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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 00-1519

RALPH ARVIZU. :

- - - - -X

Washington, D.C.

Tuesday, November 27, 2001

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:12 a.m.

APPEARANCES:

AUSTIN C. SCHLICK, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the Petitioner.

VICTORIA A. BRAMBL, ESQ., Assistant Federal Public
Defender, Tucson, Arizona; on behalf of the
Respondent.

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P R O C E E D I N G S

(10:12 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 00-1519, United States against Ralph Arvizu.

Mr. Schlick.

ORAL ARGUMENT OF AUSTIN C. SCHLICK

ON BEHALF OF THE PETITIONER

MR. SCHLICK: Mr. Chief Justice, and may it please the Court:

Since Terry, this Court has held repeatedly that reasonable suspicion analysis requires a common sense evaluation of the totality of the circumstances. The decision below is fundamentally inconsistent with that rule because it requires law enforcement officers to disregard potentially relevant facts when determining whether investigative stop is warranted.

This Court's decisions in Cortez and Sokolow are especially clear in rejecting attempts to put categories of facts off limits. In Cortez, the Court held that a vehicle's route, the timing of its trip, and its capacity for carrying illegal aliens together established reasonable suspicion, notwithstanding that each of those facts independently might be consistent with innocent travel.

1 In Sokolow, the Court rejected a rule that would
2 have limited officers' ability to consider the personal
3 characteristics of suspected drug smugglers. The Court
4 held that that sort of rule adds to the difficulty of
5 applying the reasonable suspicion standard. It does not
6 ease it. And the Court further confirmed that innocent
7 facts, facts consistent with innocent travel, in
8 themselves may together establish reasonable suspicion.

9 In this case, the Ninth Circuit attempted to
10 establish a rule that would bar categorically
11 consideration of certain facts that the court deemed
12 innocent. That -- that rule presents two fundamental
13 problems.

14 The first is that it doesn't accommodate the
15 subtleties of real world encounters. For every
16 categorical rule, there would have to be exceptions and
17 subrules, and even if law enforcement officers could be
18 asked to master those, they would still then have to
19 anticipate new situations, and those rules could not
20 provide guidance when --

21 QUESTION: Mr. Schlick, you said this is an area
22 in which one can use one's common sense, and I thought
23 that what the Ninth Circuit was telling us was that some
24 items in that list under all circumstances wouldn't cast
25 suspicion. And one was -- had a certain familiar ring

1 with me that when you see a police car, you slow down.

2 This wasn't a car that came to a screeching halt or was
3 trying to dodge it, and then it just slowed down. And
4 isn't that a most natural reaction?

5 MR. SCHLICK: The problem, Justice Ginsburg, was
6 that the Ninth Circuit didn't admit of situations in which
7 deceleration might be relevant. For example, in the
8 Fifth Circuit's Villalobos case, which we cited in our
9 brief, the law enforcement officer pulled in front of the
10 vehicle that was suspected. The vehicle then slowed to
11 drop back away from the law enforcement officer vehicle,
12 and the Border Patrol officer in that case deemed that
13 suspicious, that it appeared that the vehicle had changed
14 its speed in order to increase its distance from the
15 law --

16 QUESTION: But they weren't talking about that
17 case. They were talking about this case. And I thought
18 what they were saying was that there was nothing
19 suspicious about the slowdown here, and if that's all that
20 you have, it won't do.

21 MR. SCHLICK: Justice Ginsburg, we read the
22 court of appeals opinion as attempting to establish
23 categorical rules. On page 12a of the petition appendix,
24 the court says, we attempt here to describe and clearly
25 delimit the extent to which certain factors may be

1 considered by law enforcement officers in making stops
2 such as the stop here. On the same page, slowing down
3 after spotting a law enforcement vehicle is an entirely
4 normal response that is in no way indicative of criminal
5 activity. That -- that appears not to have made a -- the
6 possibility that deceleration may in some context be
7 suspicious.

8 And indeed, in the Ninth Circuit's Sigmond-
9 Ballesteros case, decided after this case, the Ninth
10 Circuit interpreted its decision in this case as holding
11 that only certain factors may be considered by law
12 enforcement officers when making stops. And it's -- it's
13 that categorical rule that is inconsistent with the
14 totality of the circumstances test.

15 QUESTION: I suppose it would be suspicious if
16 -- if you're on a highway that has not only a maximum
17 speed but a minimum speed, and -- and the car slows down
18 20 miles below the minimum when it -- when it sees a
19 police officer. That -- that wouldn't be a normal
20 reaction, would it?

21 MR. SCHLICK: No. No, it would not.

22 QUESTION: And -- and do you think it's a normal
23 reaction always to slow down when one sees a police -- a
24 police car even if you happen to be going 10 miles below
25 the speed limit already?

1 MR. SCHLICK: It may depend on the particular
2 area, and that's -- that may be a question on which you
3 would look to the law enforcement officer's experience and
4 expertise.

5 QUESTION: I don't do it. Maybe you do it. But
6 if I'm 10 miles under the speed limit already, I -- I
7 don't immediately slow down when I see a police car. I
8 don't know why you are willing to accept that as a -- as
9 an image of reality that everybody slows down when you see
10 a police car. If you're -- if you're going over the speed
11 limit, I assume you do.

12 MR. SCHLICK: I think your intuition accords
13 with common experience and the holdings of most courts.

14 QUESTION: There was a concrete record here of
15 what this driver was doing, and he wasn't going 10 miles
16 an hour. He was going a -- a normal speed.

17 MR. SCHLICK: Justice Ginsburg, on page 57 of
18 the joint appendix, Agent Stoddard testified that the
19 extreme deceleration in this case, from about 50 to 55
20 miles per hour down to about 25 or 30 miles per hour, was
21 not normal and did set respondent's vehicle apart from
22 ordinary traffic on those roads.

23 QUESTION: What was the speed limit on the
24 roads?

25 MR. SCHLICK: Between 25 miles per hour and 35

1 miles per hour, Your Honor.

2 QUESTION: And that's what he slowed down to.

3 QUESTION: That was an established speed limit?

4 MR. SCHLICK: Yes, Your Honor. In -- in the
5 joint appendix, there are photographs which show speed
6 limit signs, and it's 35 miles per hour down near the
7 southern portion of the roads, 25 in the northern portion.

8 QUESTION: What -- what was the portion where --
9 where he slowed down? I mean, it was 25 to 35? No. It
10 was either 25 or 35. What was it, do you know?

11 MR. SCHLICK: I -- I don't know for sure. I --
12 I would guess it was 25, but I don't know for sure.

13 QUESTION: But that's what he slowed down to.
14 So, he had been going above the speed limit.

15 QUESTION: That sounds a lot more reasonable
16 then. I mean, gee, if you don't slow down to the speed
17 limit when you see a police car, you're in big trouble.

18 (Laughter.)

19 MR. SCHLICK: Again, Agent Stoddard testified
20 that that sort of deceleration, that speed, was not common
21 in the area, and it --

22 QUESTION: You mean they just keep zipping along
23 at 50 despite seeing a police car. What part of the
24 country is this anyway?

25 (Laughter.)

1 QUESTION: It's Arizona.

2 (Laughter.)

3 QUESTION: What was the nature of the road? Was
4 -- was it a regularly paved road?

5 MR. SCHLICK: No, Mr. Chief Justice. The road
6 on which respondent was apprehended was a dirt road. It
7 was a road that Agent Stoddard testified is used primarily
8 by the local ranchers and by Forest Service vehicles and
9 by the Border Patrol itself. It's -- it's not an improved
10 highway. And it was extremely unusual, Agent Stoddard
11 believed, for a vehicle, a minivan, to be on these roads,
12 and it was a notorious smuggling route.

13 QUESTION: Is this one on exhibit 5 of the joint
14 appendix, or have I got the wrong road there? Exhibit 5
15 is Kuykendall Cutoff Road and Rucker Canyon Road.

16 MR. SCHLICK: Yes, Justice Kennedy. The -- the
17 photographs at the back of the joint appendix depict the
18 route. They -- they moved from the southerly portion of
19 the route up, as you get back to the later pages, toward
20 the northern portion. Exhibit 24, for instance, is the
21 intersection of Kuykendall Road and Rucker Canyon Road,
22 which is very close to where the apprehension occurred.

23 The maps in the joint appendix on pages 155 and
24 157 show the area at issue. And you can see the first of
25 those maps on page 155 shows the route beginning at the

1 bottom of the page in the center, Leslie Canyon Road.

2 Respondent then -- and that's -- that's paved for about 10
3 miles, about the first 10 miles near Douglas.

4 Respondent traveled north on that road and then
5 at the T intersection you see approximately in the middle
6 of the page, by which point the -- the roads become
7 unpaved, headed right, away from the Border Patrol
8 checkpoint, away from the highway, which would take you
9 north, through the dirt road, proceeded up Rucker Canyon
10 Road, about three-quarters of the way up the page. That's
11 an important intersection.

12 QUESTION: Well, he turned left rather than
13 right, didn't he?

14 MR. SCHLICK: I'm sorry. Turned -- turned right
15 at the intersection, at that T intersection where Leslie
16 Canyon Road jogs right, then stayed on Leslie Canyon Road,
17 took a left on Rucker Canyon. And that was a critical
18 turn.

19 Had he gone right, he would have been going
20 towards the only recreation areas in the vicinity. And
21 that might have explained the presence of cargo in his --
22 in his minivan. Agent Stoddard could see that there
23 appeared to be cargo on the floor of the van. But he
24 instead turned left, away from the only -- the local
25 recreation area and on a route that, if he then took --

1 took a right onto Kuykendall Road, which is -- which is
2 again almost in the center of the page near the top
3 between numbers 2 and 3 -- if he took that right on
4 Kuykendall Road, then he would be circumventing the Border
5 Patrol checkpoint which is indicated by number 1 on the
6 left-hand margin of the page.

7 QUESTION: The idea that he would eventually go
8 north on Kuykendall and then take -- go west to rejoin 191
9 north of the checkpoint.

10 MR. SCHLICK: That -- that's right, and then
11 head up to I-10, which would allow him to go to Tucson --
12 Tucson or Phoenix, for example. And it was that route
13 which Agent Stoddard testified is a notorious smuggling
14 route, very rarely used by anyone except ranchers and
15 Forest Service personnel --

16 QUESTION: Although it is a route that could
17 have been used by people going up to the Chiricahuas.

18 MR. SCHLICK: It's -- it's possible, Your Honor,
19 but --

20 QUESTION: From Douglas.

21 MR. SCHLICK: -- the district court addressed
22 that possibility on page 22a of the petition appendix and
23 said that that would require a 40 or 50 mile trip over
24 unimproved dirt roads. The most logical way to go is to
25 take I-191 straight up I-181 and then across to Chiricahua

1 National Monument.

2 That's particularly significant in this case
3 because the registration of the minivan was to a block
4 that was just two blocks from I-191 in Douglas, and that
5 makes it all the more inexplicable that a -- a vehicle
6 that should know the roads would go out of its way to
7 Leslie Canyon Road, rather than just going two blocks,
8 picking up the highway and heading straight north. You
9 know, that's -- that's the route that you would take if it
10 were a long distance trip.

11 I said that the cargo couldn't be explained by
12 the recreation area, because it had already passed the
13 turn on Rucker Canyon Road. Nor could it be explained by
14 a long distance trip because the highway is the road that
15 you would take if you were headed on -- on a long distance
16 with children with suitcases or overnight bags.

17 QUESTION: Mr. Schlick, could I come back to the
18 -- to the slowing -- slowing up? I'm not quite sure what
19 the -- what the Government's objection to the court's
20 opinion is. I -- I would tend to think that -- that it is
21 true, in the circumstances of this case, that if somebody
22 is barreling along at 50, sees a police car, and slows
23 down to 25, that is not at all suspicious. Indeed, I -- I
24 might consider it suspicious if he continued barreling
25 along at 50.

1 So, you know, if your argument is that in the
2 circumstances of this case, the slowing down was
3 suspicious, I -- I don't think I agree with you. On the
4 other hand, it is the case that the court of appeals
5 seemed to have -- seems to say that slowing down can never
6 be suspicious.

7 Now, which of the two are -- are you objecting
8 to? Do you really think that -- I mean, that there was
9 proper suspicion in this case simply because the person
10 slowed down to the speed limit when he saw the police car?

11 MR. SCHLICK: In this case, Justice Scalia, the
12 deceleration is -- is not a factor on which the case would
13 turn. There were other indications of nervousness which
14 I'd like to discuss in a moment.

15 QUESTION: Okay. So, as to that factor, your --
16 your -- really your only objection is you can't be as
17 categorical as the court of appeals put the point.

18 MR. SCHLICK: That's -- that's exactly right.
19 We think it's a good example of the error of the court of
20 appeals' approach.

21 But in this case, even looking at the factor of
22 nervousness, there were other indications. After
23 decelerating, respondent drove past the Border Patrol
24 vehicle and stared rigidly straight ahead, without looking
25 at or acknowledging Agent Stoddard, which --

1 QUESTION: May I ask this question? At the very
2 page of the opinion that you call our attention to, the
3 court of appeals said, in reaching our conclusion, we find
4 that some of the factors on which the district court
5 relied are neither relevant nor appropriate to a
6 reasonable suspicious -- suspicion analysis in this case.
7 And are you agreeing with Justice Scalia that the slowing
8 down in this case was not relevant?

9 MR. SCHLICK: Justice Stevens, we would say that
10 it had some relevance. It was -- it was not a
11 particularly important factor, but it had some relevance.
12 The -- the court of appeals I think --

13 QUESTION: Do you think the court of appeals
14 erred in saying that in this case it had no relevance?

15 MR. SCHLICK: Yes, Justice Stevens.

16 QUESTION: I see.

17 QUESTION: And what about -- what about, you
18 know, not -- not waving to the police car as you go by? I
19 don't know when I -- if I were ever exceeding the speed
20 limit and saw --

21 (Laughter.)

22 QUESTION: -- and saw a police car, it seems to
23 me I would slow down and -- and try to give the impression
24 that I wasn't slowing down because I saw the police car.

25 (Laughter.)

1 QUESTION: I mean, you know, you don't hit the
2 brake and wave at the police officer.

3 (Laughter.)

4 QUESTION: So, why is that a suspicious factor?
5 I don't see why in the circumstances of this case that's a
6 suspicious factor either.

7 MR. SCHLICK: Agent Stoddard's testimony was
8 that both respondent and his front-seat adult passenger
9 stared straight ahead. The respondent gripped the wheel
10 very tightly in -- in a position that Agent Stoddard
11 deemed characteristic of someone who simply wants to melt
12 into their vehicle if possible, and --

13 QUESTION: Or maybe somebody who had been going
14 50 miles an hour in a 25-mile-an-hour zone.

15 MR. SCHLICK: Again, Agent Stoddard's testimony
16 was -- was that respondent's behavior was -- was very
17 unusual.

18 And after he saw those -- those and began to
19 follow the minivan, there was another indication of
20 nervousness, which was at the intersection of Rucker
21 Canyon Road and Kuykendall Road. Respondent turned on his
22 blinker, well ahead of the intersection, then turned it
23 off, drove towards the intersection, and just before the
24 intersection, made a sharp turn and turned on his blinker
25 again, which again indicated uncertainty or nervousness,

1 which supported the inference that he was unusually
2 distracted by the presence of the Border Patrol vehicle.

3 QUESTION: What's the testimony as to the amount
4 of use this particular route got? How many cars a day,
5 anything about how many cars a day or an hour came over
6 it?

7 MR. SCHLICK: The testimony, Mr. Chief Justice,
8 was that this road -- the sensor hits on -- the Border
9 Patrol maintains sensors along Leslie Canyon Road and
10 Rucker Canyon Road, and that the first sensor on Leslie
11 Canyon Road, which responded to northbound traffic, was
12 triggered about once every 2 hours.

13 QUESTION: So, that would mean one car every 2
14 hours?

15 MR. SCHLICK: Correct. And -- and that's
16 directly relevant to the expected response. When you're
17 in an area where one car travels approximately every 2
18 hours, you're more likely to acknowledge perhaps a
19 friendly wave -- another vehicle. This road was extremely
20 remote, and again, most of the traffic was local vehicles
21 from -- from the ranches, and the minivan was a vehicle
22 which was not only unusual by type for this road, because
23 it was not a four-wheel drive vehicle, but also had the
24 capability of carrying a large amount of concealed cargo,
25 which made it well-suited to smuggling activity. This

1 Court noted in Brignoni-Ponce that that is a factor that
2 is potentially relevant when determining whether
3 investigative stop is warranted in the border context.

4 The -- the second problem with the court of
5 appeals approach, in addition to the fact that it can't
6 comprehend the subtleties the real world encounters, is
7 that it's unrealistic to ask officers to put out of their
8 minds facts that they see before them and believe to be
9 relevant. Even if officers could do that, they would then
10 be left to speculate about the hypothetical import of the
11 imagined set of facts, and that's going to --

12 QUESTION: One -- one of the things the Ninth
13 Circuit said is just looking at this laundry list and just
14 to throw everything in and mix it all up and say it's
15 suspicious that the driver didn't look at the police
16 officer or didn't wave, but it's equally suspicious that
17 the children did wave. So, one characterization of that
18 was damned if you do, damned if you don't. If you wave,
19 that's no good, and if you don't wave, that's no good.
20 And I think that the -- the Ninth Circuit can't be faulted
21 for saying it's not good enough just to list everything
22 that happened and say it's -- everything the officer could
23 perceive and say it was all relevant. Some of it is
24 relevant and some of it isn't.

25 Why would, for example, the children -- how old

1 were the children, by the way?

2 MR. SCHLICK: 12, 10, and 7.

3 QUESTION: And the children were waving in the
4 back, and something was to be inferred from that?

5 MR. SCHLICK: They weren't simply waving, Your
6 Honor. Without turning toward the Border Patrol
7 vehicle --

8 QUESTION: They were waving forward.

9 MR. SCHLICK: Correct.

10 QUESTION: And -- and the car -- the police --
11 the Border Patrol car was behind them.

12 MR. SCHLICK: Correct. It may be expected that
13 a Border Patrol agent would have some experience with
14 children's reaction to him in his vehicle. And in this
15 case he said he -- he hadn't seen anything like this. It
16 went on for about 4 or 5 minutes. It was methodical. The
17 children waved together, facing forward without -- without
18 facing Agent Stoddard.

19 With respect to the damned if you do/damned if
20 you don't argument, waving or not waving, the court of
21 appeals ignored the fact that -- Agent Stoddard's
22 testimony was that he deemed it suspicious that when the
23 Border Patrol vehicle was stopped and respondent drove
24 past, respondent didn't acknowledge him at all. After
25 that, he turned and began to follow respondent's vehicle,

1 and it was only at that point that the children began
2 their odd waving. So, it's a reasonable inference that
3 having failed in his effort to avoid the -- the Border
4 Patrol officer's attention, respondent then went to plan
5 B, which was we'll attempt to -- to look like a family on
6 -- on an outing, and one way of -- of perhaps deflecting
7 the agent's suspicion is to have the children wave. But
8 that resulted, from Agent Stoddard's perspective, in a --
9 a very odd circumstance, and that's the exactly the sort
10 of situation that the reasonable suspicion analysis --

11 QUESTION: To -- to what extent, Mr. Schlick, do
12 three judges, say, sitting in San Francisco or Los Angeles
13 or nine Justices sitting here -- do we defer to the
14 judgment in these matters of a Border Patrol agent on the
15 scene?

16 MR. SCHLICK: Ornelas, among other cases,
17 addressed that, Your Honor, and -- and held that it's
18 appropriate to give due weight to the expertise and
19 experience of law enforcement officers and local judges.
20 And in this case, both Agent Stoddard and -- and the trial
21 judge deemed this route to be unusual, to be associated
22 with smuggling. It deemed -- the trial judge deemed the
23 factors that I've enumerated to be significant in the
24 context of what was going on out there, and I believe
25 those are the trial judge's words. We have to look at

1 this in the context of what was going on out there.

2 The cargo, for example. He considered the
3 possibility that it might just be camping supplies, but he
4 said that would be -- that would be a possible inference
5 were it not for all the other indications of illegality.
6 So, he -- he correctly undertook to analyze the facts --

7 QUESTION: May I ask this question? I got the
8 impression, in reading the officer's testimony, what he
9 really did is once he checked and found where the car came
10 from, where it was registered in a high drug area, that's
11 what triggered his decision to stop the vehicle. And my
12 question to you is supposing all he knew was the very
13 unusual circumstances of a family driving in an area
14 that's mostly driven through by ranchers and -- and not
15 families. That fact, the rare amount of traffic on the
16 road, and the -- and the location from which the car
17 originated, would that be enough in your view?

18 MR. SCHLICK: If you --

19 QUESTION: -- put aside all these rather unusual
20 things like waving and slowing down and so forth. Would
21 those three facts be enough in your view to justify the
22 stop?

23 MR. SCHLICK: As -- as I understand your
24 question, no, I don't think they would be. But when you
25 start adding factors such as missing the turnoff to the

1 recreation areas, such as carrying the concealed cargo --

2 QUESTION: Well, missing the turnoff is part of
3 the location, as I say. The unusual location of the
4 vehicle at the time of the stop. Is that -- and the fact
5 it was not the normal. You normally see ranchers or -- or
6 Border Patrol people. You don't normally see families out
7 there. That's a -- that's a road that is not usually
8 used. Is the -- I'm just wondering if the rarity of the
9 -- of the general scene plus the fact that they did --
10 that the officer did check and find that this vehicle was
11 registered in the -- in the area known for drug smuggling,
12 was that enough? I think you said no.

13 MR. SCHLICK: Is -- in your hypothetical,
14 Justice Stevens, is the fact that it was a minivan?

15 QUESTION: Yes.

16 MR. SCHLICK: Yes, yes. If you knew that it was
17 a minivan, which was out of character, suited to carrying
18 aliens, and knew that the route had been taken, that last
19 turn onto Kuykendall Road, north so that the minivan would
20 not approach the checkpoint, then yes, there would be
21 reasonable suspicion.

22 QUESTION: In other words, you're saying -- what
23 you're saying I think is that even if the Ninth Circuit
24 were correct in disregarding the waving and the slowing
25 down and the failure to wave once, you'd still have a

1 reasonable suspicion.

2 MR. SCHLICK: Yes, Justice Stevens. It would be
3 our position that even if you consider only the three
4 factors that the court of appeals considered categorically
5 in the analysis -- that would be the route, the fact that
6 it was a minivan, and the time. The time was when the
7 Border Patrol was likely to have stepped down its
8 surveillance. The court of appeals held if you considered
9 those factors, there was no reasonable suspicion. We
10 would disagree and say even if you only consider those
11 factors, there was reasonable suspicion. But the
12 appropriate analysis is to consider all the factors
13 collectively, and then clearly there were grounds for the
14 stop.

15 If the Court has no further questions --

16 QUESTION: I have another question, if -- if you
17 have the time.

18 This checkpoint is about 30 miles north of the
19 border. Was there also a checkpoint in the --in the town
20 from which the car originated? I'm just a little puzzled
21 at what the -- at the setup here, why there's the
22 checkpoint 30 miles from the border, and whether or not
23 there was one closer to the border.

24 MR. SCHLICK: There -- there's a border
25 inspection station in -- in Douglas, but the Court

1 explained in Martinez-Fuerte the -- the criteria the
2 Border Patrol uses to establish its fixed checkpoints, and
3 I think those criteria continue to hold true today. One
4 of them is that the checkpoint should be outside, about 25
5 miles from the border, because 25 miles is the zone in
6 which a border crossing card allows an alien to travel.
7 So, you would -- so, you would be stopping aliens who were
8 -- who were legally there because of their border crossing
9 card.

10 Also, you want your checkpoint to be somewhat
11 remote from -- from the population center. Douglas is a
12 town of about 15,000 people. And you want your -- your
13 checkpoint to capture traffic which is heading north, away
14 from the border, rather than just local traffic within
15 that area.

16 QUESTION: And then the other question I had is
17 about the sensors. There were two sensors triggered in
18 this case, as I understand the record. Are there -- are
19 the sensors spotted purely in order to identify every
20 vehicle that uses this particular road that this -- this
21 man used?

22 MR. SCHLICK: The sensors are magnetic sensors
23 which are directional. So, they don't pick up southbound
24 travel, which would -- which would not be consistent with
25 smuggling away from the border. They do pick up all

1 northbound traffic. So, it would pick local --

2 QUESTION: Well, they picked up not only the
3 northbound, but also the fact that he turned right the
4 first time. No, left the first time. He passed the
5 Rucker Canyon Road.

6 MR. SCHLICK: Yes. In this case there were two
7 sensors. One was before Rucker Canyon Road. When that
8 sensor was triggered, Agent Stoddard began to drive
9 towards respondent to -- to check out the sensor hit. And
10 then a second sensor was triggered after respondent turned
11 left on Rucker Canyon Road and away from the national
12 forest.

13 QUESTION: Away from the recreational area.

14 MR. SCHLICK: That's right.

15 QUESTION: Yes.

16 QUESTION: Very well, Mr. Schlick.

17 Ms. Brambl, we'll hear from you.

18 ORAL ARGUMENT OF VICTORIA A. BRAMBL

19 ON BEHALF OF THE RESPONDENT

20 MS. BRAMBL: Mr. Chief Justice, and may it
21 please the Court:

22 I wanted to respond to the question that you
23 asked, Mr. Chief Justice, about who should we give due
24 weight to and who is going to know better, the officer in
25 the field, the district court, or the court of appeals.

1 And certainly the decision in Ornelas v. United States
2 does instruct us that we give weight -- we review for
3 clear error the -- the factual findings that the district
4 court made. However, inferences from those findings that
5 the district court makes and -- and that the officer makes
6 are reviewed. They're reviewed giving due weight to
7 those. That is not as strict or rigorous as the standard
8 as for clear error.

9 And then finally, Ornelas -- that decision
10 really wanted and instructed the courts -- the courts of
11 appeal to issue opinions that were instructive to firm up
12 the precedent and to offer guidance to everybody, to
13 officers in the field, to litigants, to district courts.
14 And really, the Ninth Circuit in this case -- they handle
15 the lion's share, over two-thirds of -- or approximately
16 two-thirds of the border stop cases come from the Ninth
17 Circuit. They also have developed experience. They've
18 developed both practical experience in seeing these cases
19 over and over again and seeing neutral and rote factors
20 offered over and over again that really don't have any
21 weight. And they're instructing through this opinion and
22 several other opinions that they've issued over the last
23 20 or 30 years --

24 QUESTION: All those -- that type of opinion
25 seems to me contrary to our opinion in Sokolow where we

1 said you just can't categorize these kind of factors and
2 say that this kind of thing is never useful and something
3 else is always useful.

4 MS. BRAMBL: I think that all the parties agree
5 that the totality cannot have categorical rules because --

6 QUESTION: Well, then certainly you -- you must
7 -- you're not defending then some parts of the Ninth
8 Circuit opinion. Is that correct?

9 MS. BRAMBL: I think that some of the language
10 that the Ninth Circuit used was inartful in that it made
11 it sound -- if you take one sentence out of the whole
12 opinion, it would make it sound like they were creating
13 categorical rules. But when you read everything, the
14 whole opinion, in the context, they do cite all of the
15 cases this Court has decided: Sokolow, Terry, Cortez,
16 Brignoni-Ponce, Wardlow. They say that they consider
17 everything.

18 But then they go through factor by factor. And
19 I do defend the way they went about that, separating out
20 the factors and discussing them because it seems that that
21 would be the only orderly way to go about the analysis,
22 and the only way to -- to offer an opinion that really
23 does give some instruction and guidance.

24 QUESTION: How -- how is that? I was quite
25 disturbed actually by the opinion because I thought there

1 were five or six Supreme Court cases that say this is just
2 the kind of opinion you should not write. So, then I -- I
3 went through it, and it says, for example, one of the
4 factors, the fact the minivan slowed, is prohibited by our
5 precedent. Well, my own common sense reaction would be it
6 all depends. If he was going 40 miles an hour and slowed
7 to 10 in -- in 2 seconds, I'd say, why in the middle of
8 the desert did he feel compelled to slow so much? I -- I
9 suspect people don't give tickets in Arizona for driving
10 50 miles in the middle of the desert. Maybe they do, but
11 it doesn't say that. I think it would depend.

12 He says that the fact that a van is registered
13 to an address in a block notorious for smuggling is of no
14 significance and may not be given any weight.

15 Then there are four or five others which are
16 listed where the second factor is of questionable value.
17 The failure -- he has five of them there, which say our
18 precedent says you give no weight.

19 Now, I just don't see how to square that either
20 with Ornelas, Sokolow, or five other precedents of this
21 Court, as well as with common sense, because it seems to
22 me it would all depend.

23 MS. BRAMBL: Well, I certainly agree that --
24 that there may be circumstances in which where you live or
25 slowing down could be. With respect to the first one,

1 where they do say squarely prohibited by our precedent,
2 they go ahead and -- and then relate instances where
3 slowing down -- where they do find that this is
4 suspicious. Just merely the act of slowing down they have
5 determined, using common sense and -- and I think a lot of
6 the comments this morning illustrate that if maybe not a
7 universal reaction, it's so common to slow down when you
8 see a law enforcement officer, that it's meaningless.

9 QUESTION: Maybe -- maybe we really don't know
10 enough to say that. I -- I was engaging in that
11 conversation with the Government's counsel. But -- but in
12 point of fact, I'm not sure what the reaction is, as -- as
13 Justice Breyer puts it, out in the middle of the desert.

14 For one thing, I don't know whether -- whether
15 Border Patrol officers can give speeding tickets. For
16 another thing, I don't know whether it's generally known
17 that Border Patrol officers cannot give speeding tickets.
18 And therefore, I don't know whether it's, indeed, quite
19 common out in the middle of the -- of the vast desert of
20 Arizona for people to go barreling along at 50 miles an
21 hour past a Border Patrol agent and ordinarily to wave and
22 say hi.

23 (Laughter.)

24 QUESTION: These are all matters that I'm sure
25 the Border Patrol agent was aware of, and perhaps the

1 district court. I'm less certain that the court of
2 appeals out in San Francisco was -- was aware of all of
3 those things. Why shouldn't I give the Border Patrol
4 agent and the district court the benefit of the doubt?

5 MS. BRAMBL: Well, the agent -- like so many of
6 the factors in this case, the agent didn't really tie down
7 or tie into his experience why slowing down would be
8 predictive or indicative of not just speeding but of
9 criminal activity such as alien or drug smuggling, which
10 was the reason that he was out there.

11 QUESTION: Well, he said, people, when they see
12 my Border Patrol car, normally don't slow down. He
13 certainly said that, and he found that to be unusual.
14 Now, why -- why should I think that that is false?

15 MS. BRAMBL: Well --

16 QUESTION: Do you know, as a matter of fact,
17 whether Border Patrol agents give speeding tickets?

18 MS. BRAMBL: I think that that's an open
19 question.

20 QUESTION: It's an open question whether they
21 give speeding tickets?

22 MS. BRAMBL: But I believe that generally --

23 QUESTION: Don't they have other things to do?

24 MS. BRAMBL: They do have other things to do. I
25 believe that if driving would be characterized as

1 dangerous where maybe the public was in jeopardy, that
2 they would be authorized to make a stop, but just because
3 someone is speeding or violating an Arizona traffic law, I
4 don't believe that they would make such a stop.

5 But I wanted to point out that the Ninth Circuit
6 opinion went on, after they said that this factor was
7 squarely prohibited, to say the kinds of ways that slowing
8 down or a deceleration would be indicative of reasonable
9 suspicion or would -- would have some weight. And they
10 characterized that as evasive driving where -- where
11 perhaps the Border Patrol is seen and then there's an act
12 of evasion as well as deceleration.

13 QUESTION: Ms. Brambl, the -- the district court
14 ruled for the Government in this case, and the Ninth
15 Circuit reversed. And I don't see that in the district
16 court's opinion, which the court of appeals was -- was
17 reviewing, that same laundry list that appears in the
18 Ninth Circuit's decision. So, what I don't understand is
19 if you just take the district court's opinion, what did
20 the district court rely on that could be questionable?
21 The district judge did not rely on the children waving, as
22 I recall.

23 MS. BRAMBL: Well, the district court judge did
24 refer to that, but what's -- what the -- the court of
25 appeals picked up on, which the district court didn't, was

1 all of the inferences that -- and subjective beliefs that
2 this waving entailed because it wasn't just -- the
3 children were facing forward and waving forward. So, it
4 was a big leap that they were even waving at the agent to
5 begin with and an even bigger leap that the agent made
6 that they were coached to do so, presumably by the driver
7 or the adult passengers. And that's what the Ninth
8 Circuit seized on.

9 And another big deficiency with this is how does
10 waving or waving in a mechanical, odd way, as the district
11 court found -- how would that be tied in to criminal
12 behavior? And the record doesn't indicate how.

13 QUESTION: How do we know from the record what
14 kind of wave it was? What -- what he says in his
15 testimony is they kind of stuck their hands up and began
16 waving to me like this. Well, I'm sorry.

17 (Laughter.)

18 QUESTION: There we are. Okay?

19 Now, the person who saw that was the district
20 judge, and the way it was characterized by the policeman
21 is it wasn't in a normal pattern. It looked like they
22 were instructed to do so. And without being able to see
23 what he did, it's a little tough for me. And -- and so, I
24 don't know. What the courts both say is it doesn't add
25 much.

1 The odd thing about the court of appeals opinion
2 is it seems to suggest, because it doesn't prove the case,
3 it's not relevant. Now, I -- I mean, what's the response
4 to that?

5 MS. BRAMBL: Well, I think that -- that goes to
6 the heart of the issue presented by this case, which is
7 what can the court of appeals exclude as factors, even if
8 they do it on a case-by-case basis. Can they look at
9 factors and just say, you know what, this is so marginally
10 relevant or completely weightless that we're not going to
11 -- to count it in the equation? And although I don't
12 defend this --

13 QUESTION: But it does seem as though the Ninth
14 Circuit was trying to suggest that no other court could
15 consider it in the calculus either in the future and --
16 and was making some kind of effort to develop some more
17 rigid guidelines than we've seen in the past.

18 Let me tell you what concerns me very frankly.
19 We live in a perhaps more dangerous age today than we did
20 when this event took place. And are we going to back off
21 from totality of the circumstances in an era when it may
22 become very important to us to have that as the overall
23 test? And I'm concerned that the Ninth Circuit opinion
24 seemed to be a little more rigid than our precedents
25 require or that common sense would dictate today.

1 MS. BRAMBL: Well, I certainly agree that
2 totality and reasonableness has to remain flexible, and
3 that given the times that we live in, that perhaps
4 adjustments are going to be made. Thankfully this case I
5 don't know presents the -- the specter of that.

6 And it -- it seems that what the Ninth Circuit
7 tried to do in this case was to really provide some
8 meaningful guidance. They could have just listed the
9 factors in a very straight forward way without any
10 discussion and just said, you know what? We add all these
11 together and there's no reasonable suspicion. And we
12 probably wouldn't be here today. However, what they tried
13 to do I think is to provide some guidance for everybody
14 because when we get these cases as --

15 QUESTION: When we have said that the test is
16 totality of the circumstances, the amount of guidance that
17 can be provided by -- by a court is -- is somewhat
18 limited.

19 MS. BRAMBL: It is but there's a surprising
20 repetition of factors. This Court in --

21 QUESTION: A surprising repetition of factors by
22 the Ninth Circuit.

23 MS. BRAMBL: Well -- well, even this Court in
24 Ornelas recognized that certain fact patterns were
25 similar, such as Sokolow and Royer and a few others, that

1 really -- given how fact-specific they are, there really
2 is, especially when you start looking in border areas
3 where -- for instance, there are a number of stops where
4 there are checkpoints and -- and people claiming that
5 perhaps these people are on the road for checkpoint
6 evasion purposes.

7 QUESTION: Yes, but -- but you know, checkpoints
8 vary too. The checkpoint north of San Diego is -- is in a
9 heavily populated area where things may be quite different
10 than out here in the Sulphur Springs Valley where there
11 aren't very many people.

12 MS. BRAMBL: Well, sure. It seems that -- that
13 if you look through, for instance, just Ninth Circuit
14 opinions, or if you go over to Fifth Circuit and Tenth
15 Circuit, but also look at the -- the border areas, you do
16 see surprising number of repetition, even though perhaps
17 some are in very urbanized areas and some are in rural
18 areas.

19 QUESTION: Well, that's -- that's true. The
20 officers are -- are trained to tell the district court,
21 the finder of fact, all of the factors that entered into
22 their judgment. It seems to me, though, a fair reading, a
23 necessary reading of the Ninth Circuit's opinion, that we
24 now have seven factors that every officer in the Ninth
25 Circuit must memorize and not rely on. And I just don't

1 see how that's consistent with the ability of the police
2 to perform their work or consistent at all with our
3 opinions. And as the court -- as the Government has told
4 us, the Ninth Circuit itself has construed this opinion in
5 subsequent cases precisely that way.

6 MS. BRAMBL: Well, the Ninth Circuit, even since
7 this opinion, still examines all of the factors. They
8 still look at the totality even in the Sigmond-Ballesteros
9 case that the Government cited in its briefs. However --

10 QUESTION: You have a point that's a serious
11 point I think. The first time I see a case where the
12 policeman testifies I -- I stopped this individual because
13 he looked nervous as he came away from the airplane down
14 to the baggage counter, and he looked both ways, and then
15 there was sweat on his upper lip and he walked around the
16 baggage thing, and then, looking around, went over to his
17 suitcase -- the first time you see that, you think, well,
18 that makes sense to me. But when you see exactly the same
19 thing 15 times, you begin to wonder. Now, that I guess is
20 your point.

21 MS. BRAMBL: Well, it -- well, it is.

22 QUESTION: Okay. Now, what do we do about that?
23 I had thought that the way to deal with it is -- totality
24 of the circumstances is the way to deal with it, not
25 having rigid rules that say you can never consider whether

1 his -- he was sweating or wasn't sweating. In other
2 words, I don't see how a rigid rule helps. It puts too
3 many cases on one -- it gets the wrong cases. It doesn't
4 draw a sensible line.

5 Now, what's your view of that? I see your
6 problem. I want to know the solution.

7 MS. BRAMBL: Well, I think that the solution is
8 to allow courts like the Ninth Circuit and other circuits
9 to say, look, we see the same thing time and time again,
10 and it really has very little or no meaning. Officers, we
11 want you to tell us why this factor is suspicious. It's
12 not going to be enough anymore to come in and just say, he
13 looked nervous, he slowed down. And --

14 QUESTION: But that -- and I -- I think your --
15 your point is -- is well taken as far as you go, but it
16 seems to me that that's not going to help the Ninth
17 Circuit opinion here because what you're saying is don't
18 rely on highly general factors which are so general that
19 we really, in the abstract, don't know where they point.
20 Be more specific. Give us facts not conclusions. But
21 that's not -- that's not what the Ninth Circuit said. The
22 Ninth Circuit, in effect, said, well, we're -- we're
23 simply going to exclude certain categories of fact.

24 MS. BRAMBL: Well, as I said, the language the
25 Ninth Circuit used could have been a lot more clear and a

1 lot more artful.

2 QUESTION: Well, it might have said what you
3 said, but it didn't say what you said. I mean, isn't that
4 so?

5 MS. BRAMBL: Well, they did say frequently, and
6 in effect, when there was a rehearing in this case, they
7 amended the opinion to add under the circumstances of this
8 case and in this case on many, many times.

9 QUESTION: Maybe not often enough.

10 (Laughter.)

11 MS. BRAMBL: It would have helped.

12 QUESTION: Because -- because initially the
13 opinion did read categorically we don't consider slowing
14 down, we don't consider kids waving, and then they threw
15 in a lot of under the circumstances in this case, not in
16 -- in every instance, but in a number of cases. That's --
17 the amendment seems at odds with what the original opinion
18 was, which seemed to be saying we have three categories
19 here: never relevant, sometimes relevant, always relevant.

20 MS. BRAMBL: And I think you're right. They --
21 I wouldn't say that they were categorical in excluding,
22 but they -- they certainly did seem to suggest that --
23 that certain factors were not relevant, and they did add
24 in this case. And basically if someone comes into court
25 with the exact same factor and they're not able to show

1 why that's relevant or probative in this case, why this
2 factor isn't neutral and does have an inference of
3 criminal activity, then that factor, if you follow the --
4 the other courts follow the Ninth Circuit's opinion it's
5 going to -- it's going to be excluded. It's not going to
6 be considered as relevant or probative.

7 I think that that is the kind of guidance that
8 the circuits should be offering.

9 QUESTION: Well, one thing that the circuit
10 didn't do and it did puzzle me was when I read the
11 district court's opinion, I thought the district court was
12 saying, yes, I could go along with they're in a recreation
13 area. But when it came to a certain point and they made a
14 turn, it made no sense at all because if that's where they
15 were going to go, they should have gotten right on the
16 highway. That seemed to be unanswered, that. Why wasn't
17 -- the -- the Ninth Circuit didn't deal with that as
18 precisely as the district court did.

19 MS. BRAMBL: That's true, but the Ninth Circuit
20 did point out -- and if you look at the map that's on --
21 on page 157 of the joint appendix -- that's the map that
22 we submitted in connection with this case and that the
23 district and the -- the Ninth Circuit considered -- it
24 shows that -- it's got a lot more detail, as far as a lot
25 of the destinations. And when the Government said that

1 really there weren't any destinations beyond Rucker
2 Canyon, beyond where the stop occurred --

3 QUESTION: Where you turn onto Kuykendall?

4 MS. BRAMBL: Yes. Once you turn onto that road
5 and you keep going, you can see to the east there's a
6 number of campgrounds, a number of areas, including --

7 QUESTION: The Chiricahua?

8 MS. BRAMBL: Yes.

9 QUESTION: Yes, but to go from Douglas to
10 Chiricahua National Monument would be -- would be
11 extremely odd to go the route this minivan took. You'd go
12 up -- up 191 and cut over above the checkpoint.

13 MS. BRAMBL: Well, the van was appropriate for
14 that road and the conditions, and I would point out that
15 when the agent had --

16 QUESTION: Well, if it's appropriate, if it's --
17 it's also appropriate to go on a paved highway, I take it.

18 MS. BRAMBL: Well, sure, but --

19 QUESTION: I mean, why would you go up this
20 very winding road to a place that you can get to much more
21 quickly by going up a paved highway?

22 MS. BRAMBL: It might be a -- a matter of
23 preference and -- and taste. But these areas are
24 beautiful and --

25 QUESTION: Well, you know, all of these factors

1 -- as Justice Breyer suggested, we're not saying that they
2 would prove guilt beyond a reasonable doubt or that they
3 would amount to probable cause. But all we're talking
4 about is reasonable suspicion.

5 MS. BRAMBL: But it isn't suspicious for a
6 family from Douglas to use a road that leads right from
7 Douglas, that start out -- that starts out 10 miles paved,
8 to go through a beautiful area up to perhaps Chiricahua
9 Monument or some of the areas along there on the --

10 QUESTION: Yes. You can't -- it's obviously
11 nothing criminal. But what -- what did the respondent
12 say, that he was going to meet somebody there?

13 MS. BRAMBL: That's correct.

14 QUESTION: What's -- how does that tie in with
15 going to a recreational area?

16 MS. BRAMBL: Well -- well, it really doesn't
17 because we know that he was involved in illegal activity,
18 but that's the hindsight of what the officer found after
19 the stop. And the -- the --

20 QUESTION: Would you comment on a -- on a phase
21 of the case that keeps puzzling me? The -- the sensors on
22 the road. It must be that the -- that there was some
23 suspicion on every vehicle that went up here because I
24 guess the first sensor that was triggered caused the
25 officer to -- to go over and take a look at the vehicle,

1 and that happened rarely enough, so you make a special
2 examination of every vehicle that trips the sensor. And
3 then if they trip the second sensor, that's -- they're
4 doubly suspicious. And how -- how relevant is that in the
5 whole picture?

6 MS. BRAMBL: Well -- well, I think what's
7 important to recognize is that when you look at the maps,
8 there aren't too many roads that lead anywhere from
9 Douglas because it's right on the border. So, there's the
10 main road, the paved one, that the district court that Mr.
11 Arvizu should have taken, and then there's this dirt road,
12 the unpaved one, which is quite well-maintained, and they
13 have sensors on that to catch all the cars that avoid the
14 checkpoint.

15 But my point is that every road that leads away
16 from the border is suspicious to some degree and can be
17 labeled that way. It happened to be --

18 QUESTION: It is particularly suspicious if
19 there's a much more rapid route available, rapid and
20 comfortable. If you got three kids in the car, you
21 generally don't want a bumpy road.

22 MS. BRAMBL: Well, they were going 50 to 55
23 miles per hour.

24 QUESTION: I know.

25 MS. BRAMBL: And there was no testimony that the

1 car was flying -- the van was flying all over the place,
2 which -- which tells me -- and the pictures bear it out --
3 is that this wasn't -- it was a dirt road and it was in a
4 -- a fairly isolated area, not full of houses and -- and
5 whatnot. But this was a decent road.

6 QUESTION: It's not only an isolated area, but
7 the testimony was that the people who normally used the
8 road were locals, ranchers or others, that it was not a
9 road frequently traveled by families.

10 MS. BRAMBL: However, the -- that was the
11 testimony by the Border Patrol agent.

12 QUESTION: Right.

13 MS. BRAMBL: The investigator from our office
14 testified that this road was used and enjoyed by all kinds
15 of families. The Chiricahuas are a beautiful area.
16 There are a number of areas within them that -- that are
17 visited by people from all over, and because they're
18 basically in the -- in the residents of Douglas' back
19 yard, people from Douglas frequent that area. So, we
20 don't have a record as to how many sensor hits turn out to
21 be smugglers, how many turn out to be ranchers, and how
22 many turn out to be people from Douglas visiting the area.

23 QUESTION: But we do have a record that suggests
24 that every time somebody trips the sensor, they go out and
25 take a look at them.

1 MS. BRAMBL: That's true.

2 QUESTION: Yes.

3 MS. BRAMBL: And -- and it would be a shame if
4 -- if every family on a road like that or on that road in
5 a minivan on a holiday would be subject to heightened
6 scrutiny just because this happens to be a road where
7 smugglers sometimes use it. And --

8 QUESTION: Is there any indication there ever
9 has been such a family? I mean, I imagine if there were
10 an innocent family that happened to accidentally come from
11 an area where there is a lot of smuggling, that doesn't --
12 you know, not everybody is a smuggler in such an area.
13 They drive with their family just for recreation 50 miles
14 out of the way. Their children wave oddly.

15 (Laughter.)

16 QUESTION: They screech to a halt, and there
17 they were, stopped. I -- I guess they would be sort of
18 outraged and there might be some publicity about it. Has
19 there been such a --

20 MS. BRAMBL: Well, one of the problems with --
21 with Fourth Amendment issues is that the vast majority of
22 innocent people that are protected by the Fourth Amendment
23 often remain silent when they are subjected to arbitrary
24 or -- or random stops.

25 QUESTION: I'd feel much more sympathetic to --

1 to that person than -- than I would to your client whose
2 -- whose argument essentially is, yes, I was indeed a
3 smuggler, but -- and he suspected me to be a smuggler and
4 he turned out to be right. But the suspicion was not
5 accurate. I don't understand that. Should we give any
6 weight to the fact that he turned out to be right? Does
7 that -- does that have any bearing on whether the
8 suspicion was reasonable or not?

9 MS. BRAMBL: It doesn't. In fact, if we had
10 that kind of test, then we would have no way to litigate
11 reasonable suspicion issues because the only way we get to
12 court --

13 QUESTION: I'm not saying it's conclusive. I'm
14 just saying, you know, I'm -- I'm more inclined to find
15 that the Border Patrol agent who stops a smuggler had a
16 reasonable suspicion than I am to find that a Border
17 Patrol agent who stops a -- a happy family out on outing
18 had a reasonable suspicion.

19 MS. BRAMBL: Well, the problem is there weren't
20 really any factors or --

21 QUESTION: How would one know about the stops of
22 someone who is a perfectly law-abiding citizen? Nobody is
23 pressing charges against them. Quite the contrary. And
24 very few of them would bother with a Bivens action given
25 the qualified immunity. So, we don't hear from those

1 people. And I thought the whole idea of the Fourth
2 Amendment, frankly, is that you have to protect the crooks
3 because if you don't protect them, then the innocent, the
4 law-abiding people will lose their protection.

5 MS. BRAMBL: That's exactly right. The -- the
6 Fourth Amendment protects all of the law-abiding people,
7 and it seems like Terry struck a balance. You -- you can
8 stop people when you have reasonable suspicion, but that's
9 the floor below which you cannot go because otherwise
10 you're casting in a large universe of -- of innocent, law-
11 abiding citizens who are going to be stopped. And they're
12 the people that we're concerned about in this litigation.

13 And obviously our client is not a sympathetic
14 figure because he was doing something wrong. But all of
15 the objective factors that were available to the agent
16 pointed not to a smuggler running dope or aliens, but
17 instead to a family that was on an outing on a -- a lovely
18 day on a -- a very scenic area.

19 All of the factors that the Ninth Circuit found
20 had some level of suspicion, the fact that it was a
21 minivan, the fact that it was a road that could be used by
22 smugglers and could be used to avoid the sensor, and the
23 fact that it was 45 minutes before a Border Patrol shift
24 change -- all those are really just the setting. When you
25 get to the individualized factors that were listed, those

1 factors are the ones that fall short.

2 QUESTION: Well, but just before the shift
3 change is an individualized factor.

4 MS. BRAMBL: Well --

5 QUESTION: I mean, we're not saying that anytime
6 someone comes along this road it's suspicious. We're
7 saying it's suspicious just before the shift change.

8 MS. BRAMBL: Well, it's certainly 45 minutes
9 before a shift change when perhaps, depending on where the
10 agents are out in the field, some of them may be returning
11 back. But it -- it would seem inappropriate to say,
12 families, you better find out when Border Patrol shift
13 changes are because otherwise you won't -- you travel on
14 these roads, you're going to get stopped. And --

15 QUESTION: Would you explain to me the
16 significance of the shift change? I frankly didn't quite
17 understand.

18 MS. BRAMBL: Well, the Border Patrol claims that
19 smugglers, in general, are aware of when they change
20 shifts and --

21 QUESTION: But what difference would it make --
22 does that make?

23 MS. BRAMBL: Well, the thought is that smugglers
24 would then think they're getting by because all of the
25 agents are at the -- at the station. The truth of it is,

1 we see this factor so often throughout the -- the
2 published cases, that it seems a strategy, if it is one,
3 that does not work because --

4 QUESTION: But the idea would be that the Border
5 Patrol agents were all at the checkpoint and wouldn't be
6 out in the field to -- to be able to follow up on any
7 information from the sensor.

8 MS. BRAMBL: That's exactly right.

9 QUESTION: But I still don't understand because
10 that would be at the moment of the change. 20 minutes
11 ahead of time some will be coming in, and 20 minutes after
12 some will be going out. They're still within -- within
13 time to react to a sensor, which they did.

14 MS. BRAMBL: Well, sure.

15 QUESTION: It still really puzzles.

16 MS. BRAMBL: And that's the point we were able
17 to make in the -- in the record that the -- the court of
18 appeals reviewed, which is that when -- exactly when shift
19 change would occur and when the agent --

20 QUESTION: Thank you, Ms. Brambl.

21 MS. BRAMBL: Thank you.

22 QUESTION: Mr. Schlick, you have 5 minutes left.

23 REBUTTAL ARGUMENT OF AUSTIN C. SCHLICK

24 ON BEHALF OF THE PETITIONER

25 MR. SCHLICK: Mr. Chief Justice, unless the

1 Court has further questions, we submit that the judgment
2 of the court of appeals should be reversed.

3 QUESTION: Tell me. Explain to me again why the
4 shift change is so significant.

5 (Laughter.)

6 MR. SCHLICK: Certainly, Justice Stevens. The
7 -- the testimony was that agents who are out in the field
8 will, as the 3:00 p.m. shift change approached, head back
9 to --

10 QUESTION: Right.

11 MR. SCHLICK: -- the checkpoint on I-191. That
12 drive would take perhaps 45 minutes, perhaps a half hour,
13 perhaps as much as an hour, depending on where they were.
14 So, during that period, a Border Patrol agent who was,
15 let's say, stationed on Leslie Canyon Road, supervising
16 the road, would be driving back.

17 QUESTION: He'd be driving back, but at the same
18 time the sensors are working. If the sensor is triggered,
19 they tell him -- they say, turn around and go back, which
20 is what happened to this guy. I just don't understand it.

21 MR. SCHLICK: That's true. And Justice Stevens,
22 you may be thinking more clearly than smugglers. What
23 smugglers see is the absence of Border Patrol vehicles,
24 and they take that as an indication that --

25 QUESTION: Does the record tell us whether it

1 was generally known that there were sensors on this road?

2 MR. SCHLICK: The record does not. It does not
3 reveal that, no, Your Honor.

4 QUESTION: I had the feeling it might be a
5 different case if they just put a sign up saying,
6 strangers in this area are subject to stop if they're not
7 -- you know, if they're not local people. We got sensors
8 that will catch you. But if they gave them notice, I
9 wonder if it would be a different case.

10 MR. SCHLICK: Certainly, Justice Stevens, the
11 smugglers are well aware of the location of the checkpoint
12 and the route to -- to evade it.

13 QUESTION: But not of the sensors you think.

14 MR. SCHLICK: I -- I can't answer that question.
15 The record doesn't reveal.

16 QUESTION: Are there -- is there anything in the
17 record that suggests at all, or anywhere, that there are
18 other -- there are families, that sometimes people do use
19 this for picnics? They like sightseeing. They want to go
20 up there on this old dirt road. Is there any -- any
21 evidence on that at all?

22 MR. SCHLICK: The record does include evidence
23 that the recreation areas off of Rucker Canyon Road -- if
24 respondent --

25 QUESTION: Well, that's one of them, but there's

1 one further to the north. So, somebody who likes driving
2 on old dirt roads, as some people do, might take their
3 family, drive up there, going further to the north. So, I
4 wonder what the state of the -- any evidence at all in
5 there that -- that families who are not smugglers do use
6 this road once a week, once a day, once a month.
7 Anything?

8 MR. SCHLICK: No, Justice Breyer. The -- the
9 testimony was that that recreation area to the north
10 existed. There was no testimony that any particular
11 number of -- of families do, in fact, use these roads.
12 The testimony to the contrary was that ranchers and Forest
13 Service personnel and the Border Patrol itself used these
14 roads. The district court's finding on page 24a of the
15 petition appendix was that this route was not a logical
16 route to get up to the Chiricahua National Monument.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
18 Schlick.

19 The case is submitted.

20 (Whereupon, at 11:10 a.m., the case in the
21 above-entitled matter was submitted.)
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