NO. 15-168

In the Supreme Court of the United States

RICHARD RYNEARSON,

PETITIONER,

v.

JUSTIN K. LANDS, BORDER PATROL AGENT, ET AL.,

RESPONDENTS.

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

BRIEF OF THE TEXAS CIVIL RIGHTS PROJECT AND THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amicus Texas Civil Rights Project ("TCRP") is a non-profit, public-interest legal organization with 3,000 members in Texas. TCRP strives to foster equality, secure justice, ensure diversity, and strengthen low- and moderate-income communities in Texas. It works through education, advocacy, and litigation to protect individuals' civil rights and liberties under the Constitution.

TCRP was founded in 1990 as part of Oficina Legal del Pueblo Unido, a non-profit community-based foundation located in South Texas, and now has offices in Austin, South Texas, El Paso, Houston, and Midland/Odessa. TCRP has appeared as *amicus curiae* or represented individuals in litigation involving privacy rights, Fourth Amendment rights, police and border patrol misconduct, and other border and civil rights-related concerns. Consistent with its mission, TCRP is especially interested in the ways in which members of the public are affected by the operations of the United States Border Patrol.

Amicus National Immigration Project of the National Lawyers Guild ("NIP") is a non-profit membership organization of attorneys, legal workers, grassroots advocates, and others working to defend

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[1] Pursuant to Sup. Ct. R. 37.2(a), counsel for all parties received notice of *amici*'s intent to file this brief 10 days before its due date. All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

immigrants' rights and secure the fair administration of the immigration and nationality laws. For thirty years, the NIP has provided legal training to the bar and the bench on immigration issues. The NIP has participated as *amicus curiae* in several significant immigration-related cases before this Court. *See, e.g.*, *Vartelas v. Holder*, 132 S. Ct. 1479 (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Padilla v. Kentucky*, 559 U.S. 356 (2010).

Both TCRP and NIP are concerned about the Fifth Circuit's decision, which permits border patrol agents to conduct lengthy checkpoint detentions to investigate matters unrelated to immigration status without reasonable suspicion of any criminal activity. The justification for this arbitrary intrusion on an individual's Fourth Amendment rights appears to be nothing more than an agent's view that the detainee engaged in "unorthodox tactics." App. 8a. Not only is the Fifth Circuit's decision out of step with this Court's clear precedent limiting the permissible scope of suspicionless detentions, it also conflicts with decisions from other circuits.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *United States v. Martinez-Fuerte*, this Court approved internal immigration checkpoints as a narrow exception to the general rule that law enforcement officers may not stop someone without individualized suspicion of wrongdoing. 428 U.S. 543, 545 (1976). Because a checkpoint detention is for the "sole purpose" of "conducting a routine and limited inquiry into residence status," *id.* at 560, it should "usually consume[] no more than a minute," *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975) (describing identical parameters for roving stops), or perhaps up to five minutes for travelers referred to a secondary inspection area, *Martinez-Fuerte*, 428 U.S. at 547. To ensure that the "intrusion on Fourth Amendment interests is quite limited," *id.* at 557, the detention may extend only as long as needed for a "brief question or two and possibly the production of a document evidencing a right to be in the United States." *Id*. at 558 (internal quotation marks omitted).

The permissible duration of an immigration checkpoint stop, like any non-arrest detention, is therefore measured by its justifying purpose. This limitation finds its roots in *Terry v. Ohio*, which held that a seizure based on less than probable cause must be "reasonably related in scope to the circumstances which justified the interference" with the detainee's Fourth Amendment rights. 392 U.S. 1, 19–20 (1968); *see also Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (traffic stop may not be "prolonged beyond the time reasonably required to complete [its]

mission"); *Florida v. Royer*, 460 U.S. 491, 500 (1983) ("scope of the detention must be carefully tailored to its underlying justification"). As the Court recently reaffirmed, investigatory stops must be limited to no more than "the time needed to handle the matter for which the stop was made." *Rodriguez v. United States*, 135 S. Ct. 1609, 1612 (2015).

In this case, petitioner was detained at an internal immigration checkpoint for an extended period *after* he verbally affirmed his citizenship and offered two valid U.S. passports, even though there was never any suspicion of wrongdoing or any other basis for prolonging his detention. In a split decision, the Fifth Circuit held that the extended detention did not violate petitioner's Fourth Amendment rights because instead of agreeably responding to the stop, petitioner purportedly engaged in "unorthodox tactics," including asserting "his right against unlawful searches and seizures." App. 7a–8a. But the agents never had any reasonable suspicion that petitioner was in the country illegally or involved in criminal activity. App. 7a; *id.* at 16a n.7 (Elrod, J., dissenting). And nothing petitioner said or did during the stop was unlawful or contributed to the length of his detention after he produced his passports. App. 15a. Instead, the prolonged delay was caused by the agents' failure to limit their stop to determining petitioner's citizenship status—attempting to stir up trouble, they tried to contact his military base and inquire into his military status, which they had no right to do.

A checkpoint agent's duty to determine immigration status with diligence applies regardless

of whether the detainee is as agreeable as the agent might prefer. And an individual's decision to invoke his constitutional rights can never justify an invasion of those rights. Nor should it lessen or excuse an agent's obligation to conduct a diligent stop limited to the only purpose for which the stop was permitted—determining the individual's citizenship status. To hold otherwise, as the Fifth Circuit did below, opens a conflict with decisions from other circuits and establishes a dangerous precedent that exposes citizens to arbitrary exercises of government power and threatens to undermine the justification for permitting suspicionless checkpoint stops in the first place.

The question presented in this case is important. *Amici* are especially concerned about recent reports of widespread abuses of the carefully tailored limits that the Constitution imposes on internal checkpoints, as this Court recognized nearly forty years ago. The Court should therefore grant certiorari to reaffirm the clear rule that, unless there is reasonable suspicion of wrongdoing, border patrol agents must limit the scope of any detention in terms of its duration, purpose, and the reasonable diligence needed to complete the stop.

ARGUMENT

I. The Fifth Circuit's Decision Creates An Irreconcilable Conflict In Lower Court Authority.

The Fifth Circuit's decision below cannot be reconciled with this Court's clear and long-standing requirement that an agent exercise reasonable diligence during any kind of short detention—especially during a suspicionless immigration stop. The lower court justified its departure from clearly established precedent on the theory that petitioner purportedly engaged in "unorthodox tactics" and "the agents had difficulty determining how to respond." App. 8a. But that approach is not only contrary to this Court's precedent, it is also squarely in conflict with decisions from other courts of appeals.

As the Court explained earlier this year, in a case involving a traffic stop made with probable cause, "an officer always has to be reasonably diligent" in his investigation. *Rodriguez*, 135 S. Ct. at 1616 (internal quotation marks omitted); *see also United States v. Sharpe*, 470 U.S. 675, 686 (1985). A detainee's exercise of his rights cannot excuse the officer's duty of diligence or justify improperly prolonging a detention. Instead, an agent must "diligently pursue[] a means of investigation that [is] likely to confirm or dispel [his] suspicions quickly." *Sharpe*, 470 U.S. at 686. And only when the delay is "almost entirely" attributable to the detainee's actions should a court sanction a prolonged delay. *Id.* at 687–88.

Sharpe involved a 20-minute *Terry* stop, where a suspect fled recklessly when signaled to pull over. *See id.* at 678, 688 n.6. The Court explained that the extended *Terry* stop—a stop that, unlike here, must be based on reasonable suspicion—was justified only because there was "no evidence that the officers were dilatory in their investigation" and any "delay in the case was attributable almost entirely to the evasive actions of" the suspect. *Id.* at 687–88. As the Court noted, the case "[c]learly" did "not involve any delay *unnecessary* to the legitimate investigation of the law enforcement officers," and the suspect "presented no evidence that the officers were dilatory in their investigation." *Id.* at 687 (emphasis added).

Until the decision below, lower courts have faithfully followed *Sharpe*'s clear guidance. *See* Pet. 27–31. Indeed, courts in very similar cases have rejected the approach embraced by the Court below. Two such decisions—one from the Third Circuit and one from the Ninth Circuit—are particularly notable. In both cases, the lower courts recognized, consistent with this Court's precedent, that the length of a stop must be tied to its mission and the stop cannot be prolonged to allow officers to pursue unrelated inquiries.

In *Karnes v. Skrutski*, the Third Circuit held that a traffic detainee's conduct—which included, among other things, being "argumentative and difficult"—could not justify prolonging a traffic stop to an excessive length. 62 F.3d 485, 495–97 (3d Cir. 1995), *overruled in part on other grounds by Curley v. Klem*, 499 F.3d 199, 209–11 (3d Cir. 2007). As the court explained, the detainee "d[id] not bear the burden of

justifying his refusal to allow police to invade his privacy"; instead, it is "the government official who must meet the constitutional requirements before he can encroach upon an individual's privacy." *Id.* at 497. Those "constitutional requirements" include avoiding "additional delay." *Id.* The officers argued that "any additional delay was attributable to [the detainee] because he asked the troopers questions, argued with them, challenged their procedures, and insisted on explanations as to their actions." *Id.* Even still, the Third Circuit held that the delayed detention "was the result primarily of the [officers'] dilatory pursuit of their investigation, not [the detainee's] questioning," and that the officers' argument about delay "shows a misunderstanding about the purposes of the Fourth Amendment." *Id.*

The Ninth Circuit confronted a similar situation in *Liberal v. Estrada*, where the court rejected a claim for qualified immunity arising out of a 45-minute traffic stop that was attributable, in part, to the conduct of the suspect. 632 F.3d 1064 (9th Cir. 2011). After a patrol car turned on its lights, the suspect pulled into a darkened parking lot, turned off his headlights, and confronted the officers about his detention. *Id.* at 1068–69. Although this behavior "certainly played a part in prolonging his detention," the court found the detention unconstitutionally prolonged because the officers "were not diligently pursuing a means of investigation that was likely to confirm or dispel their suspicions quickly." *Id.* at 1081. The stop should have lasted only five or ten minutes—the time needed for "investigatory checks to be run or [for] asking [the detainee] questions." *Id.* Yet the stop continued for more than half an hour

"merely to engage in an exaggerated display[] of authority," which the Ninth Circuit held was "unreasonable and unconstitutional." *Id.* (internal quotation marks omitted).

In contrast, the Fifth Circuit here stretched *Sharpe* well beyond its limits, ignoring altogether the border patrol agents' obligation to conduct a diligent investigation into the only reason the stop was permitted—whether petitioner was lawfully in the United States. It is undisputed that very early in the stop petitioner did everything needed to allow the agents to determine his lawful right to be in the United States. App. 103a–08a; 12a–13a (Elrod, J., dissenting). When asked, petitioner told the agents that he was a United States citizen. App. 12a. And within minutes and upon request, petitioner surrendered both a personal and official U.S. passport, App. 12a—documents that he was not even required to have or produce at an interior checkpoint. It should have taken only moments to confirm the authenticity of those documents and send petitioner on his way. There was no other lawful basis for continuing his detention.

The Fifth Circuit excused the agents' dilatory conduct on the view that petitioner engaged in purportedly "unorthodox tactics" during the stop and "the agents had difficulty determining how to respond." App. 8a. But that makes no sense. The only purpose of the stop was to determine whether petitioner had a right to be in the United States and nothing petitioner did prevented the agents from asking the questions and inspecting the documents needed to make that determination. The delay had

nothing to do with determining petitioner's citizenship; it resulted from the agents' decision to use the stop to question petitioner about his military status and to complain to his military superiors when he was less deferential than they might have preferred. The notion that the agents could prolong the stop for *that* purpose, merely because they did not like petitioner's demeanor, is absurd. That is precisely the type of delay and improper conduct that this Court's precedents clearly prohibit. It is also directly contrary to the decisions from the Third and Ninth Circuits discussed above. Those courts have recognized that the scope of an officer's search or seizure does not expand merely because a detainee or a suspect peaceably questions the officer's authority.

II. The Fifth Circuit's Decision Invites Abuse Whenever A Detainee Engages in "Unorthodox Behavior."

Unlike its general interest in criminal enforcement, the government's interest in making suspicionless administrative detentions at internal immigration checkpoints must be carefully circumscribed to protect constitutional liberties. The purpose of an immigration checkpoint is to accomplish one, and only one, objective: to determine whether the detainee has a lawful right to be in the United States. To be sure, in some circumstances, the conduct of the detainee may give rise to reasonable suspicion of criminal activity, which could justify a continued detention to investigate beyond the initial purpose of the stop. Other times, it is possible that the detainee's behavior so interferes with an agent's activities (as in *Sharpe*), that it is

impossible for an agent to complete the stop within a short time. But absent either circumstance, the stop should last no longer than reasonably necessary for a border patrol agent to determine the detainee's citizenship status.

The decision below departs from these clearly established rules by creating a new and amorphous exception for suspicionless stops: it invites border patrol agents to extend stops whenever a detainee engages in what the agents might characterize as "unorthodox tactics," App. 8a, which apparently include asserting one's constitutional rights. App. 11a (Elrod, J., dissenting); *cf. Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015) (noting due process concerns when criminal law is "so standardless it invites arbitrary enforcement"). But the constitutional right to be free from unreasonable seizures is "of little value if [it can] be . . . indirectly denied" by border patrol agents whenever a detainee's protected behavior is arguably "unorthodox." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) (internal quotation marks omitted). That novel rule has no basis in precedent and opens a very dangerous loophole in basic principles of Fourth Amendment law.

This Court has long recognized that "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987); *see also Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973) (per curiam) (reversing conviction of petitioner who

"verbally and negatively protested [the officer]'s treatment of him"). As a result, "when an officer, without reasonable suspicion or probable cause, approaches an individual, . . . any refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (internal quotation marks omitted). And even when there may be reasonable suspicion for a *Terry* stop, a detainee's refusal to cooperate beyond what the law requires cannot be a basis for extending the duration of the limited stop. *See, e.g., United States v. Massenburg*, 654 F.3d 480, 491 (4th Cir. 2011) ("refusing to consent to a search cannot itself justify a nonconsensual search"). In the typical *Terry* stop, "the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). "But," importantly, "the detainee is not obliged to respond." *Id.*

As noted above, this case does not involve a *Terry* stop, where reasonable suspicion is required. It involves a suspicionless stop by border patrol agents, which means that even more care should be required to ensure that the stop remains within the proper bounds of law. A detainee's constitutionally protected behavior, regardless of whether it is perceived by an agent as respectful and deferential or ill-mannered and standoffish, cannot by itself be a basis for prolonging a checkpoint detention for non-immigration purposes. To the contrary, although an individual traveling through an immigration checkpoint must stop when ordered to do so, he has

no obligation to actively assist the immigration inspection—just like the suspect detained at a *Terry* stop has no constitutional obligation to respond. *See Berkemer*, 468 U.S. at 439. If the individual chooses not to answer some questions (or otherwise chooses to invoke his rights), his conduct does not justify indefinite detention until all questions (whether related to immigration or not) are answered to the border patrol agent's satisfaction.

In short, a detainee's behavior should not excuse an agent from the duty to pursue diligently the only legitimate reason for the detention—determining citizenship status. An agent at an immigration checkpoint could otherwise use any "unusual" behavior as justification for detaining a traveler indefinitely for purposes unrelated to citizenship, converting the brief immigration stop into a *de facto* arrest. *See Sharpe*, 470 U.S. at 685 ("Obviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop."); *Royer*, 460 U.S. at 499 ("In the name of investigating a person who is no more than suspected of criminal activity, the police may not . . . seek to verify their suspicions by means that approach the conditions of arrest"). The Constitution does not protect only the meek, polite, and compliant. Regardless of a detainee's behavior, "an officer always has to be reasonably diligent" in focusing on the legitimate mission of an investigatory stop. *See Rodriguez*, 135 S. Ct. at 1616 (internal quotation marks omitted).

III. The Question Presented Is Especially Important And Worthy Of This Court's Review.

More than a hundred million travelers pass through interior checkpoints every year, Pet. 32, and concerns about unconstitutional conduct of border patrol agents at those checkpoints has persisted for decades. These concerns are widespread—as recent reports from Arizona and California demonstrate—and the Fifth Circuit's decision opens the door to abuse in important states where immigration checkpoints are often used. This Court should therefore grant this petition to reaffirm the clear constitutional limits on suspicionless stops and prevent the potential abuses permitted under the Fifth Circuit's misguided approach.

Concerns regarding harassment and extended detentions at checkpoints are serious. In the early 1990s, Judge Kozinski, reflecting on the "vast potential for abuse" in conducting administrative searches, urged an investigation into whether "the Constitution is being routinely violated at these checkpoints." *United States v. Soyland*, 3 F.3d 1312, 1316, 1320 (9th Cir. 1993) (Kozinski, J., dissenting). He further observed: "There's reason to suspect the agents working these checkpoints are looking for more than illegal aliens. If this is true, it subverts the rationale of *Martinez-Fuerte* and turns a legitimate administrative search into a massive violation of the Fourth Amendment." *Id.* at 1316.

More recently, the ACLU of Arizona filed an administrative complaint describing a series of abuses suffered by citizens aged 6 to 69 years old,

during 12 separate incidents over a 15-month period at 6 different Arizona checkpoints. *See* Letter of James Lyall, Staff Attorney, ACLU of Arizona, to U.S. Dep't of Homeland Security, at 1 (Jan. 15, 2014), *available at* https://www.aclusandiego.org/wp-content/uploads/2014/11/ACLU-AZ-Complaint-re-CBP-Checkpoints-2014-01-15.pdf. As the complaint noted, the ACLU "receives frequent reports" from Arizona residents of "unconstitutional searches and seizures, excessive use of force, racial profiling, and other agent misconduct at checkpoints . . . including searches based on service canines 'alerting' to nonexistent contraband and prolonged, unjustified detentions." *Id.*

Of great concern, especially, is how little today's checkpoints resemble what the Court envisioned when it first sanctioned their use:

> [b]order [p]atrol checkpoints today bear little resemblance to those authorized . . . in *Martinez-Fuerte*. Many border patrol officials do not understand—or simply ignore—the legal limits of their authority at checkpoints. . . . [Agents] claimed, falsely, that motorists could not make phone calls or videotape agents searching vehicles. Multiple citizens have reported being told by agents, "You have no rights here," or that refusal to consent to a search gives agents probable cause for a search. In many cases, agents responded to citizens who legitimately asserted their rights with additional abuses.

Id. at 15.

A California ACLU chapter made similar observations recently: "Border residents describe . . . being detained, interrogated and searched at checkpoints they must pass through daily to go to work, run errands, or take children to school. Some agents abandon any pretext of immigration enforcement, conducting generalized criminal investigations . . . ." ACLU of San Diego & Imperial Counties, California, *U.S. Border Patrol Interior Enforcement*, at 1 (Nov. 20, 2014), *available at* http://www.acluaz.org/sites/default/files/documents/100%20Mile%20Zone%20Updated%2011.20.2014.pdf.

Nationwide publicity regarding incidents of violence between the public and police officers underscores the need for law enforcement to exercise restraint, especially when interacting with individuals who are not suspected of any crime. In this case, the extended detention "operated as retribution against [petitioner] for asserting his rights," App. 15a (Elrod, J., dissenting), and one of the agents told petitioner they would "do this the hard way" because he declined requests to get out of his car, App. 21a. Rather than allowing this type of unnecessary escalation to occur, as the Fifth Circuit has sanctioned here, the courts should encourage officers to recognize an individual's ability to stand on his constitutional rights and not retaliate against him for doing so. *See Hill*, 482 U.S. at 462, 471 (noting "constitutional requirement that, in the face of verbal challenges to police action, officers . . . must respond with restraint" and that "a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently" to

verbal criticism and challenge) (internal quotation marks omitted).

If it is not corrected, the Fifth Circuit's new and amorphous "unorthodox tactics" standard will leave residents in border states uniquely unprotected from Fourth Amendment violations. It will also almost certainly make matters more difficult for hard working law-enforcement officers in tense or difficult situations. The best way to encourage agreeable interactions between law enforcement and the public is to avoid any doubt over what conduct is permissible, and to ensure that immigration stops are limited to the narrow purpose for which they are permitted. By departing from this Court's precedent, the lower court's decision blurs lines that are supposed to be clear. It invites officers to make subjective judgments about the orthodoxy of someone's behavior as a justification for continued detention. And it cannot help but lead to more controversies over how far an agent may stray from the purpose of a suspicionless stop when faced with a citizen who chooses to stand on his rights. Observing the clear lines and strict limits for suspicionless detentions drawn by this Court will avoid that kind of subjective and impermissible line drawing.

Finally, not only does this petition present two splits of authority, *see* Pet. 14–31, but it is also an opportunity for the Court to address a troubling pattern of conduct by certain border patrol agents in our Nation's border states. Although concern about abuse is widespread, few cases arising from border patrol checkpoints reach this Court. This case therefore presents a unique, and significant,

opportunity to reaffirm the constitutional principles that apply to this increasingly important area of the law.

CONCLUSION

For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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