No. ____

IN THE

Supreme Court of the United States

JOHN CANADA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Melody Brannon
Federal Public Defender
Daniel T. Hansmeier
Appellate Chief
KANSAS FEDERAL PUBLIC DEFENDER
500 State Avenue
Suite 201
Kansas City, KS 66101

Michael R. Dreeben
Counsel of Record
Ellie Hylton
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300
mdreeben@omm.com

Evan Hindman
O'MELVENY & MYERS LLP
Two Embarcadero Center
28th Floor
San Francisco, CA 94111

Attorneys for Petitioner John Canada

QUESTION PRESENTED

This case presents a significant and recurring question about the standard of appellate review of a district court's ruling on a motion to suppress evidence, on which the courts of appeals are deeply divided. In *Ornelas v. United States*, 517 U.S. 690 (1996), this Court granted certiorari to resolve this issue and explicitly held that the court of appeals should review the district court's factual findings for clear error; "give due weight to inferences drawn from those facts by resident judges and local law enforcement officers"; and decide whether reasonable suspicion or probable cause exists *de novo*. *Id.* at 699.

Despite that clear guidance, the Tenth Circuit and other courts of appeals have *added* a layer of deference to the prosecution by reviewing the evidence in a suppression-hearing record in the "light most favorable to the government." This case presents the following issue:

Whether the review of the evidence in a suppression-hearing record "in the light most favorable to the government" conflicts with *Ornelas*'s standard of review and impermissibly places a thumb on the scales in favor of the prosecution in resolving Fourth Amendment claims.

PARTIES TO THE PROCEEDING

Petitioner is John Canada, defendant and appellant below.

Respondent is the United States of America, appellee below.

RELATED PROCEEDINGS

United States of America v. John Canada, No. 21-3202 (10th Cir.)

United States of America v. John Canada, No. 6:20-CR-10053-EFM-1 (D. Kan.)

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL PROVISION

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

IN THE

Supreme Court of the United States

NO. ___

JOHN CANADA

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Petitioner John Canada respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 76 F.4th 1304, and is reprinted in the Appendix to the Petition (App.) at 1a-20a. The district court's unpublished order denying Petitioner's motion to suppress is available at 2021 WL 2290806, and reprinted at App. 21a-29a.

JURISDICTION

The court of appeals entered its judgment on August 9, 2023. App. 30a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

INTRODUCTION

Appellate review of a motion to suppress evidence takes place along three dimensions: the courts of appeal must review (1) the "historical facts" underlying the decision, (2) the "inferences" drawn by the officers and the district court, and (3) the district court's ultimate legal determination. All agree that determinations of "historical fact" must be reviewed for "clear error" and that appellate courts must review the ultimate legal determination, a "mixed question of law and fact," *de novo*. *Ornelas v. United States*, 517 U.S. 690, 696, 699 (1996). This case involves the second dimension—the level of deference owed to the inferences drawn by law enforcement officers and district courts.

Ornelas answered that question too: reviewing courts should give "*due* weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.* at 699 (emphasis added). The Court did not say that the courts of appeals should see inferences in a government-favoring light or always give the prosecution the benefit of the doubt. Rather, inferences are to receive the weight they are due, and it is the appellate court's job to ensure that the inferences drawn from the facts are "reasonable." *Id.* at 699-700 ("An appeals court should give due weight to a trial court's finding that the officer was credible and the inference was *reasonable*.") (emphasis added). Anything else would undermine, if not outright abdicate, the court of appeals' responsibility to conduct an "independent appellate review" of the district court's ultimate conclusions. *Id.* at 697.

But despite *Ornelas*'s clear holding, the federal courts of appeals are deeply divided over whether to graft an additional layer of deference onto this framework. Some courts put a thumb on the scales for the prosecution by viewing evidence in the suppression record in the "light most favorable to the government"; other courts of appeals reject that standard and adhere to *Ornelas*. In this case, the Tenth Circuit followed its longstanding circuit precedent and applied the government-favoring double-deference rule. App. 4a ("When reviewing the denial of a motion to suppress, we view the evidence in the light most favorable to the government" and "accept the district court's finding of fact unless clearly erroneous") (quoting *United States v. Windom*, 863 F.3d 1322, 1326

(10th Cir. 2017), quoting *United States v. Mosley*, 743 F.3d 1317, 1322 (10th Cir. 2014)) .

Seven circuits apply the "light most favorable" standard in some form, and five circuits do not. The conflict is intolerable. In *Ornelas*, this Court granted certiorari to resolve this very issue. 517 U.S. at 695 ("We granted certiorari to resolve the conflict among the Circuits over the applicable standard of appellate review" concerning district court "probable cause" and "reasonable suspicion" determinations). The "light most favorable" standard conflicts with this Court's precedent in *Ornelas*.

Beyond that, the "light most favorable to the government" standard undermines *Ornelas*'s requirement of independent review on appeal and defeats the purposes of that rule: to promote uniform application of the law, develop the content of the substantive law, and provide guidance to the police. *Id.* at 697. And it tilts the balance of appellate review inexorably in the government's favor when a suppression motion has been denied by the district court, which threatens the continued vitality of the rights guaranteed by the Fourth Amendment. If a reviewing court defers to an officer's inferences that the historical facts justify some level of suspicion by seeing the facts in the light most favorable to the government, it is a short step to concluding that the applicable Fourth Amendment standard is satisfied. The reasonableness of the inferences and the ultimate determination of reasonable suspicion or probable cause merge, and deference

suffuses both. Under this approach, the benefits of *de novo* review are lost.

This case illustrates that point—the ultimate "reasonable suspicion" determination rested on attenuated and disputed inferences drawn from the undisputed facts, which the court of appeals did not seriously scrutinize. The key issue was whether it was suspicious for Mr. Canada to take 14 seconds to stop his car after officers activated their lights. The timing—14 seconds—is a historical fact; the inference about its meaning should be reviewed for reasonableness. A reviewing court should have assessed the reasonableness of the officers' inferences—and the weight they are due—without seeing the facts through a "light most favorable to the government" lens. The Tenth Circuit never did so. But the independent review required by *Ornelas* would have produced a different outcome; indeed, the dissenting judge, looking at all the circumstances, rejected the inference of suspicion even under the Tenth Circuit's "light most favorable" mandate.

The question presented is critically important. The standard of review applied to appeals from motions to suppress can be outcome determinative in criminal cases, as it likely was here. And the level of deference that appellate courts apply, after a district court finds that a lawful search has taken place, should not vary based on happenstance of geography. This Court should grant certiorari, reject the "light most favorable to the government rule" as inconsistent with *Ornelas*, and remand for application of the correct standard of review.

STATEMENT

A. The Search

1. Petitioner John Canada was driving through Wichita on a rainy weekday night when he passed two officers from the Wichita Police Department's Violent Crime Community Response Team. App. 2a, 21a. After passing Mr. Canada, the officers did a U-turn and pulled behind Mr. Canada, who was in a dedicated right-hand-turn lane. App. 16a, 22a. Mr. Canada failed to signal before making a right turn. App. 2a.

The officers followed Mr. Canada through the intersection and initiated a traffic stop by activating their overhead lights. App. 2a, 22a. Roughly four seconds after the officers activated their lights, Mr. Canada braked, indicating that he had become aware of the officers' presence. Suppl. R. on Appeal, Ex. 1 (Feb. 17, 2022) ("Suppl.R.Ex. 1") at 00:48; C.A. App. III.12. He had been attempting to merge left, but cancelled his left-turn signal, continued to slow his vehicle, signaled right, and pulled over on the right shoulder. Suppl.R.Ex. 1 at 00:44-00:58. Mr. Canada's vehicle came to a full stop roughly 14 seconds after the officers activated their lights, App. 2a, and roughly 10 seconds after Mr. Canada first began braking, Suppl.R.Ex. 1 at 00:44-00:58.

The officers exited their patrol car and approached Mr. Canada's vehicle. App. 2a. One officer saw that Mr. Canada had his shoulders pinned up against the seat, leaning back, with his hips lifted off of the driver seat. C.A. App. III.15. He then saw Mr. Canada's arm reaching back behind his seat. *Id.* When the officers approached, Mr. Canada had his wallet out and his

identification in hand. App. 2a-3a; Suppl.R.Ex. 1 at 01:15-01:30. The officers removed Mr. Canada from the vehicle immediately, searched his person, and moved him behind his car. App. 3a.

The officers next conducted a "protective sweep" of the car and discovered a gun under the driver's seat. *Id.* When the officers learned that Mr. Canada was prohibited from possessing a firearm, they arrested him. *Id.*

2. The historical facts are not in dispute; the officers recorded the encounter, the district court admitted the recordings into evidence, and the recordings were included in the Record on Appeal before the Tenth Circuit. *See* Minute Entry (May 24, 2021), Dkt. 37; *see also* Suppl. R. on Appeal (Feb. 17, 2022). At issue are the two key *inferences* that the officers drew from these historical facts.

First, the officers contended that Mr. Canada took "an abnormal amount of time to pull over," C.A. App. III.12, which raised the officers' suspicions because it could mean that the driver "is attempting to hide or retrieve something inside the vehicle" or "trying to come up with an exit plan or strategy," C.A. App. III.13. *See* App. 2a. One of the officers commented contemporaneously that Mr. Canada's stop "appeared to be 'a little bit of a slow roll,'" but later testified that Mr. Canada's stop "did not take 'an absurd amount of time'" in their opinion and experience; it was just "'a little bit longer than usual.'" *Id.*

Second, the officers inferred that Mr. Canada's "furtive movements" suggested that Mr. Canada may have had access to a weapon in his car. *See* App. 7a-

9a. The officer who witnessed Mr. Canada's movements testified that he found them "very strange." C.A. App. III.36. The officer admitted that he could not be certain that there was a weapon in the vehicle, C.A. App. III.19, and that Mr. Canada's "furtive" movements could well have resulted from completely benign circumstances, such as if Mr. Canada had been trying to stow stolen merchandise, drug paraphernalia, "drive-thru fast-food," or other items that would not have endangered the officers, C.A. App. III.37-39.

Despite this uncertainty, the circumstances led the officer to infer that "there potentially could be a firearm in the vehicle," which led him to order Mr. Canada to exit the vehicle, and then search under the driver's seat. C.A. App. III.16.[1]

B. District Court Proceedings

1. Mr. Canada was indicted and charged with possession of a firearm by a prohibited person under 18 U.S.C. § 922(g)(1). He moved to suppress the evidence obtained through the officer's "protective sweep," including the gun and statements made by Mr. Canada

[1] The opinions of the district court and court of appeals each noted an additional inference from the officers—that the traffic stop occurred in a "high-crime" area. App. 2a, 21a. But neither court relied on that inference. *See* App. 26a-27a ("The [District] Court concludes that Canada's slow stop combined with his furtive gesture . . . gave rise to . . . reasonable, articulable suspicion."); App. 9a ("[T]he furtive movement and slow roll provided enough for the officers to reasonably suspect that Defendant was both dangerous and had access to a weapon."). That "high-crime area" inference is thus irrelevant to this Court's review, since it was not a factor cited to justify the constitutionality of the protective sweep.

after the search, arguing that the officers lacked reasonable suspicion necessary to perform a protective sweep. App. 24a.

2. The district court denied the motion to suppress after an evidentiary hearing involving the testimony of both officers. App. 21a-29a. The district court's written order noted that a "protective sweep" of a vehicle is permitted only if the officer "reasonably believes that the suspect poses a danger and may gain immediate access to a weapon" and that the search must be "limited to those areas in which a weapon may be placed or hidden." App. 24a-25a (citing *United States v. Valdez Hocker*, 333 F.3d 1206, 1209 (10th Cir. 2003); *Michigan v. Long*, 463 U.S. 1032, 1049 (1983)). The district court also noted that, although the sweep here occurred after officers removed Mr. Canada from his car, a protective sweep may be justified to ensure that a person would not have access to a weapon if and when he returns to the vehicle. App. 26a (citing *Arizona v. Gant*, 556 U.S. 332, 352 (2009) (Scalia, J., concurring)).

Applying that standard, the district court concluded that the officers had "reasonable, articulable suspicion that [Mr.] Canada had access to [a] weapon and may have posed a danger to the officers." App. 27a. The district court relied exclusively on two factors in support of its finding: that Mr. Canada had come to a "slow stop" once the officers initiated the traffic stop and that Mr. Canada had performed a "furtive gesture" by reaching into the area beneath

his seat as the officers approached. App. 25a-27a.[2] Based on those two factors, the district court concluded that the protective sweep of Mr. Canada's vehicle was lawful and did not violate Mr. Canada's Fourth Amendment rights. App. 26a.

3. Following the district court's denial of his motion to suppress, Mr. Canada pleaded guilty to a violation of 18 U.S.C. § 922(g)(1), reserving the right to appeal the denial of the suppression motion. C.A. App. I.70. Mr. Canada was sentenced to 15 months in prison and a two-year term of supervised release. C.A. App. I.78-79.

C. Tenth Circuit Proceedings

1. The court of appeals affirmed the district court's denial of Mr. Canada's suppression motion in a published opinion over the dissent of Judge Rossman. App. 1a-20a. Based on established precedent in the

---

[2] The district court's statements on the record at the evidentiary hearing provide further insight into the district court's factual findings and credibility judgments. The district court stated that the reasonableness of the stop "essentially [came] down to the gestures that Officer Jensen observed Mr. Canada engaging in after the car had come to a stop," and whether those furtive gestures were sufficient to create reasonable, articulable suspicion that Mr. Canada had access to a weapon in the vehicle. C.A. App. III.120; *see also id.* III.123 (noting that the alleged "slow roll" was "not a very significant factor," and theorizing that the slow roll constituted "maybe 5 percent" of the government's claim for reasonable, articulable suspicion); *id.* III.124. In the Tenth Circuit, the district court's "statements and rulings from the bench" may be used to "ascertain the trial court's factual findings and credibility determinations." *United States v. Pappas*, 735 F.2d 1232, 1233 (10th Cir. 1984).

Tenth Circuit, the court of appeals "view[ed] the evidence in the light most favorable to the government, accept[ed] the district court's finding of fact unless clearly erroneous, and review[ed] de novo the ultimate determination of reasonableness under the Fourth Amendment." App. 4a (citing *Windom*, 863 F.3d at 1326 & *Mosley*, 743 F.3d at 1322).

The ultimate legal question was whether the officers had a "reasonable suspicion that [Mr. Canada] pose[d] a danger and [could have gained] immediate access to a weapon," App. 5a (citing *Long*, 463 U.S. at 1050-51), defining "reasonable suspicion" as "something more than an inchoate and unparticularized suspicion or hunch," *id.* (citation omitted). The Tenth Circuit rejected Mr. Canada's argument that the "slow roll" and "furtive gesture" were insufficient to create reasonable suspicion. App. 6a. Based on the "totality of circumstances," and deferring to the officers' ability to "distinguish between innocent and suspicious actions," the court of appeals agreed that the officers reasonably suspected that Mr. Canada "was both dangerous and had access to a weapon," and affirmed the district court's ruling. App. 7a-9a

2. Judge Rossman dissented. App. 12a-20a. She disagreed with the majority's standard of review, concluding that the Tenth Circuit's light-most-favorable test is inconsistent with this Court's holding in *Ornelas*. In her view, "continued application of a light-most-favorable bias does not abide the standard formulation of clear error review and is incompatible with a principled *de novo* analysis." App. 15a n.2. She traced the circuit's "light most favorable" language to

a pre-*Ornelas* sufficiency-of-the-evidence habeas corpus case, *Sinclair v. Turner*, 447 F.2d 1158 (10th Cir. 1971), but observed that "this standard seems to have crept into our Fourth Amendment jurisprudence." App. 14a n.2. Noting that *Ornelas* "nowhere adopted a light-most-favorable analysis," she was "unable to square our pre-*Ornelas* precedent with the Supreme Court's directives." App. 15a n.2.

In any event, without purporting to apply a different standard of review than the majority, Judge Rossman disagreed with their conclusion. She noted that the majority had identified just two facts supporting the reasonableness of the protective sweep—the 14-second "slow roll" stop and the "furtive gesture." Judge Rossman rejected the purported "slow roll" as a reasonable source of suspicion. App. 16a.

> It was raining. It was dark. [Mr. Canada] was traveling on a multilane road with other vehicles present. When the officers' lights were activated, he had to transition from merging left to pulling over to the right-side curb. . . . And the traffic offense committed—failure to signal a right-turn from a right-turn-only lane—was a "minor traffic infraction" for which "[i]t is not unreasonable to think that it would take Mr. Canada a few seconds to realize that the officers wanted him, and not someone else."

Id. (citations omitted). Judge Rossman accordingly disagreed that the officers had drawn a reasonable inference of suspicion based on "Mr. Canada's brief delay—if delay we may call it." App. 18a. She then found the second fact—Mr. Canada's purported "fur-

tive gestures"—insufficient to create reasonable suspicion alone. Relying on binding Tenth Circuit precedent that "furtive movements alone establish nothing," Judge Rossman would have reversed. App. 19a n.5 (quoting *United States v. Humphrey*, 409 F.2d 1055, 1059 (10th Cir. 1969)).

REASONS FOR GRANTING THE PETITION

Ornelas recognized that standards of review matter and that reviewing courts play a critical function in suppression cases that requires applying *de novo* review to Fourth Amendment determinations of reasonable suspicion and probable cause. For that reason, this Court in *Ornelas* granted review to settle the applicable standards for appellate review of suppression rulings. Notwithstanding *Ornelas*'s clarity, the courts of appeals are in longstanding conflict over a recurring issue: how much deference to give to inferences that district courts and officers draw from the historical facts.

The Tenth Circuit's decision here exemplifies the problem. That court has long applied a measure of deference to inferences from historical facts that finds no support in *Ornelas* and that undermines its core holdings and purpose. In the Tenth Circuit, the evidence in a suppression case is viewed in the "light most favorable to the government." The court applies this deference on top of the usual clear-error review of historical facts. *Ornelas* said nothing of the sort. Instead, it required that reviewing courts give "due weight" to those inferences—*i.e.*, the weight they reasonably deserve—and then resolve the ultimate questions *de novo*. The Tenth Circuit's approach defeats that review. Viewing the evidence in the light most

favorable to the government virtually always translates to deferring to the government's inferences, which drive the court's ultimate conclusions. The conflict between the unfounded "light most favorable to the government" standard and *Ornelas* alone warrants this Court's review.

The decision also implicates a deep circuit conflict. The courts of appeals are divided 7-5 on this recurring question. One court—the Second Circuit—has painstakingly explained why "light most favorable" review—used in the review of jury verdicts—has no place in the review of suppression rulings. But the conflict persists, perhaps because the courts of appeals expect this Court to intervene in cases of such entrenched splits. Only this Court can resolve the question and reconfirm what *Ornelas* held.

The issues presented by this case are vitally important. Appellate review of suppression rulings can achieve *Ornelas*'s goals only if *de novo* review is meaningful. But if courts of appeals can circumvent the hard work of deciding whether an inference of suspicion from the facts *is* reasonable (and entitled to weight), and must instead view the evidence through a government-favoring lens, appellate decisions will skew towards the prosecution, erode Fourth Amendment protections, and leave the law in a state of disarray.

This case is the perfect vehicle to resolve this conflict. The Tenth Circuit's application of its light-most-favorable standard of review is plain on the face of its opinion and likely outcome determinative. One judge would have rejected the "slow roll" factor that was piv-

otal to the ultimate ruling even under the Tenth Circuit's standard. And for good reason: this was a dubious law enforcement inference on which even the district court barely relied. Without that factor, reasonable suspicion was clearly lacking under circuit law. Thus, this case cleanly poses the question presented. Accordingly, as it did in *Ornelas* and in many other contexts involving conflicting standards of review, the Court should grant certiorari to settle this issue.

I. THE TENTH CIRCUIT'S "LIGHT-MOST-FAVORABLE" STANDARD CONFLICTS WITH *ORNELAS*

This Court's direction has been clear: an appellate court reviewing a ruling on a motion to suppress must review the district court's findings of historical fact for clear error; "give due weight to inferences drawn from those facts by resident judges and local law enforcement officers"; and review the district court's legal determination *de novo*. *Ornelas*, 517 U.S. at 694 n.3, 697, 699. The Tenth Circuit's approach conflicts with that framework.

A. The Tenth Circuit's Standard Cannot Be Reconciled With *Ornelas*

Despite *Ornelas*'s clear direction, the Tenth Circuit has grafted on an additional layer of deference that turns this Court's precedent on its head. The Tenth Circuit's approach transforms this Court's "due weight" language into a presumption favoring the district court's acceptance of inferences of suspicion, which then drive its ultimate determination—a determination that should instead be reviewed *de novo*. *See Ornelas*, 517 U.S. at 699. In this case, the Tenth

Circuit "view[ed] the evidence in the light most favorable to the government." App. 4a. And an unbroken line of precedent in the Tenth Circuit has applied that deferential standard of review, or similarly deferential standards stacking the deck in the government's favor, both before and after *Ornelas*. *See, e.g.*, *United States v. Gaines*, 918 F.3d 793, 796 n.3 (10th Cir. 2019) ("light most favorable to the district court's ruling or to the prevailing party"); *Windom*, 863 F.3d at 1326 ("light most favorable to the government"); *Mosley*, 743 F.3d at 1322 (same); *United States v. Valenzuela*, 365 F.3d 892, 896 (10th Cir. 2004) ("light most favorable to the district court's determination"); *United States v. Davis*, 94 F.3d 1465, 1467 (10th Cir. 1996) (reviewing evidence "in the light most favorable to the government," but citing *Ornelas* for the proposition that the district court's legal determination should be reviewed *de novo*); *United States v. Lambert*, 46 F.3d 1064, 1067 (10th Cir. 1995) (conducting "light most favorable" review before *Ornelas*).

The Tenth Circuit's approach misapprehends *Ornelas*. This Court in *Ornelas* stated that reviewing courts should give *due* weight to inferences—not reflexive deference. Accepting *reasonable* inferences drawn by officers and trial courts is one thing. But placing a light-most-favorable spin on the record is a one-way ratchet in favor of the prosecution. That is not what *Ornelas* said courts should do. Nor is it what the Court itself did. To illustrate its point about giving due weight to district court inferences, the *Ornelas* Court discussed the harsh climate of Milwaukee in winter and observed that a traveler from California was unlikely to make a stop for leisure, and more

likely to be present either for business or to see people. *See Ornelas*, 517 U.S. at 700. That background fact provided context for the officers' suspicion that petitioners' presence at a Milwaukee motel in December, in an older model General Motors car with California plates, could reflect a drug-courier operation. *Id.* at 692, 699-700. It likewise explained that an officers' familiarity with searching cars for drugs would inform the officers' reaction to a loose panel in the back seat. *Id.* at 700. The Court thus gave reasons for giving the officers' inference "due weight." *Id.*

This approach enlists the appellate court's judgment about inferences, rather than applying a predetermined requirement to see things the government's way. That approach also accords with the broader structure of Fourth Amendment law. Objective reasonableness is the governing standard. *See id.* at 696 (determination on motion to suppress depends on whether "historical facts, viewed from the standpoint of an *objectively reasonable* police officer, amount to reasonable suspicion") (emphasis added); *id.* at 700 (requiring "due weight to a trial court's finding that the officer was credible and the inference was *reasonable*") (emphasis added); *see also Terry v. Ohio*, 392 U.S. 1, 27 (1968) ("[D]ue weight must be given, not to [an officer's] inchoate and unparticularized suspicion or 'hunch,' but to the specific *reasonable* inferences which he is entitled to draw from the facts in light of his experience.") (emphasis added); *United States v. Ortiz*, 422 U.S. 891, 897 (1975) (officers "entitled to draw *reasonable inferences*" from facts "in light of their knowledge of the area and their prior experience"); *United States v. Arvizu*, 534 U.S. 266, 275-77

(2002) (independently reviewing district court's reasonable suspicion analysis and according officer's inferences varying amounts of weight based on reasonableness); *United States v. Cortez*, 449 U.S. 411, 418-21 (1981) (exhaustively examining reasonableness of various inferences drawn by law enforcement officers). The Tenth Circuit, however, in reviewing these inferences in the "light most favorable" to the government, *assumes* that those inferences are reasonable instead of engaging in the independent review that this Court has always demanded.

B. The Tenth Circuit's Standard Cannot Be Justified As A Matter Of Principle

The Tenth Circuit has never tried to justify its "light most favorable to the government" standard. As Judge Rossman explained, the court of appeals transposed the principle from a completely different context: a decision discussing the review of habeas corpus determinations. *See* App. 14a-15a n.2 (Rossman, J., dissenting). The Tenth Circuit articulated the "light most favorable" rule in *Sinclair v. Turner*, 447 F.2d 1158, 1160 (10th Cir. 1971), to describe the "appellate review rule" for sufficiency-of-the-evidence challenges to a jury's guilty verdict, and then inexplicably imported that rule into the Fourth Amendment appellate-review context in *United States v. Miles*, 449 F.2d 1272, 1274 (10th Cir. 1971). The deferential standard applicable in those cases, intended to avoid judicial intrusion on the prerogative of the jury, *see*, *e.g.*, *Jackson v. Virginia*, 443 U.S. 307, 324 (1979), has no place in the Fourth Amendment context.

And to make matters worse, the Tenth Circuit failed to reexamine its erroneous transposition of the jury-verdict-review standard to the Fourth Amendment context even after *Ornelas* made the error clear. Nor could first-principles reasoning justify this government-favoring standard of review. The legal context here calls for appellate courts to define the applicable constitutional standards that govern citizen-police encounters. To that end, the goal of independent appellate review is "to unify precedent and . . . come closer to providing law enforcement officers with a defined 'set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'" *Ornelas*, 517 U.S. at 697-98 (quoting *New York v. Belton*, 453 U.S. 454, 458 (1981)). Reflexive deference to inferences drawn by officers and district courts is at odds with that principle.

C. The Tenth Circuit's Standard Subverts *Ornelas*'s Goals

The Tenth Circuit's "light most favorable" standard tips the balance of appellate review in a way this Court has expressly forbidden. While the Tenth Circuit purports to conduct *de novo* review, *see* App. 3a-4a, the Tenth Circuit's deferential take on "inferences" inescapably drives the ultimate determination. The "historical" facts subject to "clear error" review are often indisputable; that is especially so where, as here, the encounter is recorded on video, *see supra* at 7, as is increasingly the case in modern policing. Thus, the task before the district court is often less

about determining the contours of the relevant historical facts, and more about determining whether an officer reasonably judged that particular factual scenario to be *suspicious*. On a suppression motion in the "reasonable suspicion" context, an officer has already *necessarily* made that inference; that is why the defendant is in court, moving to suppress evidence that he claims was unlawfully obtained. In the Tenth Circuit, then, where "[r]eviewing courts must . . . defer to the ability of a trained law enforcement officer to distinguish between innocent and suspicious actions," *United States v. Dennison*, 410 F.3d 1203, 1207 (10th Cir. 2005) (internal quotation marks omitted), the deck is stacked in the government's favor in *every* case.

That means that in this case, for example, the Tenth Circuit's "light most favorable" standard required the court of appeals to defer to the following inferences drawn by the officers and apparently credited by the district court: (1) that 14 seconds was an "abnormal amount of time to pull over"; (2) that Mr. Canada's 14-second "slow roll" suggested that he may have been attempting to hide or retrieve something inside the vehicle; (3) that Mr. Canada's allegedly "furtive" movements were "odd"; and (4) that those "furtive movements" suggested that he may have had access to a weapon in the vehicle. *See supra* at 7-8, 10-11. It is hard to imagine how a reviewing court could defer to each of those inferential leaps without deferring to the officers' ultimate conclusion that "reasonable suspicion" justified the warrantless "protective sweep." Put differently, this deferential approach

is flatly inconsistent with *de novo* review, which requires an "independent appellate review" that the Tenth Circuit forbids itself from conducting. *Ornelas*, 517 U.S. at 697.

The Tenth Circuit's recitation of "*de novo* review" thus papers over how the rule actually operates in practice. This unbroken chain of "sweeping deference"—from the courts of appeal to the district court, and on to the officer that conducted the challenged search—is no different than the regime this Court deemed "unacceptable." *Id.* ("We have never, when reviewing a probable-cause or reasonable-suspicion determination ourselves, expressly deferred to the trial court's determination.").

II. THE COURTS OF APPEALS ARE DIVIDED ON THE PROPER STANDARD OF REVIEW OF SUPPRESSION MOTIONS.

Certiorari is also warranted because the courts of appeal are deeply divided over the question presented. Contrary to the Tenth Circuit's approach below, five circuits *do not* review evidence in the "light most favorable" to the prevailing party on an appeal from a motion to suppress—and the Second Circuit has expressly repudiated the Tenth Circuit's view. Seven circuits—including the Tenth—generally apply some form of "light most favorable" review to the factual findings of a district court. This Court's intervention is necessary to restore the clear mandate of *Ornelas*.

A. The Second Circuit Has Expressly Rejected The "Light Most Favorable" Standard

The Second Circuit has expressly rejected the "light most favorable" standard that applies in the

Tenth Circuit. *United States v. Pabon*, 871 F.3d 164, 173 (2d Cir. 2017). On appeal, the Second Circuit upheld the district court's denial of Pabon's motion to suppress, but declined to apply the "light most favorable" standard or to view the evidence "in either party's favor." *Id.* Rather, the Second Circuit adhered to the traditional principles of *de novo* review, describing that approach as the "one most consistent with precedent." *Id.* at 173-74 (citing *Ornelas*, 517 U.S. at 699).

Specifically, the Second Circuit concluded that *Ornelas* "nowhere suggested that the clear error standard should be slanted in favor of one party or another" and that "viewing the evidence in the light most favorable to the prevailing party" would make "little sense" under this Court's precedent, because *Ornelas* already requires courts to give "due weight to the inferences drawn by local law enforcement officers and by trial judges." *Id.* at 174 (noting that it was "far from clear" how courts could "layer[] the inferences" of "light most favorable" and "due weight" deference already required under *Ornelas*). The Second Circuit thus squarely "decline[d] to view the evidence in the Government's favor." *Id.*; *see also United States v. Bershchansky*, 788 F.3d 102, 109 (2d Cir. 2015) (explaining the flaws in the light-most-favorable-to-the-prevailing-party approach and concluding that "the better approach is to review the district court's findings of fact for clear error without viewing the evidence in favor of either party, and to review its conclusions of law and mixed questions of law and fact *de novo*," but finding it unnecessary to resolve whether

the evidence should be viewed in favor of the prevailing party because the choice of standards would not affect the outcome).[3]

B. The Seventh, Eighth, Ninth, And D.C. Circuits Do Not Apply The "Light Most Favorable" Standard

Like the Second Circuit, the D.C. Circuit reviews findings of fact on appeal from a suppression motion ruling for clear error, giving "due weight" to the inferences of district judges and law enforcement as *Ornelas* commands, but without shading the facts in the government's favor. *See United States v. Delaney*, 955 F.3d 1077, 1082 (D.C. Cir. 2020) (citing *Ornelas*); *United States v. Castle*, 825 F.3d 625, 632 (D.C. Cir. 2016). In *Castle*, the D.C. Circuit reversed a denial of a motion to suppress evidence gathered from a warrantless seizure in a high-crime area of D.C., where the defendant's "furtive movements" evoked the suspicions of law enforcement. *Id.* at 635-36. In conducting its review, the D.C. Circuit explained that when

---

[3] Despite the Second Circuit's clear holding in *Pabon*, subsequent cases in the Second Circuit have occasionally cited the "light most favorable" standard, *see United States v. O'Brien*, 926 F.3d 57, 73 (2d Cir. 2019), or have noted confusion over which standard applies within the Second Circuit. *United States v. Hagood*, 78 F.4th 570, 576-77 & n.8 (2d Cir. 2023); *United States v. Rodriguez*, 727 F. App'x 725, 728 (2d Cir. 2018). But because the Second Circuit follows the rule that "[p]ublished panel decisions . . . are binding on future panels unless they are reversed *en banc* or by the Supreme Court," *United States v. Afriyie*, 27 F.4th 161, 168 (2d Cir. 2022) (citation and internal quotation marks omitted), there is reason to expect panels to treat *Pabon* as binding when litigants call it to the court of appeals' attention. *Cf. McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc) (noting that in most circuits the rule is "to follow the earlier of conflicting [panel] opinions").

the district court "has made factual findings," it would not "search the record for any reasonable view of the evidence that will support the trial judge's conclusions." *Id.* at 632. That principle is inconsistent with a light-most-favorable view-of-the-evidence approach, which would demand an appellate search of the record that the D.C. Circuit refused to conduct.

The Seventh, Eighth, and Ninth Circuits regularly do not cite or apply the "light most favorable" standard of review, either. *See, e.g., United States v. Radford*, 39 F.4th 377, 383 (7th Cir. 2022) ("In considering a district court's decision on a motion to suppress, we review findings of fact for clear error and questions of law *de novo*."); *United States v. Cole*, 21 F.4th 421, 427 (7th Cir. 2021) (en banc) (same); *accord United States v. Cherry*, 920 F.3d 1126, 1132 (7th Cir. 2019);[4] *United States v. Finley*, 56 F.4th 1159, 1164 (8th Cir. 2023) ("We review the district court's findings of fact under the clearly erroneous standard, and the ultimate conclusion of whether the Fourth Amendment was violated is subject to *de novo* review." (internal

[4] The Seventh and Eighth Circuit's positions are particularly notable because some of their pre-*Ornelas* case law employed "light-most-favorable" review—an approach those circuits abandoned after *Ornelas*. *See United States v. Garcia*, 605 F.2d 349, 351 (7th Cir. 1979) (assessing the "facts adduced at the suppression hearing" in "the light most favorable to the Government"); *United States v. Watkins*, 369 F.2d 170, 171 (7th Cir. 1966) (same); *United States v. Weir*, 748 F.2d 459, 460 (8th Cir. 1984) (per curiam) ("[I]n reviewing the denial of a motion to suppress, we must view the evidence in the light most favorable to the government."); *United States v. Clark*, 743 F.2d 1255, 1257 (8th Cir. 1984) (same).

quotation marks omitted)); *United States v. Shumaker*, 21 F.4th 1007, 1015 (8th Cir. 2021) (same); *United States v. Taylor*, 60 F.4th 1233, 1239 (9th Cir. 2023) ("We review the district court's denial of a motion to suppress de novo and its factual findings for clear error."); *United States v. Bontemps*, 977 F.3d 909, 913-14 (9th Cir. 2020) (citing *Ornelas*).[5]

C. Seven Other Circuits Apply The "Light Most Favorable" Standard

Seven other circuits—the First, Third, Fourth, Fifth, Sixth, Tenth and Eleventh—review suppression motion rulings under some iteration of the "light-most-favorable" standard.

1. The First Circuit has explained that "we must consider the facts in the light most favorable to the district court's ruling." *United States v. Fagan*, 71 F.4th 12, 18 (1st Cir. 2023); *United States v. Arnott*, 758 F.3d 40, 43 (1st Cir. 2014) (analyzing "record evidence in the light most favorable to the suppression ruling").

2. The Third Circuit likewise recently explained that where a district court denies a suppression motion, "we view the facts in the light most favorable to the Government." *United States v. Kramer*, 75 F.4th

---

[5] A handful of older Ninth Circuit decisions viewed the "facts in the light most favorable to the Government." *See United States v. Delgado-Hernandez*, 283 F. App'x 493, 496 (9th Cir. 2008); *see also United States v. Brown*, 563 F.3d 410, 413 (9th Cir. 2009); *United States v. Mesa*, 234 F. App'x 680, 682 (9th Cir. 2007). More recent cases have generally abandoned that approach, but for a few outliers, *see United States v. Brown*, 996 F.3d 998, 1002 n.1 (9th Cir. 2021).

339, 342 (3d Cir. 2023); *United States v. Dyer*, 54 F.4th 155, 158 (3d Cir. 2022) (same).[6]

3. The Fourth Circuit has also explained that it will "evaluate[] the evidence in the light most favorable to the government" when reviewing a district court's denial of a motion to suppress. *United States v. Runner*, 43 F.4th 417, 421 (4th Cir. 2022) (internal quotation marks omitted); *United States v. Coleman*, 18 F.4th 131, 135 (4th Cir. 2021) (same).

4. The Fifth Circuit also reviews factual findings in the "light most favorable to the party that prevailed in the district court." *United States v. Nelson*, 990 F.3d 947, 952 (5th Cir. 2021); *United States v. Flowers*, 6 F.4th 651, 655 (5th Cir. 2021) (same).

5. Finally, the Sixth and Eleventh Circuits have also conducted light-most-favorable review of factual findings on motions to suppress evidence. *See United States v. Johnson*, 921 F.3d 991, 997 (11th Cir. 2019) (en banc) ("We view the evidence in the light most favorable to the government, as the party that prevailed in the district court." (internal quotation marks omitted)); *see also United States v. Morgan*, 71 F.4th 540, 545 (6th Cir. 2023) ("viewing the record in the light most favorable to the officer, as we must in the context of a district court's denial of a suppression motion"); *United States v. Sharp*, 40 F.4th 749, 752 (6th Cir. 2022) ("We take the evidence in a light most favorable to the government."); *United States v.*

---

[6] Some older Third Circuit cases do not explicitly apply light-most-favorable review, *e.g.*, *United States v. Yusuf*, 993 F.3d 167, 182 n.11 (3d Cir. 2021), but the more recent cases show that it is now embedded in circuit law.

Snoddy, 976 F.3d 630, 633 (6th Cir. 2020) (same); *but see United States v. Cooper*, 24 F.4th 1086, 1090-91 (6th Cir. 2022) (not explicitly applying light-most-favorable review).

D. This Court's Intervention Is Necessary To Resolve This Division Of Authority

As discussed, the courts of appeals are hopelessly divided. Even within circuits, panels occasionally stray from established circuit law and cite inconsistent standards. But those detours cannot obscure a fundamental divide. Only through this Court's intervention can these conflicts be resolved.

III. THE QUESTION PRESENTED IS CRITICALLY IMPORTANT, AND THIS CASE IS THE IDEAL VEHICLE TO RESOLVE IT

A. This Court's Intervention To Reaffirm *Ornelas* Is Vital To Courts, Litigants, And The Development Of The Law

Resolving the conflicts within and among the circuits is critically important. Disuniformity in the relevant standard of review causes the typical harms inherent in any circuit split. But beyond that, the light-most-favorable standard cedes to district courts and law enforcement officers the responsibility for interpreting the bounds of the Fourth Amendment, threatening to create and amplify legal disparities *within* the circuits, blurring the Fourth Amendment's guarantees, and ultimately threatening the value of those constitutional rights.

Accordingly, resolving this question—by reaffirming *Ornelas*—will benefit courts, law enforcement officers, and individuals. Standards of review are important to the fair administration of justice, yet the

fractures between the circuits on this question oblige criminal defendants to face different standards of review depending on the geographic location of the court of appeals. Even within individual courts of appeal, variations persist, guaranteeing unpredictable outcomes. For instance, the light-most-favorable standard applicable in the Tenth Circuit has been consistently reaffirmed in explicit terms, but even there, some panels have declined to cite it. *See, e.g.*, *United States v. Frazier*, 30 F.4th 1165, 1174 (10th Cir. 2022); *United States v. Shrum*, 908 F.3d 1219, 1229 (10th Cir. 2018); *United States v. Nelson*, 868 F.3d 885, 889 (10th Cir. 2017).[7] Contradictory precedents in other circuits further confirm that the courts of appeal are hopelessly adrift. *See supra* at 23, 25-27 (discussing conflicting precedents in at least the Second, Third, Sixth, and Ninth Circuits).

This Court frequently grants certiorari to clarify standards of appellate review. *See*, *e.g.*, *U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 963 (2018) (assessing whether courts should review certain determinations under the Bankruptcy Code de novo, or for clear error); *Metro. Life Ins. Co. v.*

---

[7] Notably, the Tenth Circuit reversed the district court's denial of the defendant's motion to suppress in each of these cases. *Frazier*, 30 F.4th at 1180; *Shrum*, 908 F.3d at 1240; *Nelson*, 868 F.3d at 893. It is true that the Tenth Circuit has occasionally reversed suppression rulings under the light-most-favorable standard, too. *See, e.g.*, *United States v. Leon*, __ F.4th __, 2023 WL 5838456, at *2 (10th Cir. Sept. 11, 2023). But those few exceptions to the rule do not counter the overwhelming tendency to produce government-favorable outcomes when a court reviews the evidence in the light most favorable to the government.

Glenn, 554 U.S. 105, 115 (2008) (standard for reviewing decisions by a conflicted ERISA trustee); *Pierce v. Underwood*, 487 U.S. 552, 558 (1988) (standard for reviewing attorney's fee awards under the Equal Access to Justice Act). The context here is just as vital if not more so as bankruptcy, attorney's fees, and ERISA as it affects individual liberty and constitutional rights. And of course, in *Ornelas*, this Court granted certiorari to resolve *this* very issue. 517 U.S. at 695. Certiorari is warranted once again.

B. This Case Is The Ideal Vehicle For Review

This case squarely presents the question presented: whether the Tenth Circuit's standard of review on motions to suppress is consistent with this Court's precedent. The relevant "historical" facts are undisputed, and indisputable—they were captured on video footage presented to the district court and the court of appeals. *See supra* at 7. The sole disputed predicate issues to resolving the case are the inferences credited by the court of appeals. The argument was also preserved below and explicitly addressed by the dissenting judge, *see* App. 14a-15a n.2. And the standard of review may well have been determinative. *See supra* at 14-15.

If the Tenth Circuit reviewed the evidence with the more critical eye required by *Ornelas*, it would have rejected the inference that the "slow roll" could have reasonably engendered the suspicions of the officer. *See supra* at 12. Even the district court downplayed the significance of Mr. Canada's 14-second stop. *See supra* at 10 n.2 (noting district court's conclusion that the slow roll was "not a very significant factor" in the officers' analysis). And with that basis

for suspicion set aside, Tenth Circuit law precluded it from affirming based on Mr. Canada's "furtive gesture" alone, given the Tenth Circuit's unequivocal statements in prior cases that "'furtive' movements alone establish nothing." *Humphrey*, 409 F.2d at 1059; *see also United States v. Ridley*, 1998 WL 778381, at *3 (10th Cir. Nov. 2, 1998) ("[W]e do not believe a 'furtive' movement, standing alone, supports a *Terry* search. . . ."); App. 18a-19a.

The Tenth Circuit has had ample opportunity to align its precedent with *Ornelas*, but will not do so absent this Court's intervention. The Tenth Circuit has consistently explained that it will not overrule its light-most-favorable precedents absent en banc review, *see United States v. Berg*, 956 F.3d 1213, 1216 n.3 (10th Cir. 2020) (rejecting defendant's challenge to the "light most favorable" standard because "one panel of this court can't overrule another panel" (citations and internal quotation marks omitted)). The Tenth Circuit, however, has also repeatedly declined to consider the question en banc. *See, e.g.*, Order, *United States v. Berg*, No. 18-3250 (10th Cir. Apr. 15, 2020) (denying petition for rehearing en banc); Order, *United States v. Juszczyk*, No. 15-3323 (10th Cir. Feb. 16, 2017) (same). Only this Court can correct the Tenth Circuit's error and bring the courts of appeal into alignment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Melody Brannon
Federal Public Defender
Daniel T. Hansmeier
Appellate Chief
KANSAS FEDERAL PUBLIC DEFENDER
500 State Avenue
Suite 201
Kansas City, KS 66101

Michael R. Dreeben
Counsel of Record
Ellie Hylton
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300
mdreeben@omm.com

Evan Hindman
O'MELVENY & MYERS LLP
Two Embarcadero Center
28th Floor
San Francisco, CA 94111

September 25, 2023