "knew" these plates were "often misused or stolen" and stopped Aguilar to check if "the tag was being used properly." *Id.* The court held these circumstances "amount to nothing more than a generalized suspicion that there was a possibility that [Aguilar] might have been" misusing the demonstration plate. *Id.* at 368.

The facts on which the officer relied for the stop, the court explained, were "evidence of neutral conduct." *Id.* at 368 (citing *State v. Galvan*, 90 N.M. 129, 132-33 (Ct. App. 1977) (turning off road into unmarked dead-end was "neutral conduct," not reasonable suspicion of evading police)). Although the officer found 2 a.m. suspicious as no dealerships were open to "demonstrate" a car, statutes do not limit when the plates may be used. *Id.* Additionally, the officer's knowledge about misuse of such tags was offset by what he did not know. He had no information about the misuse of that specific plate or misuse generally by the dealer to whom the plate was issued. *Id.* at 367. He admitted the plate was valid on its face and he knew nothing surrounding

Aguilar's use of the car. In other words, once objective facts were considered the officer's general suspicions were alleviated. The court concluded the officer had not "articulated [] specific fact[s] that would set [Aguilar] apart from an innocent driver using a dealer demonstration plate at the same time of day." *Id.* at 368.

In *Neal*, the New Mexico Supreme Court held that "neutral acts" that neither incriminate nor exculpate an individual are not part of a reasonable suspicion analysis. 142 N.M. at 185. There, an officer stopped Neal for a cracked windshield. He then offered five reasons for extending the detention to wait for a drug dog. First, before the stop he saw Neal parked in front of a house that officers were investigating for drug trafficking. Second, he saw Neal talking to a man outside the house that he knew was a convicted felon. Third, when stopped, Neal became nervous. Fourth, shortly thereafter, Neal indicated he wanted to leave. Fifth, when asked, Neal refused a search of his truck. *Id.* at 179, 184. The court held the inferences drawn from Neal's objectively "innocent conduct" did not "constitute the type of individualized, specific articulable circumstances necessary to create reasonable suspicion that [Neal] himself was involved in criminal activity . . . ." *Id.* at 185.

The court stressed that each of the officer's suspicions were balanced by objective facts that gave Neal's conduct an innocent or unremarkable cast. *Id.* at 184-85. For example, when the officer saw Neal speaking to a man outside the house under investigation, he did not know the identity of either man. *Id.* at 185. Nor did the officer see anything but them talking. He could not hear what they said and he had no information Neal even knew he was outside a suspected drug house. *Id.* at 184-85. Furthermore, Neal's alleged nervousness when stopped was not unusual for anyone stopped by the police,

whether "innocent or guilty." *Id.* at 184. And withholding consent was also a neutral act that added nothing to the reasonableness of the officer's suspicions. *Id.* at 185. In fact, these "surrounding circumstances . . . smack more of the type of conjecture and hunch [] rejected in the past as insufficient to constitute reasonable suspicion." *Id.* To conclude otherwise, the court said, the individual rights and liberties protected by the Fourth Amendment would be "eviscerate[d]." *Id.*

Again, had Sanchez's case been prosecuted in New Mexico state court, the outcome of his suppression motion would likely have paralleled those above. The nature of the officers' suspicions all match and New Mexico courts have shown an intolerance for arousing suspicion from "neutral or innocent conduct." Unlike in the Tenth Circuit, when objective facts, in the aggregate, reveal only "neutral or innocent conduct," the generalized suspicion of possible misconduct that remains will not be "sufficient to create reasonable suspicion." *Aguilar*, 141 N.M. at 368; *Neal*, 142 N.M. at 185.

Like *Aguilar* and *Neal*, what the officers here knew and what they saw Sanchez do was generalized or else "evidence of neutral or innocent conduct." Like *Aguilar*, the hour here was late. But, just as in *Aguilar*, no city or hotel restrictions prohibited Sanchez from working on a car after dark. Here, too, the officers "knew" stolen cars had been found in the hotel parking lot but neither had "any specific facts" about the Hyundai or its license plate being stolen and neither knew anything about Sanchez. 141 N.M. at 367, 370. And just as the officer in *Neal* did not see him do anything illegal outside the drug house, the officers here saw nothing illegal while they watched Sanchez. Although all the officers claimed what they observed was suspicious, none were able to articulate particularized facts to support it. Nothing set Sanchez

apart from an innocent hotel guest working on a car in the parking lot at the same time of day. None of the officers had anything more than generalized suspicion.

This Court must intervene to resolve the disparity between circuits and between the Tenth Circuit and New Mexico state courts. Until it does, variability will continue to be injected into Fourth Amendment decisions. *Drakeford*, 992 F.3d at 267. Investigative detentions based on presumptively innocent or neutral conduct will continue to be sanctioned in the Tenth Circuit, thereby eroding the Fourth Amendment protections of those in its court rooms. Sanchez asks this Court to not let this happen.

Conclusion

Sanchez requests that this Court grant *certiorari* in this case, vacate the Tenth Circuit's decision, and direct the court to suppress the evidence derived from the officers' detention of Sanchez because that detention was unlawful.

Respectfully submitted,

DATED: December 13, 2021

By: *s/ Margaret A. Katze*
Margaret A. Katze
Federal Public Defender
Attorney for the Petitioner

Appendix

No. _____

In the

Supreme Court of the United States

FABIAN SANCHEZ, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

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

Certificate of Service

I, Margaret A. Katze, hereby certify that on December 13, 2021, a copy of the petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614,

950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

DATED: December 13, 2021

s/Margaret A. Katze

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