

**DRIVING WHILE MEXICAN: WHY THE
SUPREME COURT MUST REEXAMINE
UNITED STATES V. BRIGNONI-PONCE, 422
U.S. 873 (1975)**

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I. INTRODUCTION

In recent years, Congress and the Immigration and Naturalization Service of the Department of Justice have made prosecution of illegal aliens and immigration offenses in the southwestern United States a top priority.¹ Since 1994, there has been nearly a 100 percent increase in the number of Border Patrol agents manning the Mexican border.² Roving border patrols—Border Patrol agents in marked Border Patrol vehicles—roam the roadways of the Southwestern United States stopping vehicles that the agents suspect contain illegal aliens.³

However, the states along the Mexican border—Arizona, California, New Mexico, and Texas—also have a high percentage of law-abiding Hispanic citizens,⁴ and roving border patrols routinely stop them for no other reason than the fact that they are Hispanic.⁵ The problem affects all Hispanics, regardless of

¹ See generally Mark Helm, *INS to Add 1,000 Agents to Border*, SAN ANTONIO EXPRESS-NEWS, Mar. 11, 1998, at A1 (describing the latest efforts by the INS to bolster the border patrol); see also *INS Aims High-Tech Crackdown Along the Border*, HOU. CHRON., Jul. 27, 1997, at A36.

² See Steve Lash, *Judges Come Off Bench to Seek Help/Congress Urged to Provide More Jurists*, HOU. CHRON., May 12, 2000, at A8.

³ See *Almeida-Sanchez v. United States*, 413 U.S. 266, 268 (1973); see also 8 U.S.C. § 1357(a)(3) (1994); 8 U.S.C. § 1101(a)(34) (1994).

⁴ See *United States v. Montero-Camargo*, 208 F.3d 1122, 1131–35 (9th Cir. 2000) (en banc), *cert. denied*, 121 S. Ct. 211 (2000).

⁵ See Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics*, N.Y. TIMES, Jan. 26, 2000, at A17; see also *United States v. Zapata-Ibarra*, 223 F.3d 281, 284 (5th Cir. 2000) (Wiener, J., dissenting) (noting that the agent's testimony that thirty of his 200 stops on R.R. 2523 led to arrests showed that

socio-economic status. There have been several incidents of federal and state judges, as well as elected officials, being stopped because of their race or ancestry.⁶ Indeed, the Honorable Filemon Vela, a federal district judge from the Southern District of Texas, was stopped when he and three aides drove on a south Texas highway because of, according to the Border Patrol agent, the number of passengers in the car.⁷ On August 13, 2000, the Border Patrol again stopped Judge Vela's vehicle on the same road because of the vehicle's tinted windows.⁸ This time there was only one passenger—a federal prosecutor.⁹ Civil rights groups and public officials complain that the Border Patrol stops law-abiding citizens without legal justification.¹⁰ The problem is so pervasive that some call it “driving while Mexican.”¹¹

Part II of this article summarizes the Supreme Court precedent on roving border patrol stops. Part III reviews the facts and holding of *United States v. Chavez-Chavez*, a recent Fifth Circuit roving border patrol case.¹² Using *Chavez-Chavez* as an example, Parts IV, V, and VI explain how the circuits along the Mexican border—the Fifth and Ninth Circuits, and to a lesser extent, the Tenth Circuit¹³—have applied Supreme Court precedent, regarding distance from the border, race, and the type of vehicle. Finally, Part VII concludes that the Supreme Court should reevaluate its prior roving border patrol jurisprudence, given the changed demographics of the southwestern United States.

eighty-five percent of the stops were mistakes that hassled, inconvenienced, and embarrassed law abiding people who were entirely within their constitutional rights), *cert. denied*, 121 S. Ct. 412 (2000).

6 See Yardley, *supra* note 5.

7 See *id.*

8 James Pinkerton, *Border Patrol Twice Stops U.S. Judge on Way to Court*, HOU. CHRON., Oct. 1, 2000, at A1.

9 See *id.*

10 *Id.* The Border Patrol Chief called Judge Vela after the second stop and apologized. *Id.* Of course, if Judge Vela had not been a public official, it is doubtful that his stop would have received such personal attention. See *id.*

11 Yardley, *supra* note 5.

12 *United States v. Chavez-Chavez*, 205 F.3d 145 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 251 (2000).

13 See 28 U.S.C. § 41 (1994) (designating that Texas is in the Fifth Circuit, Arizona and California are in the Ninth Circuit, and New Mexico is in the Tenth Circuit).

II. SUPREME COURT PRECEDENT

In 1975, the United States Supreme Court in *United States v. Brignoni-Ponce* held that a roving border patrol may stop vehicles “if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.”¹⁴ However, the Border Patrol agents can only question the driver and passengers about their citizenship and immigration status, or any suspicious circumstances; anything else requires consent or probable cause.¹⁵

The Court recognized several factors that may support an agent’s reasonable suspicion: (1) characteristics of the area; (2) proximity to the border; (3) usual traffic patterns; (4) the agent’s previous experience with alien traffic; (5) information about recent illegal border crossings in the area; (6) driver’s behavior, such as erratic driving or obvious attempts to evade the agent; (7) aspects of the vehicle, such as that it is heavily loaded, has an extraordinary number of passengers, or that the agent observes its occupants attempting to hide; and (8) characteristics of passengers that indicate that they do not live in the United States, such as dress mode and haircut.¹⁶ Each case must be evaluated on the “totality of the particular circumstances.”¹⁷ The Supreme Court held that the roving border patrol stop in *Brignoni-Ponce* violated the Fourth Amendment because the stop was based on nothing more than the apparent Mexican ancestry of the vehicle’s occupants.¹⁸

Six years later, the Supreme Court found that the roving border patrol stop in *United States v. Cortez* was constitutional because, unlike *Brignoni-Ponce*, the agents articulated reasonable facts that led to their conclusion that the vehicle contained illegal aliens.¹⁹ In *Cortez*, Border Patrol agents found

14 *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

15 *Id.* at 881–82.

16 *Id.* at 884–85.

17 *Id.* at 885 n.10.

18 *Id.* at 885–86.

19 *United States v. Cortez*, 449 U.S. 411 (1981).

footprints in a remote part of an Arizona desert.²⁰ Over time, the agents continued to find similar sets of footprints in the same area.²¹ The agents tracked and studied the footprints and concluded that on clear weekend nights a person had been leading illegal aliens to a vehicle.²² The agents estimated the rate of travel for a group on foot in the desert, and parked their patrol car near the area at 1:00 a.m. on a Sunday, which was the first clear night in three days.²³ Because the agents had learned that the group would probably include about eight to twenty people, the agents concentrated on vehicles that could contain that many people without suspicion.²⁴ The agents observed a pickup truck with a camper shell at 4:30 a.m. with a partial license plate of “GN 88-.”²⁵ About one and one-half hours later, a similar vehicle with the license plate “GN 8804” passed in the opposite direction.²⁶ The agents had previously determined that the vehicle would probably pass in one direction and then turn around and return.²⁷ The agents stopped the vehicle and discovered six illegal aliens.²⁸

Brignoni-Ponce and *Cortez* are on opposite sides of a wide spectrum. While *Brignoni-Ponce* was completely devoid of any facts to support the stop, *Cortez* was so replete with facts that Chief Justice Warren Burger stated that it involved “the kind of police work often suggested by judges and scholars as examples of appropriate and reasonable means of law enforcement.”²⁹ Ultimately, neither case is very helpful because most cases fall somewhere in between the two.

20 *Id.* at 413.

21 *Id.*

22 *Id.*

23 *Id.* at 414.

24 *Id.* at 415.

25 *Cortez*, 449 U.S. at 415.

26 *Id.*

27 *Id.* at 414–15.

28 *Id.* at 415–16.

29 *Id.* at 419.

III. UNITED STATES V. CHAVEZ-CHAVEZ

A. *The Facts*

Highway 77 is the major highway from Brownsville, Texas, to Corpus Christi, Texas.³⁰ Highway 286 is an alternate highway leading into Corpus Christi.³¹ Hundreds of thousands of people live in the cities of south Texas, such as Brownsville, San Benito, Harlingen, and Kingsville.³² These people legally use Highway 286 to travel to Corpus Christi.³³ However, alien smugglers also use Highway 286 to avoid the more heavily patrolled Highway 77, and the Nueces County Sheriff³⁴ sometimes requests the Border Patrol's assistance with stops on Highway 286 involving suspected illegal aliens.³⁵

Around 8:00 a.m., on Wednesday, July 29, 1998, Border Patrol Agents Neil Heideman and Ron Torralba were parked on the side of Highway 286 in Corpus Christi looking for cars with illegal aliens.³⁶ Agent Heideman testified that 8:00 a.m. is a "common time for illegals passing."³⁷ The agents were about 150 to 160 miles from the Texas-Mexico border and either 40 to 45 miles or 60 miles north of the Sarita Border Patrol checkpoint, which is on Highway 77.³⁸ There are many towns between the checkpoint and Corpus Christi, including Kingsville.³⁹

According to Agent Heideman, as Mr. Chavez drove a minivan by the parked patrol car, the five visible passengers appeared "very rigid" because they looked straight forward and

30 See, e.g., RAND MCNALLY ROAD ATLAS 99 (2001).

31 See *id.*

32 2 Record at 14–15, *United States v. Chavez-Chavez*, 205 F.3d 145 (5th Cir. 2000) (No. B–98–455), *cert. denied*, 121 S. Ct. 251 (2000).

33 *Id.* at 9, 15.

34 Corpus Christi is located in Nueces County, Texas. See, e.g., RAND MCNALLY ROAD ATLAS 99 (2001).

35 2 Record, *supra* note 32, at 9–10, 24, 26.

36 See *id.* at 9, 11.

37 *Id.* at 11.

38 *Id.* at 14, 19–20, 25.

39 *Id.* at 20. Sarita is in Kenedy County, Texas, which is two counties south of Nueces County, Texas, where the stop occurred. See, e.g., RAND MCNALLY ROAD ATLAS 99 (2001). Kleberg County is located between Nueces and Kenedy Counties. *Id.*

“appeared to be making an effort not to look anywhere else.”⁴⁰ However, upon cross-examination, Agent Heideman agreed that the passengers were sitting in the minivan in a normal fashion.⁴¹ Agent Torralba similarly testified that the passengers sat straight and that the four adults who sat on the rear bench seat appeared uncomfortable.⁴² Agent Torralba testified that such seating is “typical of people being smuggled in these vehicles.”⁴³

As the minivan drove past the parked patrol car, Mr. Chavez glanced back at the agents.⁴⁴ The agents then followed the minivan for a mile or two.⁴⁵ The minivan was not speeding.⁴⁶ The minivan did not have an extraordinary number of passengers, and the occupants did not attempt to hide when they passed the Border Patrol car.⁴⁷ The agents had no information that the minivan came from the border or about any illegal border crossings in that area.⁴⁸

Even though the agents could see only the heads and shoulders of the passengers, and possibly the top of their chests, the agents testified that the passengers appeared very dirty and disorganized.⁴⁹ Agent Heideman admitted that he could not see the feet, legs, or torsos of the passengers.⁵⁰

Agent Heideman concluded that the minivan had a “rigid suspension,” indicating that the minivan had been modified so that it would not appear low or weighed down, but he did not testify to any facts that led him to that conclusion.⁵¹ Agent

40 See 2 Record, *supra* note 32, at 11, 21, 23; Appellant’s Pet. for En Banc Reh’g, at 3, 13, *Chavez-Chavez* (No. B-99-40072) (noting that the pre-sentencing investigation report, or PSR, reflects that the vehicle was a Ford Aerostar, which is a minivan); Petition for Writ of Certiorari, at 3 n.1, 6, *Chavez-Chavez* (No. 00-5486) (again noting that the PSR reflects that the vehicle was a Ford Aerostar).

41 See 2 Record, *supra* note 32, at 16.

42 *Id.* at 21, 23.

43 *Id.*

44 *Id.* at 11, 23.

45 *Id.* at 11, 13.

46 *Id.* at 12-13.

47 *Id.* at 18-19.

48 *Id.* at 18, 27-28.

49 *Id.* at 11, 16-17, 27, 29.

50 *Id.* at 16-17.

51 *Id.* at 12.

Heideman later checked the minivan's suspension, but he could not recall whether it had been modified.⁵² He admitted that if the suspension had been modified, he would have included this important fact in his report.⁵³ Agent Torralba's testimony about the suspension contradicted itself. Although he testified that the suspension appeared rigid to prevent it from appearing weighed down, he also testified that the minivan kept bouncing, which is inconsistent with a rigid suspension.⁵⁴

As the agents followed the minivan, Agent Heideman noticed that Mr. Chavez looked back at them in his side-view mirror.⁵⁵ On cross-examination, Agent Heideman admitted that Mr. Chavez did not continuously look back at them, but looked back only several times.⁵⁶ After the agents stopped the minivan, they discovered eight passengers, all of whom were illegal aliens from Guatemala.⁵⁷

On August 18, 1998, an indictment charged Mr. Chavez with two counts of alien transporting.⁵⁸ On August 31, 1998, depositions were taken of two of the transported aliens—Pablo Perea-Davila and Rudy Chacon-Portillo.⁵⁹ On September 9, 1998, Mr. Chavez filed a motion to suppress.⁶⁰ At the suppression hearing, the district court admitted as an exhibit the transcript of the deposition held on August 31, 1998.⁶¹

B. The Deposition Testimony

Pablo Perea-Davila and Rudy Chacon-Portillo are citizens of Guatemala, who illegally entered the United States from Matamoros, Mexico.⁶² They crossed the Rio Grande River with a

52 *Id.* at 17–18.

53 *Id.* at 18.

54 *Id.* at 24.

55 *Id.* at 12.

56 *Id.* at 15–16.

57 *Id.* at 13–14, 23.

58 Indictment, 1 Record 41–42, *Chavez-Chavez* (No. B–98–455); *see also* 8 U.S.C. § 1324(a)(1)(A)(ii) (1994).

59 Dep. Of Material Witnesses 1–19, *Chavez-Chavez* (No. B–98–455).

60 Def. Mot. To Suppress, 1 Record 33–35, *Chavez-Chavez* (No. B–98–455).

61 *See* 2 Record, *supra* note 32, at 4, 7.

62 *See* Dep. Of Material Witnesses, *supra* note 59, at 7, 13–14.

guide who put them into a car when they reached the United States.⁶³ The car then dropped them off near some woods, and after several days in the brush, they entered a minivan driven by Mr. Chavez.⁶⁴ Eight people entered the minivan; five were sitting and three were not visible to anyone outside the minivan.⁶⁵ Mr. Chavez did not tell them to act in any particular manner or how to sit.⁶⁶ The Border Patrol agents stopped the minivan immediately after it passed the patrol car.⁶⁷

Perea-Davila appeared at the deposition in the same unwashed shirt that he had worn when he was arrested the month before.⁶⁸ There was nothing remarkably dirty about the shirt.⁶⁹

C. The District Court's Reasons for Denying the Motion to Suppress

The district court denied Mr. Chavez's motion to suppress based upon evidence showing:

[T]he description of the vehicle based upon the experience of the police officers as to the reason that they found it to be suspicious [sic]; that the suspension being rigid causing it to bounce; the fact that the behavior of the passengers sitting rigidly and their appearance; the known traffic pattern in that area, given the reports and their own experience in being called by Kleberg County [sic]⁷⁰ law enforcement to confirm citizenship of vehicles or passengers in vehicles that had been detained on Highway 286. Furthermore, the fact that the other common experience is on that highway being that law enforcement stopping vehicles

⁶³ *Id.* at 8, 14.

⁶⁴ *Id.* at 8–10, 15.

⁶⁵ *Id.* at 11, 17.

⁶⁶ *Id.* at 11.

⁶⁷ *Id.* at 11–12.

⁶⁸ *Id.* at 12.

⁶⁹ *Id.*

⁷⁰ The only reference to local law enforcement at the suppression hearing was to the Nueces County Sheriff's Department. 2 Record, *supra* note 32, at 10. As mentioned earlier, Kleberg County is south of Nueces County. *See, e.g.*, RAND MCNALLY ROAD ATLAS 99 (2001).

and the occupants fleeing; the—also based on the behavior of the driver and the proximity to the Sarita checkpoint, as well.⁷¹

D. The Fifth Circuit's Reasons for Affirming the Denial of the Motion to Suppress

On February 22, 2000, the U.S. Court of Appeals for the Fifth Circuit affirmed the denial of Mr. Chavez's motion to suppress.⁷² The Fifth Circuit found that the following factors did not support a reasonable suspicion: (1) the stop's distance from the border; (2) Mr. Chavez's glances at the border patrol; (3) the number of passengers in the vehicle; and (4) the passengers' seating arrangement.⁷³ However, while the Fifth Circuit found that the stop occurred a substantial distance from the border, the Court justified the stop by relying upon: (1) the proximity to the Sarita checkpoint on Highway 77, which can be circumvented by using Highway 286; (2) the type of vehicle; (3) its suspension; (4) the Hispanic passengers' dirty appearance; and (5) the time of the stop.⁷⁴

Specifically, the Fifth Circuit affirmed because Mr. Chavez drove five Hispanic passengers with a dirty appearance in a van with a rigid suspension at 8:00 a.m. on a road in Corpus Christi, Texas that could have circumvented a checkpoint on a different road about sixty miles away in Sarita, Texas.⁷⁵

⁷¹ 2 Record, *supra* note 32, at 36.

⁷² United States v. Chavez-Chavez, 205 F.3d 145, 150 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 251 (2000).

⁷³ *Id.* at 148–50. The Ninth Circuit similarly has discounted eye contact with police or its avoidance. See United States v. Montero-Camargo, 208 F.3d 1122, 1136 & n.27 (9th Cir. 2000) (en banc), *cert. denied*, 121 S. Ct. 211 (2000).

⁷⁴ *Chavez-Chavez*, 205 F.3d at 150.

⁷⁵ *Id.* at 147–50.

IV. THE BORDER PATROL LACKS THE AUTHORITY TO STOP
VEHICLES OVER 100 MILES FROM AN INTERNATIONAL
BORDER

A. *Stops Over 100 Miles*

The INS and its Border Patrol agents are authorized to search for illegal aliens in vehicles *only* if the vehicles are within a reasonable distance from an international border.⁷⁶ A reasonable distance is defined as no more than 100 miles from the border.⁷⁷ The Supreme Court has suggested that the Border Patrol lacks the authority to stop vehicles more than 100 miles from the Mexican border.⁷⁸ Furthermore, the Tenth Circuit has indicated that roving border patrol stops over 100 miles from the border are *per se* unreasonable.⁷⁹ Nevertheless, the Fifth and Ninth Circuits permit stops that occur well into the interior of the United States.⁸⁰

B. *Stops Over Fifty Miles In the Fifth Circuit*

The Fifth Circuit has consistently held that the proximity to the border is a “vital element” or a “paramount factor,” the absence of which requires the Fifth Circuit to charily examine

76 8 U.S.C. § 1101(a)(34) (1994); 8 U.S.C. § 1357(a)(3) (1994) (emphasis added).

77 8 C.F.R. § 287.1(a)(2) (2000).

78 See *United States v. Brignoni-Ponce*, 422 U.S. 873, 882–83 (1975).

79 *United States v. Venzor-Castillo*, 991 F.2d 634, 635–37, 639 (10th Cir. 1993) (relying upon § 1357(a)(3) and the C.F.R. in holding a stop 235 miles from the Mexican border unreasonable and noting prior Ninth Circuit and Tenth Circuit cases permitting stops over 100 miles from the border had not defined “reasonable distance”).

80 See, e.g., *United States v. Chavez-Chavez*, 205 F.3d 145, 147 (5th Cir. 2000) (approximately 150 to 160 miles from the Mexican border), *cert. denied*, 121 S. Ct. 251 (2000); *United States v. Morales*, 191 F.3d 602, 603 (5th Cir. 1999) (150 miles from the Mexican border), *cert. denied*, 120 S. Ct. 1211 (2000); *United States v. Orozco*, 191 F.3d 578, 579 (5th Cir. 1999) (200 to 300 miles from the Mexican border), *cert. denied*, 120 S. Ct. 996 (2000); *United States v. Magana*, 797 F.2d 777, 778, 780 (9th Cir. 1986) (1500 miles from the Mexican border and just north of Eugene, Oregon); *United States v. Varela-Andujo*, 746 F.2d 1046, 1047 (5th Cir. 1984) (over 170 miles from the Mexican border); *United States v. Salazar-Martinez*, 710 F.2d 1087 (5th Cir. 1983) (165 miles from the Mexican border and fifteen miles east of San Antonio, Texas). *But see Orozco*, 191 F.3d at 584 (Dennis, J., dissenting) (arguing *Brignoni-Ponce*, 8 U.S.C. § 1357(a)(3), and 8 C.F.R. § 287.1 do not permit border patrol stops based on reasonable suspicion more than 100 miles from the border).

the remaining *Brignoni-Ponce* factors.⁸¹ According to the Fifth Circuit, a stop that occurs more than fifty miles from the Mexican border does not justify a belief that the vehicle came from the border, and thus the proximity factor is missing.⁸²

While the Fifth Circuit noted that the stop of Mr. Chavez's vehicle occurred about 160 miles from the Mexican border, the Court disregarded its own precedent in analyzing the remaining factors, and did not accord any special weight to the distance from the border.⁸³ As Judge Furgeson of the Western District of Texas has noted, the Fifth Circuit's application of its own precedent regarding roving border patrols is inconsistent and confusing.⁸⁴ Judge W. Royal Furgeson has criticized the Fifth Circuit's fifty-mile rule and vital element analysis as unsupported by Supreme Court precedent.⁸⁵ Still, until the en

81 *United States v. Aldaco*, 168 F.3d 148, 150 (5th Cir. 1999) (recognizing a stop's proximity to the border as a "paramount factor," in absence of which the remaining factors must be examined "carefully"); *United States v. Nichols*, 142 F.3d 857, 865 (5th Cir. 1998) (recognizing reason to believe vehicle had come from the border as a "vital element" and examining the remaining factors "charily"); see, e.g., *United States v. Moreno-Chaparro*, 180 F.3d 629, 632 (5th Cir. 1998) (noting "[a] vital element of the *Brignoni Ponce* test is whether the agent had reason to believe that the vehicle in question had come from the border."); *United States v. Rodriguez-Rivas*, 151 F.3d 377, 380 (5th Cir. 1998) (examining remaining factors "charily"); *United States v. Jones*, 149 F.3d 364, 367-69 (5th Cir. 1998) (considering possibility that vehicle may have recently crossed the border a "vital element" and examining the remaining factors "charily"); *United States v. Inocencio*, 40 F.3d 716, 722 & n.6, 723 (5th Cir. 1994) (considering possibility that vehicle may have recently crossed the border as a "vital element" in making an investigatory stop and absent government's assertion that stop was based on proximity to border, facts offered in support of "a reasonable suspicion will be examined charily").

82 E.g., *Rodriguez-Rivas*, 151 F.3d at 380; *Jones*, 149 F.3d at 368; *Inocencio*, 40 F.3d at 722 n.7.

83 *Chavez-Chavez*, 205 F.3d at 148 (distancing itself from *Inocencio* and failing to acknowledge proximity as a vital element or that the other factors must be examined charily); accord *United States v. Morales*, 191 F.3d 602 (5th Cir. 1999) (affirming a stop that was 150 miles from the border without acknowledging that proximity is a vital element or that the other factors must be examined charily), *cert. denied*, 120 S. Ct. 1211 (2000).

84 *United States v. Rubio-Hernandez*, 39 F. Supp. 2d 808, 813-15 (W.D. Tex. 1999) (inviting the Fifth Circuit to re-examine its roving border patrol jurisprudence because it is unclear, and noting a difference between examining factors "carefully," as opposed to "most carefully" or "charily").

85 *Id.* at 810-15.

banc Fifth Circuit decides to overrule its precedent,⁸⁶ the Fifth Circuit must charily examine stops, such as Mr. Chavez's, that occur over fifty miles from the Mexican border.

C. Mr. Chavez's Case

In Mr. Chavez's case, the evidence showed that: (1) the stop occurred near Corpus Christi, about 150 to 160 miles from the Mexican border, on a road used by both alien smugglers and the law-abiding public; (2) the Sarita checkpoint was about sixty miles away from the stop; (3) the checkpoint was on a different road than the stop; and (4) many towns and roads are between the checkpoint and the stop.⁸⁷ In such circumstances, a stop is unreasonable.⁸⁸ The mere fact that a road may be used by alien smugglers is insufficient to justify a stop.⁸⁹ "[O]therwise, law enforcement agents would be free to stop any vehicle on virtually any road anywhere near the Texas-Mexico border."⁹⁰ Indeed, the Supreme Court has recognized that the "[r]oads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well."⁹¹ Moreover, there was no testimony that it was unusual to see a minivan on Highway 286 in Corpus Christi at 8:00 a.m. on a weekday.⁹²

86 *E.g.*, *Burge v. Parrish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999) ("It is a firm rule of this circuit that in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court, a panel cannot overrule a prior panel's decision.").

87 2 Record, *supra* note 32, at 9–11, 15, 20, 24–26.

88 *See* *United States v. Rodriguez-Rivas*, 151 F.3d 377, 380 (5th Cir. 1998) (finding a lack of reasonable suspicion and noting that although Highway 385 is frequently used by smugglers to avoid a checkpoint on Highway 67, Highway 385 is also the main entrance to Big Bend National Park); *United States v. Venzor-Castillo*, 991 F.2d 634, 639–40 (10th Cir. 1993) (finding that a stop approximately 230 miles from the Mexican border was unreasonable because the road was not a direct route from Mexico and the road passed through thirteen New Mexico towns and cities between the border and the stop).

89 *United States v. Diaz*, 977 F.2d 163, 165 (5th Cir. 1992).

90 *Id.*

91 *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975).

92 *See* *United States v. Lopez-Valdez*, 178 F.3d 282, 287 (5th Cir. 1999) ("Although there was testimony that FM 2644 could be used to avoid an immigration checkpoint, the Government did not introduce at trial any evidence that it was unusual to see a car on

Thus, the stop's distance from the Mexican border rendered the stop of Mr. Chavez's vehicle unconstitutional for three reasons. First, because the stop of Mr. Chavez's vehicle occurred more than 100 miles from the Mexican border, the Border Patrol should not have stopped the vehicle at all. Second, because the stop occurred over fifty miles from the Mexican border, the Fifth Circuit was required to charily examine the remaining *Brignoni-Ponce* factors, but the Fifth Circuit failed to follow its own precedent. Third, because there were so many towns and roads between the border and the stop and because the stop occurred in a metropolitan area, the stop of Mr. Chavez's vehicle was unreasonable, even if the Border Patrol had the authority to stop vehicles so far into the interior of the United States.

V. HISPANIC NATIONALITY IS NOT A PERMISSIBLE FACTOR

A. *The Fifth Circuit's View*

In *Chavez-Chavez*, the Fifth Circuit found that the time of the stop, 8:00 a.m., taken with the Hispanic passengers' dirty appearance from the mid-chest up was a significant factor that justified the stop.⁹³ The Fifth Circuit further noted that because the stop occurred at 8:00 a.m., rather than later in the day, the likelihood that the Hispanic passengers had been outdoors working was diminished.⁹⁴

The Fifth Circuit's assumption that the passengers could not have been working outside before 8:00 a.m. in July 1998 in Texas is unfounded. Outdoor laborers in Texas during the summer heat waves of the late 1990s often worked in the early morning hours to avoid the notorious Texas summer heat.⁹⁵

FM 2644 at 8:30 in the morning.”).

⁹³ *United States v. Chavez-Chavez*, 205 F.3d 145, 148–49 (5th Cir. 2000) *cert. denied*, 121 S. Ct. 251 (2000).

⁹⁴ *Id.* at 149.

⁹⁵ *E.g.*, Sandra Baker, *When the Heat Is On; Outdoor Workers and Their Employers Handle Hot Spell with Caution*, FT. WORTH STAR-TELEGRAM, July 20, 1998, at 17 (noting that the summer heat in 1998 was so extreme that some city employees who worked outside began work at 6:00 a.m. to avoid the heat and they were encouraged to take frequent breaks from the outdoors); Maria F. Durand, *Workers Keeping Their Cool Despite Heat*, SAN ANTONIO EXPRESS-NEWS, Aug. 20, 1997, at 1B (noting shifts in

Further, an agent's testimony that a car's occupants were dirty, disheveled, or unkempt is too subjective to support a reasonable suspicion for a stop.⁹⁶ Indeed, such speculation, which often leads to improper racial stereotyping, flies in the face of the requirement that the agents base their decision to stop a vehicle on an articulable, reasonable suspicion of criminal activity.⁹⁷

Moreover, the agents could only see the passengers' heads and shoulders.⁹⁸ At the deposition, which was held one month after the stop, one of the passengers wore the same unwashed shirt that he had worn when he was arrested, but the testimony did not reveal that there was anything remarkably dirty about the shirt.⁹⁹ To the extent the Fifth Circuit relied upon the passengers' presence in the brush for a period of days before the stop, the Fifth Circuit erred. The agents did not know the passengers had been in the brush until *after* they had stopped the vehicle and arrested its occupants.¹⁰⁰ Later discovered facts cannot support a reasonable suspicion for a stop.

The parties agreed at the suppression hearing that hundreds of thousands of south Texans legitimately use Highway 286 to travel to Corpus Christi,¹⁰¹ and there was no testimony that it was unusual to see a minivan on Highway 286 at 8:00 a.m.¹⁰²

schedules that allowed many construction workers in downtown San Antonio to begin working at 6:30 a.m. to avoid the summer heat).

96 *United States v. Garcia*, 732 F.2d 1221, 1232 (5th Cir. 1984) (Tate, J., dissenting).

97 *See United States v. Sokolow*, 490 U.S. 1, 12 (1989) (Marshall, J., dissenting) ("By requiring reasonable suspicion as a prerequisite to such seizures, the Fourth Amendment protects innocent persons from being subjected to 'overbearing or harassing' police conduct carried out solely on the basis of imprecise stereotypes of what criminals look like, or on the basis of irrelevant personal characteristics such as race.").

98 2 Record, *supra* note 32, at 16–17.

99 *See Dep. Of Material Witnesses*, *supra* note 59, at 12.

100 *United States v. Moreno-Chaparro*, 180 F.3d 629, 632 (5th Cir. 1998) ("obviously only those factors known to the officer at the time of the stop can be considered when determining whether the stop was reasonable"); *United States v. Montero-Camargo*, 208 F.3d 1122, 1129 n.11 (9th Cir. 2000) (en banc), (noting that a stop may be justified only by reference to factors that were present up to the time of the stop), *cert. denied*, 121 S. Ct. 211 (2000).

101 2 Record, *supra* note 32, at 14–15.

102 *See United States v. Lopez-Valdez*, 178 F.3d 282, 287–88 (5th Cir. 1999) (reversing and holding that an older-model, mid-size sedan with six to eight passengers traveling within twenty miles of the border did not "give rise to reasonable

Essentially, the Fifth Circuit justified the stop simply because the minivan contained what the Border Patrol agents perceived to be dirty Hispanics. The Fifth Circuit routinely relies upon Hispanic nationality as a justification for a roving border patrol stop of illegal aliens.¹⁰³ In fact, the Fifth Circuit's rulings encourage stops based merely upon race. At least one state police department in the Fifth Circuit, the Louisiana State Police, explicitly instructs its officers to stop cars based on the driver's skin color and "trains officers to ask themselves whether the person 'fits the car,' a veiled reference to the belief held by some that a person of color in an expensive car is engaged in suspicious activity."¹⁰⁴

B. The Ninth Circuit's View

On the other hand, the Ninth Circuit, sitting en banc, has held that race is an impermissible factor when considering whether the agents had an articulable reasonable suspicion for an investigatory stop.¹⁰⁵ The Ninth Circuit noted that *Brignoni-Ponce's* twenty-six-year-old dictum that race can be a factor is no longer valid in light of changed demographics in which Hispanics are a large number, if not the majority, of the population in many areas of the southwestern United States.¹⁰⁶ The Ninth Circuit held that "at this point in our nation's history, and given the continuing changes in our ethnic and racial

suspicion of unlawful activity" where there was no evidence that it was unusual to see such a car on FM 2644 at 8:30 a.m.).

103 See, e.g., *United States v. Cenicerros*, 204 F.3d 581, 583, 585 (5th Cir. 2000) (noting that the driver was male and Hispanic and the car was registered to a female with a non-Hispanic surname); *United States v. Samaguey*, 180 F.3d 195, 198 (5th Cir. 1999) (noting that the vehicle contained a lone Hispanic and that *Brignoni-Ponce* recognizes that Hispanic ancestry is a relevant factor); *United States v. Varela-Andujo*, 746 F.2d 1046, 1047 (5th Cir. 1984) (noting that the passengers "were obviously Mexican-American" and two of them were "disheveled, tired, and wearing dirty clothes."); *United States v. Salazar-Martinez*, 710 F.2d 1087, 1088-89 (5th Cir. 1983) (noting that the vehicle's occupants were Mexican, "extremely unkempt," and had "shabby dress").

104 *United States v. Thomas*, 787 F. Supp. 663, 676 & n.17 (E.D. Tex. 1992), *aff'd*, 983 F.2d 1062 (5th Cir. 1993).

105 *United States v. Montero-Camargo*, 208 F.3d 1122, 1131-35 (9th Cir. 2000) (en banc), *cert. denied*, 121 S. Ct. 211 (2000).

106 *Id.* at 1132-36.

composition, Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required.”¹⁰⁷

Contrary to the position of the Ninth Circuit, the Fifth Circuit encourages stops based on nothing more than race or ancestry, which the Supreme Court has arguably held to be unconstitutional.¹⁰⁸ Because the right to be free from unreasonable seizures¹⁰⁹ and the right to travel without governmental interference¹¹⁰ are fundamental freedoms, the Supreme Court should resolve the circuit split in favor of the Ninth Circuit.¹¹¹

VI. THE USE OF A MINIVAN OR SPORT UTILITY VEHICLE IS NOT PER SE A RELEVANT FACTOR

A. Minivans and SUVs

In *Brignoni-Ponce*, the Supreme Court noted that “[aspects] of the vehicle itself may justify suspicion,” and suggested that large vehicles such as “certain station wagons, with large compartments for fold-down seats or spare tires,” are frequently used for transporting and concealing aliens.¹¹² Thus, the Fifth Circuit has used the fact that someone was driving a minivan or other popular, large vehicle to justify a roving border patrol stop.¹¹³ However, as the Ninth Circuit has noted, “minivans,

¹⁰⁷ *Id.* at 1135.

¹⁰⁸ *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975); see also Reginald T. Shuford, *Civil Rights in the Next Millennium: Any Way You Slice It: Why Racial Profiling is Wrong*, 18 ST. LOUIS U. PUB. L. REV. 371, 375 n. 20 (1999) (discussing various federal court decisions which have reached conflicting results regarding the constitutionality of stops based solely on race or national origin).

¹⁰⁹ U.S. CONST. amend. IV.

¹¹⁰ *United States v. Guest*, 383 U.S. 745, 757–59 (1966).

¹¹¹ SUP. CT. R. 10(a) (noting a division of opinion among the federal courts of appeals is a possible ground for Supreme Court review).

¹¹² *Brignoni-Ponce*, 422 U.S. at 885.

¹¹³ See, e.g., *United States v. Chavez-Chavez*, 205 F.3d 145, 149 (5th Cir. 2000) (noting that “smugglers often carry illegal aliens in vans like the one stopped”), *cert. denied*, 121 S. Ct. 251 (2000); *United States v. Morales*, 191 F.3d 602, 605 (5th Cir. 1999) (noting that the vehicle was a pickup truck with a fiberglass cover over the truck bed),

although sometimes used by smugglers, are among the best-selling family car models in the United States.”¹¹⁴ Thus, the fact that Mr. Chavez drove a minivan is in and of itself irrelevant as to whether the agents had reasonable suspicion for the stop.¹¹⁵ In other words, the agents must testify to articulable facts that support a reasonable suspicion that a minivan, SUV, or other popular large vehicle contains illegal aliens.

B. The Agents in Chavez-Chavez Did Not Have a Reasonable Articulable Suspicion that the Minivan Contained Illegal Aliens

In Mr. Chavez’s case, Agent Heideman had a total of three and one-half years experience with the Border Patrol, including the year he spent in training.¹¹⁶ Agent Heideman was assigned to Corpus Christi for only fourteen months at the time of the stop.¹¹⁷ The record also shows that at the time of the stop Agent Torralba had six years experience with the Border Patrol, including training, and that five and one-half years were spent assigned to Corpus Christi.¹¹⁸ Based on this testimony, the Fifth Circuit concluded that Agents Heideman and Torralba “had developed substantial experience in detaining illegal aliens” on Highway 286.¹¹⁹ However, this conclusion is not clearly supported by the record.

Although Agent Heideman testified that he had patrolled

cert. denied, 120 S. Ct. 1211 (2000).

¹¹⁴ United States v. Arvizu, 217 F.3d 1224, 1233 (9th Cir. 2000).

¹¹⁵ See United States v. Montero-Camargo, 208 F.3d 1122, 1130 n.12 (9th Cir. 2000) (en banc) (“[I]t seems eminently reasonable to us that a factor that often has innocent connotations — driving a minivan on a particular highway, for example — should carry less weight. . .”), *cert. denied*, 121 S. Ct. 211 (2000); see also *id.* at 1131 (noting that where a substantial number of people share a characteristic, that characteristic does not support a reasonable, articulable suspicion for an investigatory stop); United States v. Jones, 149 F.3d 364, 369 (5th Cir. 1998) (noting that a factual condition that is consistent with alien smuggling is insufficient to justify a reasonable suspicion if it also occurs more frequently in the law-abiding public).

¹¹⁶ 2 Record, *supra* note 32, at 8.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 22.

¹¹⁹ United States v. Chavez-Chavez, 205 F.3d 145, 149 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 251 (2000).

Highway 286 approximately 100 times with “many” stops,¹²⁰ there was no testimony from either Agent Heideman or Agent Torralba as to the number of stops they had made on Highway 286, how many involved alien trafficking, how recently the stops occurred, or how many stops actually led to arrests.¹²¹ Thus, there is no basis for the Fifth Circuit to find that the agents’ conclusions were based upon a reasonable articulable suspicion of illegal activity. This is particularly true with respect to the so-called “rigid” or “modified suspension.”

As in *United States v. Morales*, the Fifth Circuit found that the minivan had a rigid, modified suspension to prevent it from appearing weighed down, which is common in vehicles used to transport illegal aliens.¹²² However, unlike the agent in *Morales*, neither Agent Heideman nor Agent Torralba provided any articulable facts to support the conclusion that the suspension was rigid or had been modified.

In *Morales*, Agent Bollier, an agent with twenty-eight years of experience, parked facing eastbound traffic on a particular part of the highway that had a series of bumps.¹²³ Agent Bollier selected this particular area to observe the reactions of vehicles driving over the bumps.¹²⁴ Morales’s pickup truck kept bouncing or “floating” after it passed over the bumps, which is characteristic of a heavily loaded vehicle.¹²⁵ Agent Bollier also found it significant that the tires on Morales’s pickup truck were underinflated, a condition that results from carrying a heavy load.¹²⁶

In *Chavez-Chavez*, there was no testimony that Highway

120 2 Record, *supra* note 32, at 14.

121 *Cf.* *United States v. Morales*, 191 F.3d 602, 604 (5th Cir. 1999) (noting that arresting officer had twenty-eight years experience as a Border Patrol agent, and in the year before the stop, he had detained 600 illegal aliens on the particular stretch of highway at issue), *cert. denied*, 120 S. Ct. 1211 (2000); *United States v. Orozco*, 191 F.3d 578, 582 (5th Cir. 1999) (noting that the same officer as in *Morales*, in the five months before the stop, had personally arrested twenty loads of illegal aliens in the same area as the stop), *cert. denied*, 120 S. Ct. 996 (2000).

122 *Chavez-Chavez*, 205 F.3d at 149 (citing *Morales*, 191 F.3d at 604).

123 *Morales*, 191 F.3d at 604–05.

124 *Id.* at 605.

125 *Id.*

126 *Id.*

286 was particularly bumpy, or that the minivan had any unusual characteristics, such as abnormal tire pressure. Even so, Agent Heideman concluded that the minivan was “very rigid as if to have a modified suspension.”¹²⁷ However, a later check of the minivan did not reveal a modified suspension.¹²⁸ Agent Torralba’s testimony about the suspension contradicted itself. Although he testified that the suspension was rigid to prevent it from appearing weighed down, he also testified that the minivan kept bouncing, which is inconsistent with a modified suspension.¹²⁹ In short, the agents did not testify to any reasonable, articulable facts that led them to believe that the minivan had a modified suspension. Moreover, because minivans are prevalent in today’s society, the requirement of a reasonable suspicion should be vigorously maintained.

VII. CONCLUSION

What may have been true in 1975 is no longer true today. The increased Hispanic presence in the southwestern United States and the proliferation of minivans, sport utility vehicles, and other large vehicles make much of *Brignoni-Ponce*’s analysis untenable.¹³⁰ However, because the Supreme Court has not provided an in-depth review of roving border patrol stops for illegal aliens in a quarter of a century, the lower courts are without any guidance.¹³¹

Indeed, the lower courts have found “virtually anything and everything” to justify a reasonable suspicion for a stop, including that:

The vehicle was suspiciously dirty and muddy or the vehicle was suspiciously squeaky-clean; the driver was suspiciously dirty, shabbily dressed and unkept, or the

¹²⁷ 2 Record, *supra* note 32, at 12.

¹²⁸ *See id.* at 17–18.

¹²⁹ *Id.* at 24.

¹³⁰ *See* United States v. Montero-Camargo, 208 F.3d 1122, 1132–36 (9th Cir. 2000) (en banc) (noting that *Brignoni-Ponce*’s statistical analysis of the racial demographic in the Southwest is outdated), *cert. denied*, 121 S. Ct. 211 (2000).

¹³¹ United States v. Covarrubia, 911 F. Supp. 1409, 1414 & n.12 (D.N.M. 1994) (noting that “*Brignoni-Ponce* provides only limited guidance to lower courts,” and that *Cortez* is also limited).

driver was too clean; the vehicle was suspiciously traveling fast, or was traveling suspiciously slow (or even was traveling suspiciously at precisely the legal speed limit); the [old car, new car, big car, station wagon, camper, oilfield service truck, SUV, van] is the kind of vehicle typically used for smuggling aliens or drugs; the driver would not make eye contact with the agent, or the driver made eye contact too readily; the driver appeared nervous (or the driver even appeared too cool, calm, and collected); the time of day [early morning, mid-morning, late afternoon, early evening, late evening, middle of the night] is when “they” tend to smuggle contraband or aliens; the vehicle was riding suspiciously low (overloaded), or suspiciously high (equipped with heavy duty shocks and springs); the passengers were slumped suspiciously in their seats, presumably to avoid detection, or the passengers were sitting suspiciously ramrod-erect; the vehicle suspiciously slowed when being overtaken by the patrol car traveling at a high rate of speed with its high-beam lights on, or the vehicle suspiciously maintained its same speed and direction despite being overtaken by a patrol car traveling at a high speed with its high-beam lights on; and on and on *ad nauseam*.¹³²

Although legislators in non-border states perceive immigration offenses and roving border patrol issues to be a regional problem,¹³³ the problem is not insignificant by any means. The number of immigration prosecutions brought in federal district courts near the Mexican border has skyrocketed.¹³⁴ Between 1995 and 1999, the criminal case load increased by 181 percent in the Western District of Texas and by 145 percent in the Southern District of Texas.¹³⁵ In fact, of the eighty-nine federal district courts in the country, the five federal district courts near the Mexican border—the Southern and Western Districts of Texas, the Districts of New Mexico and

132 *United States v. Zapata-Ibarra*, 223 F.3d 281, 282–83 (5th Cir. 2000) (Wiener, J., dissenting) (footnotes omitted), *cert. denied*, 121 S. Ct. 412 (2000).

133 *See Lash*, *supra* note 2.

134 *Id.*

135 *Id.*

Arizona, and the Southern District of California— were responsible for more than a quarter of all criminal cases filed in 1999.¹³⁶ This dramatic increase is the result of what Chief Justice William Rehnquist has called an “unmanageable number of immigration and drug-related cases.”¹³⁷

Because the federal assault on immigration offenses shows no sign of slowing, the U.S. Supreme Court should grant certiorari to clarify its roving border patrol jurisprudence. The Court should hold that the Border Patrol does not have the authority to stop vehicles more than 100 miles from an international border. The Court should further hold that Border Patrol agents cannot rely upon factors that readily occur in the law-abiding population, such as Hispanic ancestry and the use of minivans. Finally, the Supreme Court should emphasize that the Border Patrol must base a stop on articulable facts that support a reasonable suspicion that a vehicle contains illegal aliens. Border Patrol agents cannot just speculate or summarily conclude that a vehicle contains illegal aliens.

As Fifth Circuit Judge Jacques Wiener, Jr., has so aptly pointed out, “the fabric of our society suffers significantly more harm by sacrificing the right of all the people – including those near the Mexican border – to the constitutional protections of the Fourth Amendment than it gains from the apprehension of a few more illegal immigrants or narcotic traffickers and their contraband . . .”¹³⁸

136 *Id.*

137 *Id.*

138 *United States v. Zapata-Ibarra*, 223 F.3d 281, 281–82 (5th Cir. 2000) (Wiener, J., dissenting) (footnotes omitted), *cert. denied*, 121 S. Ct. 412 (2000). In his dissent, Judge Wiener “sense[d] that history is likely to judge the judiciary’s evisceration of the Fourth Amendment in the vicinity of the Mexican border as yet another jurisprudential nadir, joining *Korematsu v. United States*, 323 U.S. 274 (1944), *Dred Scott* [60 U.S. 393 (1856)], and even *Plessy v. Ferguson*, 163 U.S. 537 (1896)] on the list of our most shameful failures to discharge our duty of defending constitutional civil liberties against the popular hue and cry that would have us abridge them. (Wiener, J., dissenting). Fifth Circuit Judge James Dennis has stated that Judge Wiener’s “dictum has the ring of truth and may prove to be more prophetic than hyperbolic.” *United States v. Guerrero-Barajas*, No. 99-41208, 2001 WL 65598, at *7 (5th Cir. Jan. 19, 2001) (Dennis, J., dissenting).