No. 16-805

In the Supreme Court of the United States

DAX K. LEWIS AND RICHARD JIMERSON,

Petitioners,

v.

PETER L. VASQUEZ,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Tenth Circuit correctly withheld qualified immunity from two Kansas Highway Patrol officers for violating clearly established law by detaining Peter Vasquez without reasonable suspicion of criminal activity.

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BRIEF IN OPPOSITION

Officers Dax Lewis and Richard Jimerson detained Peter Vasquez while he was driving through Kansas. The officers initially stopped Vasquez for a routine traffic violation and gave him a warning. Rather than let Vasquez leave, however, the officers detained him for fifteen more minutes while they waited for another officer to arrive with a drug-sniffing dog. The dog alerted and the officers searched Vasquez's car. The search revealed nothing illegal.

Vasquez brought 42 U.S.C. § 1983 claims against the officers, arguing that they violated his Fourth Amendment rights by detaining him beyond the initial stop and searching his car without reasonable suspicion of criminal activity. The district court held that the officers were entitled to qualified immunity, but the Tenth Circuit reversed, concluding that clearly established law prohibited Vasquez's detention and search.

The Tenth Circuit's decision was entirely correct. At bottom, the officers detained Vasquez because he was coming from Colorado, a state they felt implicated him in drug trafficking. During the stop, the officers stressed how suspicious they found "Colorados." Dash Camera Tr. 19:10-16. Yet the totality of Vasquez's behavior revealed nothing more than an innocent, out-of-state driver making the final leg of a cross-country move. As the Tenth Circuit held on nearly identical facts in *United States* v. *Wood*, 106 F.3d 942 (10th Cir. 1997), there was no reasonable suspicion to detain Vasquez beyond the initial stop. By arguing otherwise, petitioners ask this Court to take up a fact-dependent inquiry that presents no novel or broadly applicable question of law and no

circuit split. Petitioners' unwarranted desire for error correction is no basis for review.

Certiorari should be denied.

STATEMENT

A. Factual Background.

1. In December 2011, Peter Vasquez set out for Maryland in his 1992 BMW, traveling eastbound on Interstate 70 from Colorado. Pet. App. 21. Vasquez, a disabled Army veteran, was moving to where his girlfriend and daughter lived. *Id.* at 21-22. He had already transferred most of his belongings to Maryland, so he had his few remaining items on the front floorboard and backseat, and had covered them with some blankets and a pillow for the long drive. *Ibid.*

He was passing through Wabaunsee County, Kansas, at 2:43 a.m., when Kansas Highway Patrol Officers Richard Jimerson and Dax Lewis pulled him over. *Id.* at 21. Vasquez's car had a temporary tag taped to the inside of the rear window, but the officers could not read it through the tinted glass. *Ibid.*

Officer Jimerson approached. He told Vasquez why he had stopped him, and Vasquez handed over his license and proof of insurance, telling Jimerson that he had only recently bought the car. *Id.* at 21-22, 35. Jimerson, noticing the blankets and other items in the car, asked Vasquez where he was going. *Id.* at 21. Vasquez said that he was on his way to Elkton, Maryland, where he had just moved from Colorado. Asked whether he had any family in Maryland, Vasquez told Jimerson that his daughter lived there with her mother, whose husband was an Air Force member stationed in Dover. *Id.* at 21, 36.

Jimerson returned to the patrol car and told Officer Lewis that Vasquez seemed nervous. *Id.* at 22. He told Lewis to "get a feel" for Vasquez and "see how nervous he is." *Ibid.* When Lewis returned, he told Jimerson that Vasquez looked "scared to death." *Ibid.* Neither officer told the other why he thought Vasquez was nervous.

Meanwhile, Jimerson verified that Vasquez did not have a criminal record, noting that his request for Vasquez's history was part of a drug investigation. Lewis Dep. at 13:6-14:2. Jimerson also checked Vasquez's proof of insurance. The search showed that Vasquez also owned two other cars, a 2011 Chevy Malibu and a 1998 Ford Mustang.[1] Pet. App. 22. Lewis asked Vasquez why he was driving his oldest car across the country. *Ibid.* Vasquez responded that he had bought the Chevy for his girlfriend,[2] and the Chevy was already in Maryland with her. *Id.* at 22, 40-41.

Vasquez also told Lewis, as he had already told Jimerson, that he was moving to Maryland. *Id.* at 22. Lewis was curious why the car was largely empty, and Vasquez explained that he had already moved

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[1] At this point, the officers decided to call in for a drug dog, apparently having already reached the conclusion that Vasquez was suspicious. See Dash Camera Tr. 6:22-23.

[2] The court of appeals and the district court both found that, when Vasquez told Officer Lewis that he "bought it for [his] girlfriend," he was referring to the 2011 Chevy Malibu, not the 1992 BMW. See Pet. App. 4, 22. Petitioners attempt to recast the factual record, urging that when Vasquez said "it," the officers understood him to mean the 1992 BMW. But Vasquez clearly referred again to the 2011 Chevy when explaining that he had "already moved a lot of [his] stuff" to Maryland, clarifying "[t]hat's how the 2011 Malibu got out there." *Id.* at 41.

most of his belongings. *Ibid.* Vasquez also mentioned that he co-owned a store called Boutiques at Brighton. *Ibid.* Lewis issued a warning for Vasquez's traffic infraction, and Vasquez prepared to leave. *Id.* at 23.

2. A moment later, Lewis walked back to Vasquez's car and asked Vasquez if he could ask him a couple additional questions. *Ibid.* Vasquez agreed. *Ibid.* Lewis asked whether Vasquez had any marijuana or cocaine in the car, and Vasquez said no. *Id.* at 23, 42. Lewis then asked for permission to search the car for drugs, and Vasquez again said no, "I'm not going to let you search because I didn't do anything wrong." *Id.* at 42.

At that point, Lewis told Vasquez, "we're just going to detain you here until we get a dog up here." *Ibid.* When Vasquez asked why, Lewis explained that he suspected Vasquez was "probably involved in a little criminal activity," and urged that Vasquez should tell him if he had "a dimebag or a pipe," anything "that's a little bit of personal use." *Id.* at 23, 43. Vasquez responded that he "just [found] it offensive" that the officer would "accuse [him] of that" when he was "just trying to get home." *Id.* at 43.

Lewis told Vasquez to stay in his car until the drug dog arrived. *Id.* at 43-44. The officers likewise waited in their patrol car, commenting on the "Colorados" they had seen drive by "all night long," "five Colorado f***ers" since they had stopped Vasquez. Dash Camera Tr. 19:13-16. About fifteen minutes later, Lewis ordered Vasquez out of his car, patted him down, and waited while the dog sniffed the car. Pet. App. 23, 45-46. After the dog alerted, the officers searched the car. *Id.* at 23. The search revealed nothing illegal. *Ibid.*

B. Proceedings Below.

1. Vasquez filed suit under 42 U.S.C. § 1983 against Jimerson and Lewis. Pet. App. 23. He claimed that his detention and search were unreasonable, in violation of the Fourth Amendment. *Ibid.* Although the initial stop was proper, Vasquez argued, the officers did not have reasonable suspicion of criminal activity to detain him further and search his car. *Id.* at 21, 23.

2. The district court granted summary judgment to the officers. *Id.* at 31. The court did not decide whether the officers had reasonable suspicion, concluding instead that any Fourth Amendment violation was not "clearly established." *Id.* at 30. Accordingly, the court held that the officers were entitled to qualified immunity. *Ibid.*

3. The Tenth Circuit reversed. The court held that because Vasquez's search and seizure violated the Fourth Amendment under clearly established law, the officers were not immune from suit under Section 1983. Pet. App. 13.

First, the court concluded that the officers lacked reasonable suspicion to detain Vasquez beyond the initial stop. *Id.* at 7-11. Vasquez's conduct, "taken together," was neither suspicious nor unusual. *Id.* at 7. "What we have here," the court summarized, "is a driver traveling from Colorado to Maryland, on a major interstate; in an older car despite owning a newer car; with blankets and a pillow obscuring items in the back seat; who did not have items visible that an officer expected to see; and who was and continued to be nervous when pulled over by officers late at night." *Id.* at 10. While the officers offered a "list of unrelated facts" about Vasquez's conduct, they did

not explain "why the factors considered together are suspicious." *Id.* at 7 n.2.

The court was particularly troubled by the officers' focus on Vasquez's Colorado origins. The court declared it "wholly improper to assume that an individual is more likely to be engaged in criminal conduct because of his state of residence." *Id.* at 9.

The court next held that the lack of reasonable suspicion was clearly established when the officers violated Vasquez's Fourth Amendment rights. *Id.* at 11-13. It reasoned that *United States* v. *Wood*, 106 F.3d 942 (10th Cir. 1997), was directly on point. Pet. App. 11. In *Wood*, the court held that Officer Jimerson—the same officer involved in this case—had detained a motorist and searched his car for drugs without reasonable suspicion. 106 F.3d at 948. The court here considered *Wood* to be "almost indistinguishable": in both, Jimerson detained a driver because "he thought the car was unusual (Vasquez's older car and Wood's rented car)," "the car had 'unusual' but typical items in it (Vasquez's items covered by blankets and Wood's trash wrappers and maps)," and "the driver was nervous, leaving a drug source state, and passing through Kansas." Pet. App. 12.

One panel member dissented. *Id.* at 14-19. Like the district court, he offered no opinion on whether the officers had reasonable suspicion to detain Vasquez, admitting that the question was, at the very least, a "close call." *Id.* at 14. But the dissent would have held that a lack of reasonable suspicion was not "clearly established" at the time. *Ibid.* In his view, *Wood* was not sufficiently on point, and other circuit precedent created a "hazy legal backdrop." *Id.* at 18. See also *id.* at 17-19.

3. The officers petitioned for panel rehearing and rehearing *en banc*. The panel denied rehearing 2-to-1. *Id.* at 32. The *en banc* court also denied rehearing after no member requested a poll on the petition. *Id.* at 32-33.

REASONS FOR DENYING THE PETITION

Review is unwarranted. The Tenth Circuit correctly denied qualified immunity because Officers Jimerson and Lewis detained Vasquez in violation of the Fourth Amendment, as clearly established by *United States* v. *Wood*, 106 F.3d at 948. Its holding turned on the particular facts of Vasquez's stop. Indeed, there is no disagreement, within the Tenth Circuit or otherwise, over the legal framework to evaluate reasonable suspicion or qualified immunity. The legality of all future stops and subsequent detentions will continue to turn on the particulars of each incident.

I. This Case Has Limited Prospective Importance.

1. The court of appeals made a fact-bound determination that, under clearly established law, the officers lacked reasonable suspicion to detain Vasquez. Reasonable suspicion turned on the facts known to the officers: Vasquez was alone on a major interstate at night, moving from Colorado to Maryland where his daughter and girlfriend lived; he was driving an older car, having given his newer one to his girlfriend; he had a few items in his car that the officers found unusual, including blankets and a pillow (but not the majority of his belongings that he had already transferred to Maryland); he seemed nervous; he owned a store in Colorado; and he asked the offic-

ers to repeat a few questions. Pet. App. 2-4, 21-23, 34-46.

The fact-dependent nature of this case gives it limited prospective importance. "[B]ecause the mosaic which is analyzed for a reasonable-suspicion * * * inquiry is multi-faceted, 'one determination will seldom be a useful "precedent" for another.'" *Ornelas* v. *United States*, 517 U.S. 690, 698 (1996) (quoting *Illinois* v. *Gates*, 462 U.S. 213, 238 n.11 (1983)). Were this Court to decide whether the officers had reasonable suspicion to detain Vasquez or their entitlement to qualified immunity, its holding would extend only to cases involving similar stops—*i.e.*, those where an officer encounters a generically nervous, out-of-state motorist on a major thoroughfare, who is driving a car that the officer thinks unusual, filled with typical items that the officer finds surprising.

To be sure, two cases can be "so alike" that one will control the next. *Ibid.* A future officer may someday confront a similar situation to that here. Indeed, Jimerson himself confronted nearly identical circumstances about twenty years ago in *Wood*, 106 F.3d at 944. And in those cases, settled qualified immunity doctrine holds that officers are liable, as Congress set forth in Section 1983, for their violations of clearly established law—including for searches and seizures conducted without reasonable suspicion. But the time elapsed between *Wood* and this case reveals it is not an everyday occurrence.

2. The Tenth Circuit did not offer any novel legal conclusions about reasonable suspicion that might have broader application.

In the first part of its holding, the court concluded that the officers lacked reasonable suspicion to detain Vasquez. To do so, it evaluated the facts under the "totality of the circumstances," the settled legal test for reasonable suspicion. *United States* v. *Arvizu*, 534 U.S. 266, 273 (2002). The court's use of that framework hardly presents a novel question for review.

Indeed, the court took pains to emphasize that it was evaluating all the facts together. See Pet. App. 6 ("The existence of reasonable suspicion of illegal activity does not depend upon any one factor, but on the totality of the circumstances."); *id.* at 7 ("Such conduct, taken together, is hardly suspicious, nor is it particularly unusual."); *id.* at 7 n.2 ("As the Supreme Court has reminded the circuit courts, we should not and cannot review these factors in isolation."); *id.* at 8 ("[W]e analyze these facts under the totality of the circumstances."); *id.* at 9-10 ("Even under the totality of the circumstances, it is anachronistic to use state residence as a justification for the Officers' reasonable suspicion."); *id.* at 10 ("Some other factors also weigh little in our totality of the circumstances analysis."); *id.* at 10-11 (summarizing all the facts together and concluding "[s]uch conduct does not raise an inference of reasonable suspicion").

Nor did the court of appeals offer any novel legal conclusions within that framework that would warrant review. For example, the court made the unremarkable observation that officers usually should not discriminate against drivers based on their state of residence. *Id.* at 8-10. To the officers, Vasquez was just another "Colorado f***er[]," Dash Camera Tr. 19:13, coming from a "huge source [state] of narcotics." Lewis Dep. at 34:19-20. But with twenty-five

states permitting medical marijuana, it made little sense to detain Vasquez simply because he was from Colorado. Under that logic, half the country would count as "drug-source" areas. This Court has made a similar observation. See *Reid* v. *Georgia*, 448 U.S. 438, 441 (1980) (holding that a traveler's origin of Fort Lauderdale, "a principal place of origin of cocaine," did not create reasonable suspicion).

Likewise, the court of appeals reiterated that a driver's "nervousness" is not especially probative of criminal activity, especially when supported by only the officer's vague and subjective opinion. Pet. App. 10. This Court has raised similar concerns before. See *Delaware* v. *Prouse*, 440 U.S. 648, 657 (1979) (recognizing that traffic stops are a "possibly unsettling show of authority" that "create substantial anxiety" as a matter of course).

Petitioners and *amici* seek to reframe the Tenth Circuit's decision to present this Court with a legal question of prospective importance. They argue that in practice, the court of appeals took a piecemeal approach to reasonable suspicion, rejecting each factor one-by-one, rather than considering them together. Pet. 20-21; Nat'l Ass'n of Police Orgs. ("NAPO") *Amicus* Br. 10. But that is not what happened. Instead, the court simply explained why it found certain factors less convincing *within* the totality of the circumstances. See Pet. App. 8 ("Though we analyze these facts under the totality of the circumstances, *Arvizu*, 534 U.S. at 273, we first note which factors have less weight in our analysis."). In other words, the court evaluated the factors "separately *and* in aggregate." *United States* v. *Pettit*, 785 F.3d 1374, 1380 (10th Cir. 2015) (emphasis added). The court was right to explain its reasoning, and it was not obliged to limit

its opinion to one unstructured paragraph that discussed every factor at the same time.

Relatedly, petitioners argue that the court of appeals overlooked that innocent factors can add up to something suspicious. Pet. 21. It did not. As the court recognized, petitioners needed to "explain why the factors considered together are suspicious, and not simply recite isolated factors, leaving it to the courts to glean how they create reasonable suspicion." Pet. App. 7 n.2. In other words, just because 0 + 0 + 0 *can* exceed zero does not mean it always will. Sometimes, as the court of appeals concluded here, a combination of innocent factors in fact suggests only innocent behavior; it is up to the officers to explain why it should be otherwise in any given case, and here they did not do so.

3. Nor did the court of appeals offer any novel or generally applicable legal conclusions about qualified immunity.

In the second part of its holding, the court concluded that the officers were not entitled to qualified immunity because at the time of the stop, it was "clearly established" that they were violating Vasquez's Fourth Amendment rights. Pet. App. 11-13. The court relied on *United States* v. *Wood*, 106 F.3d at 948, a case that concluded an officer had violated the Fourth Amendment "under similar circumstances." *White* v. *Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam).

While petitioners believe that the court reached the wrong result, they do not argue that it used the wrong legal test. Petitioners agree, as they must, that the core question for qualified immunity is whether the officers violated clearly established law.

Pet. 10. And petitioners make no claim that the court used the wrong framework to answer that question when it "identif[ied] a case where an officer acting under similar circumstances * * * was held to have violated the Fourth Amendment," as this Court instructs. *Pauly*, 137 S. Ct. at 552.

Instead, petitioners take issue with the court's choice of *Wood*, arguing that the case did not put the officers on notice that their actions violated the Fourth Amendment. First, they urge that *Wood*'s facts are not similar enough to this case. Pet. 11-17. Relatedly, they contend that other Tenth Circuit decisions involved more analogous factual circumstances, and that those cases muddied the legal backdrop. *Id.* at 17-19.

Even if petitioners are right—which they are not, see Parts II.2 and III—they are asking this Court to engage in a type of error correction that has little prospective importance. At bottom, they would like this Court to decide which Tenth Circuit decision has the most similar facts to this case. That question has limited relevance for future cases with different facts.

4. Given the limited prospective importance of this case, it is not appropriate for even summary disposition. Pet. 23. This Court summarily reviews cases to clarify general principles of law, not to make highly fact-bound determinations.

For example, consider *White* v. *Pauly*, in which an officer had arrived late to an ongoing police action. 137 S. Ct. at 549. He saw shots fired by one of several people surrounded by other officers, and he shot and killed one of the armed men without first giving a warning. *Ibid.* In *Pauly*, this Court an-

swered two legal questions with broad relevance for qualified immunity doctrine.

First, the *Pauly* Court set forth a principle for all officers who arrive late to a serious ongoing police action: there is no clearly established federal law that bars them from assuming that proper procedures, including identification, have already been followed. *Id.* at 552. This pronouncement established general liability expectations for responding officers, who regularly need to rely on earlier steps taken by their fellow officers. *Ibid.* In contrast, this case presents no unanswered legal question that would govern a commonly recurring police situation.

Second, the *Pauly* Court clarified the framework for evaluating "clearly established law." The court below had reasoned from general principles, but this Court reiterated that courts should not analyze qualified immunity "at a high level of generality." *Ibid.* (quoting *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 742 (2011)). Outside of an "obvious case," the court needed to "identify a case where an officer acting under similar circumstances * * * was held to have violated the Fourth Amendment." *Ibid.* By clarifying the legal standard that applies in most qualified immunity cases, the Court made it more likely that lower courts will apply the right framework in the future. Unlike *Pauly*, the court below applied the right framework to evaluate the Fourth Amendment and qualified immunity issues.

Carroll v. *Carman*, 135 S. Ct. 348, 348 (2014) (per curiam), is similarly instructive. In *Carroll*, two officers went to the Carmans' house looking for a person reported to have stolen a car and two handguns. *Ibid.* The officers walked onto a back deck behind the house to knock on a sliding glass door, an

incursion that the Carmans challenged. *Id.* at 349. At issue in the case was the scope of the "knock and talk" exception to the warrant requirement of the Fourth Amendment, which allows officers to knock on a person's door to speak with the people inside. *Id.* at 350. Reversing the Third Circuit, this Court held that no clearly established rule extended the knock-and-talk exception *only* to officers who first knock on the front door. *Id.* at 351. That decision settled the liability question for any number of officers who routinely approach houses from a variety of directions. Moreover, the Third Circuit's holding directly conflicted with decisions of the Second, Seventh, and Ninth Circuits, and of the New Jersey Supreme Court. *Id.* at 351-352. Unlike *Carroll*, this case presents neither a general question of law nor a circuit split.

Once again in *Stanton* v. *Sims*, 134 S. Ct. 3 (2013) (per curiam), this Court answered questions of general importance for qualified immunity doctrine. In *Stanton*, an officer was in hot pursuit of a fleeing suspect who had committed a misdemeanor, and the suspect ran into a yard surrounded by a tall fence. *Id.* at 3-4. The officer, fearing for his safety, kicked in the gate and inadvertently injured a woman inside. *Id.* at 4. The woman brought suit, arguing that the officer violated the Fourth Amendment by entering her property without a warrant. *Ibid.* Reversing the Ninth Circuit, the Court held that no clearly established law prohibited warrantless entry in pursuit of a fleeing misdemeanant, a recurring issue on which the circuits were deeply divided. See *id.* at 5-6. The court of appeals had also misinterpreted a Supreme Court case, and the Court took the opportunity to clarify the scope of its prior holding. *Id.* at 6. The court here neither relied on a misinterpretation of

Supreme Court precedent, nor withheld qualified immunity in an oft-recurring situation.

The Court's summary reversal cases have at least one thing in common: they resolve legal issues that are likely to recur and affect qualified immunity for myriad officers. This case presents no such issue.

II. There Is No Intra-Circuit Split.

Petitioners contend that this Court's intervention is needed to resolve an intra-circuit split in the Tenth Circuit. Pet. 21-23. It is not.

1. First, an intra-circuit split is not a reason to grant a writ of certiorari. And no wonder why not. Intra-circuit splits regularly resolve themselves, whether through *en banc* review or otherwise. The circuits have their own approaches to resolving splits, a common issue that they are well equipped to handle on their own. See Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeal*, 3 Fed. Cts. L. Rev. 17, 20 (2009). And the Tenth Circuit provides a clear rule for what officers should do in the case of an unresolved intra-circuit split: follow the earliest-decided case. See *Hiller* v. *Oklahoma*, 327 F.3d 1247, 1251 (10th Cir. 2003). Accordingly, there is no "legal uncertainty" for officers. Pet. 22. See also NAPO *Amicus* Br. 18.

2. In any event, there is no intra-circuit split. Petitioners' two cases are simply fact-bound applications of the same basic approach. Pet. 21-23.

First, consider *United States* v. *Moore*, 795 F.3d 1224 (10th Cir. 2015). The *Moore* court concluded that, under the "totality of the circumstances," there was reasonable suspicion to detain a driver based on his nervousness, prior criminal history, and name

recently being added to the vehicle's registration. *Id.* at 1227, 1229. While there is some superficial similarity to this case, the two are wholly distinct.

For one, Moore's nervousness was different in kind. The *Moore* court recognized that nervousness is a "common" and "natural" response to police confrontation, but it can be more probative when "extreme and persistent." *Id.* at 1230 (alterations omitted). The officer testified that Moore's nervousness was both: his hands were shaking, he could not stop fidgeting, his heart was beating rapidly, he immediately asked to smoke, and he remained anxious even after the officer gave him only a warning for the initial stop. *Ibid.* Unlike *Moore*, the officers here offered neither specific, objective facts to show "extreme" nervousness, nor any suggestion that Vasquez remained nervous after receiving only a warning for the traffic violation. See Pet. App. 3, 22-23.

Additionally, Moore was evasive about his criminal history. Moore had a criminal record, and when the officer asked whether he had been in trouble before, Moore admitted that he had but refused to provide any details. *Moore*, 795 F.3d at 1230. That factor is wholly absent here.

Finally, the court reasoned that Moore's name had been added recently to the vehicle registration and that, while recent registration has limited persuasiveness, it was relevant to the totality of the circumstances. *Id.* at 1231. The officer had asked Moore why there was a woman's name on the registration in addition to his, and Moore offered a vague explanation that the vehicle was "originally registered to a friend," but did not elaborate on why his name had been added. *Ibid.* In contrast, Vasquez's name was not added to someone else's registration, and the of-

ficers did not ask Vasquez any follow-up questions about his new car or why he had bought it. All Jimerson asked Vasquez was whether he had recently bought the 1992 BMW, and Vasquez said yes. Pet. App. 35.[3] That response was neither vague nor suspicious.

There is no split when two cases apply the same law to different facts. *Moore* involved a distinct factual situation in which the court rightly concluded, under the totality of the circumstances, that the officers had reasonable suspicion.

The same is true for *United States* v. *Pettit*, 785 F.3d at 1374. The *Pettit* court once again concluded that an officer had reasonable suspicion to extend a traffic stop beyond the initial encounter. *Id.* at 1377. The court relied on three factors: the driver's nervousness, implausible travel plans, and multiple suspended driver's licenses. *Id.* at 1380-1383.

As in *Moore*, the *Pettit* court recognized that a driver's nervousness generally has limited significance, and that it requires "specific indicia that the defendant's nervousness was extreme" beyond an officer's "naked assertion." *Id.* at 1380. But Pettit's nervousness was extreme. During the stop, his lower body moved nervously, his whole arm shook when he handed the officer his license, and Pettit expressly told the officer twice within 25 seconds that the officer was making him nervous. *Id.* at 1380-1381. Pettit's nervousness, like Moore's, was thus different in kind from Vasquez's.

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[3] As already noted, petitioners misread the record to say that Vasquez bought the 1992 BMW for his girlfriend. See note 2, *supra*.

Pettit's travel plans were also especially implausible. Pettit had flown to California to pick up a friend's car and drive one-way across the country alone. The court recognized that ordinarily a one-way car trip does not give rise to reasonable suspicion. *Id.* at 1382. But Pettit's plans were suspicious for another reason: he was driving a car registered to an absent third party, a fact that can indicate drug trafficking. *Ibid.* Petitioners' argument that here, the opposite was equally suspicious (Pet. 13)—*i.e.*, the car was recently registered in Vasquez's own name—would, when combined with the *Pettit* court's reasoning, make every driver of a recently acquired car suspicious for either driving his own car or that of someone else.

Finally, and "[p]erhaps most importantly," Pettit had two suspended driver's licenses. 785 F.3d at 1382. The officer requested Pettit's license twice before he produced it, and Pettit passed over a suspended California license in his wallet before handing the officer his suspended Missouri license. *Id.* at 1383. Pettit's suspended licenses made his claimed travel plans even less plausible, because someone without a valid license would be less likely to volunteer to drive a friend's car across the country. *Id.* at 1382. That factor is wholly absent here.

3. Even if there were an intra-circuit split about the standard for reasonable suspicion—and there is not—this case would be a poor vehicle to resolve it.

First, petitioners and *amici* rely heavily on the "implausib[ility]" of Vasquez's travel plans, but their argument rests on a factual ambiguity in the record. Pet. 13, 17; NAPO *Amicus* Br. 8. They contend that Vasquez told Lewis he recently bought a 20-year-old car in Colorado to give as a gift to his girlfriend in

Maryland. The dissent below read the record as petitioners do. See Pet. App. 19 n.2. Petitioners argue that the officers could have found that explanation implausible, urging that most people would not buy someone a gift that they immediately need to drive across the country; instead, they would buy it in Maryland.

But the question is whether "it" meant the 2011 Chevy or the 1992 BMW. Pet. 4 n.3. For their parts, the court of appeals and the district court both found that when Vasquez told Lewis that he "bought it for [his] girlfriend," he was referring to the 2011 Chevy, not the 1992 BMW. See Pet. App. 4, 22. Only petitioners' interpretation would make Vasquez's travel plans arguably "implausible." There is nothing suspicious about buying the car one can afford; and it should go without saying that a 1992 BMW is no "dilapidated sofa." Pet. 13 (quoting *United States* v. *Kopp*, 45 F.3d 1450, 1453-1454 (10th Cir. 1995)).

Second, the posture of this case makes it a poor comparison to *Moore*, *Pettit*, or most other cases with a holding on reasonable suspicion. In those cases, the court considered the evidence in the light most favorable to the government, because it reviewed a motion to suppress. See*, e.g.*, *Pettit*, 785 F.3d at 1379. But this is a qualified immunity case resolved on summary judgment. As such, the evidence is viewed in the light most favorable to Vasquez, which is perhaps why the court of appeals read the record to say that "it" referred to the 2011 Chevy, not the 1992 BMW. See Pet. App. 24 (citing *Rojas* v. *Anderson*, 727 F.3d 1000, 1003 (10th Cir. 2013)). Although reasonable suspicion always rests on the same legal standard, the inquiry is heavily fact-dependent, and it matters how the court reads the record. See

Ornelas, 517 U.S. at 696 ("The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search.").

III. The Decision Below Is Correct.

The Tenth Circuit correctly denied qualified immunity because the officers violated clearly established law when they detained Vasquez without reasonable suspicion.

1. The Fourth Amendment's protection against unreasonable searches and seizures extends to traffic stops. See *Arvizu*, 534 U.S. at 273. An officer violates the Fourth Amendment if he detains a driver without "articulable and reasonable suspicion." *Prouse*, 440 U.S. at 663. "Reasonable suspicion" requires the officer to have "'a particularized and objective basis' for suspecting the person stopped of criminal activity." *Ornelas*, 517 U.S. at 696 (quoting *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1981)). An officer's "unparticularized suspicion or 'hunch'" is not enough. *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 27 (1968)). Courts evaluate reasonable suspicion under the "totality of the circumstances." *Arvizu*, 534 U.S. at 273.

Additionally, qualified immunity protects a government official from suit unless the violation of law was "'clearly established' at the time of the challenged conduct." *al-Kidd*, 563 U.S. at 735 (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). To be clearly established, the law must be sufficiently defined such that "every 'reasonable official would have understood that what he is doing violates that right.'" *Id.* at 741 (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)). Typically, that showing is

made by an on-point decision holding that an official, "acting under similar circumstances," violated the law. *Pauly*, 137 S. Ct. at 552.

2. The Tenth Circuit did precisely what this Court instructed courts to do in *Pauly*: it identified *United States* v. *Wood*, 106 F.3d at 942, an on-point case that held an officer, "acting under similar circumstances," violated the Fourth Amendment, *Pauly*, 137 S. Ct. at 552. In *Wood*, Officer Jimerson stopped a motorist for a minor traffic violation on I-70, the same interstate highway where he stopped Vasquez. 106 F.3d at 944. After resolving the initial stop, Jimerson asked Wood for permission to search his car for drugs. *Ibid.* Wood said no, at which point Jimerson detained Wood, called a drug dog, and proceeded to search the car. *Ibid.* Unlike here, the search revealed drugs. *Ibid.*

Petitioners attack the Tenth Circuit's reliance on *Wood* by arguing that the two cases have just one fact in common: the driver's nervousness. Pet. 11-17. In reality, they have *six* facts in common. The only discrepancies between them are that Wood was known to have narcotics convictions, Vasquez was known to be a small business owner, and Vasquez could not hear a few of the officers' questions. The court of appeals rightly concluded that the two cases are "almost indistinguishable." Pet. App. 12.

To recap, the officers knew a number of things about Vasquez when they detained him: (1) Vasquez was alone at night on I-70 and was in the process of moving from (2) Colorado to Maryland, where (3) his girlfriend and daughter lived; (4) he was driving his 1992 BMW because his 2011 Chevy was already in Maryland with his girlfriend; (5) he had a few items in his car that were covered by blankets and a pillow,

and he had already transferred most of his belongings to Maryland; (6) he appeared "nervous" when pulled over in the middle of the night; (7) he co-owned a store in Colorado; and (8) he asked the officers to repeat a few questions. Pet. App. 2-4, 21-23, 34-46. The first six factors each correspond to one in *Wood*.

First, Jimerson thought both drivers had "implausible" travel plans. Wood was an unemployed painter who was driving home to Kansas from a two-week vacation in California. Jimerson thought it unlikely that an unemployed painter, even one with the promise of a job in six weeks, could afford that trip. *Wood*, 106 F.3d at 946. In reality, however, there was nothing at all implausible about Wood's travel plans. As the court reasoned, temporarily unemployed people often take vacations; after all, they have time to spare. *Id.* at 947. Likewise here, Vasquez's travel plans were altogether ordinary. Many people drive their car overnight when making a cross-country move, and when they do they almost always take a major interstate highway.

Second, both drivers began their trips in a "known source state" for drugs. *Wood*, 106 F.3d at 947. At Wood's trial, Jimerson testified that drugs commonly came from California. *Ibid.* So too here. Vasquez had left Colorado, a state the officers emphasized was "known to be home to medical marijuana dispensaries." Pet. App. 8. "Particularized" suspicion cannot rest on a factor that would equally implicate half the country. See *Reid*, 448 U.S. at 441 (rejecting the government's reliance on petitioner's early morning arrival with little luggage from Fort Lauderdale, "a principal place of origin of cocaine," because that logic would subject "a very large catego-

ry of presumably innocent travelers" to "virtually random seizures"). The officers unfairly maligned Vasquez, an Army veteran, merely because he used to call Colorado home. As this Court has long held, mere proximity to other people involved in drug activity does not provide reasonable suspicion. See *Ybarra* v. *Illinois*, 444 U.S. 85, 93-96 (1979).

Third, Jimerson argued that both drivers gave him inconsistent information. Jimerson asked Wood where he had rented the car, and Wood said San Francisco when he should have said Sacramento. *Wood*, 106 F.3d at 947. The *Wood* court recognized that inconsistent statements can give rise to reasonable suspicion, particularly if Wood were trying to conceal that he had rented the car in a city known for narcotics. But there was nothing suspicious about renting a car in Sacramento as opposed to San Francisco, and Wood promptly corrected his error when it was drawn to his attention. *Ibid.* Likewise here, petitioners argue that Vasquez made inconsistent statements to the officers, telling Jimerson that he had a daughter in Maryland and telling Lewis that he was moving to Maryland with his girlfriend. Pet. 14. But those statements were neither inconsistent nor suspicious. People often move to places where they know more than one person. And contrary to the suggestion of *amici*, Vasquez never suggested to either officer that the purpose of his trip was to visit his daughter—he simply gave Jimerson a direct answer to his question whether Vasquez had any family in Maryland. See NAPO *Amicus* Br. 8.

Fourth, Jimerson thought that both drivers had unusual choices of transportation. He found it suspicious that Wood, an unemployed painter, would "rent a 1995 Mercury Marqu[i]s in California" to drive

back to Kansas. *Wood*, 106 F.3d at 946. But the court saw nothing criminal in "traveling by car to view scenery." *Id.* at 947. Likewise here, there was nothing suspicious about Vasquez's choice to drive his 1992 BMW as opposed to his 2011 Chevy. As he explained to Officer Lewis, the Chevy was already in Maryland with his girlfriend. And Lewis admitted in his deposition that it is "equally likely" for drugs to be found in older versus newer cars. Lewis Dep. at 44:13-24.

Fifth, Jimerson considered the contents of both cars to be suspicious. Wood's car had open maps and fast-food wrappers in the passenger compartment, items that the court thought were entirely consistent with innocent travel. *Ibid.* The same is true for the items in Vasquez's car. Vasquez had a pillow and blankets covering miscellaneous belongings, as do "a very large category of * * * innocent travelers." *Reid*, 448 U.S. at 441. At the same time, the officers thought Vasquez had too few items in his car, missing belongings they thought to be typical of a cross-country move. Pet. 12-14. But with the advent of UPS and other cost-effective, convenient shipping services, it is not at all unusual to ship rather than drive one's belongings across the country. As this Court has held, traveling light is not suspicious behavior. See *Reid*, 448 U.S. at 441.

Sixth, Jimerson offered his generic and subjective opinion that both drivers were nervous. In neither case did Jimerson provide specific facts to suggest either Wood or Vasquez was more nervous than an average driver during a traffic stop. See *Wood*, 106 F.3d at 948. Such vague observations add little to the reasonable suspicion analysis. As this Court has recognized, traffic stops constitute a "possibly

unsettling show of authority" and frequently "create substantial anxiety," including for innocent drivers. *Prouse*, 440 U.S. at 657.

The last two factors, while not present in *Wood*, do not make Vasquez's conduct any more suspicious or render the two cases "[dis]similar," *Pauly*, 137 S. Ct. at 552. Petitioners question why Vasquez would move across the country when he owned a business in Colorado. Pet. 14. But when Lewis asked Vasquez where he worked, he said that "we own a Boutiques at Brighton." Pet. App. 39. By "we," Vasquez clearly indicated that he did not own the store alone. Family-run small businesses often depend on the work of more than one person. Nothing in Vasquez's answer suggested either that he was abandoning the business to be run by no one, or that he was going to be the one to personally manage the Colorado store from Maryland.

Similarly, petitioners point to the few times that Vasquez asked the officers to repeat a question, suggesting he could have been biding time to think up excuses. Pet. 15-16. In context, however, Vasquez's three requests that the officers repeat themselves were not suspicious. Even the officers asked Vasquez to repeat himself twice. All this shows is that the officers and Vasquez had difficulty understanding each other. In light of the substantial traffic that is common along major interstates, even at night, that difficulty is readily understandable.

To summarize: Jimerson argued that both Wood and Vasquez (1) had implausible travel plans; (2) were coming from a "known source state" for drugs; (3) had offered him inconsistent information; (4) had chosen unusual modes of transportation; (5) had surprising items in their cars; and (6) were nervous. In

reality, their travel plans and modes of transportation were normal, any inconsistency in their statements was marginal at worst, and the items in their cars were quite typical of long-distance drivers. As the Tenth Circuit rightly concluded, *Wood*'s facts are "almost indistinguishable" from this case, Pet. App. 12, and at the very least offer "similar circumstances," *Pauly*, 137 S. Ct. at 552. After *Wood*, "every reasonable official" would have understood that he lacked reasonable suspicion to detain Vasquez and search his car. *al-Kidd*, 563 U.S. at 741 (internal quotation marks omitted).

3. Petitioners next argue that even if *Wood* is on point, the officers could not have been expected to follow it, either because the case was no longer good law or because other decisions by the Tenth Circuit muddied the legal waters by finding reasonable suspicion in similar circumstances. Pet. 16-19.

But *Wood* remains good law. It evaluated reasonable suspicion under the same legal standard that applies today, the totality of the circumstances. Just as petitioners and *amici* mischaracterize the analysis below as taking a piecemeal approach, see Part I.2, *supra*, they seek to reframe *Wood* in the same way. But *Wood* could not have been clearer: "We are well aware that the existence of objectively reasonable suspicion of illegal activity does not depend upon any one factor, but on the totality of the circumstances." 106 F.3d at 946.

Nor did the *Wood* court fail to recognize that a combination of otherwise-innocent factors can add up to reasonable suspicion. Like the court below, it recognized that "the nature of the totality of the circumstances test makes it possible for individually innocuous factors to add up to reasonable suspicion." *Id.* at

948. In *Wood*, as here, there simply were no "concrete reasons" to make that conclusion. *Ibid.* Innocent behavior need not always add up to something suspicious, and no court has ever held otherwise.

The other Tenth Circuit cases identified by petitioners do not make *Wood*'s holding any less clear. Pet. 17-19. Each involved starkly different, more suspicious facts. See*, e.g.*, Part II.2, *supra* (discussing *Moore* and *Pettit*); *United States* v. *Duenas*, 331 F. App'x 576, 579-580 (10th Cir. 2009) (unpublished) (driver lied about having authority to drive his rental car in Kansas; could not utter more than "the main town" when asked where in Kansas he was moving to; and was extremely and increasingly nervous throughout the stop); *United States* v. *Karam*, 496 F.3d 1157, 1164 (10th Cir. 2007) (driver lied about where he had just been); *United States* v. *$49,000.00 in U.S. Currency, More or Less*, 208 F. App'x 651, 653, 655-656 (10th Cir. 2006) (unpublished) (driver hesitated when explaining a discrepancy in his rental car contract, and court noted "additional facts * * * not present in *Wood*"); *United States* v. *Williams*, 271 F.3d 1262, 1268-1270 (10th Cir. 2001) (driver was extremely nervous; had a two-way radio but travel plans that would not require such a radio; and was not named on the rental car agreement); *United States* v. *Toledo*, 139 F.3d 913, 1998 WL 58117, at *3 (10th Cir. 1998) (unpublished) (driver gave self-contradictory account of travel plans and had strong odor of air fresheners in a brand-new rental car).

Rather than muddy the waters, these decisions and others have reaffirmed *Wood* and repeatedly clarified that the specific factors in this case carry

little-to-no probative value. As the Tenth Circuit has reiterated time and again:

First, a solo cross-country drive is not an "implausible" travel plan that suggests criminal activity. See*, e.g.*, *Pettit*, 785 F.3d at 1382 (a one-way solo car trip "is not the type of unusual itinerary that gives rise to reasonable suspicion," and travel is not implausible "where the plan is simply unusual or strange because it indicates a choice that the typical person, or the officer, would not make"); *United States* v. *Simpson*, 609 F.3d 1140, 1148-1149 (10th Cir. 2010) (same); *United States* v. *Salzano*, 158 F.3d 1107, 1112 (10th Cir. 1998) (same). *Cf. Duenas*, 331 F. App'x at 579-580 (finding implausible travel plans where a driver planned to move to a town he could not name).

Nor is nighttime travel *per se* suspicious. Petitioners rely on *United States* v. *Pollack*, 895 F.2d 686 (10th Cir. 1990), in which the driver's presence on the road at 3:00 a.m. contributed to reasonable suspicion. *Id.* at 690-691. But the court specifically noted that traffic on the highway in question was "very unlikely" at that hour, and that a "very, very small percentage" of such traffic was legitimate. *Id.* at 690. In contrast, I-70 is a major interstate highway full of nighttime traffic, the vast majority of which is legitimate. The officers themselves remarked that they had seen a vast number of "Colorados" driving on the road that night. Dash Camera Tr. 19:12-16.

Second, it matters little what state the driver is from. See*, e.g.*, *Karam*, 496 F.3d at 1163-1164 (cautioning that "eastbound travel from a well-known drug source area" was "so innocuous and so susceptible to varying interpretations" that it carried "little

or no weight"); *United States* v. *Guerrero*, 472 F.3d 784, 787-788 (10th Cir. 2007) (same).

Third, not all inconsistencies are suspicious; while a lie is probative, an innocent mistake often is not, and the officer must look to whether the statement is of a type that suggests criminal activity. See*, e.g.*, *Karam*, 496 F.3d at 1164 (finding driver's lie about where he had just been suspicious); *Duenas*, 331 F. App'x at 579-580 (finding driver's lie about his authority to drive his rental car in Kansas suspicious); *Toledo*, 1998 WL 58117, at *3 (distinguishing driver's self-contradictory account of his travel plans, which was suspicious, from Wood's erroneous statement, which was "not of a type that suggested an intent to conceal criminal activity"); *United States* v. *Kitchell*, 653 F.3d 1206, 1219 (10th Cir. 2011) (relying on four inconsistent statements that revealed the driver's lack of familiarity with his passengers).

Fourth, an "unusual" choice of transportation must actually be unusual to be suspicious. See*, e.g.*, *Pettit*, 785 F.3d at 1382 ("Mr. Pettit was not driving a vehicle rented in his own name across the country * * * but rather a vehicle registered to an absent third party as a purported favor [when his license was suspended]."); *Moore*, 795 F.3d at 1231 (finding that a car registered to someone else without explanation was suspicious).

Fifth, a car's contents must actually be unusual to be suspicious; it is not enough to point to typical items in the car, or to question the absence of items when there is a ready explanation. See*, e.g.*, *Karam*, 496 F.3d at 1163-1164 (rejecting the officer's reliance on the presence of neatly taped boxes and small amount of luggage, reasoning there was no "objective justification" for finding the boxes suspicious and

"there are many reasons a person may choose to travel lightly"); *Toledo*, 1998 WL 58117, at *3 (reasoning that strong air fresheners in a new car were more suspicious than "the presence of commonplace food wrappers in *Wood*"); *United States* v. *Mendez*, 118 F.3d 1426, 1431 (10th Cir. 1997) (discounting lack of luggage on the vehicle's backseat when the car had a trunk, "a location in which many, if not most, travelers store luggage"); see also *United States* v. *Powell*, 277 F. App'x 782, 787 (10th Cir. 2008) (unpublished) (offering testimony that "in common experience," people making a cross-country move "pack things in tightly on the first trip to assure there will be room in the second trip for the remainder").

Sixth, time and again the Tenth Circuit has emphasized that to rely on a driver's nervousness, the officer must provide specific facts showing that the driver is more nervous than average. See*, e.g.*, *Salzano*, 158 F.3d at 1113 ("[A]bsent signs of nervousness beyond the norm, we will discount the detaining officer's reliance on the detainee's nervousness as a basis for reasonable suspicion."); *Moore*, 795 F.3d at 1230 (same); *Duenas*, 331 F. App'x at 580 (same); *Powell*, 277 F. App'x at 787 (same); *Pettit*, 785 F.3d at 1381 (same, distinguishing *Wood* as involving only the officer's "subjective" assessment and "generic" description); *Williams*, 271 F.3d at 1268-1269 (same).

Against this weight of precedent, petitioners argue that *Wood*'s application was not sufficiently clear. *Amici* further urge that drug interdiction is so critical to public safety that officers effectively should be entitled to absolute immunity for their actions on the job. NAPO *Amicus* Br. 14-18. But their argu-

ments would foreclose liability in *any* case where the Fourth Amendment violation turns on an officer's lack of reasonable suspicion, because there will always be minor, inconsequential factual distinctions among reasonable suspicion cases. That is not the law.

There was no ambiguity here. At the time of the stop, *Wood* clearly established that Jimerson and Lewis violated the Fourth Amendment by detaining Vasquez without reasonable suspicion. Petitioners are wrong to suggest that this Court should upend settled qualified immunity doctrine to foreclose liability in reasonable suspicion cases based on inconsequential factual distinctions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2017