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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
KENNETH A. POLITE, JR.
Assistant Attorney General
ANDREW C. NOLL
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the lower courts correctly determined that an officer had reasonable suspicion to stop petitioner when, as part of a special task force assigned to patrol a specific area due to its history of burglaries and violent crimes, the officer observed that the vehicle petitioner was driving was the lone car parked in a convenience store parking lot at night; the vehicle was parked in one of the only spots where it would be difficult for individuals inside the store to see it; and neither petitioner nor his passenger exited the vehicle or otherwise appeared to patronize the store.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statute, and rule:

In the Supreme Court of the United States

No. 21-835

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 6 F.4th 651.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2021. On October 18, 2021, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including November 30, 2021, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Mississippi, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The court sentenced petitioner to 96

months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-22a.

1. On February 18, 2017, Officer Eric Stanton and a number of other police officers were patrolling the area of Capitol Street and Road of Remembrance in Jackson, Mississippi. Pet. App. 2a-3a, 26a-27a. The officers were members of the Jackson Police Department's "Direct Action Response Team," a "proactive unit" that patrols areas "where crime is deemed to be increasing." *Id.* at 26a-27a; see *id.* at 2a-3a. A supervisor had directed the officers to patrol the area that night because of "recent violent crime and burglaries in that area." *Id.* at 27a; see *id.* at 3a.

At about 8:30 p.m., while turning onto the Road of Remembrance, Officer Stanton observed a silver Cadillac parked in a convenience store parking lot. Pet. App. 2a-3a. It was dark outside, and the Cadillac was parked in the spot farthest from the cross-street with Capitol Street, beyond the store's entrance, and at a point of the storefront fully covered by brick—where it would be difficult for anyone inside the store to see the car. *Id.* at 3a, 8a, 27a, 29a; see Pet. 8 (reproduction of exhibit depicting location).

Officer Stanton saw two men sitting in the Cadillac. Pet. App. 3a. He observed the vehicle for 10 to 15 seconds, during which time neither man exited the vehicle. *Ibid.* And in Officer Stanton's judgment, neither man "'appear[ed] to be patronizing the establishment.'" *Ibid.* Because he believed that the men might be "casing the business," Officer Stanton stopped to conduct a field interview and to confirm "that they had legitimate reasons [to be] at the business." *Id.* at 32a; see *id.* at 50a. He stopped his cruiser close to the Cadillac and

activated his blue lights; separate cruisers with five or six other members of his patrol also parked close to the Cadillac. *Id.* at 3a, 27a, 30a, 35a-37a.

Officer Stanton approached the Cadillac in a "non-threatening" manner, and petitioner, who was in the driver's seat, rolled down his window. Pet. App. 11a; see *id.* at 4a. Officer Stanton immediately smelled "the strong odor of marijuana coming from the vehicle." *Id.* at 4a. The Cadillac's passenger then placed an object into his mouth. *Ibid.* Officer Stanton ordered both men to exit the vehicle and, after they did so, observed a .32 caliber revolver on the driver's seat. *Ibid.* The gun contained five live rounds and two spent shell casings. *Id.* at 4a n.2, 32a. A records check disclosed an outstanding arrest warrant for petitioner, and Officer Stanton placed him under arrest. *Id.* at 33a-34a.

2. A federal grand jury in the Southern District of Mississippi returned an indictment charging petitioner with possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Indictment 1. Before trial, petitioner moved to suppress the firearm on the theory that the officers violated the Fourth Amendment by detaining him without reasonable suspicion. See Pet. App. 4a.

Following an evidentiary hearing, the district court denied petitioner's motion to suppress. Pet. App. 109a. The court found that the "investigatory aspect" of the officers' initial approach to the Cadillac did not "evolve[] into a seizure." *Id.* at 106a. The court also indicated that the circumstances provided the officers with grounds to "resolve a suspicious circumstance," and thus reasonable suspicion to make a stop under *Terry* v. *Ohio*, 392 U.S. 1 (1968). Pet. App. 105a; see *id.* at 7a. And the court determined that before the officers took any

further action, Officer Stanton smelled marijuana coming from the vehicle, which established a basis for petitioner's removal from the car and arrest. *Id.* at 106a-107a. The court also noted that, after petitioner was removed from the car, the firearm was in the officers' plain view on the seat where petitioner had been seated. *Id.* at 107a.

The case proceeded to trial, and the jury found petitioner guilty. Judgment 1. The district court sentenced petitioner to 96 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1a-22a.

a. "[A]ssum[ing] arguendo" that petitioner had been seized, Pet. App. 7a, the court of appeals recognized that such a "temporary, warrantless detention of an individual * * * may only be undertaken if the law enforcement officer has reasonable suspicion to believe that a crime has occurred or is in the offing," *id.* at 5a (citing *Terry*, 392 U.S. at 30-31). And the court found that, in the specific circumstances here, reasonable suspicion supported petitioner's seizure, highlighting a set of facts that it found "determinative." *Id.* at 7a; see *id.* at 7a-8a.

The court of appeals noted that the officers had been patrolling the area "because of the prevalence of 'violent crime and burglaries'" and that this Court has found such facts "'among the relevant contextual considerations'" when determining whether reasonable suspicion exists. Pet. App. 7a (quoting *Illinois* v. *Wardlow*, 528 U.S. 119, 124 (2000)). The court also focused on the role that this Court has given to the experience of law enforcement—ten years of experience for Officer Stanton—in evaluating the circumstances of a particular case. *Ibid.* (citing *Terry*, 392 U.S. at 27). The court

then observed that Officer Stanton, in conducting his special-patrol duties, had seen the Cadillac parked in the spot farthest from the store's glass storefront, "facing [the store's] brick wall rather than the glass door, so [that] its occupants could not easily be viewed from within the store," *id.* at 8a, and thus "in a manner that suggested to [a] seasoned officer that its occupants might be casing the store or preparing to prey on patrons," *id.* at 10a. The court also took note that the men in the car did not step out of the previously parked vehicle while Officer Stanton observed them. *Id.* at 8a. Emphasizing that "[e]very case that turns on reasonable suspicion is intensely fact specific," and identifying differences from the scenarios in prior circuit decisions on which petitioner relied, the court found that the "reasonable, articulable facts taken in context here supported" Officer Stanton's decision to briefly seize petitioner and have a discussion with him to "dispel[] the ambiguity in the situation." *Ibid.*; see *id.* at 9a-11a.

b. Judge Elrod dissented in relevant part. Pet. App. 14a-22a. In her view, the officers seized petitioner, *id.* at 15a-17a, and Officer Stanton lacked reasonable suspicion to justify the stop, *id.* at 17a-22a.

ARGUMENT

Petitioner renews his contention (Pet. 26-28) that he was seized in violation of the Fourth Amendment between the time when the officers parked and approached the Cadillac and the time when Officer Stanton smelled marijuana. But petitioner fails to identify any legal error in the lower courts' factbound assessments, conflict with a decision of this Court, or any decision of another court of appeals or state court of last resort that has reached a contrary result on analogous

facts. The petition for a writ of certiorari should be denied.

1. As this Court explained in *Terry* v. *Ohio*, 392 U.S. 1 (1968), "the central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Id.* at 19; see *Birchfield* v. *North Dakota*, 136 S. Ct. 2160, 2186 (2016) ("[R]easonableness is always the touchstone of Fourth Amendment analysis."). Accordingly, in *Terry*, this Court held that a police officer may make an investigatory stop of a suspect based upon a reasonable and articulable suspicion that the suspect is engaged in potentially criminal activity. 392 U.S. at 21, 30-31.

In determining whether an officer had reasonable suspicion, a court "must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing." *United States* v. *Arvizu*, 534 U.S. 266, 273 (2002) (citation and internal quotation marks omitted). That "process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *Ibid.* (citation and internal quotation marks omitted). To establish reasonable suspicion, "the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *Id.* at 274.

In *Illinois* v. *Wardlow*, 528 U.S. 119 (2000), this Court emphasized that one fact that is "among the relevant contextual considerations in a *Terry* analysis" is whether a "stop occurred in a 'high crime area.'" *Id.* at

124 (citation omitted). As the Court explained in *Wardlow*, officers "are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." *Ibid.* Instead, those characteristics can support the context-specific reasonableness of a brief investigatory stop, as they did in *Wardlow* itself. *Ibid.*

The Court has also emphasized that officers "need not rule out the possibility of innocent conduct" in order to have reasonable suspicion. *Arvizu*, 534 U.S. at 277; see *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 588-589 (2018) (applying same rule in analyzing probable cause). The Court has explained that "the Fourth Amendment" "accepts the risk that officers may stop innocent people" as long as an individual who is stopped is permitted "to go on his way" if the suspicion is dispelled. *Wardlow*, 528 U.S. at 126. Indeed, even when "each of the[] factors" that a court is considering "alone is susceptible of innocent explanation," they may, "[t]aken together, * * * suffice[] to form a particularized and objective basis for" reasonable suspicion. *Arvizu*, 534 U.S. at 277; see *Wardlow*, 528 U.S. at 125 ("Even in *Terry*, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation."). Accordingly, the Court has explained that a *Terry* stop following ambiguous conduct does not "establish a violation of the Fourth Amendment"; rather, officers may detain an individual "to resolve the ambiguity." *Wardlow*, 528 U.S. at 125.

2. a. The lower courts did not legally err in their application of those principles to the specific facts of this case. The court of appeals properly recognized that the stop's occurrence in a high-crime area was a "relevant

contextual consideration[] in [the] *Terry* analysis," Pet. App. 7a (quoting *Wardlow*, 528 U.S. at 124), emphasizing that here the officers were on patrol as part of a special task force assigned to that area precisely because of the prevalence of burglaries and other violent crime, *id.* at 7a, 10a. It then highlighted several particularized observations by Officer Stanton that, "taken in context," suggested that petitioner and his passenger might be casing the convenience store for the very type of crime that the patrol was created to prevent. *Id.* at 8a. The Cadillac was the only car parked in the lot and was parked in one of the only spots facing the store's brick wall, rather than its glass storefront. *Id.* at 8a, 10a. That position ensured that individuals inside the store could not easily see the Cadillac or its occupants—while petitioner and his passenger could watch the entrance. *Id.* at 8a, 11a. Officer Stanton—who first spotted the Cadillac only sometime after it had initially parked there—observed the car for an additional 10 to 15 seconds and saw neither the driver nor the passenger exit the car or otherwise appear to patronize the business. *Id.* at 3a, 8a.[*]

"Taken together," the court of appeals found those facts "suffic[ient] to form a particularized and objective basis for" reasonable suspicion, *Arvizu*, 534 U.S. at 277, such that it was reasonable for the officers to briefly detain petitioner "at least to the point of * * * dispelling

---

[*] Petitioner incorrectly contends (Pet. 26 n.3) that the court of appeals made inconsistent observations about the Cadillac's location in the parking lot. The Cadillac was parked alongside the convenience store, and therefore "close" to the store. Pet. App. 10a. And the Cadillac was parked in the only location where the wall was fully covered by bricks, and therefore "as far as possible from the storefront." *Id.* at 8a.

the ambiguity in the situation," Pet. App. 8a. The court noted that Officer Stanton made a "non-threatening" approach to the Cadillac "to ask some questions" and found it "difficult to see how any active policing can take place" if such conduct is "constitutionally impermissible." *Id.* at 11a-12a.

b. Petitioner's assertions of legal error lack merit.

Petitioner acknowledges (Pet. 23) that the lower courts appropriately considered the area's high rate of crime in evaluating whether the circumstances were sufficiently suspicious to warrant further investigation. See *Wardlow*, 528 U.S. at 124. He argues, however, that this Court's decisions foreclose a finding that the circumstances were sufficiently suspicious, on the theory that the conduct could potentially be described as "common" or "ambiguous." Pet. 23-24; see Pet. 21-26. But the Court has repeatedly rejected the contention that the existence of an innocent explanation for conduct precludes a finding of reasonable suspicion. See *Arvizu*, 534 U.S. at 277 ("A determination that reasonable suspicion exists * * * need not rule out the possibility of innocent conduct" even when "each of the[] factors alone is susceptible of innocent explanation."); *Wardlow*, 528 U.S. at 125 (explaining that even when "the conduct justifying [a] stop [i]s ambiguous and susceptible of an innocent explanation * * * officers c[an] detain the individual[] to resolve the ambiguity"); see also *Wesby*, 138 S. Ct. 588-589.

The Court likewise has rejected efforts to impose bright-line rules—like the one that petitioner proposes here—that "'clearly delimit' an officer's consideration of certain factors." *Arvizu*, 534 U.S. at 275 (citation omitted). The Court has explained that imposing such rules would "seriously undercut the 'totality of the

circumstances' principle which governs the existence *vel non* of 'reasonable suspicion.'" *Ibid.* And petitioner's rule would require courts to make essentially standardless judgments about the set of actions that can be described as "lawful" conduct in which members of the public "routinely engage." Pet. I. Different courts would inevitably reach divergent results on broad classes of conduct, and the regime would create confusion and indeterminacy for officers in the field. The sound course is the one that this Court's precedent already specifies—namely, a holistic and case-specific assessment that views particular facts in light of the officer's experience. See *Terry*, 392 U.S. at 27.

Contrary to petitioner's suggestion (Pet. 24), the court of appeals' decision does not conflict with this Court's decision in *Brown* v. *Texas*, 443 U.S. 47 (1979). In *Brown*, the Court found no reasonable suspicion to support stopping an individual who was walking in an alley during the afternoon in a high-crime area. *Id.* at 48-53. The Court based its finding on a number of factors: "the officers did not claim to suspect appellant of any specific misconduct," but instead stopped him only "to ascertain his identity"; although the officers thought "that the situation in the alley 'looked suspicious,'" they were "unable to point to any facts supporting that conclusion"; and "[t]here [wa]s no indication in the record that it was unusual for people to be in the alley." *Id.* at 49, 52. Here, in contrast, the officers suspected petitioner of specific misconduct—that he might be casing the convenience store. That suspicion rested on a number of factors, including the time of day; the location in which petitioner had parked the Cadillac; the occupants' lack of any apparent interest in patronizing the

business; and the recent spate of burglaries and violent crime in the area.

Petitioner advances (Pet. 26-28) innocent explanations for each of the factors that collectively led the officers to suspect that petitioner might be casing the convenience store. But this Court's decisions "preclude[] this sort of divide-and-conquer analysis" which describes each observation as "by itself readily susceptible to an innocent explanation" and thus "entitled to 'no weight.'" *Arvizu*, 534 U.S. at 274 (citation omitted). At bottom, petitioner simply disagrees with the lower courts' application of the framework approved by this Court to the facts of his case. No reason exists to review that "intensely fact specific" determination, Pet. App. 8a, which the court of appeals took care to distinguish from other cases that petitioner claimed to be analogous, see *id.* at 9a-11a.

3. Petitioner contends (Pet. 16-21) that the decision below conflicts with decisions of the Fourth, Eighth, and Tenth Circuits and several state courts. But petitioner identifies no decision holding that ambiguous, "potentially suspicious, yet widely shared, conduct," Pet. 16, can never support a finding of reasonable suspicion. And none of those decisions demonstrates that another court of appeals or state court would have reached a different outcome on the particular facts of this case.

a. The Tenth Circuit decisions that petitioner cites (Pet. 17-18) each turned on case-specific evaluations of the relevant facts—and not on the conclusion that officers are barred from considering particular types of conduct when determining whether there is reasonable suspicion to support a *Terry* stop. In *United States* v. *Hernandez*, 847 F.3d 1257 (2017), the Tenth Circuit

found no reasonable suspicion where the defendant, who was wearing black clothing and carrying two backpacks while walking in a high-crime area next to a fenced construction site that had previously been the target of theft, reasoning, *inter alia*, that the defendant was "merely walking next to a construction site that was previously the target of thefts" and "was not, for example, inside the fence, carrying construction materials, or acting as a lookout." *Id.* at 1268; see *id.* at 1260-1261, 1268-1269. And in its non-precedential decision in *United States* v. *Dell*, 487 Fed. Appx. 440 (2012), the Tenth Circuit found that the officer "never articulated why" his observation of the defendant and a companion peering into the windows of a parked car "led him to suspect criminal activity," and the court found that the officer's assertions about the area's high crime rate were "generalized," "ambiguous," "anecdotal," and "not particularly probative or persuasive." *Id.* at 444-445, 447. Neither decision would be controlling on the facts here, where petitioner was not merely walking by a recently victimized area, and where Officer Stanton articulated why petitioner's actions led him to believe that petitioner might be casing the convenience store.

The Fourth Circuit decisions on which petitioner relies (Pet. 18-19) likewise turned on case-specific circumstances. In *United States* v. *Slocumb*, 804 F.3d 677 (4th Cir. 2015), the court recognized that facts "'susceptible to innocent explanation' individually may 'suffice'" to establish reasonable suspicion "when taken together," but found no reasonable suspicion under "the totality of the circumstances" because an officer had spoken with the defendant before he was seized and received "answers consistent with [the defendant's] actions" that "dispelled" any reasonable suspicion. *Id.* at 682, 684

(quoting *Arvizu*, 534 U.S. at 277) (brackets omitted). And in *United States* v. *Black*, 707 F.3d 531 (2013), the Fourth Circuit reiterated the same point about potentially innocent explanations, see *id.* at 539, but concluded that the lawful open carry of a firearm by the defendant's associate and another associate's previous arrest did not support individualized reasonable suspicion that justified stopping the defendant, *id.* at 540. Neither decision addressed facts like the ones here, let alone adopted a rule governing them. Moreover, *Slocumb* predates this Court's discussion of a suspect's contemporaneous assertions of innocence in *Wesby*, *supra*, and the Fourth Circuit has made clear that *Black* did not hold that lawful conduct can never support reasonable suspicion, *Walker* v. *Donahoe*, 3 F.4th 676, 682-686 (2021), explaining that "[t]he notion that lawful conduct can contribute to reasonable suspicion is hardly shocking or controversial," *id.* at 683; see *Wesby*, 138 S. Ct. at 588 ("[P]robable cause does not require officers to rule out a suspect's innocent explanation for specific facts.").

Petitioner also cites (Pet. 16-17) decisions in which the Eighth Circuit has declined to find reasonable suspicion where the court believed that a defendant's conduct was shared "by countless, wholly innocent persons," *United States* v. *Jones*, 606 F.3d 964, 967 (2010) (per curiam), was "typical of countless innocent people," *United States* v. *Crawford*, 891 F.2d 680, 682 (1989), or "fit" "[t]oo many people," *United States* v. *Gray*, 213 F.3d 998, 1001 (2000) (citation omitted). But that court has reiterated that the Fourth Amendment requires consideration of the totality of the circumstances confronting an officer. See *Jones*, 606 F.3d at 965-967; *Gray*, 213 F.3d at 1000. And the court has more

recently confirmed that even "factors" that "hardly seem suspicious taken on their own" can support a finding of reasonable suspicion and emphasized that "[t]here is no place in" the reasonable-suspicion "analysis for a 'divide-and-conquer' approach that would isolate each cited factor and disregard it if a court could 'conceive of an innocent explanation.'" *United States* v. *Dortch*, 868 F.3d 674, 680 (8th Cir. 2017) (brackets, citations, and internal quotation marks omitted).

In any event, the facts in the Eighth Circuit cases on which petitioner relies bear little resemblance to the facts here. See *Jones*, 606 F.3d at 965-967 (defendant was crossing a parking lot in a high-crime area while clutching the outside of his sweatshirt pocket, and the government never identified "what criminal activity" the officer suspected before stopping and frisking the defendant); *Gray*, 213 F.3d at 1000-1001 (defendant crossed the street "in a hurried fashion" around 10 p.m. in an area known for drug activity and prostitution, and the officers "conceded they saw nothing out of the ordinary or criminal" before frisking the defendant); *Crawford*, 891 F.2d at 680-682 (defendant ran into an apartment building where an individual previously arrested on drug charges lived, carried a bicycle and several coats to a car, and drove away in the car after looking up and down the street numerous times). They therefore do not show that, if presented with the specific facts of this case, the Eighth Circuit would reach a different conclusion than the court of appeals reached below.

b. Petitioner also contends (Pet. 19-21) that the decisions of several state courts of last resort conflict with the decision below. But the state-court decisions on which petitioner relies involve facts materially different from the ones here, or concessions by the State that the

officers lacked particularized suspicion. See *State* v. *Edmonds*, 145 A.3d 861, 867-868, 882 (Conn. 2016) (defendant was standing alone in a parking lot behind a sandwich shop at 7 p.m. "for a few seconds" and began to walk away and move his hands near his waist when officers approached, and "[t]here was no testimony suggesting that [the officers] had any reason to believe that * * * any sort of criminal activity was underway or recently had transpired at that location"); *State* v. *Andrade-Reyes*, 442 P.3d 111, 118-119 (Kan. 2019) (per curiam) (State "implicitly conceded" that the officers "lacked reasonable suspicion" when the defendant "sat in a car legally parked in a high-crime area," appeared nervous, clenched his hands and reached toward the floor, and did not respond to an officer's questions); *Crain* v. *State*, 315 S.W.3d 43, 46-47, 53 (Tex. Crim. App. 2010) (officer observed the defendant, who was walking late at night in a residential area, "grab[] at his waist," and the officer conceded that "he had not observed the [defendant] do anything that could be construed as criminal activity"); *Garza* v. *State*, 771 S.W.2d 549, 558-559 (Tex. Crim. App. 1989) (en banc) (officer knew that the defendant "'had been seen at some unspecified times in an area where some unspecified burglaries had been committed at some unspecified times'" but "had observed nothing to indicate that an offense was being committed or had been committed and nothing to suggest that any illegal activity was about to take place") (citation omitted); *State* v. *Weyand*, 399 P.3d 530, 532, 536 (Wash. 2017) (defendant walked quickly when leaving a residence known for drug activity and looked up and down the street before entering a car, and the officer "failed to articulate a reasonable suspicion that

[the defendant] was involved in criminal activity at that house based on [the defendant's] conduct").

Consistent with this Court's decisions, those courts generally acknowledge that the reasonable-suspicion determination must be based on the totality of the circumstances. See, *e.g.*, *Crain*, 315 S.W.3d at 53 (considering "the totality of the circumstances" before finding no reasonable suspicion); *Weyand*, 399 P.3d at 534-535 (indicating that a court must examine the "totality of the circumstances" and "each case must be evaluated on its own facts"). And the fact-specific state decisions provide no better basis than the cited circuit decisions for deeming lower courts to be in conflict on the principles applicable to a situation like the one here. Further review of the factbound decision in this case is accordingly unwarranted. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
KENNETH A. POLITE, JR.
Assistant Attorney General
ANDREW C. NOLL
Attorney

APRIL 2022