No. 09-102

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

DEMETRES J. RUDOLPH,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Supreme Court of Virginia properly find, on the facts of this case, that an investigative stop was unjustified under the Fourth Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

STATEMENT OF THE CASE

Respondent Demetres Rudolph, who had been legally parked outside an open business, was stopped by a police officer as he drove away. The Supreme Court of Virginia, after examining the record and "[v]iewing the totality of the circumstances objectively," held that the officer lacked reasonable suspicion to make the stop and that the subsequent search and arrest violated the Fourth Amendment. Pet. App. 4. The question presented by this case is whether the Supreme Court of Virginia correctly applied this Court's *Terry* jurisprudence to the facts here.

1. On January 23, 2006, at about 8 p.m., Rudolph and a passenger were sitting in his car in Virginia Beach. The car was parked near the rear entry door to an open Citgo gas station. Pet. App. 1-2.

Officer Jeremy Latchman was patrolling a nearby shopping center, which had recently experienced break-ins and robberies. Pet. App. 1. He noticed Rudolph's car. During what he described as a "few seconds" of observation, *see* Suppression Hearing Transcript ("SH"), July 26, 2006, at 17, Latchman saw Rudolph moving around in the car. Pet. App. 2. He later testified that he "d[id]n't know if [Rudolph] was looking around for something or what else was going on in the vehicle at the time." SH 16.

Latchman decided to drive around the station to "'make sure everything was fine,'" and "he did not observe anything unusual." Pet. App. 2. Meanwhile, Rudolph began to leave. *Id.* There is no evidence

that Rudolph left in response to seeing Latchman. Nor did Latchman testify that he believed Rudolph had done so.

At this point, Latchman activated his siren and stopped Rudolph's car. Pet. App. 2; SH 17-18. He called for backup and ran Rudolph's license and registration. Both came up clean. SH 18-19. Nonetheless, Latchman asked for consent to search the car, which Rudolph refused. SH 19. During this additional conversation, the backup officer, who had just arrived, leaned in toward the car and smelled marijuana. SH 37, 40-42. Latchman ordered Rudolph and his passenger to exit the vehicle, then searched the car and found marijuana. SH 20-22.

2. Rudolph was charged with possession of marijuana with intent to distribute. Pet. App. 1. He moved to suppress the evidence recovered from his car on the ground that Latchman had unreasonably stopped the vehicle in violation of the Fourth Amendment. Pet. App. 4. When the trial court denied the motion to suppress, Rudolph entered a guilty plea conditioned on his right to appeal the denial of his motion, and to withdraw his guilty plea if he was successful. Pet. App. 4. The court imposed a seven year sentence, of which all but one year was suspended. Sentencing Order ("SO"), Jan. 9, 2007, at 1-2.

3. A divided Virginia Court of Appeals affirmed the conviction in an unpublished memorandum opinion. Pet. App. 21-22. The majority and the dissent agreed on the legal standard to be applied, but disagreed on the facts. Pet. App. 36.

The majority thought that some of Latchman's observations "point[ed] to the reasonable inference that the vehicle's occupants were preparing to rob the gas station." Pet. App. 25. It noted that there had been several burglaries in the adjacent shopping center; that Rudolph was parked in what the court characterized as "a dark, low-traffic area in a manner well-suited for a quick getaway," near a rear entrance that Latchman had testified was unused at night; that Rudolph and his passenger were reaching around in the car without turning on the lights; and that Rudolph "promptly" drove away when, the court assumed, he saw Latchman. Pet. App. 24-26. On that view of the facts, the majority concluded that Latchman had had reasonable suspicion to stop Rudolph. Pet. App. 26.

Judge Haley dissented and took issue with several of the majority's characterizations of the evidence. First, he found that Rudolph's car was parked in a perfectly normal manner "only a few steps away from one of the [station's] doorways," in front of windows covered with advertisements for items sold inside. Pet. App. 32, 34. Since Latchman did not know at that time whether the rear door was open for use, Judge Haley thought that any inference that the parking was unusual was unjustified. Pet. App. 32-34 (citing SH 34-35). He also noted that there was a speed bump directly in front of Rudolph's car, belying the assertion that the car was parked for a quick getaway. Pet. App. 32. And he questioned the assumption that "a robber [would] be less likely to use a marked space than a customer." Pet. App. 50. Since the station was open, the hour – 8 p.m. –

did not "add[] anything to the objective circumstances of suspicion . . . ." Pet. App. 49.

The dissent also explained that there was no evidence that Rudolph realized Latchman was present when he started to leave the parking lot. Pet. App. 55. In fact, since Latchman stopped Rudolph before he left the lot, "[f]or all Officer Latchman knew," Rudolph might have been driving towards the gas pumps. *Id.* Given the absence of testimony on this point, and the fact that "the vast majority of motorists" leave gas stations simply because they have finished their transactions, Judge Haley thought no inference of evasive behavior was possible. *Id.*

Finally, the dissent questioned the majority's assertion that Latchman's observations pointed towards a "reasonable inference" that Rudolph was planning a robbery. Judge Haley first noted that Latchman did not testify that he had suspected a robbery; in fact, he had not articulated any crime he may have suspected. *See* Pet. App. 49. He also found that the observations Latchman did make were inconsistent with the idea that Rudolph was planning a burglary or robbery. The fact that Rudolph *left* the parking lot actually undermined that assumption. Pet. App. 51-55. Additionally, no one had reported any suspicious behavior that night. Pet. App. 34. Standing alone, a history of robberies nearby could not transform an otherwise completely unremarkable incident into a suspicious one. Pet. App. 41-48.

4. A divided Supreme Court of Virginia reversed, holding that Latchman lacked reasonable suspicion to stop Rudolph. Pet. App. 4. As in the court of appeals, the majority and the dissent largely

agreed on the legal standard to be applied, but the majority rejected the dissent's view of the facts. The majority thought there was insufficient evidence that Rudolph's actions were suspicious. Pet. App. 1-4. It understood the record to reflect that Rudolph's car was parked in the rear of the shopping center, which contained "an entry door for customers." Pet. App. 2. Latchman had observed the car for only a "few seconds," and merely saw that "Rudolph appeared to be looking or reaching for something." *Id.* When Latchman further investigated, "he did not observe anything unusual." *Id.* The majority concluded that "the circumstances did not supply a particularized and objective basis to suspect that Rudolph's observed behavior was a precursor to a break-in, robbery, or any other criminal activity on his part." Pet. App. 4.

In light of its conclusion that Latchman lacked a reasonable suspicion for the initial stop, the court ordered that Rudolph be given an opportunity to withdraw his guilty plea. Pet. App. 4.

The dissent read the record differently. It believed that the car's location was "unusual," especially given "the time of day" and the fact that the lights were off. Pet. App. 12. The dissent also thought that moving around in the car "could reasonably have raised questions about [the occupants'] activities and intent." Pet. App. 12-13. Finally, the dissent thought Rudolph's departure could be "reasonably interpreted as evasion." Pet. App. 13. Therefore, the dissent found reasonable suspicion. Pet. App. 16.

REASONS FOR DENYING THE WRIT

The Commonwealth asks this Court to review an application of settled law of the sort regularly made by lower courts: whether, on a particular set of facts, the police had reasonable suspicion for detaining an individual. The Commonwealth's argument depends on the theory that the Supreme Court of Virginia got the facts wrong. This is not a court of error, but in any event the record supports the Supreme Court of Virginia's conclusions.

Moreover, the decision below does not conflict with decisions by other federal or state courts. *Terry* cases, by their very nature, turn on their particular facts. Some of the cases cited by the Commonwealth involved constellations of facts that led courts to find reasonable suspicion; others did not. That hardly bespeaks a conflict.

In an effort to transform this case from one about error correction into a larger question of Fourth Amendment jurisprudence, the Commonwealth claims that the Supreme Court of Virginia has been regularly misapplying *Terry*. However, the cases the Commonwealth cites do not actually involve reasonable suspicion to stop a suspect, but involve the entirely distinct question of what kind of frisk is appropriate after a suspect has legitimately been stopped. A review of cases that do involve reasonable suspicion for initial stops reveals that they are entirely consistent with this Court's directives.

In short, review here would resolve nothing more than the dispute between the majorities and dissents of the Supreme Court of Virginia and the Virginia Court of Appeals as to whether Rudolph was

behaving suspiciously on the evening of January 23, 2006. It would neither establish any new rule of law nor change the outcome in any larger class of cases. Certiorari should be denied.

I. The Decision Below Properly Applied This Court's Precedents To The Actual Facts Of This Case.

The Commonwealth asserts that the Supreme Court of Virginia made two errors in finding that the police lacked reasonable suspicion to stop Rudolph. First, the Commonwealth suggests the court applied a heightened standard to determine the reasonableness of the stop. Second, it argues the court misapplied the law to the facts of this case. The first argument, however, is belied by the plain language of the decision below. The second argument depends on adopting a version of the facts that the Supreme Court of Virginia rejected and that, at any rate, the record does not support.

1. The Commonwealth criticizes the decision below for applying "a more stringent standard" than the one prescribed by this Court. Pet. 8; *see id.* at 5-8, 15-17. This is false on its face; the decision below applied exactly the test announced in *Terry v. Ohio*, 392 U.S. 1 (1968), and refined since.

In *Terry*, this Court held that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot," he is entitled to make a limited stop. *Terry*, 392 U.S. at 30. The Court later clarified that in making such a determination, "the totality of the circumstances – the whole picture – must be taken into account. Based upon that whole

picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). An officer must be able to point to specific, articulable facts; "an inchoate and unparticularized suspicion or hunch of criminal activity" is not enough. *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000) (internal quotation marks omitted).

The decision below echoes these precedents precisely:

> In order to conduct an investigatory stop, a police officer need not have probable cause; he must have a reasonable suspicion, based on objective facts, that the person is involved in criminal activity. To establish reasonable suspicion, an officer must be able to articulate more than an unparticularized suspicion or "hunch" that criminal activity is afoot. A court must consider the totality of the circumstances when determining whether a police officer had a particularized and objective suspicion that the person stopped was involved in criminal activity.

Pet. App. 3 (citations omitted).

The Commonwealth takes issue with the court's use of definitive terms (e.g., "criminal activity *was* afoot") rather than speculative ones (e.g., "criminal activity *may be* afoot"). Pet. 5-7, 15. That is, the Commonwealth argues that the Supreme Court of Virginia required more certainty on the part of police by using "is" rather than "may."

This argument depends on plucking phrases out of sentences. Indeed, when the sentences cited by the Commonwealth are read in whole, the purported distinction disappears. *Terry* allows a stop when an officer observes "conduct which leads him reasonably to *conclude* in light of his experience that criminal activity *may be* afoot." 392 U.S. at 30 (emphasis added). The decision below found "that the circumstances and actions observed by Latchman were not enough to *create a reasonable articulable suspicion* that criminal activity *was* afoot." Pet. App. 4 (emphasis added). While the Commonwealth makes much of the transformation from "may be" to "was" (speculative to definitive) at the end of the sentence, it fails to recognize the corresponding transformation from "conclude" to "create a reasonable articulable suspicion" (definitive to speculative) earlier on. Put together, each sentence means the same thing. The Supreme Court of Virginia did exactly what the Commonwealth says it ought to have done, Pet. 16-17: recognize that this is a speculative inquiry, not one that requires certainty or even a more-likely-than-not probability.

Moreover, this Court itself has used both definitive and speculative phrasing in describing the *Terry* standard, yet it has never *relied* on a distinction between "is" and "may be" in assessing the reasonableness of a stop. *See, e.g.*, *Wardlow*, 528 U.S. at 123 (speculative-definitive: "In *Terry*, we held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable *suspicion* that criminal activity *is* afoot."); *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (speculative-

speculative: "In [*Terry*], we held that the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable *suspicion* supported by articulable facts that criminal activity '*may be* afoot,' even if the officer lacks probable cause."); *id.* at 11 (speculative-definitive: "We hold that the agents had a reasonable basis to *suspect* that respondent *was* transporting illegal drugs on these facts."); *Cortez*, 449 U.S. at 417 (definitive-definitive: "An investigatory stop must be justified by *some objective manifestation* that the person stopped *is*, or *is about to be*, engaged in criminal activity."); *id.* at 417 n.2 (speculative-definitive: "Of course, an officer may stop and question a person if there are reasonable grounds to *believe* that person *is* wanted for past criminal conduct.") (emphases in each quotation added). Consequently, the Commonwealth is wrong to assert that the decision below adopted a new "restrictive approach" that contravenes this Court's precedent. Pet. 13.[1]

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[1] None of the four *Terry*-stop decisions rendered by the Virginia Court of Appeals in the time since the opinion below even cited the decision in this case, let alone treated it as if it had "impose[d] a more stringent standard for such stops." Pet. 8. To the contrary, each recent decision cited both this Court's and Virginia courts' prior precedents and applied the usual reasonable-suspicion analysis to its own facts. *See Stout v. Commonwealth*, No. 0227-08-4, 2009 WL 3347107 (Va. Ct. App. Oct. 20, 2009) (finding no reasonable suspicion); *Commonwealth v. Calloway*, No. 0416-09-3, 2009 WL 2365981 (Va. Ct. App. Aug. 04, 2009) (finding reasonable suspicion); *Smith v. Commonwealth*, No. 0924-08-2, 2009 WL 1658184 (Va. Ct. App. June 16, 2009) (finding reasonable suspicion); *Johnson v.*

2. Not only did the Supreme Court of Virginia articulate the right standard, but it applied that standard properly to the actual facts of this case. The Commonwealth's argument to the contrary rests on the following factual assertions: (1) Rudolph's car was parked in a "dark, low-traffic area" that was "well-suited for a quick getaway," Pet. 4 (quoting Pet. App. 25-26), *see also* Pet. 10, 17-18; (2) Rudolph "promptly" left the lot when he saw Latchman, Pet. 5 (quoting Pet. App. 26), *see also* Pet. 17-18; (3) the Citgo parking lot was "plagued by crime" and a center of "ongoing criminal activity," Pet. i, 1, 8; and (4) given Rudolph's movements, Latchman suspected he was going to rob the gas station, Pet. 4 (quoting Pet. App. 25).

The Supreme Court of Virginia rejected this view of the facts, and for good reason:

First, the record says nothing about whether the area was low-traffic or suitable for a quick getaway. As the court of appeals dissent noted, a speed bump directly in Rudolph's path made the area quite unsuitable for a getaway. Pet. App. 32. And, while the Commonwealth emphasizes that it is dark at 8 p.m. in January, Pet. 4, 10, 18, that is beside the point: open gas stations are generally lit, and nothing in the record suggests otherwise. Moreover, contrary to the Commonwealth's assertion that Latchman "knew that customers do not use [the rear] entrance in the nighttime," Pet. 3, Latchman's testimony

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Commonwealth, No. 1645-07-2, 2009 WL 1117642 (Va. Ct. App. Apr. 28, 2009) (finding reasonable suspicion).

shows that he did not find that out until later. SH 34-35.

Second, there is no evidence that Rudolph left the lot in response to Latchman's presence. The Commonwealth never asked Latchman during the suppression hearing whether he believed that Rudolph had seen him. If the Commonwealth planned to rely on this theory, it should have put the question to its key witness. Moreover, a common-sense reading of the record provides no support for the Commonwealth's theory. Latchman observed Rudolph for only a "few seconds" before he drove by and around the building, and there is no evidence that Rudolph's departure was hasty. Pet. App. 2.

Third, the area was not "plagued by crime." Pet. i, 1, 8. Even the court of appeals acknowledged that "[t]here is no evidence in the record that overall criminal activity is higher in this neighborhood than in other parts of Virginia Beach." Pet. App. 25 n.3.

Fourth, although the Commonwealth cites the court of appeals' assumption that Latchman suspected a robbery, Pet. 4 (quoting Pet. App. 25), that is not what Latchman told the trial court when it was considering the motion to suppress. Latchman testified that he simply did not "know if [Rudolph] was looking around for something or what else was going on in the vehicle at the time." SH 16.

Setting aside unsupported speculation, in short, the record itself establishes: (1) a car parked next to a customer entrance of an *open* gas station during usual business hours, SH 10, 26-27, 34-35; (2) passengers apparently searching for something in their car, SH 16; (3) nothing suspicious within the

gas station, SH 17, SH 29-30; (4) a car driving away from the gas station, apparently unprovoked and at a usual speed, SH 17-18; and (5) prior burglaries of *closed* businesses and robberies of individuals nearby, SH 28-29, in an area of Virginia Beach that was otherwise not a high-crime one, Pet. App. 25 n.3.

3. Even when "taken together," *United States v. Arvizu*, 534 U.S. 266, 274 (2002), the facts supported by the record could not reasonably produce a particularized suspicion that criminal activity was afoot. Based on the prior burglaries of closed businesses, Officer Latchman might have wondered initially if a robbery was taking place. But his subsequent observation that all appeared well within the station, coupled with the car's unhurried departure, would have made it objectively unreasonable to suspect that a robbery was occurring or about to occur.

To the extent the officers instead hypothesized some other, still-unarticulated criminal activity, there would not have been sufficient facts to make that suspicion reasonable either. While the general "high-crime" nature of an area may contribute to the reasonableness of a stop, *see, e.g.*, *Adams v. Williams*, 407 U.S. 143, 147 (1972), here the fact of prior burglaries in an otherwise safe area could provide no basis to suspect that some unidentified non-property crime was afoot.

Rudolph's departure from the station similarly fails to give rise to a reasonable suspicion of criminal activity. In contrast to *Wardlow*, where the defendant took off in "unprovoked" and "[h]eadlong flight" on foot "upon noticing the police," in an area notorious for drug crime, *Wardlow*, 528 U.S. at 124,

here nothing in the record suggests that Rudolph even saw Latchman before he was pulled over, let alone that his departure was prompted by police presence. Certainly his orderly exit from the station's parking lot could not reasonably be characterized as "flight."[2]

Finally, contrary to the Commonwealth's suggestion, this is not a case involving "a brief detention to 'maintain the status quo' to confirm or dispel the officer's suspicions." Pet. 18. No doubt one of *Terry*'s purposes is to allow law enforcement officers "to maintain the status quo momentarily while obtaining more information" rather than "simply shrug [their] shoulders and allow a crime to occur or a criminal to escape." *Adams*, 407 U.S. at 145-46. But here the status quo was that a vehicle was leaving a gas station, where nothing appeared to be amiss, at an ordinary speed. That was not a precursor state to a crime in need of 'pausing' for a brief investigation; rather, it indicated that even any imagined threat had dissipated.

Given the totality of what he did observe, Latchman could not reasonably have been suspicious of Rudolph when he decided to pull him over. While Latchman may have been curious about Rudolph's

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[2] Under the Commonwealth's formulation, it is impossible to identify behavior that would *not* have justified a stop: how long, for example, would Rudolph have had to wait before leaving the lot for his actions not to have been suspicious? Given the usual high traffic in and out of a gas station, it would perhaps seem more suspicious if a car *stayed* for an extended period of time after a police cruiser arrived.

activities, the Fourth Amendment did not allow him to detain Rudolph without more. *Terry*, 392 U.S. at 22, 27; *cf. Ybarra v. Illinois*, 444 U.S. 85, 93 (1979) (finding no reasonable suspicion that would justify a *Terry* frisk where the officers "neither recognized [Ybarra] as a person with a criminal history nor had any particular reason to believe that he might be inclined to assault them").

II. There Is No Conflict Between The Decision In This Case And The Decisions Of Other Courts.

The Commonwealth does not point to any court that has applied a different legal standard than the court below did when it assessed the legality of a *Terry* stop. Nevertheless, the Commonwealth claims that the decision below conflicts with decisions from other federal and state appellate courts. Pet. 9-13. The reality, however, is that the different outcomes in these decisions merely reflect significant differences in the facts of each case.

For example, in *United States v. Edmonds*, 240 F.3d 55 (D.C. Cir. 2001) – a case on which the Commonwealth relies heavily, *see* Pet. 9-10 – the stop occurred near a "notorious" open-air drug market that had been home to "hundreds" of violent crimes. *Id.* at 57. The arresting officer testified that when Edmonds spotted him, his eyes "got pretty big," and he "immediately" pivoted and walked to a waiting van. *Id.* The van was parked illegally in the lot of a closed school. *Id.* After returning to the van,

Edmonds made "furtive movements,"[3] which the officer immediately suspected were to conceal drugs or weapons – precisely the sorts of contraband for which the neighborhood was known. *Id.* at 57, 60.

This case differs along every dimension. Here, the location was not a high-crime area. *Supra* at 12. Rudolph's parking was perfectly legal, which the Commonwealth does not dispute. *Supra* at 1. Latchman testified that he could not draw any inference from Rudolph's gestures. *Supra* at 12. Nothing suggests that Rudolph even realized police were present while he was rummaging around in his car, much less that he left because he saw a police officer. *Supra* at 11-12.

The factual differences between this case and the other cases the Commonwealth cites are equally apparent. For instance, the stop here occurred outside of an open establishment during business hours. By contrast, in several of the cases the Commonwealth cites, the stop took place in the middle of the night, far outside business hours. *See, e.g.*, *United States v. Watson*, 953 F.2d 895, 896 (5th Cir.), *cert. denied*, 504 U.S. 928 (1992) (3:30 a.m.); *United States v. Briggman*, 931 F.2d 705, 707 (11th Cir.) (per curiam), *cert. denied*, 502 U.S. 938 (1991) (4:00 a.m.).

Here, Latchman stopped Rudolph after just a few seconds' observation, during which he only saw that

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[3] The court explicitly held that "furtive gestures are significant only if they were undertaken in response to police presence." *Edmonds*, 240 F.3d at 61-62 (internal quotation marks omitted).

Rudolph was rummaging around in his car. By contrast, in the cases the Commonwealth cites where courts found reasonable suspicion, the officers evaluated the scene for much longer. *See United States v. McCoy*, 513 F.3d 405, 407-08 (4th Cir.), *cert. denied*, 128 S. Ct. 2492 (2008) (officer observed transaction that took several minutes); *United States v. Brown*, 209 Fed. Appx. 450, 451 (5th Cir. 2006) (per curiam) (defendant in parking lot was observed by officers driving by, but not stopped until officers observed that defendant had not moved "five to ten minutes later").

In this case, the gas station where Rudolph was parked was adjacent to a shopping center that had experienced some burglaries and robberies, but was not a prototypical high-crime area. By contrast, in the cases the Commonwealth cites, the areas had suffered from much more intense criminal activity. *See, e.g.*, *United States v. Black*, 525 F.3d 359, 361 (4th Cir.), *cert. denied*, 129 S. Ct. 182 (2008) (stop made in a "'high-crime' neighborhood that had been designated as a target of the police department's violent crime reduction initiative"); *United States v. Mayo*, 361 F.3d 802, 803 (4th Cir. 2004) (recent shootings and prevalent drug dealing in area).

Here, Latchman claimed that when he first saw Rudolph, he was making "furtive gestures." In the cases the Commonwealth cites, however, the defendants' "furtive gestures" or evasive action came after explicit awareness of police presence. *See, e.g.*, *United States v. Swain*, 324 Fed. Appx. 219, 221 (4th Cir.) (per curiam), *cert. denied*, 129 S. Ct. 2806 (2009) (suspect jumped up when he saw police and tried to run into building, and reacted nervously when officer

started talking to him); *State v. Bobo*, 524 N.E.2d 489, 491 (Ohio), *cert. denied*, 488 U.S. 910 (1988) (defendant "look[ed] directly at the officers and then ben[t] down as if to hide something").

Here, Latchman testified that he simply did not know what Rudolph was doing. By contrast, officers in the cases the Commonwealth cites could tie their observations to particular criminal activity, rather than an inchoate feeling of unease. *See, e.g.*, *Brown*, 209 Fed. Appx. at 451 (rooting around under seat after seeing police suggested that defendant was "concealing or retrieving a weapon"); *McCoy*, 513 F.3d at 408 (brief meetings in two parking lots suggested a drug deal).

Nothing about any case cited by the Commonwealth suggests that another court would have found reasonable suspicion on the totality of the facts here. Instead, these cases simply reflect that "[e]ach case of this sort will, of course, have to be decided on its own facts." *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

III. The Supreme Court Of Virginia Has Consistently Been Faithful To This Court's *Terry* Jurisprudence.

Contrary to the Commonwealth's suggestions, nothing about the Supreme Court of Virginia's handling of *other* Fourth Amendment cases supports granting certiorari here. In fact, the cases cited by the Commonwealth, Pet. 19-26, involve a different legal issue. A review of cases that actually concern whether initial stops were justified shows that the court below has consistently applied the standards laid out in *Terry* and its progeny.

1. The three cases the petition highlights, Pet. 19-26, are not even cases about reasonable suspicion to conduct a stop. Rather, *Snell v. Commonwealth*, 659 S.E.2d 510 (Va. 2008), and *Grandison v. Commonwealth*, 645 S.E.2d 298 (Va. 2007), concern the legality of searches of suspects' pockets following legitimate stops; neither devotes any discussion to reasonable suspicion in connection with the initial decision to stop. And in *McCain v. Commonwealth*, 659 S.E.2d 512 (Va. 2008), the court held that the initial stop was permissible – indeed, there was probable cause – because the officer had observed an equipment violation and a traffic infraction. *Id.* at 516. The court discussed in dicta whether there would have been reasonable suspicion for the traffic stop absent those factors. *Id.* But the bulk of the court's discussion focused on "the constitutional propriety of subjecting McCain to a seizure and pat-down search *after* he exited the vehicle." *Id.* at 516-17 (emphasis added). That discussion simply applied this Court's rulings in *Knowles v. Iowa*, 525 U.S. 113 (1998), *Maryland v. Buie*, 494 U.S. 325 (1990), and *Adams v. Williams*, 407 U.S. 143 (1972).

2. The Supreme Court of Virginia's actual decision-to-stop cases provide no support for the Commonwealth's criticism. Indeed, apart from the semantic distinction discussed *supra* at 8-10, the Commonwealth does not point to any case in which the Virginia court articulated a standard inconsistent with this Court's decisions. Nor could it. *See, e.g.*, *Moore v. Commonwealth*, 668 S.E.2d 150, 156 (Va. 2008) (noting that the "question [of] whether [an] officer's traffic stop was founded on a reasonable suspicion that criminal activity was afoot" is "a

standard less stringent than probable cause"); *Bass v. Commonwealth*, 525 S.E.2d 921, 923 (Va. 2000) ("A reasonable suspicion is more than an unparticularized suspicion or hunch.") (internal quotations marks omitted); *Zimmerman v. Commonwealth*, 363 S.E.2d 708, 709 (Va. 1998) (officer may detain an individual for questioning if the offer has "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity") (internal quotation marks omitted).

Not only does the Supreme Court of Virginia state the correct standard, but its decisions properly apply that standard. Consider, for example, *Parker v. Commonwealth*, 496 S.E.2d 47 (Va. 1998). In that case, the court found reasonable suspicion when the totality of the circumstances showed: (1) that the defendant was with a group of men standing around a white Cadillac that had its trunk open in an area described as "an open-air drug market"; (2) that the officer had made numerous drug arrests in the area and had recovered drugs and weapons; (3) that the men immediately closed the trunk and dispersed upon seeing the police cruiser; and (4) that the officer saw the defendant place an object in the waistband of his shorts. *Id.* at 52.

Similarly, in *Whitfield v. Commonwealth*, 576 S.E.2d 463 (Va. 2003), the court found reasonable suspicion where: (1) the officer observed the defendant around 3:30 a.m. "apparently trespassing on private property, near an abandoned building in an area notorious for crime problems"; (2) the officer noticed the defendant dressed in "all black" in an area the officer knew was not a common "cut-

through" to other property; (3) when the officer aimed the spotlight of his marked police vehicle toward the defendant, he began to run away in "a zig-zag direction"; (4) when the officer pursued the defendant, he continued to run and to evade the officer; and (5) the defendant was detained when he could not escape over a high fence. *Id.* at 464-65. The court also noted the defendant's "nervous, evasive behavior." *Id.* at 465 (alteration and internal quotation marks omitted).

Conversely, when faced with facts that amounted to nothing more than an inchoate hunch, the court has correctly found no reasonable suspicion. For example, in *Moore*, an officer stopped a rental car displaying an inspection sticker that was "peeling off the windshield," despite having observed that the sticker was valid. 668 S.E.2d at 152. The court held that "the officer's observation of a peeling inspection sticker, without more, gave rise to nothing more than a 'hunch' that Moore was violating the motor vehicle inspection laws [by displaying an inspection sticker belonging to another vehicle], and, therefore, was 'too slender a reed' to justify" a *Terry* stop. *Id.* at 156. The court's finding of no reasonable suspicion comports with other jurisdictions' conclusions in similar circumstances. *See, e.g.*, *People v. Cerda*, 819 P.2d 502, 504 (Colo. 1991) ("no legitimate reason" for stop where officer observed crack in car's windshield that he did not reasonably suspect rose to level of violating statute prohibiting driving with an obstructed view).

The Commonwealth has not identified a single case where the Supreme Court of Virginia improperly applied the *Terry* reasonable suspicion standard to

an investigative stop. And of course, that court each year leaves undisturbed countless lower court decisions upholding *Terry* stops. Nothing about this case or the other cases the Commonwealth cites requires this Court's intervention.

IV. A Decision In This Case Would Offer No New Guidance To Courts Or Law Enforcement Personnel.

The Commonwealth argues that "it is of critical importance that the police know what is and is not permissible." Pet. 15. That is of course true, but beside the point. The Commonwealth's petition fails to explain how this Court's intervention in this case would begin to "provide guidance to law enforcement" faced with new and distinct circumstances. *Id.* Indeed, it has proposed no new rule for this Court to adopt.[4]

Since *Terry*, this Court has occasionally granted review to clarify discrete aspects of the "reasonable suspicion" standard. *Illinois v. Wardlow*, for example, resolved a conflict among state courts over "whether unprovoked flight is sufficient grounds to constitute reasonable suspicion." 528 U.S. 119, 123 n.1 (2000). After *Wardlow*, courts and police officers know that unprovoked flight is a factor that may contribute to reasonable suspicion. Similarly, *United States v. Sokolow* expressly permitted reasonable

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[4] As the Commonwealth's amici even acknowledge, they "do not suggest any request to expand or redefine the holding in *Terry* in any way in this case." Br. of Va. Ass'n of Commonwealth's Attorneys, et al. 4.

suspicion to be based on "'probabalistic' evidence," such as facts that align with drug courier profiles. 490 U.S. 1, 8 (1989). And *United States v. Arvizu* made clear what "methodology" courts should use in evaluating the totality of the circumstances. 534 U.S. 266, 268 (2002) (factors contributing to suspicion should be viewed in the aggregate, not individually).

This case, by contrast, offers no opportunity for a new rule that would provide greater guidance. It involves no question of approach; both the Supreme Court of Virginia and the Commonwealth agree that "an objective manifestation that crime may be afoot is sufficient to merit a brief detention." Pet. 8 (emphasis omitted). Nor does this case concern a factor, like unprovoked flight in *Wardlow* or criminal profiles in *Sokolow*, whose categorical relevance to the "reasonable suspicion" determination needs clarification. Instead, this case raises only the question of whether on the totality of *these* circumstances, reasonable suspicion for a stop existed.

"[B]ecause the mosaic which is analyzed for a reasonable-suspicion . . . inquiry is multi-faceted, one determination will seldom be a useful 'precedent' for another." *Ornelas v. United States*, 517 U.S. 690, 698 (1996) (internal quotation marks omitted). That is particularly true where, as here, the facts themselves are highly disputed. *Cf. id.* at 691 ("The facts are not disputed."). And while "there are exceptions" in which analyses of similar factual scenarios "when viewed together may usefully add to the body of law on the subject," *id.* at 698, the circumstances here are entirely factbound and unexceptional.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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