No. 23-327

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

REPLY BRIEF FOR PETITIONER

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The contradictory arguments and omissions in the Brief in Opposition only underscore the need for this Court to resolve an entrenched circuit conflict and enforce adherence to its holding in *Ornelas v. United States*, 517 U.S. 690 (1996).

The government disputes whether the light-most-favorable test applied by the Tenth Circuit and six other courts of appeals is distinct from the clear-error standard for review of district-court factfinding. It contends that the inferences officers draw before a search are simply historical facts subject to the same deferential review as the district court's own factual determinations. That illogical reading simply ignores the Tenth Circuit's repeated pronouncements, including in this case, that the light-most-favorable standard is a separate and distinct form of deference from clear-error review. Whereas the Tenth Circuit applies clear-error review to the district court's resolution of disputed historical facts, the light-most-favorable standard extends a separate and unvarying deference to the inferences giving rise to an officer's suspicions. That deference conflicts with *Ornelas*'s instructions that such inferences are entitled only to "due weight" and that the reasonableness of a search must be determined *de novo*—as five other circuits have recognized in declining to adopt it.

The government minimizes this circuit split as "overstated" only by completely ignoring the Second Circuit's 2017 decision in *United States v. Pabon*, 871 F.3d 164 (2d Cir. 2017), which explicitly considered and rejected the light-most-favorable rule as an improper deviation from *Ornelas*. That ruling leaves

no room to question the entrenched disagreement among the circuits on a vitally important question of criminal appellate procedure.

The government's attempt to reconcile the light-most-favorable rule with *Ornelas* fares no better. The government identifies no way to square the unwavering deference the rule requires with *Ornelas*'s instruction that officers' inferences are entitled only to "due weight" based upon their reasonableness. In any event, the government's agreement with the Tenth Circuit's approach does not negate circuit conflict on the question presented, which undermines not just the consistent adjudication of individual criminal cases but also the rational development of Fourth Amendment law. The circuits' divergence on an important question of criminal appellate review cries out for this Court's intervention. This Court should grant certiorari to resolve that disagreement and reaffirm the *de novo* review mandated by *Ornelas*.

A. The Courts Of Appeals Are Intractably Divided On The Question Presented.

The government does not deny that the courts of appeals disagree about the question presented. *See* BIO 17 & n.4. Instead, it argues that the circuit split is "overstated." *Id.* at 17 n.4. But to make the argument, the government points the Court to stale briefing it submitted in a 2017 case addressing the state of circuit authority at that time. *Id.* The government simply ignores the Second Circuit's subsequent decision in *Pabon*, which expressly rejected the light-most-favorable standard as inconsistent with *Ornelas*, further heightening the

conflict among the courts of appeals. *See* Pet. 21-22. Far from being "overstated," the circuit split has only been deepened by *Pabon*, reinforcing the need for this Court's review.

Unable to dispute the courts of appeals' disagreement, the government makes a convoluted claim that the question presented "is not, in fact, presented in this case." BIO 17. The government posits that the light-most-favorable standard is simply a component of clear-error review of a district court's factfinding, and therefore inapplicable to this case, where the historical facts were undisputed. *Id.*

But the government's argument that the light-most-favorable standard simply describes the Tenth Circuit's flavor of "clear-error" review misreads the Circuit's precedent and the decision below. The government contends that the Tenth Circuit's standard requires a court to "'view the *evidence'*—not an officer's inferences—'in the light most favorable to the government.'" BIO 10-11 (emphasis in original). But the Tenth Circuit frames its light-most-favorable test not as deference to a district court's factfinding, but as "defer[ence] 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).[1] That court has made

[1] The government misreads Judge Rossman's dissent on this point, too. *See* BIO 16. The dissent makes the same argument petitioner makes here. *See* Pet. App. 15a n.2 (Rossman, J., dissenting) (explaining that *Ornelas* requires "*due weight*" to inferences, but "nowhere adopted a light-most-favorable analysis") (emphasis in original)).

explicitly clear that this deference is distinct from clear-error review, explaining that "[w]e review the district court's legal rulings on a motion to suppress de novo, viewing the evidence in the light most favorable to the government, ***and*** we review the court's factual findings for clear error." *United States v. McDowell*, 713 F.3d 571, 574 (10th Cir. 2013) (emphasis added); *see also United States v. Juszczyk*, 844 F.3d 1213, 1214 (10th Cir. 2017) ("In applying de novo review, we view the evidence in the light most favorable to the ruling ***and*** review the district court's factual findings under the clear-error standard.") (emphasis added).

Indeed, in the opinion below, the court of appeals framed the light-most-favorable standard as separate from the clear-error standard, stating that on top of clear-error review of the district court's factual findings, the court "also" defers to officers' assessments of reasonableness. Pet. App. 4a. And the court went on to do exactly that, expressly deferring to the officers' inference that the petitioner's supposed "slow roll" gave rise to reasonable suspicion, citing Tenth Circuit precedent requiring deference to a "trained law enforcement officer" in "distinguish[ing] between innocent and suspicious actions." Pet. App. 7a.

Elsewhere in its Brief in Opposition, the government mischaracterizes officers' "inferences" themselves as "historical facts" subject to clear-error review. BIO 8, 17. But *Ornelas* makes clear that such inferences are a separate category subject to a separate inquiry. *See, e.g.*, 517 U.S. at 699-700. It permits "clear error" review of the district court's

determination of "historical" facts, but requires that an officer's inferences be assessed for "reasonableness" and be given only the weight they are "due" under the circumstances. *See* Pet. 15-18. The government plainly understands this; indeed, it repeatedly notes the "separateness" of the determinations on "historical fact," "inferences," and the *de novo* review applicable to the district court's ultimate reasonableness determination. *See, e.g.*, BIO 12. The circuits are plainly divided on whether reviewing courts owe deference to the inferences officers draw from the historical facts. This case, in which the Tenth Circuit extended such deference, squarely implicates that division of authority.

B. The Tenth Circuit's Approach Contravenes *Ornelas*.

The government's effort to square the Tenth Circuit's deference to officers with the requirements of *Ornelas* is unavailing. The parties agree that *Ornelas* requires clear-error review of the district court's findings of historical facts and independent *de novo* review of whether the evidence justifies an officer's finding of "reasonable suspicion" or "probable cause." 517 U.S. at 697, 699.

But the parties disagree on whether *Ornelas* additionally requires invariable deference to the inferences that police officers draw from the historical facts. By its plain terms, it does not. Rather, *Ornelas* instructs courts to give "*due* weight" to "inferences drawn from [historical] facts by resident judges and local law enforcement officers." *Id.* at 699 (emphasis added); *id.* at 700 ("An appeals court should give due weight to a trial court's finding that the officer was

credible and the inference was reasonable."). And this Court has never suggested that "due weight" means that lower courts should uniformly defer to the officers' inferences.

The Tenth Circuit, however, replaces the Court's instruction to assess the reasonableness of officer inferences into a requirement that the reviewing court *assume* that an officer's inference was reasonable. *See* Pet. App. 4a (outlining Tenth Circuit's "light-most-favorable" standard, in which the court of appeals "must … defer to the ability of a trained law enforcement officer to distinguish between innocent and suspicious actions" (citing *Dennison*, 410 F.3d at 1207)). This deferential approach contravenes *Ornelas*'s instruction to accord such inferences only "due weight," and is at war with the *de novo* review *Ornelas* mandates of the reasonable-suspicion question, which necessarily turns on whether the objective facts the officers encounter reasonably support their suspicions. *See* Pet. App. 15 n.2 (Rossman, J., dissenting).

Nor can the government avoid this conflict with *Ornelas* by observing that the Tenth Circuit purports to conduct *de novo* review on the "ultimate determination of reasonableness." BIO 11 (citing Pet. App. 4a). In practice, that so-called "de novo review" is undercut by the deferential framework that the court applies to all-but-determinative antecedent questions about the "reasonableness" of the officer's "suspicions." *See Dennison*, 410 F.3d at 1207 (requiring deference to an officer's determination that an action is suspicious); *United States v. Santos*, 403 F.3d 1120, 1125 (10th Cir. 2005) (describing the

Tenth Circuit's "double deference" framework); *United States v. Orozco-Rivas*, 810 F. App'x 660, 663 n.4 (10th Cir. 2020) (same). One of the "inferences" that a police officer *necessarily* draws in any reasonable suspicion case is that the factual circumstances (i.e. the historical facts) are sufficiently "suspicious" to justify further investigation. *See* Pet. 20. Deferring to that inference almost invariably means that the court must defer to the ultimate determination—whether or not the officer's conduct was justified by "reasonable suspicion." *See id.* at 19-21.

Equally misplaced is the government's contention that the "light-most-favorable" standard draws support from this Court's decision in *United States v. Arvizu*, 534 U.S. 266 (2002). The government invokes a Tenth Circuit case, *Santos*, 403 F.3d 1120, that found support for the court's "double deference" in Justice Scalia's solo *Arvizu* concurrence—not the opinion of the unanimous court. Far from supporting the Tenth Circuit's approach, Justice Scalia's concurrence recognizes the crux of petitioner's arguments here: "As I said in my dissent in *Ornelas*, however, I do not see how deferring to the District Court's factual inferences (as opposed to its findings of fact) is compatible with *de novo* review." 534 U.S. at 278 (Scalia, J., concurring). Although Justice Scalia's concurrence suggested that *Ornelas* endorsed a form of invariable deference to inferences by officers and district courts, *id.*, this Court has never so held, and *Ornelas* said no such thing—it instructed only that "due weight" to be given to an officer's inferences, which can be credited only to the extent that the

factual circumstances "would lead a *reasonable* officer" to suspicion. *Id.* (emphasis added and internal quotation marks omitted).

Finally, the government's extended discussion of *United States v. Torres*, 987 F.3d 893 (10th Cir. 2021) and the briefing below, *see* BIO 12-13, fails to justify the Tenth Circuit's deference either. As the government concedes, petitioner's primary submission below was a request for the Tenth Circuit to "jettison" its light-most-favorable approach. BIO 13 n.1; *see* Pet. C.A. Br. 20 ("We simply preserve that issue for en banc review."). As an argument in the alternative—made *only* because petitioner was hemmed in by the very precedents the Tenth Circuit cited in affirming, Pet. App. 4a—petitioner argued that certain language in *Torres* suggested that the court could forgo deference to the officers' inferences and instead "give[] due weight to reasonable inferences, as *Ornelas* instructs." *See* BIO 13 (internal quotation marks omitted). The court of appeals rejected that alternative request and deferred. Likewise, *Torres* itself refused to revisit the Tenth Circuit's light-most-favorable standard and "view[ed] the evidence favorably to the government." 987 F.3d at 899. That *Torres* viewed this approach as consistent with the binding holding in *Ornelas* is unexceptional and does nothing to bridge the gulf between the "due weight" *Ornelas* assigns to officer inferences and the mandatory deference the Tenth Circuit instead applies.

C. The Question Presented Is Critically Important And This Is The Right Vehicle To Resolve It.

1. The question presented is critically important to both the rational development of Fourth Amendment law and the equal administration of justice in federal criminal cases.

Reaffirming *Ornelas* and rejecting the light-most-favorable test will facilitate the development of Fourth Amendment law by requiring appellate courts to independently review officers' justifications for their searches and seizures and thus expressly elucidate the lines separating reasonable police conduct from unconstitutional invasions of Fourth Amendment rights. That elucidation would provide officers in the field with clear guidance about Fourth Amendment requirements, while also safeguarding the rights of those subject to searches and seizures at the hands of law enforcement. Further, by eliminating the divergent approaches currently employed by the courts of appeals, this Court will ensure that such doctrinal development unfolds under a uniform national framework, lessening the potential for subsidiary circuit disagreements about specific applications of Fourth Amendment law.

No less important, resolving the circuit conflict on the question presented will eliminate an intolerable geographic disparity regarding appellate review of Fourth Amendment rulings. This Court regularly grants review to resolve disagreements about appellate standards. *See* Pet. 28-29. The disagreement at issue here cries out for this Court to do the same: As this case illustrates, the light-most-favorable standard can factor prominently in

appellate resolution of federal criminal cases. Neither private citizens nor the government should be subject to unequal justice based on the judicial district in which a federal criminal case is adjudicated. This Court's intervention is needed to ensure uniform justice in federal criminal law.

2. This case is the right vehicle to decide this critical question. As the government concedes, petitioner expressly preserved this argument below. *See* BIO 13 n.1; Pet. C.A. Br. 19-20; *contra* BIO 15.

And contrary to the government's argument, *see* BIO 15-16, the standard of review was dispositive here. *See supra* at 3. The government flags a passage in the opinion below noting that "the recognition of a slow roll by a trained officer, although not dispositive of this case, contributes to the totality of the circumstances." Pet. App. 7a. That passage, however, crystallizes the very error petitioner challenges here—rather than assess the reasonableness of the officer's inference that a 14-second stop was a suspicious "slow roll," the court credited it as a legitimate inference simply because the officer had "recogni[zed]" it as suspicious. *Id.* And, as the dissent below noted, the court's deference to that suspicion *was* dispositive: there were only two purported bases for the district court's reasonable suspicion determination, and the other—the "furtive gesture"—could not alone justify the search under binding Circuit precedent. *See* Pet. App. 18a-19a (Rossman, J., dissenting) (citing, *inter alia*, *United States v. Humphrey*, 409 F.2d 1055, 1059 (10th Cir. 1969) ("'furtive' movements alone establish nothing")); *see also* Pet. 29-30. If the Tenth Circuit had not

improperly deferred to the officer's inference that the supposed "slow roll" was suspicious, no basis would have remained to sustain the search.

This case cleanly presents a question on which the courts of appeals are intractably divided. The Court should grant certiorari to answer that question and realign precedent in the courts of appeals with the Court's clear instructions.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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