No. 21-835

In the Supreme Court of the United States

OTHA RAY FLOWERS, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

A sharply divided Fifth Circuit panel held that police had reasonable suspicion for a *Terry* stop after observing two men sitting for a mere *10-15 seconds* in a legally parked car outside an open convenience store, in a bad part of town. As Petitioner showed, the panel got that extremely important conclusion egregiously wrong. What is more, this case would come out differently in the vast majority of circuits and state high courts to address whether conduct of this kind—i.e., potentially ambiguous but widely exhibited by law-abiding members of the general public—can justify a significant intrusion on Fourth Amendment rights.

In response, the government only barely defends the outcome, with a carefully worded protest that the panel "did not legally err." Opp. 7. Instead, the government suggests reasonable-suspicion cases are effectively cert-proof; by the government's telling, a "totality of the circumstances" inquiry does not give rise to a split unless cases have identical facts. But that *Terry* contemplates a "totality of the circumstances" inquiry (Opp. 13) by no means extinguishes the possibility of a split about ***how*** to apply that framework. And if the government were right, this Court would not have granted certiorari in *United States* v. *Sokolow*, 490 U.S. 1 (1989), or other reasonable-suspicion cases.

Petitioner painstakingly catalogued a split of authority on the *legal* question of whether ambiguous but widely shared behavior, occurring in a high-crime area, supports reasonable suspicion. In response, the government deploys that well-worn Fourth

Amendment defense, emphasizing the fact-intensive nature of the inquiry, and positing factual distinctions between cases without showing they are material. But this Court long ago held that "the legal rule[] for * * * reasonable suspicion acquire[s] content only through application"; certiorari review plays a critical role to "unify precedent" and provide law enforcement with an administrable "set of rules." *Ornelas* v. *United States*, 517 U.S. 690, 697 (1996).

On the merits, the government mainly attacks a strawman. Petitioner did not argue that "an innocent explanation for conduct precludes a finding of reasonable suspicion." Opp. 9. Rather, the question is whether ambiguous actions of the kind "that any law-abiding citizen might do," Pet. App. 18a (Elrod, J., dissenting)—here, lingering for a few seconds in a parked car before patronizing a roadside shop—can justify a Fourth Amendment intrusion merely because they occur in a high-crime area. On *that* issue, lower courts are in disarray, and this Court's guidance is urgently needed.

I. Lower Courts Are Sharply Divided Over the Question Presented.

The Government's central objection to certiorari is that the irreconcilable decisions and outcomes documented in the Petition are merely fact-dependent applications of *Terry* v. *Ohio*, 392 U.S. 1 (1968), and do not diverge on any legal question. Opp. 11-16. The Government offers a range of factual distinctions without attempting to show that they were material to outcomes. Moreover, the implication of the Government's position is that because the reasonable-suspicion inquiry is context-specific, no case involving

application of that standard could be cert-worthy. But "independent review [by this Court] is * * * necessary * * * to maintain control of, and to clarify, the legal principles" underlying reasonable suspicion. *Ornelas*, 517 U.S. at 697. The cases in the split diverge on a concrete question of law.

The Eighth Circuit sits at the heart of the split. The Government's paper-thin factual distinctions (Opp. 13-14) cannot reconcile that Circuit's governing legal principles with the Fifth Circuit's rationale and ruling here. Even the government concedes that the Eighth Circuit has repeatedly articulated a crisp legal rule disfavoring reasonable-suspicion findings based on widely shared but ambiguous conduct. *Id.* at 13 (quoting cases). In *United States* v. *Jones*, 606 F.3d 964, 967 (2010), the Eighth Circuit found no reasonable suspicion where the supposedly "suspicious circumstances" occurring in a high-crime area were "shared by countless, wholly innocent persons." That court reasoned that because "nearly every person has, at one time or another," undertaken the conduct in question, simply "[t]oo many people fit this description for it to justify a reasonable suspicion of criminal activity." *Id.* at 967-968 (citation omitted). The Fifth Circuit here, by contrast, upheld reasonable suspicion based on conduct in which "any law-abiding citizen might" engage. Pet. App. 18a (Elrod, J., dissenting); see also *id.* 7a-8a. The government proffers slight factual distinctions between *Jones* and Petitioner's case. See Opp. 14. But what matters is each court's stated

rationale; on that point, the government is virtually silent.[1]

The Tenth Circuit has rejected reasonable suspicion on the ground that if the proffered "innocuous" conduct "were sufficient to confer reasonable suspicion," then "the ambling public [could be subject to] * * * virtually random seizures, inquisitions to obtain information which could then be used to suggest reasonable suspicion, and arbitrary exercises of police power." *United States* v. *Hernandez*, 847 F.3d 1257, 1268-1269 (10th Cir. 2017); accord *United States* v. *Dell*, 487 F. App'x 440, 444-446 (10th Cir. 2012) (under circuit law, no reasonable suspicion exists where conduct in high-crime area was "very much in the realm of ordinary behavior"). Instead of engaging with the Tenth Circuit's legal reasoning, the Government draws factual distinctions. See, *e.g.*, Opp. 12 (defendant was "wearing black clothing" and "walking by a recently victimized area," rather than sitting in a

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[1] Nothing in *United States* v. *Dortch*, 868 F.3d 674 (8th Cir. 2017), displaced Eighth Circuit law on widely shared conduct. *Dortch* upheld a protective frisk where officers observed two cars "unquestionably parked illegally" "on the wrong side of the street," and a defendant dressed in a manner "conspicuously inappropriate for the weather." *Id.* at 678, 676. Indeed, *Dortch* distinguished *Jones* on precisely the relevant ground: Dortch's outfit ("a winter coat worn in June") was "'significantly stranger—that is, significantly less likely to be 'shared by countless, wholly innocent persons'"—than [Jones's] hoodie in September." *Dortch*, 868 F.3d at 679-680 (quoting *Jones*, 606 F.3d at 967); accord *ibid.* (unlike in *Jones*, Dortch "responded to the sight of an approaching police officer" by taking actions to "conceal what * * * he had in his coat" and "free[] his hands to reach for any weapon he might be carrying").

parked car). But that misses the point: It was because the observed conduct in *Hernandez* was shared by the "ambling public" that the Tenth Circuit rejected reasonable suspicion, not the color of the defendant's clothing. Cf. Pet. App. 22a (Elrod, J., dissenting) (panel here improperly "base[d] a justification for a [seizure] upon actions that any similarly-situated person [may] have taken").

United States v. *Slocumb*, 804 F.3d 677 (4th Cir. 2015), is also irreconcilable with the Fifth Circuit's analytical approach. In the government's view, *Slocumb* applied a totality-of-the-circumstances test and simply reached a different outcome on less suspicious facts. Opp. 12-13. But that ignores *Slocumb*'s gloss on *Terry*: "The government must do more than simply label a behavior as 'suspicious' to make it so." *Slocumb*, 804 F.3d at 684 (citations omitted). On that basis, the Fourth Circuit held that "seemingly innocent acts" occurring late at night in a high-crime area were not "indicative of some more sinister activity." *Ibid.* (internal quotation marks omitted). The government's reliance on *Walker* v. *Donohoe*, 3 F.4th 676 (4th Cir. 2021) (cited at Opp. 13), is self-rebutting: There, unlike in *Slocumb*, reasonable suspicion existed because the observed conduct—open carry of an AR-15 rifle by a young man dressed in military-style clothing in the close vicinity of a high-school just days after the mass shooting in Parkland, Florida—was, the Fourth Circuit explained, "*unusual* and alarming," *id.* at 685 (emphasis added), not common and innocuous.

As to state courts, the government again draws factual distinctions without showing materiality. Nor does the government acknowledge—never mind

attempt to reconcile—the courts' sharply conflicting legal reasoning. See Opp. 13. To take just one example, *State* v. *Edmonds* bears uncanny similarity to this case: A defendant was observed lingering "outside a restaurant * * * for a few seconds at 7 p.m., in a city with a generally high crime rate." 145 A.3d 861, 882 (Conn. 2016). The Connecticut Supreme Court found no reasonable suspicion because "[t]oo many people" engaged in lawful conduct of that kind, and the "crime rate of a particular area cannot transform otherwise innocent-appearing circumstances" into reasonable suspicion. *Id.* at 882, 883 (citation omitted). The cited state-court decisions cannot be explained away by factual distinctions—rather, they reflect and apply a legal rule inconsistent with the panel here.

The Government suggests that in some of the state cases, prosecutors "conce[ded] * * * that the officers lacked particularized suspicion." Opp. 14-15. Not so. While officers acknowledged in some cases that they did not witness direct evidence of a crime, see Opp. 14-15, that is hardly a concession they lacked reasonable suspicion.[2] Whether the facts showed reasonable suspicion was the relevant—and litigated—question. See *Edmonds*, 145 A.3d at 884 (state argued that the "officers reasonably * * * suspect[ed] the defendant of criminal activity"); accord *Crain* v. *State*, 315 S.W.3d 43, 52-53 (Tex. Crim. App. 2010); *Garza* v. *State*, 771 S.W.2d 549, 558-559 (Tex. Crim. App. 1989) (en banc); *State* v. *Weyand*, 399 P.3d 530, 532, 536 (Wash. 2017);

[2] Direct observation of a crime would of course support a finding of probable cause, see *Maryland* v. *Pringle*, 540 U.S. 366, 370 (2003), beyond reasonable suspicion under *Terry*.

State v. *Andrade-Reyes*, 442 P.3d 111, 119 (Kan. 2019).[3]

Ultimately, the government is left arguing that in a "totality of the circumstances" context, even sharply disparate rationales and outcomes do not justify certiorari. But the truism that "each [Fourth Amendment] case must be evaluated on its own facts," Opp. 16 (citation omitted), hardly forecloses the possibility of disagreement about how to apply that framework. Indeed, the basic reasonable-suspicion inquiry has been unchanged since *Terry*, but this Court has repeatedly granted certiorari to refine its application. *E.g.*, *Illinois* v. *Wardlow*, 528 U.S. 119 (2000). And while "the mosaic which is analyzed for a reasonable-suspicion * * * inquiry is multi-faceted," some cases are "so alike" that appellate review is essential to ensure uniformity. *Ornelas*, 517 U.S. at 698. This Court's review would "unify precedent" and "come closer to providing law enforcement officers with a defined set of rules" to guide ex ante decisions about "whether an invasion of privacy is justified in the interest of law enforcement." *Id.* at 697-698.

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[3] *Andrade-Reyes* did say the government had "implicitly conceded" that officers could not justify a seizure merely because a defendant "sat in a car legally parked in a high-crime area" and "appeared nervous." 442 P.3d at 112, 118, 119. But the state vigorously defended the *Terry* stop on the ground that officers had observed *other* supposedly evasive activity. *Id.* at 118. In finding no reasonable suspicion, the Kansas Supreme Court cited its own precedent reasoning that a defendant's "car was lawfully parked in an area where cars of customers * * * frequently parked." *Id.* at 118-119 (citation omitted).

II. The Decision Below Is Wrong.

On the merits, the government makes two basic points: first, that the panel correctly identified the governing standard under *Terry* and did not commit "legal error" (other potential errors are left unaddressed), Opp. 9, 7; and second, that Petitioner's proposed rule is difficult to administer and inconsistent with precedent. Both arguments fail, as explained below. But as an initial matter, much of the Brief in Opposition can be discarded, as it rests on mischaracterizing Petitioner's position. Opp. 9. Petitioner does *not* contend that reasonable suspicion was absent merely because his conduct was "susceptible of an innocent explanation," Opp. 7 (quoting *Wardlow*, 528 U.S. at 125). Rather, Petitioner presents a narrower, more focused (and troubling) concern: whether innocuous but potentially ambiguous conduct that is widespread among law-abiding members of the public can support a finding of reasonable suspicion, merely because it occurs in a high-crime area. On *that* question, this Court's cases weigh heavily in Petitioner's favor.

1. Since *Terry*, a core precept of this Court's Fourth Amendment doctrine has been that officers may perform investigatory stops when they "observe[] *unusual* conduct." *Terry* v. *Ohio*, 392 U.S. 1, 30 (1968) (emphasis added); accord *United States* v. *Sokolow*, 490 U.S. 1, 8 (1989) (defendant's conduct was "out of the ordinary"); see also Pet. 21-30. Ambiguous conduct of the kind routinely undertaken by law-abiding citizens does not meet that requirement. Indeed, *Terry* itself contrasted the "unusual" conduct supporting a stop in that case—two men pacing in front of a shop

window, staring inside, conferring, and repeating that cycle 24 times—with common behavior of merely standing on a street corner. 392 U.S. at 22-23, 34. While the former pattern created reasonable suspicion, the result would have been "quite different" if officers observed "nothing unusual." *Id.* at 22-23; see also *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 886 (1975) (defendant's Mexican ancestry did not support a reasonable belief that defendant was in the country illegally because people with Mexican ancestry are commonly U.S. citizens); *Delaware* v. *Prouse*, 440 U.S. 648, 661 (1979) (police had no "articulable basis" for determining that "stopping a particular driver for a spot check would be more productive than stopping any other driver"). On this point, Petitioner cited *Reid* v. *Georgia*, which held that circumstances "describ[ing] a very large category of * * * innocent travelers" could not generate reasonable suspicion. 448 U.S. 438, 441 (1980); see Pet. 22. The Government offers no response. In sum, the distinction between ambiguous behavior that is "unusual" enough to support reasonable suspicion, and conduct widely exhibited by the general public (which is not), has been present since *Terry*'s inception.

The government unsuccessfully seeks refuge in off-point cases. *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 587 (2018), did not involve a reasonable suspicion inquiry. If anything, the case underscores the relevance of conduct's unusual nature, to a Fourth Amendment analysis. *Wesby* found probable cause to believe that partygoers knew they were trespassing, because "most homeowners" neither "live in near-barren houses" nor invite others to use their houses for

lurid parties. *Ibid.* Further, this Court observed, "people normally do not throw a bachelor party without a bachelor." *Ibid.*

The government also cites *Illinois* v. *Wardlow* and *United States* v. *Arvizu*, 534 U.S. 266 (2002), for the uncontroversial proposition that the mere "existence of an innocent explanation for conduct" does not "preclude[] a finding of reasonable suspicion." Opp. 9. But neither case dealt with routine conduct, widely shared among law-abiding members of the general public. The conduct in *Wardlow*—unprovoked flight—was inherently unusual. 528 U.S. at 124. *Arvizu* characterized the relevant conduct as "unusual[]," "abnormal," and "odd." 534 U.S. at 270-271. There, a minivan was traveling near the US-Mexico border, on a route used by smugglers, the driver slowed down rapidly upon seeing an officer, and the car's occupants sat with elevated knees and waved mechanically for four minutes. *Id.* at 269-272. Here, by contrast, "[p]arking in one of only a few available parking spots in front of a convenience store at an unextraordinary time of evening—8:30 p.m.—is something that any law-abiding citizen might do in order to patronize the store." Pet. App. 18a (Elrod, J., dissenting).[4]

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[4] The government suggests the location of Petitioner's car supported reasonable suspicion. Opp. 8. But the district court made no such finding (see Pet. App. 104a-105a; Opp. 3), and the row of available spots all located a few feet from the public roadway belies the government's suggestion (Opp. 8) that Petitioner parked "suspiciously close" to the store. Pet. 6-8. It is undisputed that Petitioner chose one of five or six available spots directly in front of an open convenience store on a Saturday night. Pet. App. 14a (Elrod, J., dissenting); accord *id.* at 3a.

2. The government next says Petitioner's rule is difficult to administer. But the government vacillates between criticizing Petitioner for advancing both a "bright-line rule[]" and an "essentially standardless" test. Opp. 9-10. Both cannot be true. The government also frets that "[d]ifferent courts would inevitably reach divergent results" under Petitioner's test, creating "confusion and indeterminacy." Opp. 10. But in its next breath, the government extols the virtues of "holistic and case-specific assessment[s]" based on each case's "particular facts." The government does not bother to explain how its own preferred standard will avoid divergent results. See *ibid*.

No administrability concerns will arise from adopting a common-sense rule that ambiguous, widely shared conduct—of the type engaged in by countless members of the general public—does not support a finding of reasonable suspicion merely because it is observed in a high-crime area. Since *Terry*, this Court has without difficulty determined whether conduct was "unusual." Officers are well-equipped to make the same commonsense judgments from their experience and training. See *Arvizu*, 534 U.S. at 275-276.

* * *

If the kind of routine, widely shared conduct at issue here justifies reasonable suspicion, there is virtually no place in a high-crime area where law-abiding citizens are secure from seizure. The Fourth Amendment's essential purpose is to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter* v. *United States*, 138 S. Ct. 2206, 2213 (2018). But if police may seize individuals engaging in conduct "that

any law-abiding citizen might do," Pet. App. 18a (Elrod, J., dissenting), arbitrary invasions will inevitably follow. See *Reid*, 448 U.S. at 441 ("reasonable suspicion" inquiry must guard against "virtually random seizures"). Absent this Court's review, it is Fifth Circuit law that anyone sitting in a parked car for 10 seconds outside an open convenience store in a bad neighborhood may be set upon by a convoy of armed police cruisers. Such "standardless and unconstrained" enforcement poses a "grave danger of abuse of discretion." *Prouse*, 440 U.S. at 661-662 (internal quotation marks omitted). This Court's intervention is necessary to clarify and reaffirm the limiting principle: Conduct in which law-abiding members of the public routinely engage cannot create "reasonable suspicion" for an investigatory stop, merely because it occurs in a high-crime area.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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