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No. 13-9972

IN THE

Supreme Court of the United States

DENNYS RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

After a law enforcement officer has completed a stop for a traffic infraction, does the continued detention of the driver to conduct a dog sniff, without probable cause or reasonable suspicion to believe that the vehicle contains contraband, violate the Fourth Amendment's prohibition against unreasonable seizures?

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OPINIONS BELOW

The relevant decision of the United States Court of Appeals for the Eighth Circuit, J.A. 127-31, is *United States* v. *Rodriguez*, 741 F.3d 905 (8th Cir.), *cert. granted*, 135 S. Ct. 43 (Oct. 2, 2014) (No. 13-9972). The District Court's relevant opinion, its Memorandum and Order denying Mr. Rodriguez's Motion to Suppress, J.A. 110-15, is unpublished. *United States* v. *Rodriguez*, No. 8:12-CR-170, 2012 WL 5458427 (D. Neb. Aug. 30, 2012). The United States Magistrate Judge issued Findings and Recommendations from the bench. J.A. 95-104. The Magistrate Judge's subsequent Findings and Recommendation and Order is also unpublished. J.A. 106-07.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on January 31, 2014. The petition for a writ of certiorari was filed on May 1, 2014. The petition was granted on October 2, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

INTRODUCTION

When Petitioner Dennys Rodriguez was pulled over on a Nebraska highway for momentarily driving on the shoulder of the road, he became one of more than seventeen million people "seized" each year for a traf-

fic violation.[1] Fourth Amendment seizures must be justified at their inception and limited in scope to the circumstances that warranted the intrusion in the first place. But the decision below proposes an exception to these principles for routine traffic stops. Under this exception, an officer who has stopped a driver for a minor traffic infraction may, without additional justification, continue to hold the driver for a "*de minimis*" amount of time after the stop is over based solely on the generalized possibility that the detention may lead to the discovery of contraband.

This Court should reject the "*de minimis*" exception because it authorizes a detention without individualized suspicion—an irreducible component of Fourth Amendment "reasonableness" whenever law enforcement pursues its general interest in crime control. In its place, this Court should recognize a bright-line rule that a traffic stop concludes when the tasks related to the reason for the stop are complete. Any further detention, however brief, is unconstitutional in the absence of individualized suspicion.

STATEMENT OF THE CASE

A. Factual Background

Just after midnight on March 27, 2012, petitioner Dennys Rodriguez and his passenger, Scott Pollman, were driving westward from Omaha, Nebraska, to Norfolk, Nebraska, on Nebraska State Highway 275. J.A. 17-18, 20, 24. About twenty miles into their trip,

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[1] Christine Eith & Matthew R. Durose, Bureau of Justice Statistics, *Contacts Between Police and the Public*, *2008* 7 (Oct. 2011), *available at* http://www.bjs.gov/content/pub/pdf/cpp08.pdf (reporting on survey conducted by the Department of Justice's Bureau of Justice Statistics about face-to-face contacts between citizens and police).

just outside the small community of Valley, Nebraska, Mr. Rodriguez drove past Officer Morgan Struble of the Valley Police Department. J.A. 35, 39. Officer Struble was positioned in a turnaround median watching for "speeders and intoxicated drivers and so on." J.A. 36. Although Mr. Rodriguez was not speeding or driving erratically, Officer Struble immediately pulled onto the highway and began traveling westbound behind Mr. Rodriguez's Mercury Mountaineer. J.A. 19, 44.

Officer Struble pursued Mr. Rodriguez's vehicle until he was approximately three to four car-lengths behind, with Mr. Rodriguez traveling in the right lane of the four-lane divided highway and Officer Struble staying in the left lane. J.A. 44-45. From this vantage point, Officer Struble saw the passenger-side tires of Mr. Rodriguez's vehicle cross for about two seconds over the line separating the right lane of traffic from the shoulder of the highway. J.A. 46. Mr. Rodriguez then quickly corrected back into his lane of traffic. J.A. 48-49. Officer Struble decided to stop Mr. Rodriguez for driving on the shoulder of the road. J.A. 44. He pulled over Mr. Rodriguez's vehicle at approximately 12:06 a.m. J.A. 26.

As Officer Struble approached Mr. Rodriguez's Mountaineer from the passenger's side, he noticed a strong odor of air freshener. J.A. 20. At the vehicle, he spoke first with Mr. Rodriguez, obtained Mr. Rodriguez's license, registration, and proof of insurance, and asked why he had driven onto the shoulder. J.A. 22, 50. Mr. Rodriguez said he had swerved to avoid a pothole and was agitated when Officer Struble informed him that momentarily crossing onto the shoulder was a traffic violation. *Id.* While Officer Struble was speaking with Mr. Rodriguez from the passenger side of the vehicle, he noticed that the pas-

senger, Mr. Pollman, seemed nervous. J.A. 21. Mr. Pollman pulled his cap low over his eyes, smoked a cigarette, and did not look at Officer Struble. *Id.*

Officer Struble asked Mr. Rodriguez to step out of the vehicle. J.A. 23. Mr. Rodriguez complied and met Officer Struble at the back of the Mountaineer. *Id.* Officer Struble then asked Mr. Rodriguez to accompany him to his patrol car so that the officer could complete some paperwork. *Id.* Mr. Rodriguez asked if he was obligated to do so. *Id.* When Officer Struble said "no," Mr. Rodriguez demurred, saying he would rather just sit in his own vehicle. *Id.* Officer Struble was taken aback by Mr. Rodriguez's response. J.A. 52-54. Although he had never before had anyone refuse to come back to his patrol car, he claimed that, "in [his] experience," doing so was a "subconscious behavior that people concealing contraband will exhibit." J.A. 53.

Officer Struble returned to his cruiser and called in a request for a records check on Mr. Rodriguez. J.A. 23. He then returned to Mr. Rodriguez's vehicle to talk with Mr. Pollman. J.A. 24. Officer Struble asked Mr. Pollman for his identification and then began inquiring about "where he was coming from and where they were going." *Id.* Mr. Pollman explained that he and Mr. Rodriguez had made the two-hour trip from Norfolk to Omaha to investigate the possibility of purchasing an older-model Ford Mustang. J.A. 60-61. They had decided against buying the car when the owner could not produce the title. *Id.* Officer Struble asked whether they had viewed any pictures of the Ford Mustang before driving to Omaha to see the car in person, and Mr. Pollman replied that they had not. J.A. 25.

Officer Struble had specifically noted Mr. Pollman's nervousness during the officer's first exchange with

Mr. Rodriguez at the vehicle. J.A. 21. When he was speaking to Mr. Pollman directly, however, Officer Struble did not testify that he observed any signs of nervousness. Nonetheless, Officer Struble found the plan to purchase the car strange because Officer Struble himself would not have made such a drive without first seeing photos of the vehicle he was thinking about purchasing. J.A. 25-26. He also found their decision to drive from Norfolk to Omaha late on a Tuesday night "abnormal." J.A. 26. It was "common knowledge," he said, that people do not drive a long distance to look at a vehicle and come back at midnight. J.A. 60. But, during the traffic stop, Officer Struble did not ask how long Mr. Pollman and Mr. Rodriguez had been in Omaha, when they had actually looked at the Mustang, or whether they had attended to any other business before or after looking at the car. J.A. 61-63.

After obtaining Mr. Pollman's driver's license, Officer Struble again returned to his cruiser. It was 12:19 a.m.—about thirteen minutes into the traffic stop. J.A. 26-27. Officer Struble had a drug-detection dog in his car, and decided that he was "going to walk [his] dog around the vehicle regardless whether [Mr. Rodriguez] gave [him] permission or not." J.A. 71. However, Officer Struble wanted a second officer to act as a backup because there were two persons involved in the stop. J.A. 71-72. Officer Struble requested a records check on Mr. Pollman's license and then contacted a second officer. Officer Struble then began writing a warning ticket for Mr. Rodriguez. J.A. 26-27.

Officer Struble returned to Mr. Rodriguez's vehicle for a third time, where he returned all of the documents he had collected to Mr. Rodriguez and Mr. Pollman. J.A. 27. Officer Struble then issued a writ-

ten warning to Mr. Rodriguez for driving on the shoulder of the road. J.A. 76. Officer Struble completed the warning at 12:25 a.m. and said he gave it to Mr. Rodriguez no more than a minute or two later. J.A. 27-28.

By the time Officer Struble had returned Mr. Rodriguez's documents and issued the warning, Officer Struble had "[taken] care of all the business" of the traffic stop. J.A. 70. In his words, he had "got[ten] all the reason for the stop out of the way." *Id.* Nevertheless, because of his plan to conduct the sniff regardless of what else happened, Officer Struble did not allow Mr. Rodriguez to leave. Instead, Officer Struble asked Mr. Rodriguez if "he had an issue with [Officer Struble] walking [his] police service dog around the outside of [the] vehicle." J.A. 29, 72-73. When Mr. Rodriguez replied that he did, in fact, have an issue with that, Officer Struble directed Mr. Rodriguez to turn off the ignition, get out of his vehicle, and stand in front of the cruiser until the second officer arrived. J.A. 29-30. Officer Struble acknowledged that at this point Mr. Rodriguez "was not free to leave." J.A. 69-70.

Officer Struble's backup officer, Deputy Duchelus of the Douglas County Sheriff's Office, arrived at 12:33 a.m. J.A. 32, 98. About one minute later, or approximately seven to eight minutes after Officer Struble had issued the warning for driving on the shoulder, Officer Struble walked his dog around Mr. Rodriguez's Mountaineer. The dog alerted. J.A. 32-33. During a search of the vehicle, officers discovered a bag of methamphetamine. J.A. 34. Mr. Rodriguez was later charged with possession with intent to distribute 50 grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1) and (b)(1). J.A. 116.

B. Suppression Hearing

Mr. Rodriguez moved to suppress the evidence seized from his car, arguing that Officer Struble had violated his Fourth Amendment rights by detaining him for a dog sniff without reasonable suspicion of criminal activity. J.A. 12-13.

After hearing evidence, the United States Magistrate Judge recommended that the motion be denied. J.A. 103. The Magistrate Judge acknowledged that the sniff occurred about eight minutes *after* the traffic stop had concluded. J.A. 98. He also agreed that Officer Struble had nothing but a "big hunch" that Mr. Rodriguez was hiding something in the vehicle and no reasonable suspicion to independently support the detention. J.A. 103-04. Nonetheless, the Magistrate Judge recommended that the district court deny Mr. Rodriguez's motion. The Magistrate Judge believed that Eighth Circuit precedent he was bound to apply would consider the delay an acceptable "de minimus [sic] intrusion on the defendant's Fourth Amendment rights." J.A. 101-02. The Magistrate Judge cited *United States* v. *$404,905.00 in U.S. Currency*, 182 F.3d 643 (8th Cir. 1999), to support his conclusion. J.A. 101. There, the Eighth Circuit held that, "when a police officer makes a traffic stop and has at his immediate disposal the canine resources to employ [what is a] uniquely limited investigative procedure, it does not violate the Fourth Amendment to require that the offending motorist's detention be momentarily extended for a canine sniff of the vehicle's exterior." *$404,905.00 in U.S. Currency*, 182 F.3d at 649 (footnote omitted).

The Magistrate Judge asserted that, under this "*de minimis*" rule, the Eighth Circuit allows for up to ten minutes of suspicionless detention for officers to accomplish a dog sniff. J.A. 101. Because the detention

in Mr. Rodriguez's case was less than ten minutes, the Magistrate Judge recommended denying his motion to suppress. J.A. 102-03.

The district court adopted the Magistrate Judge's factual findings and legal conclusions in their entirety. J.A. 115.

Mr. Rodriguez entered a conditional guilty plea to the Indictment, reserving his right to appeal the denial of his motion to suppress. He was sentenced to the mandatory minimum sentence of five years in prison.

C. Appellate Proceedings

The Eighth Circuit affirmed. It began with the proposition that a dog sniff conducted in a reasonable manner during a lawful traffic stop "'does not infringe upon a constitutionally protected interest in privacy.'" J.A. 130 (quoting *United States* v. *Martin*, 411 F.3d 998, 1002 (8th Cir. 2005) (quoting *Illinois* v. *Caballes*, 543 U.S. 405, 408 (2005))). A canine sniff "may be the product of an unconstitutional seizure," however, "'if the traffic stop is unreasonably prolonged before the dog is employed.'" *Id.* (quoting *Martin*, 411 F.3d at 1002). The Eighth Circuit held that this was not the case in the Rodriguez stop. "A brief delay to employ a dog does not unreasonably prolong the stop," the Court of Appeals asserted. *Id.* In fact, the Eighth Circuit had "repeatedly upheld dog sniffs that were conducted minutes after the traffic stop concluded." *Id.* (citing *United States* v. *Alexander*, 448 F.3d 1014, 1017 (8th Cir. 2006); *Martin*, 411 F.3d at 1002; *United States* v. *Morgan*, 270 F.3d 625, 632 (8th Cir. 2001); and *$404,905.00 in U.S. Currency*, 182 F.3d at 649). The Court of Appeals surveyed detentions it had upheld under this rule, noting that they ranged from two minutes to close to ten minutes. *Id.* The

seven- or eight-minute delay in Mr. Rodriguez's case fell within these limits. J.A. 131. The court therefore held that Mr. Rodriguez's detention was "a *de minimis* intrusion on [Mr.] Rodriguez's personal liberty" and not an unreasonable seizure. *Id.* In light of this conclusion, the Court of Appeals expressly declined to decide whether Officer Struble had reasonable suspicion to continue Mr. Rodriguez's detention. *Id.* Thus, the "*de minimis*" exception was the sole basis for the Court of Appeals' decision.

SUMMARY OF THE ARGUMENT

When an officer stops a motorist for a traffic violation, she initiates a "seizure" under the Fourth Amendment. But the seizure is a limited one. A traffic stop must be brief and reasonably related in scope to the circumstances that justified the detention in the first place. Because addressing the traffic violation is the "purpose" of the stop, the stop may last no longer than necessary to effectuate that purpose.

An officer may employ a drug dog during a traffic stop provided the sniff does not delay completion of the tasks related to the traffic infraction. However, the officer may not expand the boundaries of a traffic stop to accomplish the sniff. Once the acts related to the traffic violation have been completed, the driver must be allowed to be on his way unless the facts support reasonable suspicion of criminal activity. Individualized suspicion is required whenever law enforcement wishes to detain someone to investigate ordinary criminal wrongdoing.

These well-settled Fourth Amendment principles establish a bright-line rule: a traffic stop ends after an officer has completed the acts related to the traffic violation, and any detention beyond that point, no

matter how brief, is unreasonable unless independently justified by individualized suspicion.

The Eighth Circuit's justification for a "*de minimis*" exception to these clearly defined boundaries is flawed in several respects. First, the Eighth Circuit wrongly assumes that the line marking the end of a traffic stop is "artificial" and that a standard of overall reasonableness should allow a dog sniff that could have occurred within the scope of the traffic stop to take place a short time afterwards. But a line established by the Constitution is not "artificial." Moreover, any other line would leave the end of a traffic stop entirely in the hands of the police, thereby violating the Fourth Amendment's fundamental purpose of limiting officer discretion. It may be true that honoring the Constitution's line will mean that some officers will not be able to conduct a dog sniff. But the desire of police to employ a popular tool for a separate, unsupported investigation does not trump the constitutional rights of the person who has been seized. It is certainly no reason to institute a standardless "*de minimis*" exception in the name of overall reasonableness. When, as here, an exception threatens to swallow the general rule, a bright-line standard for reasonableness is not only preferred, it is necessary.

Second, a detention for a dog sniff after a traffic stop ends is not comparable, in context or intrusiveness, to the practice of ordering a driver out of his vehicle during a traffic stop. A traffic stop anchored by probable cause is a far different context than a post-stop detention initiated without any cause at all. And detaining an individual for the frightening and error-prone practice of a dog sniff is a far greater intrusion than requiring a driver to get out of his car.

Third, contrary to the Eighth Circuit's assertion, the fact that a dog sniff is not a "search" under the Fourth Amendment does not justify a suspicionless detention to enable it. It is the seizure itself, not the dog sniff conducted within the seizure, that makes a post-stop canine sniff unconstitutional.

A bright-line rule provides needed guidance to officers in the field as they conduct millions of traffic stops each year. It protects innocent motorists from suspicionless intrusions while leaving law enforcement ample opportunity to conduct dog sniffs when they have individualized suspicion or, as is often the case, consent. The Court should adopt this bright-line rule.

Under this bright-line rule, this Court should reverse the decision below. When Officer Struble detained Mr. Rodriguez after completing the traffic investigation, he had no objectively reasonable basis for suspecting that Mr. Rodriguez was involved in criminal activity. The facts that Officer Struble considered suspicious are consistent with innocent travel and easily explained by the circumstances of the stop. Because the post-stop seizure was not justified by reasonable suspicion, Mr. Rodriguez's detention violated the Fourth Amendment.

ARGUMENT

I. AFTER AN OFFICER HAS COMPLETED THE INVESTIGATION INTO A MOTORIST'S TRAFFIC VIOLATION, CONTINUED DETENTION OF THE MOTORIST WITHOUT INDIVIDUALIZED SUSPICION OF CRIMINAL ACTIVITY VIOLATES THE FOURTH AMENDMENT.

Stopping an automobile for a traffic violation constitutes a "seizure" under the Fourth Amendment. *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979). The extent of the seizure, however, is not that of a full-blown arrest. *Knowles* v. *Iowa*, 525 U.S. 113, 117 (1998). Instead, a traffic stop is analogous to a *Terry* stop. *Berkemer* v. *McCarty*, 468 U.S. 420, 439 (1984) (citing *Terry* v. *Ohio*, 392 U.S. 1 (1968)); see also *Arizona* v. *Johnson*, 555 U.S. 323, 330 (2009).

Consistent with *Terry*, a traffic stop must be justified at its inception and limited in duration and scope. *Florida* v. *Royer*, 460 U.S. 491, 500 (1983); see also *United States* v. *Sharpe,* 470 U.S. 675, 685 (1985). The officer's investigation must be brief and carefully tailored to the reason the driver was stopped in the first place. *Knowles*, 525 U.S. at 117-18; *Royer*, 460 U.S. at 500. When justified "solely by the interest in issuing a warning ticket to the driver," the stop may not be "prolonged beyond the time reasonably required to complete that mission." *Caballes*, 543 U.S. at 407. If an officer is able to conduct a canine sniff within this time frame, she may do so without independent justification. *Id.* at 407-08 (upholding a sniff that a second officer conducted while the officer who made the stop was writing out a warning ticket). According to *Caballes*, however, the officer may not extend the stop or unlawfully detain the driver to walk her dog around the vehicle. *Id.* at 408.

When the tasks related to the purpose of the traffic stop have been completed, the authority to hold the occupants of the vehicle also comes to an end. *Id.* at 407. After that time, a motorist is in the same legal position as a citizen walking on a public sidewalk or waiting for a flight at an airport. An officer may not detain that person, even momentarily, without individualized suspicion of criminal activity. *Terry,* 392 U.S. at 21-23; *Royer*, 460 U.S. at 498.

"A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of criminal wrongdoing." *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 37 (2000); *Chandler* v. *Miller*, 520 U.S. 305, 308 (1997). Because the requirement of individualized suspicion was a direct response to the use of "'general warrants'" that the Framers "despised," this Court has recognized only limited circumstances in which that requirement does not apply. *Maryland* v. *King*, 133 S. Ct. 1958, 1980-81 (2013) (Scalia, J., dissenting); *Chandler*, 520 U.S. at 308. These circumstances include detentions of persons present during the execution of search warrants, border and sobriety checkpoints, and administrative and safety inspections. *Edmond*, 531 U.S. at 37; see also Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. Mem. L. Rev. 483, 549-50 (Winter 1995). A post-traffic-stop seizure for a dog sniff does not fall into any of these categories. In fact, this Court has specifically foreclosed any argument that an officer may initiate a suspicionless seizure for the purpose of interdicting narcotics. *Edmond*, 531 U.S. at 37.

In *Edmond*, this Court struck down a series of traffic checkpoints in which officers stopped a predetermined number of drivers and conducted dog sniffs on their vehicles in an effort to curb drug crime in Indi-

anapolis. *Id.* at 34-35. The Court held that the Fourth Amendment does not authorize "brief, suspicionless seizures" when the "primary purpose" of the seizure is "to uncover evidence of ordinary criminal wrongdoing"—even if that wrongdoing involves trafficking in illegal narcotics. *Id.* at 37, 42. According to the Court: "We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime." *Id.* at 44.

When an officer institutes a "brief, suspicionless seizure" to conduct a canine sniff after the conclusion of a traffic stop, she is doing precisely what the Court in *Edmond* prohibited. In fact, suspicionless drug investigations of persons stopped for traffic violations are arguably more intrusive than those conducted through a systemized checkpoint. *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 559 (1976). Routine checkpoints "involve less discretionary enforcement activity" than other kinds of Fourth Amendment seizures. *Id.* "The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest." *Id.* A suspicionless detention after a stop for a simple traffic infraction is neither "regularized" nor "reassuring" to motorists who, after receiving a ticket or warning, reasonably expect to be allowed to be on their way. It certainly was not "reassuring" to Mr. Rodriguez, who asserted his right to leave and received in reply a direct order that he stay. J.A. 29, 69-70. *Edmond*'s reasoning therefore applies with even greater force in Mr. Rodriguez's case. To be reasonable under the Fourth Amendment, a post-traffic-stop detention must be supported by individualized suspicion.

In summary, this Court's precedent demands a bright-line rule limiting the permissible scope and duration of a routine traffic stop: the stop ends when the tasks related to the traffic violation have been completed, and any detention beyond that point, however brief, constitutes an unreasonable seizure unless independently supported by individualized suspicion. Officer Struble conducted his dog sniff seven to eight minutes after he had completed his traffic investigation and issued Mr. Rodriguez a warning citation for driving on the shoulder of the road. Because he did not have reasonable suspicion to believe Mr. Rodriguez was involved in criminal activity,[2] Mr. Rodriguez's continued detention violated the Fourth Amendment's prohibition against unreasonable seizures.

II. THE EIGHTH CIRCUIT'S "*DE MINIMIS*" EXCEPTION IS BASED ON FLAWED REASONING AND A FUNDAMENTAL MISUNDERSTANDING OF THIS COURT'S FOURTH AMENDMENT JURISPRUDENCE.

In the decision below, the Eighth Circuit borrowed the reasoning it first set forth in *United States* v.

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[2] In its Brief in Opposition to a Writ of Certiorari, the Solicitor General argued that Mr. Rodriguez's judgment was independently supported by reasonable suspicion of criminal activity. As discussed further in Section IV of this brief, this is not the case. The Magistrate Judge who considered the evidence at the suppression hearing expressly found *no* reasonable suspicion, and the district court adopted his findings in their entirety. The Eighth Circuit did not disturb this finding on appeal. Therefore, the district court's conclusion should govern the analysis of the constitutionality of Mr. Rodriguez's post-stop detention.

$404,905.00 in U.S. Currency, 182 F.3d 643.[3] In *$404,905.00 in U.S. Currency*, the Eighth Circuit offered three reasons for blurring the bright line that emanates from this Court's precedent: 1) the line marking the end of a traffic stop is "artificial," and Fourth Amendment questions should not be governed by artificial distinctions but by reasonableness under the totality of the circumstances; 2) a brief canine sniff after a stop is similar to the "*de minimis*" intrusion of ordering a lawfully stopped motorist out of his vehicle—a practice this Court upheld in *Pennsylvania* v. *Mimms*, 434 U.S. 106, 110-11 (1977); and 3) a canine sniff is a minimally intrusive procedure that serves a strong governmental interest in drug interdiction. *$404,905.00 in U.S. Currency*, 182 F.3d at 649, *cited with approval in United States* v. *Rodriguez*, 741 F.3d 905 (8th Cir. 2014), *cert. granted*, 135 S. Ct. 43 (Oct. 2, 2014) (No. 13-9972). These reasons are logically unsound and rely on an incorrect reading of this Court's precedent.

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[3] *$404,905.00 in U.S. Currency* marked the genesis of the "*de minimis*" rule in the Eighth Circuit. In *United States* v. *Alexander*, 448 F.3d at 1017, a motorist whose post-stop detention was upheld under this rule asked the Eighth Circuit to revisit the exception in light of *Caballes*, 543 U.S. at 405. The Eighth Circuit declined, noting that the Court in *Caballes* had not been called upon to consider "the length of time that a dog sniff can constitutionally be conducted following the conclusion of a legitimate stop." *Alexander*, 448 F.3d at 1017. Because it saw "no inconsistency between *Caballes* and [*$404,905.00 in U.S. Currency*]," the Eighth Circuit in *Alexander* reaffirmed the "*de minimis*" exception. *Id.* In its short decision in Mr. Rodriguez's case, the Eighth Circuit cited both *$404,905.00 in U.S. Currency* and *Alexander* as the basis for upholding Mr. Rodriguez's detention.

A. The Line Marking The End Of A Traffic Stop Is Not Artificial, And Using It To Gauge The Constitutionality Of The Stop Is An Appropriate Application Of The Fourth Amendment's "Reasonableness" Standard.

The Eighth Circuit's "*de minimis*" exception grew partly out of its belief that the line marking the end of a traffic stop is "quite artificial." *$404,905.00 in U.S. Currency*, 182 F.3d at 649; see also *Alexander*, 448 F.3d at 1017 ("[T]he artificial line marking the end of a traffic stop does not foreclose the momentary extension of the detention for the purpose of conducting a canine sniff . . . ."). The court in *$405,905.00 in U.S. Currency* noted that, if the officer who made the stop had managed to conduct the dog sniff before completing the traffic checks, the "sniff would have occurred on the traffic stop side of [the] Fourth Amendment line." 182 F.3d at 649. "When the constitutional standard is reasonableness measured by the totality of the circumstances," the Eighth Circuit observed, "we should not be governed by artificial distinctions." *Id.* For several reasons, this reasoning does not withstand scrutiny.

As an initial matter, the boundaries of a traffic stop are not artificial. Instead, they proceed logically from this Court's Fourth Amendment jurisprudence. In a routine traffic stop, the seizure of a vehicle and its occupants is justified only because the officers have probable cause to believe that the driver committed a traffic violation. *Whren* v. *United States*, 517 U.S. 806, 810 (1996). Because addressing that infraction is the purpose of the stop, the stop must last no longer than necessary to effectuate that purpose. *Caballes*, 543 U.S. at 407; *Royer*, 460 U.S. at 500. If delineating these boundaries requires a "*de minimis*"

extension to relieve it of its artificial character, nearly every other Fourth Amendment doctrine would be subject to the same "horseshoes rule" that "just being close counts." Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 Mich. L. Rev. 1843, 1871 (Aug. 2004).

This Court has said that, "normally, [a traffic] stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave." *Johnson*, 555 U.S. at 333. This moment is evident from objective factors. Federal and state courts agree that it typically coincides with the issuance of a citation or warning for the traffic violation and the return of the driver's identification and other documents. See, *e.g.*, *United States* v. *Meikle*, 407 F.3d 670, 673 (4th Cir. 2005); *United States* v. *Wilson*, 413 F.3d 382, 386-87 (3d Cir. 2005); *United States* v. *Boyce*, 351 F.3d 1102, 1106 (11th Cir. 2003); *United States* v. *Lattimore*, 87 F.3d 647, 653 (4th Cir. 1996); *United States* v. *White*, 81 F.3d 775, 778 (8th Cir. 1996); *United States* v. *Rivera*, 906 F.2d 319, 323 (7th Cir. 1990); *United States* v. *Werking*, 915 F.2d 1404, 1408 (10th Cir. 1990); *Lilley* v. *State*, 208 S.W.3d 785, 788 (Ark. 2005); *People* v. *Cosby*, 898 N.E.2d 603, 612 (Ill. 2008); *Ferris* v. *State*, 735 A.2d 491, 500 (Md. 1999); *State* v. *Vogler*, 297 S.W.3d 116, 120 (Mo. Ct. App. 2009); *State* v. *Jones*, 693 N.W.2d 104, 110 (Wis. Ct. App. 2005).[4] Officer Struble pur-

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[4] The fact that the Eighth Circuit has joined the national consensus on this point makes its allegation of "artificiality" even more curious. If the line is not "artificial" when distinguishing between the end of a traffic stop and the beginning of a post-stop consensual encounter, *White*, 81 F.3d at 778-79, it cannot contemporaneously be an "artificial" marker for purposes of deter-

posely returned Mr. Rodriguez's documents and issued him a warning before turning to the matter of the dog sniff. J.A. 69-70. He believed, as the courts do, that these actions got "all the reason for the stop out of the way." *Id.*

That is not to say that the act of returning of a driver's documents and issuing a traffic citation has talismanic qualities, making all police actions before that moment constitutional and everything afterwards unconstitutional without independent justification. "[A] crafty officer, knowing this rule, may simply delay writing a ticket for the initial traffic violation until after she has satisfied herself that all of her hunches were unfounded . . . ." *United States* v. *Stepp*, 680 F.3d 651, 662 (6th Cir. 2012). In cases at the margins, a court still may be required to determine when the tasks related to the traffic infraction were (or should have been) completed. This reality does not make identifying the end of a stop an artificial exercise. Courts all over the country engage in precisely this type of line-drawing on a daily basis.

As an alternative to honoring the Constitution's bright line, the Eighth Circuit puts the officer solely in charge of the point when the traffic stop ends. This alternative cannot be squared with the Fourth Amendment. "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions . . . .'" *Prouse*, 440 U.S. at 654 (footnote omitted) (quoting *Marshall* v. *Barlow's*, *Inc.*, 436 U.S. 307, 312 (1978))

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mining what an officer can and cannot do on either side of that line.

(internal quotation marks omitted). A standardless "*de minimis*" rule leaving the end of a traffic stop to the discretion of an officer is incompatible with this fundamental purpose. Such a rule promotes the very arbitrary line-drawing the Eighth Circuit renounces because different officers may draw different lines for different reasons even in the same situation.[5] It may also permit an officer to create "new" probable cause where none existed before, whether by additional

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[5] In some cases, bias may influence where an officer draws the line. Data collected on traffic stops indicates that, in addition to being stopped more often, minorities bear the brunt of an officer's discretionary decisions during a traffic stop. Eith & Durose, *supra* note 1, at 9-10 (during traffic stops, black and Hispanic drivers are more likely than white drivers to be arrested, ticketed, and searched); Neb. Crime Comm'n, *Traffic Stops in Nebraska: A Report to the Governor and the Legislature on Data Submitted by Law Enforcement* 4, 16, 20-21 (Apr. 2014), *available at* http://www.ncc.nebraska.gov/pdf/stats_and_research/2013DataFinal.pdf (in Douglas County, Nebraska, where Mr. Rodriguez's stop occurred, minority drivers are stopped, searched, and arrested at a higher rate than their white counterparts); *see also* I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 Harv. C.R.-C.L. L. Rev. 1, 18 (Winter 2011). This includes the discretionary decision to conduct a canine sniff. *See, e.g.*, Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 352-53 (1998) (detailing a study of stops made by the Criminal Patrol Unit in Orange County, Florida, where black drivers represented 16.3 percent of drivers stopped but accounted for more than 70 percent of the canine searches); *see also* Christopher M. Pardo, *Driving Off the Face of the Fourth Amendment: Weighing* Caballes *Under the Proposed "Vehicular Frisk" Standard*, 43 Val. U. L. Rev. 113, 127 & n.58 (Fall 2008) (highlighting cases involving actual admissions of racial profiling by police officers). Allowing the police to extend a traffic stop for a "*de minimis*" amount of time, for a dog sniff or any other reason, adds to the list of discretionary decisions that could disproportionately burden minority populations.

questioning, dog sniffs, or further opportunities for observation.

That an officer may undertake a dog sniff *before* the constitutionally mandated line but not *after* is no reason to nullify the line's constitutional significance. Simply put, a dog sniff is not a police entitlement to which Fourth Amendment limits must bend. *Caballes* did not hold otherwise. The Court in *Caballes* permitted the sniff because it caused no disruption to the tasks related to the traffic investigation. 543 U.S. at 408. It accepted the state court's conclusion that the duration of the stop "was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop." *Id.* Had the sniff occurred during an "unreasonably prolonged traffic stop" or "while the [driver] was being unlawfully detained," the Court would have reached a different result. *Id.* at 407-08. Thus, the Court in *Caballes* specifically rejected the notion that the boundaries of the Fourth Amendment must be ignored to accommodate a dog sniff.

The Eighth Circuit contends that drawing a bright line at the end of a stop would conflict with this Court's Fourth Amendment standard of "reasonableness measured by the totality of the circumstances." *$404,905.00 in U.S. Currency*, 182 F.3d at 649. But to argue that courts should look to the reasonableness of the seizure as a whole, without regard to whether something happened during the initial stop or during a "*de minimis*" extension of it, is to beg the question of whether the Constitution allows a "*de minimis*" extension in the first place. This argument also assumes that the only possible test for "reasonableness" is a "multifactor balancing test," when in fact this Court has rejected that approach in many cases. *Dunaway* v. *New York*, 442 U.S. 200, 213

(1979). When, "without clear limits[,] [an] exception could swallow the general rule," the Court has adopted categorical rules in which "reasonableness" is clearly defined. *Bailey* v. *United States*, 133 S. Ct. 1031, 1044 (2013) (Scalia, J., concurring).

The "*de minimis*" rule provides no guidance to courts but instead asks them to "measur[e] police conduct according to a virtually standardless yardstick." *Sharpe*, 470 U.S. at 695 (Marshall, J., concurring). It is also of no use to officers in the field, who cannot practically be expected to time their activities with a stopwatch. If the Court endorses such a rule, one can easily imagine the slippery slope that will follow, as courts and officers alike try to determine whether nine, then ten, then fifteen minutes is "*de minimis*."[6] *Whitfield* v. *State*, 33 So. 3d 787, 794 n.11

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[6] Affirming Mr. Rodriguez's case without qualification would by itself allow a seven- to eight-minute post-stop delay. Yet under any plausible definition of the term, such a delay is hardly "*de minimis*." A recent study revealed that an intern can evaluate the health of a new patient in an average of eight minutes. Pauline W. Chen, M.D., *For New Doctors, 8 Minutes Per Patient*, New York Times "Well" Blog (May 30, 2013, 12:01 a.m.), http://well.blogs.nytimes.com/2013/05/30/for-new-doctors-8-minutes-per-patient/. Meanwhile, in *United States* v. *Miller*, 451 F. App'x 896 (11th Cir.), *cert. denied*, 133 S. Ct. 196 (2012), the Eleventh Circuit concluded that a jury deadlocked after nine days of deliberation could reach a verdict free from coercion eight minutes after receiving an *Allen* charge. *Id.* at 897-98 & n.2 (referencing *Allen* v. *United States*, 164 U.S. 492 (1896)). In the time it took for officers to complete the dog sniff of Mr. Rodriguez's case, NASA could send a shuttle all the way into orbit. *Ask the Mission Team—Question and Answer Session*, NASA, http://www.nasa.gov/mission_pages/shuttle/shuttlemissions/sts121/launch/qa-leinbach.html (last visited Nov. 15, 2014). In other words, a great deal can happen in eight minutes. Recognizing this fact, the only other court that has considered such a substantial post-stop delay emphatically rejected the idea that it

(Fla. Dist. Ct. App. 2010) ("If a one[-]minute delay is *de minimis* in case No. 1, the two[-]minute delay in case No. 2 is only a *de minimis* amount longer than the acceptable delay in Case No. 1, and so it goes . . . ."). The "thirty seconds [to] two minutes" the Eighth Circuit endorsed in *$404,905.00 in U.S. Currency*, 182 F.3d at 649, has gradually become the "ten-minute rule" the district court employed, and the Eighth Circuit has found that difference to be of no "constitutional significance." *United States* v. *Morgan*, 270 F.3d 625, 632 (8th Cir. 2001). Although national statistics are not readily available, the median length of a traffic stop in Illinois is just ten minutes. See Ill. Dep't of Transp., *Illinois Traffic Stop Study 2013 Annual Report* 6-7 & Figure 6 (Alexander Weiss Consulting ed., 2013), *available at* http://www.idot.illinois.gov/Assets/uploads/files/Transportation-System/Reports/Safety/Traffic-Stop-Studies/2013/2013%20ITSS%20Executive%20Summary.pdf. If this is also the case in the Eighth Circuit, the "*de minimis*" exception is well on its way to swallowing the rule.

These difficulties inherent in determining "how much is too much" demonstrate why a bright-line rule for the "reasonableness" of a traffic stop is warranted. *Bailey*, 133 S. Ct. at 1044 (Scalia, J., concurring). Rather than leave the protections of the Fourth Amendment to a "balancing of multifarious circumstances presented by different cases," *Dunaway*, 442 U.S. at 213, this Court should reaffirm the contours of reasonableness that it has already defined, see *Terry*, 392 U.S. at 30; *Edmond*, 531 U.S. at 37.

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could be "*de minimis*." *State* v. *Beckman*, 305 P.3d 912, 918 (Nev. 2013) (nine-minute delay that doubled length of original stop not a "*de minimis*" intrusion).

B. The Justification For The "*De Minimis*" Intrusion Authorized In *Pennsylvania* v. *Mimms* Does Not Transfer To The "*De Minimis*" Extension Of A Traffic Stop.

The Eighth Circuit claims that the brief extension of a traffic stop for a dog sniff is similar to ordering the driver out of the vehicle during a stop. *$404,905.00 in U.S. Currency*, 182 F.3d at 649. This Court held in *Mimms* that such an order is a "*de minimis"* intrusion on personal liberty. *Mimms*, 434 U.S. at 111. Like the Eighth Circuit's claim that a dog sniff must be permitted after a stop because it is permissible before, this argument is an attempt to bootstrap an intrusion authorized in one constitutional context into a reason for holding a citizen in another. The Court should reject this distorted view of the Fourth Amendment.

In deciding that ordering the driver out of his car was permissible, the Court in *Mimms* weighed "the public interest" against "'the individual's right to personal security free from arbitrary interference by law officers.'" *Id.* at 109 (quoting *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975)). On the public side of the scale, the Court placed the "legitimate and weighty" interest in officer safety. *Id.* at 110. According to the Court, an officer could reasonably conclude that the risks inherent in a traffic stop are mitigated when a driver is outside of his car, in full view. *Id.* at 110-11. Against this interest, the Court weighed the intrusion upon a driver whose liberty already was being restricted by a lawful detention. *Id.* at 111. For someone in this position, the intrusion of being ordered out of the car was negligible. *Id.* "The police have already lawfully decided that the driver shall be briefly detained," the Court noted. *Id.* "[T]he only question is whether he shall spend

that period sitting in the driver's seat of his car or standing alongside it." *Id.* The Court concluded that the insistence that the driver stand outside the car during a lawful stop was not a "'serious intrusion upon the sanctity of the person'" rising to the level of a constitutional violation. *Id.* (quoting *Terry,* 392 U.S. at 17).

Mimms was a highly specific decision tailored to a highly specific context. The intrusion in *Mimms* occurred during a stop justified by probable cause, at a time when the traffic investigation was not yet complete and the motorist was being subjected to far greater intrusions than the "mere inconvenience" he was challenging. *Id.* In fact, this Court took great care to limit its analysis to these circumstances. The driver in *Mimms*, the Court emphasized, was "lawfully detained for a traffic violation." *Id.* at 111 n.6. "[W]e do not hold today that '*whenever* an officer has an occasion to speak with the driver of a vehicle, he may also order the driver out of the car.'" *Id.* (quoting *id.* at 122 (Stevens, J., dissenting) (emphasis added)).

Within the already limited scope of an ongoing traffic investigation, it makes sense to permit certain "*de minimis*" intrusions beyond those occasioned by the stop itself. While the investigation is in progress, law officers are pursuing their legitimate interests in promoting roadway safety and ensuring compliance with traffic laws. *Prouse*, 440 U.S. at 658; see also *Mich. Dep't of State Police* v. *Sitz*, 496 U.S. 444, 451 (1990) (discussing states' legitimate interest in eradicating drunk driving). It is important to allow them to complete the tasks attendant to these interests safely. *Mimms*, 434 U.S. at 110. Many of these tasks, like waiting for a records check or writing a ticket, come with built-in "dead time." *United States* v. *Everett*, 601 F.3d 484, 492 (6th Cir. 2010). If, dur-

ing this time, the Constitution were to forbid *any* activities unrelated to the traffic infraction, questions about the weather would constitute a Fourth Amendment event. *United States* v. *Mason*, 628 F.3d 123, 131 (4th Cir. 2010). The Constitution does not require such a result. See *Johnson*, 555 U.S. at 333 (inquiries into matters unrelated to the justification for a traffic stop are permissible provided they do not measurably extend or otherwise change the character of the stop). When a person's liberty has already been restrained, and the intrusion from a particular police practice is merely "incremental," *Mimms*, 434 U.S. at 109, allowing officers reasonable breathing room to complete the traffic investigation achieves a more sensible balance of public and private interests.

This rationale for permitting slight within-stop intrusions does not carry over to post-stop detentions. After the stop is over, the balance between public and private interests shifts. On the public side of the equation, law enforcement interests are reduced to a generalized interest in crime control. While this interest is not insignificant, it does not authorize intrusions that are not justified by individualized suspicion. *Edmond*, 531 U.S. at 44.

The need to accommodate officer safety also carries far less weight once the traffic investigation is over. This is true for two reasons. First, if the officer is legitimately concerned for her safety, she already will have exercised the precautionary measures (like the one in *Mimms*) that the Court has approved for use during a traffic stop. Second, officer safety weighs heavily during an investigatory stop because, as *Terry* holds, officers should not have to take "unnecessary risks in the performance of their duties." *Terry*, 392 U.S. at 23. After a traffic stop, provided there is no objective basis for suspecting criminal activity,

there are no "duties" for officers to perform. If an officer is concerned for her safety in a post-stop encounter unsupported by individualized suspicion, the logical (and constitutional) step toward a safer environment is to let the driver go.

While the public side of the balance moderates after a traffic stop, individual liberty interests weigh far more heavily on the scale. As set forth above in Section I, the conclusion of a traffic stop and absence of any individualized suspicion return the driver and any passengers to their natural state as citizens, entitled to protection against "police conduct which is over-bearing or harassing, or which trenches upon personal security." *Id.* at 15. The words "over-bearing" and "harassing" surely apply to detaining a person on the side of the road to conduct a dog sniff.

"Innocent or guilty, a sniff search is not nothing." *Whitfield*, 33 So. 3d at 794. "It is a humiliating and, for some, a frightening experience." *Id.*; see also *Caballes*, 543 U.S. at 421 (Ginsburg, J., dissenting) ("A drug-detection dog is an intimidating animal."). Although the sniff in *Caballes* was a "seamless event," *Whitfield,* 33 So. 3d at 794, that is not always the case. Drivers and passengers are often ordered from the vehicle, leaving them exposed to the elements and the dangers of standing on the shoulder of the roadway. *Id.*; see also *Mimms*, 434 U.S. at 111 (citing the "hazard of accidental injury from passing traffic" as a danger attendant to a traffic stop).

In addition to being embarrassing and intimidating, a dog sniff can lead to "further intrusive, time-consuming and destructive searches." *Whitfield*, 794 So. 3d at 794. This is true whether a motorist is innocent or guilty. Indeed, studies show that drug-detection canines are wrong nearly as often as they are right. In an Illinois Department of Transporta-

tion study of statewide traffic stops in 2013, analysts reported that dogs erroneously alerted between 36 and 45 percent of the time, with higher error rates for black drivers than for white drivers. Ill. Dep't of Transp., *supra*, at 14. A Chicago Tribune study of earlier Illinois traffic stop data reported that sniffs of vehicles driven by Hispanic drivers had the lowest accuracy rates. In those cases, drugs were found in only 27 percent of vehicles to which canines alerted. Dan Hinkel & Joe Mahr, *Tribune Analysis: Drug-Sniffing Dogs in Traffic Stops Often Wrong*, Chi. Trib. (Jan. 6, 2011), http://articles.chicagotribune.com/2011-01-06/news/ct-met-canine-officers-20110105_1_drug-sniffing-dogs-alex-rothacker-drug-dog (analyzing data collected by the Illinois Department of Transportation from 2007 to 2009).[7] Other studies show similarly high error rates in canine sniffs conducted during traffic stops. See, *e.g.*, Ariz. Dep't of Pub. Safety, *Traffic Stop Data Analysis Study: Year 3 Final Report* 125 & Figure 5.7 (University of Cincinnati Policing Institute ed., 2009), *available at* http://www.azdps.gov/About/Reports/docs/Traffic_Stop_Data_Report_2009.pdf (analysis of 2008 Arizona traffic stop data showed that only 51.9 percent of searches based on a canine alert led to the discovery of contraband). In other words, a startlingly high number of innocent drivers are subjected to full searches of their vehicles based on false alerts by drug-detection canines.

For all of these reasons, a dog sniff conducted during a suspicionless detention is far more intrusive

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[7] Alan Rothacker, a trainer who certifies handlers and dogs in the Chicago area, placed the blame for the low accuracy rates partly on the handlers, as dogs typically react to cues by the handler when the handler believes the person has illegal drugs. Hinkel & Mahr, *supra*.

than the "minor inconvenience" the driver had to endure during the lawful traffic stop in *Mimms*. Because the two situations are constitutionally distinct, any attempt to apply *Mimms*' reasoning to a post-stop canine sniff must fail.

C. The Fact That A Dog Sniff Is Not A Fourth Amendment "Search" Is Immaterial When The Seizure During Which It Occurs Is Itself Unlawful.

The Eighth Circuit's final justification for permitting "*de minimis*" extensions of traffic stops rests on the "uniquely limited investigative procedure" of a canine sniff and its concomitant effectiveness in "interdicting the flow of illegal drugs along the nation's highways." *$404,905.00 in U.S. Currency*, 182 F.3d at 649 (citing *United States* v. *Place*, 462 U.S. 696, 703 (1983)). This argument entirely misses the mark. The Court in *Edmond* acknowledged that a dog sniff is not a "search" under the Fourth Amendment. *Edmond*, 531 U.S. at 40. Nevertheless, it deemed the checkpoints unconstitutional because the *seizures themselves* were unreasonable under the Fourth Amendment. *Id.* at 41-42.

The Court's decision in *Caballes* reinforces this distinction. *Caballes* held that dog sniffs conducted during an otherwise legitimate traffic stop are permissible because they do not separately implicate a constitutionally protected interest in privacy. *Caballes*, 543 U.S. at 408-09. A different result is required, however, if the sniff takes place during an unreasonably prolonged traffic stop or while the driver is being unlawfully detained. *Id.* at 407-08. In the second situation, the dog sniff is not the "cause" but the "consequence" of a constitutional violation. *Id.* at 408.

Contrary to the Eighth Circuit's understanding, then, the fact that a dog sniff is "so unintrusive as not to be a search," *$404,905.00 in U.S. Currency*, 182 F.3d at 649, does not justify a suspicionless detention to enable it. If it did, it is hard to see why it would matter if the suspicionless detention that preceded the sniff occurred after a traffic stop or at any other time.[8] Viewed in this light, the Eighth Circuit's "*de minimis*" exception cannot be reconciled with any reasonable understanding of the Fourth Amendment.

III. A BRIGHT-LINE RULE PROHIBITING THE SUSPICIONLESS EXTENSION OF A TRAFFIC STOP IS EASILY ADMINISTERED IN THE FIELD AND REFLECTS THE PROPER BALANCE BETWEEN LAW ENFORCEMENT INTERESTS AND THE INTERESTS OF INNOCENT MOTORISTS.

"[I]f police are to have workable rules, the balancing of competing interests inherent in the *Terry* principle 'must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers.'" *Michigan* v. *Summers*, 452 U.S. 692, 705 n.19 (1981) (quoting *Dunaway*, 442 U.S. at 219-20 (White, J., concurring)). Bright-line rules provide "needed guidance" to officers in the field and leave less room for "manipulation." *Arizona* v. *Gant*, 556 U.S. 332, 353 (2009) (Scalia, J., concurring); see

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[8] Imagine, for example, that an officer approached an individual sitting in a vehicle a few blocks from a recently robbed bank to investigate a suspicion that the person was the robber. Once the officer had satisfied himself that the individual was not the culprit, this Court's precedent would not permit the officer to detain that person several minutes longer to retrieve a drug dog and conduct a sniff of his vehicle. Yet the reasons that the Eighth Circuit gives for approving "*de minimis*" extensions of traffic stops would authorize precisely this type of conduct.

also *Riley* v. *California*, 134 S. Ct. 2473, 2491 (2014) (noting Court's "general preference to provide clear guidance to law enforcement through categorical rules"). Given that roughly one out of every twelve Americans is stopped for a traffic violation each year, Eith & Durose, *supra* note 1, at 7, there is perhaps no other area of the law in which easily administered instruction to law enforcement is needed.

Drawing a clear line at the end of a traffic stop does not take drug-detection dogs out of the hands of officers "based solely upon a timing sequence," as one court has asserted. *State* v. *DeLaRosa*, 657 N.W.2d 683, 688 (S.D. 2003). What it does is prevent a dog sniff from becoming a constitutional imperative. If officers wish to conduct a sniff after the tasks related to the traffic infraction have been completed, they may still do so if they have reasonable suspicion or probable cause of criminal activity. Requiring individualized suspicion vastly decreases the chance that innocent motorists will be needlessly ensnared in dragnet drug investigations. At the same time, it should increase the ratio of "hits" to "sniffs," making the canine sniff a more efficient weapon in the effort to curb narcotics trafficking. Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 427-31 (Winter 1996-97) (demonstrating through analysis of false positive indications that canine sniffs are more effective when implemented in tandem with law enforcement expertise than when randomly conducted).

Under the bright-line rule dictated by this Court's precedent, police officers who wish to conduct a canine sniff also will retain the ability to seek consent to search. The effectiveness of this tool should not be underrated. While Mr. Rodriguez did not consent to the dog sniff here, he is in the minority in refusing.

Studies show that a great number of motorists *do* consent to searches when asked, even if it is contrary to their self-interests. Eith & Durose, *supra* note 1, at 10 (reporting that 60 percent of vehicle searches conducted during traffic stops in 2008 occurred with driver consent); LaFave, *supra*, at 1891 & n.274 (citing a study of Maryland and Ohio traffic stops, in which nearly 90 percent of motorists consented when officers asked to search their vehicles).

In summary, a decision recognizing a constitutionally significant line at the conclusion of a traffic stop beyond which any further detention requires individualized suspicion simplifies traffic stops and protects innocent motorists. At the same time, it leaves law enforcement officers ample tools to investigate any new criminal activity that may come to light. This Court should adopt this rule and reverse the judgment of the Eighth Circuit.

IV. THE POST-STOP DETENTION IS NOT INDEPENDENTLY JUSTIFIED BY REASONABLE SUSPICION OF CRIMINAL ACTIVITY.

In its Brief in Opposition to a Writ of Certiorari, the Solicitor General argued that reasonable suspicion justified detaining Mr. Rodriguez beyond the completion of the traffic investigation. Gov't Op. at 11. The *only* court to have addressed this issue, however, found that Officer Struble had nothing but a "big hunch." J.A. 104. The Magistrate Judge who conducted the suppression hearing and heard the testimony of Officer Struble found that the officer had no reasonable suspicion to detain Mr. Rodriguez after

issuing the citation, and the district court adopted that conclusion in its entirety. J.A. 103-04, 115.[9]

A trial court has "superior access to the evidence," *United States* v. *Arvizu,* 534 U.S. 266, 276 (2002), as well as superior knowledge of "distinctive features and events of the community." *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996). As a consequence, a court reviewing reasonable suspicion must "review findings of historical fact only for clear error and . . . give due weight to inferences drawn from those facts by resident judges . . . ." *Id.* A reviewing court owes particular deference to credibility findings, as it is the trial judge who "'hears the testimony, observes the witnesses' demeanor[,] and evaluates the facts first hand . . . .'" *United States* v. *Martinez*, 762 F.3d 127, 130 (1st Cir. 2014) (quoting *United States* v. *Young*, 105 F.3d 1, 5 (1st Cir. 1997)); see also *Neil* v. *Biggers*, 409 U.S. 188, 203 (1972) (Brennan, J., concurring in part and dissenting in part) (explaining "'two-court rule,'" where deference is given to trier of fact who

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[9] On a motion to suppress evidence, a district court properly may delegate to a United States Magistrate Judge the task of conducting an evidentiary hearing. *United States* v. *Raddatz*, 447 U.S. 667, 673-75 (1980) (discussing intent and constitutionality of the Federal Magistrates Act, 28 U.S.C. § 636). It must, however, make a *de novo* determination of any of the Magistrate Judge's findings and recommendations to which a party objects. 28 U.S.C. § 636(b)(1). The district court may, on that determination, reject or modify those findings in whole or in part. *Id.* When the district court adopts the Magistrate Judge's findings in their entirety, those findings become the findings of the district court. *Raddatz*, 683-84. Because "[t]he authority—and the responsibility—to make an informed, final determination . . . remains with the [district] judge," findings adopted by the district court are entitled to the same deference as findings made at a proceeding at which the district court itself presided. *Id.* at 682 (quoting *Mathews* v. *Weber*, 423 U.S. 261, 271 (1976)).

has had "a firsthand opportunity to observe the testimony and to gauge the credibility of witnesses").

In its Brief in Opposition, the Solicitor General offered no new reasons for the Court to consider that would overcome Magistrate Judge Gossett's express finding. While Judge Gossett found Officer Struble "credible as to [timing of the events that occurred during the traffic stop]," he said he "ha[d] some doubts about the fact that he ha[d] these suspicions." J.A. 95. These credibility findings are entitled to deference, *Ornelas*, 517 U.S. at 699, and that deference should end the matter. The Court should uphold Judge Gossett's ruling on the reasonable suspicion issue.

Even without the necessary deference, the facts on this relatively sparse and now closed record do not provide the "particularized and objective basis for suspecting . . . criminal activity" required to uphold Mr. Rodriguez's post-stop detention. *United States* v. *Cortez*, 449 U.S. 411, 417-18 (1981) (stating the "essence" of the reasonable suspicion test). Officer Struble offered four grounds for suspecting Mr. Rodriguez was involved in criminal activity: 1) an overwhelming odor of air freshener emanating from the vehicle; 2) Mr. Pollman's nervous behavior; 3) Mr. Rodriguez's decision not to sit in Officer Struble's patrol car while Officer Struble investigated the traffic violation; and 4) Mr. Pollman's explanation for why the two men had been in Omaha, which Officer Struble did not find believable. None of these factors, individually or in concert, provide grounds for a post-stop detention.

It is true that air fresheners are sometimes used to mask the smell of narcotics. See, *e.g.*, *United States* v. *Fuse*, 391 F.3d 924, 929-30 (8th Cir. 2004); *United States* v. *Salzano*, 158 F.3d 1107, 1114 (10th Cir.

1998). However, air fresheners have legitimate purposes as well, as they are manufactured and marketed to cover up the smells of everyday life that can build up inside a vehicle. Many innocent people have them in their cars. Officer Struble testified that the odor emanating from the vehicle, while strong, "was a pleasant smell," which is not often the case when used in quantities necessary to mask drug odors. J.A. 51. He could not even identify whether the odor came from a spray or a hanging tree or a "little Glade vent," much less if there was more than one air freshener in the vehicle. *Id.* Cf. *United States* v. *Robinson*, 529 F. App'x 134, 138-39 (3d Cir. 2013) (significant number of air fresheners, among other factors, supported reasonable suspicion for expanding the scope of a traffic stop); *United States* v. *Branch*, 537 F.3d 328, 338 (4th Cir. 2008) ("the presence of several air fresheners" supported finding of reasonable suspicion); *United States* v. *Goss*, 256 F. App'x 122, 124 (9th Cir. 2007) ("numerous, strangely placed air fresheners" contributed to reasonable suspicion). Unless the Court is prepared to hold that the *mere presence* of an air freshener establishes reasonable suspicion of criminal activity, this factor should carry very little weight. Reasonable suspicion may not properly be based upon circumstances which "describe a very large category of presumably innocent travelers." *Reid* v. *Georgia*, 448 U.S. 438, 441 (1980).

Mr. Pollman's nervousness is a similarly weak indicator of criminal activity. First, the conduct that Officer Struble considers "nervous" behavior is in fact completely innocuous. Officer Struble said he noted the nervousness when he was speaking to an agitated Mr. Rodriguez from the passenger window of the Mountaineer. J.A. 21-22. Under these circumstances, Mr. Pollman's behavior was a natural reaction to be-

ing "stuck in the middle." Mr. Pollman pulled his cap down so it wouldn't be in the way, continued to smoke his cigarette (a habit that is not exclusive to criminals), and did not look at Officer Struble, who was not speaking to him anyway. *Id.* And later, when Officer Struble was directly questioning Mr. Pollman about the purpose of the trip, Officer Struble did not mention any nervousness. This fact undercuts the judgment Officer Struble made about Mr. Pollman's earlier behavior.

Second, even if Mr. Pollman's behavior early in the stop *was* a sign of nervousness, that would not be out of the ordinary. "[M]ost citizens—whether innocent or guilty—[ ] exhibit signs of nervousness when confronted by a law enforcement officer." *United States* v. *Wood*, 106 F.3d 942, 948 (10th Cir. 1997). Nervousness is therefore "of limited significance in determining reasonable suspicion." *United States* v. *Fernandez*, 18 F.3d 874, 879 (10th Cir. 1994); see also *United States* v. *Noble*, 762 F.3d 509, 522 (6th Cir. 2014); *United States* v. *Massenburg*, 654 F.3d 480, 490 (4th Cir. 2011); *United States* v. *Jones*, 269 F.3d 919, 928 (8th Cir. 2001). Nothing in Officer Struble's description indicates excessively nervous behavior, especially compared to behavior cited as unusual by this Court. *Florida* v. *Harris*, 133 S. Ct. 1050, 1053 (2013) (driver was "unable to sit still, shaking, and breathing rapidly"); *Illinois* v. *Wardlow*, 528 U.S. 119, 124 (2000) (defendant exhibited excessive nervousness by fleeing from police); *Maryland* v. *Wilson*, 519 U.S. 408, 410 (1997) (driver's hands were shaking and passenger was sweating); *United States* v. *Mendenhall*, 446 U.S. 544, 548 (1980) (defendant became so nervous when approached by DEA agents she had a hard time speaking). Again, the context of the stop is important in evaluating Mr. Pollman's

"nervousness." Mr. Rodriguez and Mr. Pollman were pulled over in the middle of the night because the passenger wheels of the Mountaineer had crossed onto the shoulder of the road for about one or two seconds. J.A. 48. Since the reason for the stop was not an obvious one, and in fact had to be explained to an understandably agitated Mr. Rodriguez, some nervousness (if it was there) was to be expected.

The next fact that raised Officer Struble's suspicion was Mr. Rodriguez's decision not to accompany him to the police cruiser. But Mr. Rodriguez was well within his rights to refuse that request. See *Terry*, 392 U.S. at 34 (White, J., concurring) ("Of course, the person stopped [in a *Terry* detention] is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest . . . ."); see also *Berkemer*, 468 U.S. at 439-40 (analogizing traffic stop to *Terry* detention, and concluding that its "non-threatening" character means that questioning of a motorist during the stop does not constitute "custodial interrogation"). Moreover, although Officer Struble found Mr. Rodriguez's response suspicious, he had no basis for drawing that conclusion. The reason that courts give "due weight" to the judgment of police officers is because their "experience and specialized training" may allow them "to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *Arvizu*, 534 at 273 (quoting *Cortez*, 449 U.S. at 418). But Officer Struble had never before had anyone refuse to sit in his vehicle. J.A. 52-53. He therefore had no "experience" or "cumulative information" on which to determine that such conduct was consistent with criminal activity. J.A. 53-54. Officer Struble's experience as a police officer was limited to begin with: he had been a law enforcement of-

ficer for less than two years, including less than a month in the tiny town of Valley, Nebraska.[10] J.A. 38.

Finally, Officer Struble said he was suspicious of the reason Mr. Pollman gave for their travel. Mr. Pollman told Officer Struble that he and Mr. Rodriguez lived in Norfolk and had driven to Omaha to look at an older Mustang that someone was looking to sell for about $6,500. J.A. 60-61. They did not view pictures of the vehicle before they drove to Omaha and did not purchase the car because they discovered the seller did not have the title. Office Struble found this story suspicious because it was "not something [he] would do." J.A. 26. He was also bothered by the fact that it was "after midnight on a Tuesday and they drove over two hours to look at a vehicle in the dark." J.A. 60.

None of these observations provide reason for suspecting criminal activity. As an initial matter, the fact that Officer Struble himself would not have made the same choices does not make what Mr. Rodriguez and Mr. Pollman did suspicious. Facts supporting reasonable suspicion must be based on "more than the mere subjective impressions of a particular officer." *United States* v. *Hernandez-Alvarado*, 891 F.2d 1414, 1416 (9th Cir. 1989). Additionally, there is no evidence to support Officer Struble's assumption that Mr. Rodriguez and Mr. Pollman had made a two-hour trip to see a car in the dark. Since Officer Struble did not ask when the men had left Norfolk, when they had seen the car, or what they had done

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[10] Valley has a population of approximately 1,800 residents. *City Profile*, City of Valley, Nebraska, http://www.valleyne.org/index.aspx?nid=532 (last visited Nov. 12, 2014).

before or after seeing it, his conclusion as to their itinerary was nothing but speculation.

Even assuming that Officer Struble was correct about the timing of Mr. Rodriguez and Mr. Pollman's trip, that timing is not indicative of criminal activity. A vehicle, especially a popular vintage one, is worth looking at in person before handing over a significant amount of money. Buyers and sellers who work during the day may have only the evening hours for such activities. It takes approximately two hours to drive from Norfolk to Omaha, so a person who leaves Norfolk after the work day would arrive in Omaha at about 8:00 p.m. Officer Struble stopped Mr. Rodriguez at about midnight in Valley, Nebraska, which is about thirty minutes into a return trip from the center of Omaha. Three and one-half hours is not an unreasonable amount of time in Omaha if one accounts for introductions and small talk, looking at the vehicle, negotiating details, and perhaps a stop or two for dinner or an errand. It is no wonder, given these innocuous facts, that the Magistrate Judge found that Officer Struble had nothing more than a "hunch" that criminal activity was afoot. An officer's hunch cannot support a finding of reasonable suspicion. *Terry*, 392 U.S. at 22-23. The detention of Mr. Rodriguez beyond the conclusion of the traffic stop violated his rights under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Eighth Circuit and affirm the district court's finding of no reasonable suspicion.

Respectfully submitted,

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