NO. 15-168

In the
Supreme Court of the United States

RICHARD RYNEARSON,

Petitioner,

v.

AGENT LANDS, BORDER PATROL AGENT, INDIVIDUALLY, AND RAUL PEREZ, BORDER PATROL AGENT, INDIVIDUALLY.

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

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REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Probable cause, consent, and reasonable suspicion. These are the only three circumstances that justify extending immigration checkpoint detentions beyond the sharply limited time the Fourth Amendment permits for such suspicionless intrusions upon a motorist's liberty. The permissible duration of such stops is measured in mere minutes: the time needed for "a brief question or two" about the motorist's immigration status and "possibly the production of a document evidencing a right to be in the United States." *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976).

It is undisputed that none of these circumstances were present here. But the Fifth Circuit nonetheless upheld the legality of a checkpoint stop of more than 34 minutes. The decision below cannot stand.

To uphold the detention, the Fifth Circuit created a *new* category of justification for extending these no-suspicion detentions: investigation of a detainee's "unorthodox" behavior, which may also be labeled "atypical" or "unusual" (BIO 10), but does not raise suspicion of criminal activity. Pet. App. 8a.[1] There is no basis for this new broad, standardless, and impermissible sort of detention. Unsurprisingly, the Fifth Circuit's rule creates intractable conflicts with this Court's precedents and the established rules governing checkpoint detentions in other circuits.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

The government nowhere denies that permissible immigration checkpoint detentions must remain objectively brief, no longer than a few minutes. Pet. 15; *Martinez-Fuerte*, 428 U.S. at 547.

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[1] The government mentions (BIO 6) the district court's conclusion that the detention's length was justified by reasonable suspicion, but nowhere denies its concession at oral argument before the Fifth Circuit that reasonable suspicion was absent. *See* Pet. 9; Pet. App. 7a; *id.* at 16a n.7 (Elrod, J., dissenting). The government likewise waives any reasonable suspicion argument in this Court, by "failing to raise it in its brief in opposition to the petition for certiorari." *Knowles v. Iowa*, 525 U.S. 113, 116 n.2 (1998).

That concession alone fatally undermines the Fifth Circuit's decision to uphold a plainly *unreasonable* 34-minute detention. *See id.* The government contends (BIO 10) that by focusing on the latter part of the stop, Rynearson has "abandon[ed] his challenge" to its overall duration. Not so. Although Rynearson's argument focuses on the agents' dilatory conduct in the detention's final 23 minutes, part of what makes that conduct unconstitutional is its contribution to a detention with an *overall* length that is objectively unreasonable.

The rule from *Martinez-Fuerte* is plain: Any detention beyond a brief, routine inquiry into immigration status "must be based on consent or probable cause." 428 U.S. at 567 (internal quotation marks omitted). Add to that agents' independent authority to seize individuals for reasonable suspicion of criminal activity, *see United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975), and that leaves only three justifications to extend a checkpoint detention: consent, probable cause, and reasonable suspicion. *See, e.g.*, *Martinez-Fuerte*, 428 U.S. at 567. These are not examples, but the *exclusive* bases for extending a non-arrest seizure beyond the "time needed to handle the matter for which the stop was made," *Rodriguez v. United States*, 135 S. Ct. 1609, 1612 (2015): a "limited inquiry into residence status," *Martinez-Fuerte*, 428 U.S. at 560.

None of these grounds were present to justify detaining Rynearson far beyond the time necessary for completing the immigration inquiry, when the legitimate aims of the detention were satisfied. And each of the ad hoc justifications the Fifth Circuit came up with to justify this 34-minute suspicionless

detention creates a regime under which an agent's arbitrary desire to investigate a detainee's atypical—but admittedly not criminal—behavior overrides strict limits on the permissible scope of a suspicionless immigration detention, creating conflicts with the decisions of this Court and other courts of appeals.

A. Conflicts Exist Over Whether Agents May Conduct Inquiries Unrelated To Immigration During Checkpoint Stops.

The government itself reads the Fifth Circuit's decision to allow checkpoint detentions to be "reasonably extended" beyond the time needed to verify immigration status to "investigate" topics unrelated to immigration status, if the investigation is (1) about conduct the agents deem "unusual," "unorthodox," "atypical," or "suspicious" (though not suspicious of *criminal* activity) (BIO 10); *or* (2) to "verify[] [an] assertion" made during the immigration inspection (regardless of its relationship to immigration status) (BIO 11). These justifications conflict with the law of this Court, and disregard law clearly established in a "robust consensus" of other circuits, *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (internal quotation marks omitted), in two ways. First, the Fifth Circuit's rule permits agents to extend checkpoint detentions without *any* suspicion of criminal activity. Second, it permits investigations during a checkpoint detention that bear no relation to the detention's justifying purpose—immigration.

1. This Court has made clear that reasonable suspicion is required to convert a checkpoint detention into an investigative seizure. *See Martinez-Fuerte*, 428 U.S. at 567; *Brignoni-Ponce*,

422 U.S. at 882. The Ninth and Tenth Circuits likewise require suspicion of *criminal activity* before a checkpoint seizure can be extended beyond the few minutes needed to investigate immigration status. *United States v. Massie*, 65 F.3d 843, 848 (10th Cir. 1995); *United States v. Taylor*, 934 F.2d 218, 221 (9th Cir. 1991). The Fifth Circuit, on the other hand, permitted a "reasonably extended stop" for officers to "investigate" Rynearson's alleged "atypical behavior" (BIO 10), although the Fifth Circuit's rule does not require, and the government does not contend, that this behavior suggested criminality. That creates an intractable conflict.

In hopes of dispelling the conflict, the government notes that all three circuits would permit checkpoint detentions to be lengthened for *some reason*. (BIO 11-12.) But the conflict concerns not *whether* a stop can be extended, but *what grounds* will permit the extension. The Ninth Circuit requires some "suspicion of criminal activity." *Taylor*, 934 F.2d at 221 (internal quotation marks and citations omitted). The Tenth Circuit requires suspicion of criminal activity "reasonably related" to the basic immigration-enforcement mission—"unauthorized entry of individuals" or "smuggling of contraband." *Massie*, 65 F.3d at 848 (internal quotation marks omitted). Not so in the Fifth Circuit, where any-old "unorthodox" detainee behavior will do, whether suggestive of criminality or not.[2]

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[2] The government also glosses over this conflict (BIO 11-12) by emphasizing that the Fifth Circuit held only that the law was not "clearly established" on whether checkpoint detentions

2. Beyond permitting an extended detention for "atypical," but not criminally suspicious, behavior, the Fifth Circuit's decision creates another conflict by eliminating long-standing restrictions on the permissible scope of immigration checkpoint investigations.

It has long been established that the duration of a seizure short of arrest is limited by its purpose, and a seizure becomes unlawful if it is lengthened by "unrelated investigations." *Rodriguez*, 135 S. Ct. at 1614. But even under the government's reading (BIO 10-11), the Fifth Circuit permits unrelated investigations to lengthen detentions, essentially indefinitely, so long as they involve "verifying" some statement made during the immigration investigation. And the Fifth Circuit permits those "verifications" even after the production of documents "evidencing a right to be in the United States," which marks the outer bounds of the stop's permissible duration, *Martinez-Fuerte*, 428 U.S. at 558.

That rule is flatly inconsistent with the law in other circuits. As the government admits, the Tenth Circuit allows only questioning related to "immigration-enforcement and contraband-detection duties" (BIO 12 (citing *Massie*, 65 F.3d at 848)), and the Ninth Circuit draws an even harder line, allowing only "a few brief questions" absent criminal

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could be lengthened to investigate "unorthodox behavior," stopping short of actually articulating any Fourth Amendment standard. But conflict remains because the Fifth Circuit allows for a *possibility* that the Ninth and Tenth Circuits *clearly* prohibit, and thus departs from the "robust consensus" of circuit authority. *Ashcroft*, 131 S. Ct. at 2084 (internal quotation marks omitted).

suspicion. *Taylor*, 934 F.2d at 220. Neither circuit permits the dragnet verification-of-anything-mentioned-during-the-stop inquiry permitted in the Fifth Circuit.

The government cites (BIO 11) the Fifth Circuit's statement that the purpose of a checkpoint stop "is limited to ascertaining the occupants' citizenship status" in an attempt to dispel the conflict, but correctly acknowledges (in fact, contends) that the Fifth Circuit's rule still permits "verif[ication]" of Rynearson's "military employment" simply because that topic came up in the course of the checkpoint inquiry. That verification-of-anything-mentioned rule *necessarily* permits detentions longer than needed to ascertain citizenship status. If border patrol agents may ask questions unrelated to immigration status and verify the answers as part of the *immigration* inquiry, then immigration detentions can be continued indefinitely, and the restriction of checkpoint detentions to a "routine and limited inquiry into residence status," *Martinez-Fuerte*, 428 U.S. at 560, ceases to have any meaning. Indeed, that is what happened here. The "verification" stage went on long after Rynearson produced two passports—the *latest* point at which the detention should have concluded.

B. A Conflict Exists Over Whether A Detainee's Delay-Causing Conduct Excuses Officers' Obligation Of Diligence.

The conflicts created by the Fifth Circuit's decision cannot be confined to the immigration-checkpoint context. The Fifth Circuit has also uprooted Fourth Amendment law for all detentions

short of arrest, by using a detainee's supposedly disruptive conduct as justification to absolve agents of their otherwise universal duty to diligently pursue the investigatory reason for the detention.

The government (BIO 10) defends the Fifth Circuit's holding affording agents license for extended side-excursions whenever they encounter "unusual" behavior from a detainee by pointing to this Court's acknowledgement in *United States v. Sharpe*, 470 U.S. 675, 685 (1986) that "common sense and ordinary human experience" should guide determinations of a seizure's reasonableness. But the government gets *Sharpe* backwards. *Sharpe*'s "common sense" conclusion is that a detainee's interference may make it necessary for officers to take more time to complete their detention-prompting investigation. *Id.* at 685. But a detainee's interference provides no exception from officers' otherwise universal obligation to "diligently pursue[] a means of investigation that was likely to confirm or dispel their suspicions quickly." *Id.* at 686. And under no reading of the facts here can the government claim that the behavior of this motorist—who volunteered two passports on his own initiative and answered every immigration-related question the agents posed to him (and many others)—could be said to have "interfered" with the legitimate aims of this investigation, even if his behavior was "unorthodox," Pet. App. 8a.

Although the government contends that some (unspecified) part of "respondents' investigation into petitioner's status" was "delayed by petitioner's conduct" (BIO 12), it does not identify any conduct in the final 23 minutes of detention that actually

"undermined" the agents' ability to conduct an immigration inspection. Nor could it, when Rynearson spent the majority of that time sitting alone in his car. Pet. 6-7. That portion of the delay was caused entirely by the agents' decision to "ignor[e] the passports and plac[e] phone calls to Rynearson's employer," Pet. App. 17a (Elrod, J., dissenting), not Rynearson's purportedly "unorthodox tactics."

In pointing to Rynearson's supposedly "unorthodox tactics" as grounds to excuse this acknowledged lack of diligence, moreover, the Fifth Circuit broke with the Third and Ninth Circuits, both of which have rejected qualified-immunity claims on analogous facts. The Third and Ninth Circuits recognize as clearly established the rule that even if a detainee's conduct contributes something to the length of a detention, the Constitution prohibits a further detention that was neither caused by the detainee's actions nor the result of a reasonably diligent investigation. *See Liberal v. Estrada*, 632 F.3d 1064, 1081 (9th Cir. 2011) ("But even taking into account the inevitable investigatory delay caused by that [detainee] behavior, the length of Plaintiff's detention was still unreasonable," because the officers "were not diligently pursuing a means of investigation."); *Karnes v. Skrutski*, 62 F.3d 485, 496-97 (3d Cir. 1995) (holding delay was "the result primarily of the [officers'] dilatory pursuit of their investigation" even when the detainee became "argumentative and difficult").

The conflict created by the Fifth Circuit's relaxation of the diligence requirement extends to the Eighth Circuit as well. That court has recognized

since 2008 that the duration of a detention is not made reasonable simply because "some of the detention's duration is attributable to" the detainee. *Seymour v. City of Des Moines*, 519 F.3d 790, 797 n.5 (8th Cir. 2008).

Unable to explain away the diametric opposition between the results reached in these cases and the Fifth Circuit's decision (BIO 12), the government instead insists that the cases employed the same basic *reasoning*, based on the Fifth Circuit's recitation of the rule that the permissible duration of a checkpoint detention is "the time reasonably necessary to determine *** citizenship status." Pet. App. 6a. But reciting the standard is not the same as faithfully applying it. And the Fifth Circuit's decision makes no reference to *Sharpe* or its holding that an agent's diligence is a factor to be assessed in determining whether a detention goes on longer than "reasonably necessary." More importantly, the Fifth Circuit's decision is best understood as creating an *exception* to that diligence requirement for officers faced with "unorthodox" or "atypical" detainee behavior. No other circuit has endorsed this approach, which allows officers' personal reactions to a motorist's non-criminal behavior to trump Fourth Amendment rights.

II. THE DECISION BELOW WAS BLATANTLY WRONG.

No reasonable officer could believe that motorists can be held for more than 30 minutes for suspicionless inquiries that range far afield from immigration status, even while agents hold passports in their hands. Nor could any reasonable officer believe, even "mistaken[ly]," Pet. App. 8a, that the

Fourth Amendment would condone his failure to examine that evidence of citizenship simply because he believed that the detainee's "unorthodox" or "atypical" behavior marginally extended the first few minutes of the detention.

The Fifth Circuit's approval of such extended suspicionless detentions eviscerates time-honored limits on the permissible scope of checkpoint detentions, which provide the "principal protection of Fourth Amendment rights at checkpoints," *Martinez-Fuerte*, 428 U.S. at 566-567. And it undermines the "programmatic purpose" that distinguishes these suspicionless detentions from a "general interest in crime control," even though that distinction is the only reason these routine intrusions on motorists' liberty are permitted in the first place. *City of Indianapolis v. Edmond*, 531 U.S. 32, 44, 46 (2000).

If left standing, the Fifth Circuit's erosion of clearly established Fourth Amendment duration, scope, and diligence restrictions will encourage dilatory, even downright abusive, behavior from agents. Such troubling behavior, as *amici* have shown, and the government does not deny, is already a huge problem at immigration checkpoints. *See* Pet. 32-34; Br. of Tex. Civil Rights Project & the Nat'l Immigration Project of the Nat'l Lawyers Guild as *Amici Curiae* 14-17. Simply put, the Fifth Circuit's new rule diminishes the liberty of the millions who travel through checkpoints in Texas every year. And the implications of the Fifth Circuit's evisceration of Fourth Amendment protections for every motorist driving through Texas defeat the government's attempts to transform this case into a "one-off"

circumstance simply through ritual incantation of the words "unusual" (BIO 2, 7, 10, 12), "unorthodox" (BIO 2, 7, 10), and "uncooperative" (BIO 2, 7, 12).

Indeed, the Border Patrol itself believes that so-called "uncooperative" motorists—including those raising legitimate concerns like "why do you want to search my vehicle?"—are common enough to justify special training for agents with the stated aim of helping them "stay off YouTube." *See* Am. Civil Liberties Union of Ariz., Record of Abuse: Lawlessness and Impunity in Border Patrol's Interior Enforcement Operations, Oct. 2015, at 12 (quoting and displaying a page from a Border Patrol document titled "Guidance on Uncooperative Motorists").[3]

Allowing the Fifth Circuit's rule to survive will permit detentions begun without any suspicion of criminal wrongdoing to continue, essentially indefinitely. For such detentions, there is no need for checkpoint agents to *ever* develop suspicion of criminal activity. Rather, the agents are given free license to explore their concerns about a detainee's "atypical" or "unorthodox" behavior, "atypicalities" that are assessed entirely according to the agent's own arbitrary and idiosyncratic standards.

The Fifth Circuit's rule creates perverse incentives for law enforcement, and provides a detailed roadmap for agents to use to justify extending the length of checkpoint detentions, even though this Court has repeatedly emphasized that

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[3] *Available at* http://www.acluaz.org/sites/default/files/documents/Record_of_Abuse_101515_0.pdf.

strict time limits are essential for these suspicionless stops. This rule also diminishes the coverage of Fourth Amendment protections in an area of Fourth Amendment law that already stretches the bounds of reasonableness, where people are seized and held without a warrant, and without suspicion of criminal wrongdoing, and accordingly where concerns of abridgement and abuse are at their zenith.

This Court has held that strict observance of "appropriate limitations on the scope" of immigration checkpoint detentions is the only thing that enables these detentions to comport with Fourth Amendment rights. *Martinez-Fuerte*, 428 U.S. at 567. This Court's intervention is now needed to ensure that these strict limits continue to be enforced.

III. AT A MINIMUM, THIS CASE SHOULD BE REMANDED IN LIGHT OF *RODRIGUEZ*.

As the Petition explains, Pet. 35-38, and the government does not dispute, the decision in *Rodriguez* is an "intervening development" that reveals a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). In *Rodriguez*, the Court explained established law holding that conducting an unrelated inquiry cannot "prolong[]—*i.e.*, add[] time to—the stop." 135 S. Ct. at 1616. In this case, the Fifth Circuit permitted an unrelated inquiry to Rynearson's commanding officer to add time to the stop. Accordingly, a grant, vacate, and remand order is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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