No. 13-186

In the Supreme Court of the United States

HOWARD W. COTTERMAN,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. THIS IS A CASE OF MAJOR NATIONAL IMPORTANCE.

Respondent gives short shrift to the fact that the Ninth Circuit's decision allows border agents to arbitrarily seize property belonging to citizens returning from vacation, move it far away, and retain it for unspecified periods. Respondent omits this aspect of the case entirely in its truncated Question Presented and initial summary of the defense argument, and addresses it only superficially at the end of its brief. (Opposition at 10, 19-21.)

While it is true that property rights are not the only part of the case that makes it important, it is a prominent ingredient of the Question Presented and reason why this Court should grant *certiorari*. The unconstitutional ability to randomly take personal property without any reason to suspect wrongdoing combines with the Ninth Circuit resolving the case based on an abandoned issue to make this case worthy of this Court's review. The muddled reasoning behind the Ninth Circuit's fatally flawed ruling, which only this Court can overrule, also calls out for review. Moreover, were this Court to grant *certiorari* in other cases involving personal electronic devices this term (e.g. *U.S. v. Wurie*, 13-212; *Riley v. California*, 13-132), the present case would make a logical companion to those matters.

II. THE NINTH CIRCUIT SHOULD NOT HAVE ADDRESSED THE ABANDONED ISSUE.

A. Respondent ignores and misstates important parts of the defense argument.

Respondent attempts to defend the Ninth Circuit's actions in this case by arguing that the resurrection of the abandoned issue did not prejudice the defense because the appellate court ordered supplemental briefing. (Opposition 8, 12-13.) However, the defense suffered extreme prejudice in several ways, as explained in the petition for *certiorari*. (Petition 29-30.) Respondent ignores those facts.

Respondent claims that "Petitioner contends (Pet. 29-30) that had the government challenged the adverse reasonable suspicion holding in its opening brief, his answering brief would have argued that reasonable suspicion was lacking." (Opposition 13.) That is not a fair characterization. What the defense has said is that we would have been able to devote more of our answering brief to reasonable suspicion than was possible in the severely limited supplemental briefing. More importantly, the Government's concession in its Opening Brief of the reasonable suspicion issue essentially preempted defense arguments that a higher standard was applicable: probable cause. (Appendix 1 at 12-13.) It also prevented oral argument on the reasonable suspicion issue, which would have been possible if the Government had argued the issue in its opening brief. Respondent argues that all that is needed is an "opportunity to be heard," met here by supplemental briefing, but ignores that it must be "at

a meaningful time and. . . manner" (Opposition 13 citing *Mathews v. Eldridge*, 424 U.S. 319 (1976).)

The Government's concession that there was not even reasonable suspicion here, much less probable cause, made it unnecessary for the defense to make these arguments. The Ninth Circuit then stepped out of its proper neutral role, and changed the case to rescue the Appellant. (See Petition 28, 31 *citing Carducci v. Regan* 714 F.2d 171 (D.C.Cir.1983). Obviously, an appellate court should not spontaneously save a party from its deliberate, conscious, premeditated choice to abandon an issue for a strategic reason, where the court could have held the party to the consequences of its original choice without affecting any other case.

Further, Respondent fails to address the policy reasons why the Ninth Circuit's actions of putting its thumb on the scales of justice sets an abhorrent precedent. Likewise, Respondent completely fails to address the fact that the Ninth Circuit's professed "reason" for addressing the abandoned issue (i.e. they had to decide what "standard" to use) makes no logical sense. (*See* Petition 26-27.) If a court is going to do something so highly irregular as to decide a case based entirely upon an issue that was consciously, deliberately and repeatedly abandoned at every stage of the appellate case by the party whose duty it was to raise it, then it should at least be incumbent upon the court to explain ***why*** it did so. Of course, one need not be clairvoyant here to know the reason here. (*See* Petition 32.) Respondent has neither denied it, nor offered an alternate explanation. It is important for this Court to demonstrate that reaching a ruling

adverse to a disfavored party is not a proper reason for addressing an abandoned issue. Respondent is silent on this important fact.

B. The case law cited in the Opposition is inapplicable.

Respondent cites numerous cases in support of its argument that deciding this case based on an issue that the prosecution had abandoned at every step of the appeal was permissible. The word-limits for this brief preclude full discussion of why none of those cases apply to the facts herein, but the following summaries are offered:

- *United States Nat'l Bank v. Independent Ins. Agents of Am.*, 508 U.S. 439, 446 (1993) involved an issue that was ***logically antecedent*** to the question presented to the court. This case does not. The present case could have been resolved without affecting any other case or statute by properly accepting the Government's deliberate abandonment of the reasonable suspicion issue. *See* Appendix 1 hereto at 13-14 for further explanation.

- *Trest v. Cain*, 522 U.S. 87, 92 (1997) merely holds that an appellate court is not required to raise *sua sponte* the issue of procedural default in a *habeas corpus* case when the parties did not do so. This Court expressly declined in *Trest* to address the issue of whether an appellate court ***may*** even do so at all. 522 U.S. 87, 90. Thus, Trest does not condone deciding a case on an intentionally abandoned issue.

• *United States v. Nadler*, 698 F.2d 995, 998 (9th Cir. 1983) did address an issue not raised by the appellant (the defendant below), but it did so only because it was the ***defendant's burden*** to prove standing in a motion to suppress, and the appellate record clearly showed that the defense failed to do so. Here, in contrast, it was the ***Government's burden***, not that of the defense, to prove reasonable suspicion.

• *B & G Constr. Co. v. Director, Office of Workers' Comp.,* 662 F.3d 233, 246 n.15 (3d Cir. 2011) is about an ***antecedent*** issue of pure statutory interpretation. Like *U.S. Nat'l Bank*, it is inapplicable here.

• *United States v. Resendiz-Ponce*, 549 U.S. 102, 103-104 (2007) is also inapplicable for the reasons stated in the Petition at 27-28. This Court's review in *Resendiz-Ponce* was discretionary, whereas the Ninth Circuit's was of-right direct review here. Moreover, this Court addressed a factual question in order to avoid a constitutional issue; the Ninth Circuit did exactly the opposite, making its constitutional ruling before resurrecting the abandoned issue of reasonable suspicion.

• *United States v. Ingram*, 594 F.3d 972, 979 n.3 (8th Cir. 2010) concerned an issue that was not clearly abandoned, and was treated by the parties during oral argument as included in the appeal (594 F.3d at 978). Neither happened here.

- *Mitchell v. Fishbein*, 377 F.3d 157, 164-165 (2d Cir. 2004) is inapplicable because 1) the appellate court there ultimately declined to take up the abandoned issue; and 2) the appellant raised the issue during oral argument. Here, in contrast, the prosecutor specifically stated in oral argument that the Government "did not rely upon" and was "not pursuing" the issue of reasonable suspicion.

- *United States v. Southern Fabricating Co.*, 764 F.2d 780, 781 (11th Cir. 1985) concerned whether the appellate court could address an issue that was neither raised in, nor considered by the district court, but was raised for the first time by the appellant on appeal, just the opposite of the present case.

- *United States v. Brown*, 555 F.2d 407, 420 n.29 (5th Cir. 1977) concerned an issue that the appellate court found to be "plain error." *Id*. There has never been any suggestion, much less a ruling, that there was plain error in the present case.

In sum, the courts in the cited cases used supplemental briefing appropriately. Here, in contrast, the Ninth Circuit abused that process to doctor up the Government's case. Respondent fails to address to this point, which was raised in the Petition at 28. Thus, contrary to the impression conveyed by the Opposition, the case law does not justify the Ninth Circuit's revivification of the abandoned issue here.

III. REASONABLE SUSPICION DID NOT EXIST HERE.

The second section of Respondent's Opposition addresses whether reasonable suspicion was present in this case. Respondent characterizes this as a "factbound" issue not worthy of this Court's attention. (Opposition 15, 19.) It is true that there is a strong factual component to this issue. However, the defense argument is not based on a factual dispute, but rather on the argument that the Ninth Circuit has departed from this Court's teachings by employing a flawed methodology and an erroneously low standard for finding reasonable suspicion. Thus, the issues before this Court are not factual matters, but legal issues that affect citizens "on every street corner." (Pet.App.A. 58.)

A vivid example of the erroneous legal reasoning employed by the Ninth Circuit is echoed in Respondent's Opposition, where it repeatedly counts one fact (the TECS alert) as several different ones. (Opposition 1618-19.) One "factor" is the TECS alert. Another is Operation Angel Watch (of which the alert was a part). Yet another was Mr. Cotterman's prior conviction (which triggered his inclusion in Angel Watch).[1] Another is his occasional travel to Mexico (also part of Angel Watch). These are really all one factor, the weight of which was diminished by the exhaustive search and interrogation that produced nothing incriminating at the border.

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[1] Respondent's Opposition states that Mr. Cotterman had "three prior convictions." (Opposition 16.) In fact, Mr. Cotterman had a single previous case involving multiple counts.

Respondent argues that those "facts," along with the password protected file, established "more than an inchoate and unparticularized suspicion or hunch." (Opposition 17-19.) The guiding principle that this Court has repeated time and again is to view the facts, not one-by-one, but as a whole picture – the "totality of the circumstances." *E.g. United States v. Arvizu*, 534 U.S. 266, 273 (2002).

Here, the Ninth Circuit failed to give due weight to those parts of the picture that tended to dispel suspicion, especially the interviews of Mr. and Mrs. Cotterman. Those interviews and the exhaustive search at the border showed that the family's belongings were completely consistent with an ordinary family vacation, not sex tourism. Mr. Cotterman's rejected offer of access (an objective factor) was nullified, yet password protection (subjective) was valued. The Ninth Circuit treated the dispelling factors as nil, while placing great weight on the double or triple counted factors previously discussed. Just as this Court granted review in *Arvizu* to guide totality-of-the-circumstances analysis, it should grant review here to instruct courts that the process is not a one-way street, in which subjective factors are overblown, and objective factors dispelling suspicion dismissed or ignored.

Respondent argues that the fact that the border officers did not themselves find reasonable suspicion, but simply seized the Cottermans' property as a result of ICE policy, is "immaterial" because reasonable suspicion depends on "objective consideration of the facts available to the officers." (Opposition 17.) For this proposition Respondent cites *Ohio v. Robinette*, 519

U.S. 33, 38-39 (1996). But *Robinette* merely says that an officer's ulterior motive in making a stop does not negate the legality of a stop that is otherwise justified under the law. This Court's jurisprudence teaches that it is up to the ***on-scene*** officers to draw on their own experience and specialized training, and for the district court, as well, to make inferences from and deductions about objective information, and that reviewing courts must accord those findings due weight. *Arvizu*, 534 U.S. at 273 *citing Ornelas v. United States*, 517 U.S. 690, 699 (1996). Respondent espouses just the opposite procedure – for an appellate court to make a finding of reasonable suspicion in the first instance using factors dispelled at the border and already weighed by the district judge.

A misleading impression created by Respondent's brief is that one of the officers at the border testified that he believed that petitioner was involved "in some type of child pornography." (Opposition 17.) The testimony referenced, however, was that Mr. Cotterman's ***prior conviction*** some 15 years earlier had involved "some type of child pornography," not that the officer had any suspicion, objective or subjective, that such activities were ongoing at the time of the seizure. (R.T. 8/27/2008 at 95.)

In sum, Respondent's argument comes down to this proposition: if Government agents decide to "target" a person, this amounts to reasonable suspicion that cannot be dispelled by any search at the border. Even if they pull the person and his wife out of their vehicle, spend 8 hours searching and questioning them, and find nothing suspicious, they may still arbitrarily take their property far away, and then hold it for an

indefinite period of time, even though it could have been searched at the border. ICE policy may allow that, but the Fourth Amendment does not.

IV. THIS COURT'S GUIDANCE IS NEEDED TO GUARD AGAINST "ANYTHING GOES" AT THE BORDER.

In the final part of its Opposition Respondent contends that this Court's review is unwarranted because "petitioner does not contend that the court of appeals adopted the wrong legal standard for the search of his computer." (Opposition 19.) That is incorrect. What the defense is arguing is that there never should have been a search far from the border, because the underlying seizure was unconstitutional. Seizure was simply not justified when it was done. Had contraband been found at the border or had probable cause existed, seizure would have been justified. Or, had the search been impracticable at the border, seizure may have been justified. None of these things occurred here. The agents simply seized this property because ICE policy told them to. Such unbounded power is inconsistent with the property rights of the traveling public.

In response to the defense argument that it was the ***seizure*** that was unlawful, Respondent argues that this was resolved by the fact that the Ninth Circuit considered both the search and the seizure together as one consolidated question. (Opposition 21.) While the Ninth Circuit may have chosen to view it this way, it is well-established that privacy and property rights are not the same things for purposes of Fourth Amendment analysis. The standard for prolonged property seizure

(as opposed to a brief detention of a person) has always been probable cause as set forth in the text of the Fourth Amendment itself. *Soldal v. Cook County*, 506 U.S. 56, 66, 69 (1992). *Cf. United States v. Roberts*, 274 F.3d 1007 (2001) (finding search and seizure justified on "probable cause" grounds after defendant admitted presence of child pornography) contra Opposition 18, n. 4). *See also* Petition 15, *citing United States v. Place*, 462 U.S. 696 (1983).

Respondent fails to recognize that a border search that is justified initially may well ripen into an unreasonable seizure due to its scope, manner, and place. "Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). The reasonable suspicion standard addresses only the latter – "justification for initiating." Thus, the level of suspicion is irrelevant if the conduct or scope is unreasonable.

The Ninth Circuit's Opinion demonstrates that the circumstances of this search are particularly offensive as an "exhaustive exploratory search," an "unfettered dragnet" and "a computer strip search." (Pet.App.A. 18-25 *citing Kremen v. United States*, 353 U.S. 346 (1957); *Go-Bart Importing Co. v. U.S.*, 282 U.S. 344, 357 (1931), and Justice Sotomayor's concurrence in *United States v. Jones*, 132 S.Ct. 945, 957 (2012) (discussing intrusive searches)). General exploratory searches, accomplished by means of property rights violations, do not satisfy Fourth Amendment reasonableness simply on the basis of reasonable

suspicion. The "reasonableness" requirement of the Fourth Amendment must still be met.

The Ninth Circuit observed that, in the 30-plus years since *United States v. Ramsey*, 431 U.S. 606 (1977) this Court has left the lower federal courts adrift by "leaving open the question of when a 'particularly offensive' search might fail the reasonableness test." (Pet.App.A. 18.) The dissents, as well, lament the void whereby this Court, for example, has repeatedly alluded to "the possibility of, but never found, 'a particularly offensive' property search at the border." *Id*. 55. See also *Id*. 59. This case could fill the reasonableness test void and update the *Ramsey* illustrations with a watershed border case.

Respondent goes on to argue that "this was not a case of outright seizure and removal because petitioner's laptop never cleared customs and was only moved away from the border in order to access the particular tools required to conduct an adequate search." (Opposition 21, n.5.) In fact, however, it is clear that this search could have been done at the border. Moreover, this is essentially saying that custody determines what constitutes the border. The Opposition fails to respond to these dispositive points.

CONCLUSION

This case presents nationally important issues at the intersection of search, seizure and property rights, with implications for judicial processes, as well. Respondent fails to answer the petition's showing, amplified by *amici curiae*, that the Ninth Circuit Opinion significantly and adversely impacts the

traveling public, border authorities and law enforcement generally, and citizens "on every street corner." Nor does Respondent address the demonstration by Petitioner that the facts learned from the government's own investigation, though undisputed, were virtually ignored by the *en banc* Court to reach a ruling solely on an issue that the Government had purposely abandoned on appeal.

For the foregoing reasons this Court should grant the petition for a writ of *certiorari* and reverse the decision of the Ninth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED this 10th day of December, 2013.

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09-10139
(*En Banc* Panel: Judges Kozinski, B. Fletcher, Thomas, McKeown, Fisher, Gould, Clifton, Callahan, M. Smith, Murguia and Christen)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 09-10139
DC NO. 4:07-CR-01207-RCC-CRP

[Filed August 20, 2012]

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

HOWARD WESLEY COTTERMAN,
Defendant-Appellee.

ON APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

APPELLEE'S RESPONSE TO
APPELLANT'S SUPPLEMENTAL BRIEF

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QUESTION ONE:

May we reverse the district court's judgment by reversing its finding that there was no reasonable suspicion to search Mr. Cotterman's laptop, even though the government did not appeal that finding?

A. A COURT MAY NOT ADDRESS THIS KIND OF ABANDONED FACT-INTENSIVE QUESTION AT THIS POINT IN A CASE.

1. The Government Deliberately Abandoned and Tacitly Conceded the Issue of Reasonable Suspicion.

The first and most important consideration in answering the questions posed by this Court is to observe the universally-accepted proposition that an appellant's failure to raise or adequately argue an issue in its opening brief constitutes its abandonment of that issue. *E.g.*, *City of Emeryville v. Robinson*, 621 F.3d 1251, 1262, n.10 (9th Cir. 2010); *Avalos v. Baca*, 596 F.3d 583, 587, n.3 (9th Cir. 2010); *Rattlesnake Coalition v. U.S. E.P.A.*, 509 F.3d 1095, 1100 (9th Cir. 2007); *Xin Liu v. Amway Corp.*, 347 F.3d 1125 (9th Cir. 2003).

It is beyond dispute that the Government knowingly and purposely abandoned the issue of reasonable suspicion here. Not only did the Government not raise the issue in its opening brief as required by Fed.R.App.P. 28(a)(5) and (9), its very framing of the

Issue Presented presupposed that the border authorities had no reasonable suspicion in this case:

> Whether the Authority to Search a Laptop Computer ***Without Reasonable Suspicion*** at a Border Point of Entry Permits Law Enforcement to Take it to Another Location to Be Forensically Examined, When it Has Remained in the Continuous Custody of the Government.

Government's Opening Brief (clerk's docket, hereinafter "C.D.,"#10 at 2, (emphasis added)). This phrasing in and of itself amounted to abandonment of the issue, as well as a tacit concession that there was no reasonable suspicion in this case.

Here, however, the Government's abandonment went even deeper than that. The defense, in its Answering Brief expressly cited the Government's abandonment of the issue, and specifically stated that the defense would therefore not address the issue. (C.D.#22 at 20-21.) In its Reply, the Government did not dispute this, and still neither raised nor addressed the issue of reasonable suspicion. (C.D.#29.) Then, when asked in oral argument before the three-judge panel, Government's counsel specifically stated that the Government was "not pursuing" the issue of reasonable suspicion. (Audio of 09/09/2010 oral argument at 7:30-8:00, 9:55.) Subsequently, during the *en banc* oral argument, the Government again stated that it "did not rely" upon the issue of reasonable suspicion, and when pressed as to why it made that choice, stated that it was because the issue was "close." (Video of *en banc* oral argument 6/19/2012 at

3:40-5:25). Given the Government's answers at oral argument and the ethical requirement for counsel to be candid with the tribunal, the Government must be taken at its word: the Government purposely winnowed this issue from its briefs due to the issue's inherent weakness.

Moreover, the appellant in this case is not some unschooled litigant. It is the United States Government, with all of its institutional expertise and resources. Its attorney has made clear that her actions throughout this case have required approval by the Department of Justice. Thus, what has occurred here is a sophisticated litigant's conscious, purposeful, and deliberate abandonment of a weak claim, after consultation, knowing full well the consequences of its actions. It is hard to imagine a more purposeful abandonment of an issue than that presented by these facts.

2. **Deciding "Reasonable Suspicion" Now Would be Highly Prejudicial to the Defense**.

Despite its intentional abandonment of this issue the Government now argues that this Court may nevertheless address it. (Appellant's supplemental brief (hereinafter "S.B.") at 2-3). To do so the Government recites three exceptions set forth in *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992). The Government makes no attempt whatsoever to argue that the first two exceptions apply here, so they are abandoned and require little discussion. The first exception is for "good cause shown," but the Government's brief proffers no "good cause" for its actions, thereby conceding that none exists. The second

exception applies when an issue was raised in the appellee's brief. Clearly that did not occur here, so that exception is facially inapplicable as well.

The only contention the Government actually argues is that "defendant would not be prejudiced if reasonable suspicion was evaluated at this point, because the parties have been given an opportunity to brief the issue." (S.B. at 3.) That argument is incorrect. Had the reasonable suspicion issue been properly presented in the Opening Brief, the defense strategy would have been fundamentally different. Introducing the reasonable suspicion issue at this late stage renders irrelevant much of the briefs and oral arguments to date.

The *Ullah* case provides a good example of how the third exception actually applies. In that case, two co-defendants appealed from their convictions. One raised a certain issue; the other did not. The appellee was aware of the issue from the opening brief of the appellant who raised it, and responded to the issue in its Answering Brief. The co-defendant who did not raise the issue then joined the issue in its reply. Thus, the appellee suffered no prejudice from the fact that one of two co-defendants failed to raise the issue.

Here the situation is the opposite. Appellee made clear that the composition of its answering brief was based on Appellant's abandonment of this issue. (A.B. 20-21.) The defense made numerous strategic choices based upon that abandonment. For example, had the Government raised the reasonable suspicion issue to begin with, the defense would undoubtedly have allocated far more of its Answering Brief to that issue

than is available for addressing Question 2 in this supplemental brief. Moreover, the defense would have concentrated on other arguments indicating that an even higher standard was required for seizure: probable cause. Instead, given the District Court's ruling and the Government's concession that reasonable suspicion was lacking, the defense chose to concede that reasonable suspicion was the applicable standard for a seizure. These kinds of long-range strategic decisions that the defense made years ago cannot be undone by limited supplemental briefing at this point. Thus, the "no prejudice" exception the Government now relies upon is not applicable here.

3. **The Issue of Reasonable Suspicion Is Neither Antecedent to the Constitutional Issue in this Case Nor a Question of Legal Construction**.

The defense has also considered exceptions in addition to those cited by the Government. One concerns an unbriefed, but antecedent issue. The most prominent case known to counsel on that point is *U.S. Nat. Bank of Oregon v. Indep.Ins.Agts.*, 508 U.S. 439 (1993). That case concerned the interpretation of a statute, but the parties failed to raise on appeal the issue of whether the statute had been repealed. The Supreme Court noted that the question of whether a statute exists at all is logically antecedent to the issue litigated by the parties: how the statute operated. Thus, answering the question presented would have been improper because it would have permitted the parties by agreement to obtain a court opinion on a hypothetical Act of Congress. *Id*.

Here, in contrast, the question now propounded by this Court (i.e. whether there was reasonable suspicion) is not a question of legal construction or interpretation, but a mixed question of law and fact. *United States v. Johnson*, 581 F.3d 994, 998 (9th Cir. 2009). This is the kind of fact-intensive question that a party (here the appellant) may decide not to dispute, unlike the existence of a statute, which must be determined by a court. Thus, the existence of reasonable suspicion is not a logically antecedent question, in the way that the existence of a statute is antecedent to a question of how that statute works.

Notably, in *National Bank of Oregon* the Supreme Court's entire justification concerned a question of law, not factual matters. Other cases addressing abandoned issues also focus on the proper construction of law, not fact. *E.g. Kamen v. Kemper Financial Services*, 500 U.S. 90, 99 (1991) (court retains the independent power to identify and apply the proper construction of governing law.) Thus, the fact-intensive nature of reasonable suspicion is unlike the kind of purely legal question that survived abandonment in *Nat. Bank of Oregon*. Instead it is exactly the kind of question that an appellant permanently waives by abandonment.

4. **The Issue of Reasonable Suspicion Is Not Jurisdictional**.

Courts will also address abandoned issues if they are jurisdictional in nature. See e.g. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230 (1990). The issue of whether there was reasonable suspicion in this case was in no way necessary to this Court's jurisdiction

over this appeal. Accordingly, this exception does not apply.

5. **The Principle of Avoiding Constitutional Issues Does Not Justify Overlooking Abandonment**.

Another principle this Court may have had in mind when posing this issue is that of avoiding constitutional issues that are unnecessary to the determination of a case. That principle, while unquestionably valid, does not justify reaching an abandoned issue of mixed law and fact. The avoidance of constitutional issues is generally a principle of statutory construction, not of factual matters. *See*, *e.g.*, *United States v. Peeples*, 630 F.3d 1136, 1139 (9th Cir. 2010).

This is not to say that courts do not apply the principle of constitutional avoidance to factual matters. Courts regularly choose to rule on a factual basis, rather than on constitutional principle, where a properly raised issue can be so resolved. But what we are concerned with here is addressing an ***abandoned*** issue that does not involve statutory construction, but does involve a fact-intensive ruling made by the magistrate judge, adopted by the district court, agreed upon by the appellate parties, and explicitly affirmed by the initial appellate panel. Counsel undersigned knows of no case where a court has ever done such a thing. Consequently, it must be concluded that an appellate court may not resurrect an abandoned issue under these circumstances.

B. <u>EVEN ASSUMING ARGUENDO THAT THE COURT MAY ADDRESS THE ISSUE, IT SHOULD ELECT NOT TO DO SO</u>.

Even if this Court were to decide that it may address the abandoned issue, which the defense does not concede, it should choose, as a matter of principle and policy, not to do so in this case. Addressing this abandoned issue now would create unwise and pernicious incentives and consequences for future litigants and other citizens. Even more troubling is the heavy burden that would remain on ordinary travelers.

1. **Adverse Consequences**.

As discussed above, the Government made its choice, and should have to abide by the consequences thereof, be they good or bad. Whether the Government made this choice in an effort to force this Court to hand it unbridled seizure power, or simply because it chose not to pursue a non-meritorious issue, the result must be the same. "The premise of our adversarial system is that appellate courts do not sit as self directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C.Cir.1983).

If this Court were to forsake this core principle, it would encourage the Government to pursue high-pressure "game playing" strategies by minimizing the likelihood of adverse consequences therefrom. After all, why not press the Court's back to the wall, if the Court will just call a "do-over" whenever that tactic redounds to the Government's detriment? That, in

itself creates adverse consequences, as Judge Fletcher has pointed out. *See United States v. Chaudhry*, 424 F.3d 1051, 1054-55 (9th Cir. 2005) (B. Fletcher specially concurring).

2. **The Issue of Reasonable Suspicion Is Not the Real Reason for the Seizure**.

A second reason this Court should choose not to address reasonable suspicion, even if it decided it may, is that doing so would inevitably depend on hindsight. This is not the typical case in which a trained law-enforcement officer observed a series of facts and found reasonable suspicion in light of training and experience. As discussed later in this brief, there was never any testimony here that any ***government agent ever determined*** that the specific facts of this case amounted to "reasonable suspicion" of a crime. The district court made a factual finding (to which this Court should defer) that the agents' actions were taken irrespective of reasonable suspicion. They "had been repeatedly and incorrectly instructed no suspicion was necessary" to seize and remove the Cottermans' belongings. (ER 12, 15.) Although their exhaustive search ameliorated any inchoate suspicions they may have had, they just seized the property anyway on the grounds that they did not need reasonable suspicion. Consequently, a ruling now premised on "reasonable suspicion" would inevitably ignore the ***true*** reason for the Government's actions and replace that with a ***fictional*** construct, supported by nothing more than hindsight. Thus, the issue of "reasonable suspicion" is poorly suited to disposition of the case because it was not the real reason for the seizure.

3. **Impartial Justice Under the Law**.

This Court should also choose not address this issue because to do so would appear to be placing an unseemly thumb on the scale, favoring one litigant. Were this Court willing to overlook the Government's intentional issue abandonment, it would appear not to be dispensing impartial justice under the law. This can be seen by comparing this case with *United States v. Romm*, 455 F.3d 990 (9th Cir. 2006), also a case about a border computer search that was practicable at the border, and one cited repeatedly below. In *Romm*, the defense did not brief the issue of whether the forensic search of the defendant's computer intruded on his First Amendment rights until its reply brief, and this Court simply deemed the issue waived, and declined to consider it. *Id*. at 997. Here, we are far past the Reply Brief stage, having had oral argument, the panel opinion, petition for rehearing, amicus briefing, the Government's response, and a second oral argument, during all of which the Government has ***spurned every opportunity to raise this issue***. Ordering briefing on this issue has apparently given the Government a broad hint to hedge its position now. That is not how an impartial process should work.

In addition, whatever concern the Court may have about reaching the constitutional issue presented by the Appellant, it should not lose sight of the pernicious effect of changing the subject of the case to reasonable suspicion. As discussed below, the factual basis for finding reasonable suspicion here will inevitably boil down to this proposition: all registered sex offenders are so suspicious that even if a prolonged border search disclosing nothing untoward cannot dispel that

suspicion. Such a holding would subject tens of thousands of people who have paid for their transgressions to continual property seizures any time they travel abroad, based on registration statutes that vary in reasonableness from state to state. This would violate the precept that "Reasonable suspicion may not be based on broad profiles which cast suspicion on entire categories of people without any individualized suspicion of the particular person to be stopped." *United States v. Sigmond-Ballesteros*, 285 F.3d 1117, 1121, (9th Cir. 2002). Thus, making this a "factual" issue would have troubling consequences. *See United States v. West*, 392 F.3d 450, 459, 364 (D.C. Cir. 2004)(cautioning against ruling on un-preserved issues where the consequences are potentially far-reaching.)

4. **Sidestepping the Fourth Amendment issue properly before the Court would condone and perpetuate suspicionless seizures**.

If this Court were to sidestep the constitutional issue by ignoring the abandonment of the reasonable suspicion issue, it is clear that the Government will just continue seizing the property of thousands of travelers indefinitely. Thus, on this issue, no decision ***is*** a decision. Many ordinary travelers who have a right to this Court's protection will bear the brunt of such continued abuses. The constitutional issue is now properly before this Court, and it is an issue that urgently needs to be addressed so that our Constitution is not flouted for years more, and so that law enforcement offers will know what they are, and are not, allowed to do for property that is searchable at the border, as was Howard Cotterman's. Indeed, the Government continues to urge this Court to address

that issue twice in its brief, and not rule on the basis of reasonable suspicion . (S.B.3, 9.)

5. **A Sweeping Ruling Is Not Required**.

Addressing the constitutional issue that was properly presented by this appellant does not require a sweeping ruling, granting or denying the Government seizure power in all cases. This case presents nothing about a search that is impracticable at the border. The Court need not rule out transporting property away from the border when an adequate search at the border is determined to be impracticable. Those are issues for another case, and another day. Hypothetical questions such as whether vehicles or packages that cannot be inspected at the border may or may not be moved for search are simply not at issue here. *Cf. Terry v. Ohio,* 392 U.S. 1, 29 (1968) (Fourth Amendment cases are to be decided "in the concrete factual circumstances of individual cases.")

In conclusion as to Question 1, it is respectfully submitted that an appellate court is not empowered to override an appellant's selection of issues that includes a deliberate and informed choice to abandon a factual issue, when the facts are unfavorable to the appellant. There is no justification for this Court to reach the issue where it has been thoroughly considered by the lower courts and the initial panel of this Court, and affirmatively abandoned by the appellant despite the clear requirement of Rule 28, and despite the massive weight of precedent requiring the appellant to raise and brief the issues. There has been no invocation of hypothetical law here. There is no logical reason why an appellant may not accept that a given set of facts

did not amount to reasonable suspicion, and therefore choose not to litigate that issue on appeal. This is a case where the Government, the party with the burden of proof did not even put on evidence that reasonable suspicion existed. Most importantly, addressing the issue at this advanced stage would be prejudicial to the defense. Thus, the Fourth Amendment issue, as briefed by the parties, is what is now properly before this Court.

QUESTION 2:

Is the district court's finding that there was no reasonable suspicion supported by the record?

THE DISTRICT COURT'S FINDING THAT THERE WAS NO REASONABLE SUSPICION IS FULLY SUPPORTED BY THE RECORD.

A. STANDARD OF REVIEW

The Government correctly notes that the District Court's determination of reasonable suspicion is reviewed *de novo*. However, it neglects that the factual findings underlying those determinations are reviewed for clear error, giving "due weight to inferences drawn from those facts by resident judges and local law enforcement." *Ornelas v. United States*, 517 US 690, 699 (1996). Thus, although this Court should review the legal issues *de novo*, it should give deference to the district court's factual determinations, viewing the evidence in the light most favorable to appellee. *United States v. Babbs*, 483 F.2d 308, 312 (9th Cir. 1973)

(appellee entitled to have evidence viewed in light most favorable to him and to have the benefit of all reasonable inferences.)

B. **NO LAW ENFORCEMENT OFFICER EVER FOUND REASONABLE SUSPICION**.

As noted above, an important point for the Court to keep in mind in deciding whether there was or was not reasonable suspicion here, is that there is no need to defer to a law enforcement officer's finding. This is not a case in which a trained law enforcement officer observed a series of facts and found them suspicious in light of training and experience. *See United States v. Arvizu, 534 U.S. 266, 273* (2002) (courts reviewing reasonable-suspicion determinations look at officer's particularized and objective basis for suspecting wrongdoing in light of officer's experience and training). There was no testimony here that any government agent ever determined that the specific facts of this case resulted in reasonable suspicion of a crime, despite hours of dogged law-enforcement efforts to uncover something suspicious. In the end the agents just seized the property because they believed they did not need reasonable suspicion.

The relevant circumstances began with a person in Los Angeles adding Howard Cotterman's name to a TECS watch list. The only basis for that action was his prior conviction/registration status, and that he traveled abroad. (ER 85.) That was by no means an individualized determination of reasonable suspicion. It was simply a "fishing expedition" based on general criteria covering a broad group of people. It was the Government exploiting its enormous power to conduct

searches at the border that it could never get away with elsewhere. The TECS lookout directed border officials to search Howard's belongings should he ever show up at any border, and they complied. (ER 153-54.)

Based solely on that lookout three officers searched the Cottermans' possessions for about two hours. (ER 65, 69, 71, 72, 100, 122, 241.) Officer Alvarado, who searched the electronic equipment, was not the person who decided to seize it. (ER 153-54.) He merely obeyed the pre-ordained directive from Los Angeles, searching the equipment thoroughly and finding nothing but a password-protected file, which all the evidence showed was common. (ER 144, 146.) The inspectors informed ICE Agent Riley that they found no evidence inside or outside the vehicle, nor anywhere else. (ER 99).

Agents Riley and Brisbine interviewed Maureen and Howard separately, finding nothing inconsistent. (ER 91.) There was no disagreement that the couple went hiking, kayaking, whale watching, snorkeling and read books while in Mexico. (ER 240, 241.)

Supervisory Special Agent Brisbine testified that he was the person who made the ultimate determination to seize the electronic equipment (ER 166) but he too never testified that he had reasonable suspicion of a crime. On the contrary, he explicitly acknowledged that he had no indication one way or the other whether there were any illicit materials on the computers. (ER 166-67, 173.) He testified that he ran the record check on Howard while Agent Riley debriefed the inspectors, and that the record showed only the 15-year-old conviction. (ER 163-64.) Most significantly, when asked

if there was any evidence of violation of the law, Brisbine testified "***not at the border, no***." (ER 173.)

Thus, the record shows that the Government itself treated the seizure as pre-determined from the start, based solely on the premise that ICE has the power to seize without reasonable suspicion, just as the Government argued on appeal.

C. THE RECORD FULLY SUPPORTS THE DISTRICT COURT'S RULING.

As noted above, the fact that Howard was on a watch list was based only on his prior conviction/registration status, and the fact that he traveled abroad. (ER 85.) These facts apply to a large category of people, and even viewed as a part of the totality of the circumstances, are of little weight in finding reasonable suspicion.

The conviction was 15 years old, not recent. Howard had finished serving his time over a decade ago, and there was no indication he had done anything wrong since. Nor is the registration requirement a separate factor. It is simply a statutory consequence of the prior conviction. In short, unless this Court believes that every person required to register as a sex offender must be suspected of being in the act of committing a crime at all times, no matter how old the conviction, this factor is of little weight under these circumstances. As previously noted, reasonable suspicion must be particularized, not based on membership in a large category of people. *Sigmond-Ballesteros*, 285 F.3d at 1121.

The district court did not err in discounting the reference to Mexico. The Government never presented any evidence of specific facts, such as how often the Cottermans traveled, or what countries they visited or any indication that their travels were sexually related. Obviously everyone who enters the Lukeville port of entry has come from Mexico. A generalized reference to Mexico adds nothing to the analysis, as Mexico is a vast country with millions of inhabitants and tourists and innumerable destinations that have nothing to do with unlawful sexual activity.

Nor do the Government's citations to two cases of "sex tourism" mean that Mexico is particularly known for that activity. Both of those cases concerned the same establishment that was known to cater to pedophiles. See *United States v. Irving*, 452 F.3d 110, 114, 124 (2nd Cir. 2006); *United States v. Julian*, 427 F.3d 471, 475 (7th Cir. 2005). Authorities searched the defendant in the *Irving* case because they knew he had gone to that particular establishment, not because he had simply gone to Mexico. There was no comparable specific information about Howard in this case, and it is preposterous to call the entire country of Mexico a sex-tourism destination.

D. **THE CASES CITED BY THE GOVERNMENT ARE INAPPLICABLE HERE**.

The Supreme Court has recognized that the totality-of-circumstances test for reasonable suspicion tends to render the examination of precedent of little value. *See Arvizu* 534 U.S. at 276. Nevertheless, the Government offers as precedent two district-court cases.

In the first the court did not actually decide whether there was reasonable suspicion, but merely considered certain facts to "arguably" provide that support. *United States v. McAuley*, 563 F.Supp.2d 672, 678 (W.D.Tex. 2008). In that case there was a ***current*** investigation against the defendant for suspected criminal acts involving child pornography. In contrast, Howard's 15-year-old conviction, did not indicate a ***current*** crime. (ER 87, 173.)

The Government also cites *United States v. Bunty*, 617 F.Supp.2d 359 (E.D.Pa. 2008). Again, that fact pattern is inapposite here. There were many suspicious facts in *Bunty*, including that the defendant's prior conviction was recent and he carried multiple computers and a large variety of storage devices, including a floppy disk that could not be used in his computers. Here, the Cottermans carried only their personal laptops. Also, in *Bunty* the agents themselves made a determination that reasonable suspicion existed, whereas here they based their seizure on the premise that reasonable suspicion was unnecessary Finally, in *Bunty*, the initial search did not dispel suspicions, as did the Cotterman search and interrogation. On the contrary, the search in *Bunty* immediately disclosed child pornography. Accordingly, *Bunty* does not support the Government's argument in this case.

E. THE TOTALITY OF *THESE* CIRCUMSTANCES DOES NOT SUPPORT FINDING REASONABLE SUSPICION.

Neither party disputes that the final determination of whether reasonable suspicion exists must be based

on "the totality of circumstances – the whole picture." *United States v. Cortez*, 449 U.S. 411, 417 (1981). Nor is there any dispute that a proper totality-of-circumstances analysis must include even facts that are minimally probative or are susceptible of innocent explanation. By the same token, however, this Court "need not pretend that the probative value of all facts is equal." *United States v. Valdes-Vega*, 685 F.3d 1138 (9th Cir. 2012). Nor should this Court fall into the error of the Government's brief, considering only the suspicious facts, while ignoring those that tended to allay suspicion. A proper totality-of-circumstances review must include both. *Cf. United States v. Henderson*, 613 F.3d 1177, 1181 (8th Cir. 2010)(evidence that tends to negate the possibility that a suspect has committed a crime is part of totality of circumstances.)

Here, the totality of the circumstances known to law enforcement at the time of the seizure included the following facts that tended to ***negate*** any initial suspicion:

- three agents searched the Cottermans' belongings for hours in exhaustive detail and found nothing suspicious;

- Howard and Maureen voluntarily waived their Miranda rights and submitted to separate interrogations by trained professionals, neither of which produced contradictory stories or other suspicious information;

- all of the evidence about their travels found in their supported what they told the border officials;

- password-protected files are common;

- Howard offered access to password-protected files at the border.

Considering all of the facts, and giving proper deference to the court's factual findings, the record clearly supported the district court's ruling. (ER 13.) The circumstances relied upon by the Government's supplemental brief "describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure." *Reid v. Georgia*, 448 U.S. 438, 441 (1980). The totality of these circumstances did not amount to reasonable suspicion.

CONCLUSION

This Court may not now address the issue abandoned by the Government. To do so would be prejudicial to the defense. Furthermore, as a matter of principle the Court should choose not to change the subject of the case now, because of the adverse incentives and side-effects that would result. The Government determined that the facts supporting an argument for reasonable suspicion in this case were weak, and intentionally decided not to argue it. To this day the Government continues to urge this Court to reach the issue argued on appeal, and not the issue of reasonable suspicion. The defense agrees. This case is

simply not appropriate for determination on that abandoned issue.

Moreover, even if the Court were to address the issue, it is clear that the record supported the district court's finding that reasonable suspicion was absent in this case, given the facts that law-enforcement chose suspicionless seizure from the beginning, and that exhaustive search and interrogation allayed any potential suspicions. For all these reasons it is respectfully submitted that the appropriate resolution of this case is not to address a long-abandoned issue, but to rule on the controversy presented by the parties by rendering a very narrow and fact-specific ruling that seizure under the circumstances of this case, where search was practicable at the border, violated the Fourth Amendment.

RESPECTFULLY SUBMITTED THIS 20TH DAY OF August, 2012.

/s/ William J. Kirchner
William J. Kirchner
Attorney for Howard Cotterman

CERTIFICATE OF COMPLIANCE

I certify that the attached Appellee's Response to Appellant's Supplemental Brief Regarding Reasonable Suspicion is proportionately spaced, has a typeface of 14 points or more and contains 4986 words. This Court's Order dated June 6, 2012 (Clerk's Doc. # 83) placed a 5,000-word limit on this brief.

/s/ William J. Kirchner
WILLIAM J. KIRCHNER,
Attorney for Howard W. Cotterman

VIII. CERTIFICATE OF FILING AND SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 2012, I electronically filed the Appellee's Response to Appellant's Supplemental Brief Regarding Reasonable Suspicion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Both participants in the case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ William J. Kirchner
William J. Kirchner
Attorney for Appellee Howard Cotterman