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

PETITIONER'S REPLY BRIEF

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
WASHINGTON, D.C. 20005
(202) 736-8000

SARAH O'ROURKE SCHRUP
NORTHWESTERN
UNIVERSITY SUPREME
COURT PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-8576

DAVID R. STICKMAN *
Federal Public Defender
SHANNON P. O'CONNOR
First Assistant Federal
Public Defender
JENNIFER L. GILG
Research and Writing
Specialist
FEDERAL PUBLIC
DEFENDER'S OFFICE
DISTRICT OF NEBRASKA
222 South 15th Street
Suite 300 North
Omaha, NE 68102
(402) 221-7896
david_stickman@fd.org

Counsel for Petitioner
* Counsel of Record

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REPLY BRIEF

Contrary to the government's rhetoric, Mr. Rodriguez does not ask the Court to abandon the Fourth Amendment touchstone of "reasonableness." He simply asks the Court to enforce the constitutional lines this Court has already recognized. It is the government that offers a radical reinterpretation of the law.

According to the government, a lawful traffic stop starts with a "reasonable" amount of time—a standard to be defined on a case-by-case basis but at least enough time to also allow for a dog sniff. During that "reasonable" period the officer has carte blanche to investigate the traffic stop and any other matter that comes to mind, even if those investigatory activities extend the stop after all the activities needed to dispose of the traffic infraction have been completed. In reality, the government's "reasonableness" standard is no standard at all.

Nothing in this Court's jurisprudence supports the government's attempt to turn a traffic stop into a "general warrant" for investigation. A bright-line rule for "reasonableness" of a traffic stop, in which the justification for the detention expires when the officer has completed the tasks related to the purpose of the stop, will reaffirm the constitutional boundaries that this Court has already established, provide needed guidance to police, and safeguard individual liberties.

I. THE GOVERNMENT'S CONCEPT OF A TRAFFIC STOP AS A GENERALIZED INVESTIGATORY STOP IS ANTITHETICAL TO THE BRIEF INTRUSION, LIMITED BY ITS TRAFFIC-RELATED PURPOSE, THAT THIS COURT HAS AUTHORIZED WHEN A MOTORIST COMMITS A TRAFFIC VIOLATION.

The government's defense of the Eighth Circuit's judgment depends on a basic premise: that the traffic stop of Mr. Rodriguez had not yet concluded when Officer Struble ordered him to stay for a dog sniff even though the officer had completed all of the tasks necessary to address Mr. Rodriguez's traffic offense. The stop was not over, the government argues, because Officer Struble had not yet completed the checklist of activities that courts have at one time or another permitted an officer to undertake during a traffic investigation. Resp't Br. 12-15.

According to the government, an officer's observation of a traffic infraction gives her free rein to conduct a host of "investigatory activities," both related and unrelated to the traffic offense, including a dog sniff. Resp't Br. 12. Addressing the traffic violation must fall somewhere on the officer's list of tasks. However, because the stop is "not strictly cabined by [its] traffic justification," Resp't Br. 30, it need not be the officer's primary concern. "[T]he order in which the officer performs permissible traffic-stop tasks—running a driver's license check, issuing a ticket, questioning the driver, performing a dog sniff—is purely a matter of sequencing." *Id.* In the government's view, a traffic stop is limited only by the investigative tools the officer has at her disposal, or can easily summon, and by a "reasonable" amount of time—a standard which remains amorphous but

could easily be "40 minutes or more." Resp't Br. 12, 16, 30, 38.

This argument is question-begging and circular. It simply assumes the truth of the crucial premise in the government's argument; namely, that a "reasonable period" for a traffic stop must include the time it takes to complete whatever other investigatory efforts an officer cares to undertake, including dog sniffs. And thus, to complete the circle, additional time to conduct a dog sniff is reasonable because it is reasonable to take the time to conduct one in the first instance. It is no wonder that the government takes such a position. If an officer is entitled to a "reasonable" amount of time to complete "traffic-stop tasks," Resp't Br. 30, and one of those tasks is a dog sniff, the government will nearly always win the argument on "reasonableness" when contraband is found, especially given the myriad conceivable rationales for delay.

The government's position is not only logically flawed, it is inconsistent with this Court's precedent. A traffic stop based solely on a traffic infraction is not a generalized crime investigation but merely a brief and limited encounter "more analogous to a so-called *Terry* stop." *Berkemer* v. *McCarty,* 468 U.S. 420, 439 (1984) (citing *Terry* v. *Ohio*, 392 U.S. 1 (1968)). Its permissible duration is dependent on its "mission"—to investigate and address the traffic violation that prompted the stop. *Illinois* v. *Caballes*, 543 U.S. 405, 407 (2005). *Terry*'s guiding principles require the police to "'diligently pursue'" that purpose. *United States* v. *Sharpe*, 470 U.S. 675, 684-85 (1985) (internal citation omitted).

Because the reasonableness of a traffic stop depends on whether an officer diligently addressed the traffic violation, the order of activities conducted during the stop absolutely *does* matter. An officer is not

"diligently pursuing" the traffic violation unless she promptly devotes her time to the tasks related to the violation. And when that purpose has been addressed, as it was in this case, she is no longer "diligently pursuing" the reason for the stop if she further detains the motorist. *Sharpe*, 470 U.S. at 685; *Caballes*, 543 U.S. at 407. Instead, she is engaging in a separate investigation that requires its own justification.

That the Court in *Caballes* and *Arizona* v. *Johnson*, 555 U.S. 323 (2009), allowed officers to undertake activities unrelated to the traffic violations in those cases does not mean that an officer's authority to detain a motorist is not "strictly cabined by the traffic justification for the stop." Resp't Br. 30. The question whether, or by how much, a stop may be extended for unrelated activities, was not squarely at issue in *Caballes* or *Johnson*, as the intrusions in those cases occurred while an officer was still addressing the traffic violation. *Caballes*, 543 U.S. at 408 ("[T]he duration of the stop in this case was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop."); *Johnson*, 555 U.S. 323 ("Nothing had occurred in this case that would have conveyed to Johnson that, prior to the frisk, the traffic stop had ended . . . ."). However, nothing the Court *did* say suggests that the stop's traffic-related limits on duration are no longer applicable. To the contrary, *Caballes* and *Johnson* reaffirmed those limits.

The government repeatedly mischaracterizes *Caballes*, claiming that the Court held that a dog sniff is permissible so long as it does not "unreasonably prolong" a traffic stop. Resp't Br. 8, 12-13, 19-22, 36. But that is not what *Caballes* said. The "narrow" holding in *Caballes* is that the Fourth Amendment does not require reasonable suspicion to justify using

a drug-detection dog "*during* a legitimate traffic stop." *Caballes*, 543 U.S. at 407 (emphasis added) (internal quotation marks omitted) (emphasizing the "narrow" question presented). The Court defined the temporal boundaries of a "legitimate traffic stop" as the time "reasonably required to complete [the] mission [of addressing the traffic violation]." *Id.* It used the words "unreasonably prolonged" to describe an example of an unconstitutional seizure during which a dog sniff would *not* be permitted. *Id.* at 407-08 (citing *People* v. *Cox*, 782 N.E.2d 275, 280 (Ill. 2002) (overruled on other grounds)). But that is quite different from holding that a dog sniff is always permissible if it does not "unreasonably prolong" the stop. Resp't Br. 8, 12-13, 19-22, 36. It does not come close to endorsing the government's overarching position that even an extensive prolongation of a stop could be justified for a dog sniff so long as prosecutors were able to offer some objective factor for the delay, such as the distance of a K-9 Unit in a rural area or the late hour of the traffic stop.

Johnson reinforced the traffic-related boundaries set forth in *Caballes*, stating that, in a traffic stop setting, the "first *Terry* condition—a lawful investigatory stop—is met whenever it is lawful for police to detain an automobile and its occupants *pending inquiry into a vehicular violation*." *Johnson*, 555 U.S. at 327 (emphasis added). When *Johnson* later described a "lawful roadside stop," it married that term and its permissible duration to the "investigation of a traffic violation." *Id.* at 333.

In addition to reaffirming a traffic stop's underlying traffic justification, the Court in *Caballes* and *Johnson* described the activities in question as ancillary to, rather than an intrinsic part of, the stop justified by the traffic violation. In *Caballes,* the Court

acknowledged that a dog sniff is an activity separate from "the traffic offense and the ordinary inquiries incident to [that offense]," but held it does not require independent justification when those traffic-related inquiries are still ongoing and the traffic-related "mission" has not yet been accomplished. *Caballes*, 543 U.S. at 407-08. In *Johnson*, the Court held that mere questioning into matters "unrelated to the justification for the traffic stop" does not change the stop's basic character provided the traffic investigation is still in progress and the unrelated questions do not "measurably extend" it. *Johnson*, 555 U.S. at 333. At no time did this Court consider either of these activities part and parcel of a routine traffic stop, such that the stop is not truly "over" until the officer has checked these items off her list of investigatory activities. If they were, it would make no difference if they "measurably extend[ed]" its duration or not. *Id.*

Because an officer's authority to detain for a traffic violation *is* "strictly cabined by the traffic justification," Resp't Br. 30, her right to hold a driver expires when that violation has been resolved. That is why the "overall objective reasonableness" inquiry that the government urges this Court to adopt, Resp't Br. 20, should not include any circumstances that occur *after* the traffic violation has been addressed. Once the traffic investigation that provided cause for the stop is resolved, the additional detention of the driver for further investigation is actually a second seizure—as here, where Officer Struble ordered Mr. Rodriguez to stand and wait at the front of the car until backup arrived. See *Muehler* v. *Mena,* 544 U.S. 93, 101 (2005) (additional seizure would have occurred had unrelated questioning prolonged the detention of a woman who was initially lawfully detained during a search conducted under a search warrant). Individu-

alized suspicion is required in order for that seizure to be "reasonable." *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 37 (2000).

For these same reasons, the government's hypothetical stops miss the point. The government asserts that the individual interest at stake in this case is "the interest in avoiding an unreasonably long detention," Resp't Br. 9, and therefore varies its hypotheticals by the order in which the officer undertakes certain tasks rather than by the length of the stop. Resp't Br. 21, 25, 30, 32.[1] "From the individual's perspective," the government asserts, "each stop involves exactly the same intrusion, in character and degree." Resp't Br. 32.

But the government misapprehends the nature of the interest at stake. In the case of a detention after the traffic investigation has concluded, the interest at stake is not merely an interest in avoiding an unreasonably long detention. It is the fundamental interest in not being detained *at all*, on an entirely separate matter, in the absence of individualized suspicion. This interest was the very reason behind the Fourth Amendment. *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2083-84 (2011) ("The Fourth Amendment was a

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[1]The government's hypothetical stops all last between ten and fifteen minutes. Resp't Br. 21, 25, 32. The limited studies that have been conducted on the length of traffic stops show that such times are close to the average. 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 (median length of a traffic stop in Illinois is ten minutes). Having posited these hypotheticals as stops the Court should consider "reasonable," it is disingenuous for the government to assert that a stop of "40 minutes or more" should not raise an eyebrow. Resp't Br. 38.

response to the English Crown's use of general warrants, which often allowed royal officials to search and seize whatever and whomever they pleased while investigating crimes or affronts to the Crown."). From the individual's perspective, that interest is different in both character and degree from the interest in the amount of time it may take for an officer to address the traffic violation. "A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, [and] that he may then be given a citation . . . ." *Berkemer*, 468 U.S. at 437; see also *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979) (traffic stops are a "brief" and "limited" encounter). A motorist does not expect an officer to continue to detain him for a separate investigation after the purported reason for the stop has been addressed. *Berkemer*, 468 U.S. at 437. The government's hypotheticals therefore fail to account for critical expectations that go beyond the amount of time that individuals are required to expend.

II. THE GOVERNMENT'S CONCEPT OF A TRAFFIC STOP IS INCOMPATIBLE WITH THE FOURTH AMENDMENT'S FUNDAMENTAL PURPOSE OF LIMITING OFFICER DISCRETION.

The Framers implemented the Fourth Amendment's safeguards to ensure that individual liberties would not be "'subject to the discretion of the official in the field.'" *Prouse*, 440 U.S. at 655 (quoting *Camara* v. *Municipal Court*, 387 U.S. 523, 532 (1967)). To that end, the Fourth Amendment's tests of "reasonableness" require that an intrusion be "capable of measurement against 'an objective stand-

ard.'" *Prouse*, 440 U.S. at 654 (quoting *Terry*, 392 U.S. at 21).

Despite these bedrock principles, the government offers a vision of a traffic stop in which an officer has a significant amount of time (at least up to 40 minutes) and unfettered discretion to investigate the motorist she stops. Resp't Br. 12. The government suggests that a "reasonableness" standard will adequately define the limits of that discretion. Resp't Br. 20, 37-38. But because the government's version of a traffic stop is no longer tethered to its traffic-related purpose, there are no objective standards against which "reasonableness" may be measured. In other words, the government's test of "reasonableness" is no test at all. It places individual constitutional liberties solely "in the hands of every petty officer," *Boyd* v. *United States*, 116 U.S. 616, 625 (1886)—the very outcome the Framers wished to avoid.

This conflict with fundamental Fourth Amendment purposes is reason enough to reject the government's position. But there are policy implications to affording broad discretion, as well. Traffic stops have "human consequences—including those for communities and for their relationships with the police." *Heien* v. *North Carolina*, 135 S. Ct. 530, 544 (2014) (Sotomayor, J., dissenting). As the most common form of interaction between citizens and police, they play a substantial role in shaping citizens' perceptions of the legitimacy of police conduct. Christine Eith & Matthew R. Durose, Bureau of Justice Statistics, *Contacts Between Police and Public, 2008* 1 (2011);[2] see also Seth W. Stoughten, *The Incidental Regulation of Policing*, 98 Minn. L. Rev. 2179, 2187-88 (June 2014) ("Community attitudes about . . . the

[2] *Available at* http://www.bjs.gov/content/pub/pdf/cpp08.pdf.

legitimacy of both law and government depend heavily on perceptions that are shaped by the interactions that civilians have with police officers . . . .").

Studies show that most drivers pulled over for a traffic violation believe that the police had a legitimate reason for stopping them. Eith & Durose, *supra*, at 8 (in 2008 study of traffic stops, 84.5 percent of drivers felt they had been stopped for a legitimate reason). When discretionary conduct like a search is added to the equation, however, the perception of legitimacy dramatically decreases. *Id.* at 11. In cases in which a search of a vehicle was conducted during a traffic stop, 79.3 percent of motorists believed that the search was *not* legitimate, even though 60 percent of those searches were conducted with driver consent. *Id.* at 10, 11 & Table 15. Minority drivers are more likely to be ticketed, searched, and arrested during a traffic stop, and therefore bear the brunt of an officer's discretionary decisions. *Id.* at 9-10. Concerns that police are acting on improper motives are correspondingly higher in minority communities. Ronald Weitzer & Steven A. Tuch, *Race and Perceptions of Police Misconduct*, 51 Soc. Probs. 305, 314-16 & Table 1 (2004).

This Court held in *Whren* v. *United States*, 517 U.S. 806, 810-12 (1996), that an officer's subjective motivations do not render a traffic stop unlawful when the officer has probable cause to believe a traffic violation has occurred. But the Court did not suggest that improper motives were not a concern, only that it was preferable to measure the legality of a traffic stop against the objective standard of probable cause rather than attempt to discern whether a "reasonable officer" would have been motivated to stop the car. *Id.* at 813. If this Court accepts the government's invitation to expand a traffic stop beyond its traffic-

investigation purposes, any objective standard for gauging the reasonableness of a stop's execution will be exceedingly difficult to discern and enforce. This Court's precedent counsels against such an approach. *Prouse*, 440 U.S. at 654. As Professor LaFave explains: "Since the Court [has] concluded that detecting pretext on a case-by-case basis [i]s not worth the candle, this is all the more reason for ensuring that the procedures permitted incident to traffic stops are limited to those needed for traffic enforcement . . . ." 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).

III. A BRIGHT-LINE RULE PROHIBITING SUSPICIONLESS DETENTIONS AFTER A TRAFFIC INVESTIGATION IS COMPLETE AFFORDS AMPLE FLEXIBILITY TO OFFICERS IN THE FIELD AND POSES NO DIFFICULTY TO THE COURTS ENFORCING IT.

The government and its *amici* predict that a bright-line rule will lead to a host of adverse consequences. They argue that the rule deprives officers of flexibility, and that a solo officer in particular will find it difficult to complete a dog sniff (or other unrelated activities) while also addressing the reason for the traffic stop. Resp't Br. 22, 25; Resp't Amici Br. 12-13. *Amici* desire a stop open-ended enough to take into account geography and population density, as solo officers often require backup to safely conduct a dog sniff and, in many localities, backup "may simply need time to arrive." Resp't Amici Br. 22.

What the government and its *amici* ignore is that a stop justified by a driver's traffic violation authorizes a traffic investigation, not a drug investigation.

Whren, 517 U.S. at 810; see also *Berkemer,* 468 U.S. at 437-38 (emphasizing limited nature of a traffic investigation). Mr. Rodriguez's bright-line rule would not in any way hinder an officer's ability to address the traffic-related purpose of the stop, which is the only reason the Constitution allows the motorist to be stopped in the first place. The "while I have you here" investigation that the government and its *amici* seek may advance an interest in general crime control, but that is not an interest the Constitution can accommodate in the absence of individualized suspicion. *Edmond*, 531 U.S. at 43-44. "The mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey* v. *Arizona*, 437 U.S. 385, 393 (1978).

Amici's request for a traffic stop long enough to account for geography, population density, and local police practice is particularly insupportable. Fourth Amendment rights cannot vary "from place to place and from time to time." *Whren*, 517 U.S. at 815. The Fourth Amendment rights of a motorist in Valley, Nebraska must be the same as the rights of a motorist in urban St. Louis. Because a dog sniff is not an integral part of a traffic stop, those rights should not depend on whether the motorist is stopped by a single officer or by officers working in tandem, on the size of the local police force, or on the number and location of dogs to which the officers are afforded access. And while officer safety is never to be trivialized, there is a simple solution for the officer who must go forward with a traffic stop without a dog or a backup officer: attend quickly to the business of the traffic violation and then allow the driver to be on her way. Literally millions of traffic stops are conducted in this manner each year. See Eith & Durose, *supra*, at 7.

Contrary to the government's and its *amici*'s assertion, drawing a constitutional line at the point that an officer has completed the traffic investigation does not deprive officers of the ability to respond to situations that arise during a traffic stop. Resp't Br. 35; Resp't Amici Br. 20. Officers may still act on exigent circumstances, individualized suspicion, and consent. The police are deprived only of a rule that allows them to use a dog 100 percent of the time within whatever time they can convince a court is "reasonable." Because there is no dog sniff exception to the Fourth Amendment and no basis for creating one, that rule is not one to which they are entitled.

The government's *amici* warn of adverse consequences for the courts, as well. They assert that courts will struggle to apply the bright-line rule because it is "difficult to isolate" when a traffic investigation is complete. Resp't Amici Br. 12. But reason and experience say otherwise. As Professor LaFave explains, "[t]he bare essentials of a 'routine traffic stop' consist of causing the vehicle to stop, explaining to the driver the reason for the stop, verifying the credentials of the driver and the vehicle, and then issuing a citation or a warning." 4 Wayne R. LaFave, *Search and Seizure* § 9.3(c), at 507 (5th ed. 2012). Applying this criteria, lower courts have proved more than capable of identifying when an investigation into a traffic violation has concluded. See, *e.g.*, *United States* v. *DeJesus*, 435 F. App'x 895, 900 (11th Cir. 2011) ("'[W]hen a citation or warning has been issued and all record checks have been completed and come back clean, the legitimate investigative purpose of the traffic stop is fulfilled.'") (citation omitted); *United States* v. *Branch*, 537 F.3d 328, 336 (4th Cir. 2008) ("[O]nce the driver has demonstrated that he is entitled to operate his vehicle, and the police officer has

issued the requisite warning or ticket, the driver 'must be allowed to proceed on his way.'") (citation omitted); see also Pet'r Br. 18 (listing cases discussing the moment a traffic stop ends and a post-stop "consensual encounter" begins). Courts are also prepared for situations in which an officer delays issuing a ticket while pursuing an unrelated investigation. See *United States* v. *Santiago*, 310 F.3d 336, 341-42 (5th Cir. 2002) (motorist was unlawfully detained after officer had completed computer checks, confirmed that the vehicle was not stolen, and satisfied himself the driver was authorized to drive, even though officer had not issued a ticket or returned the driver's documents); *United States* v. *Bell*, 555 F.3d 535, 541 (6th Cir. 2009) ("[T]he fact that the warning was never actually completed is not determinative: A stop may be unlawfully extended beyond the initial purpose even if the officer never formally completes the citation."). Thus, any concern that a bright-line rule would be difficult for courts to apply is unfounded.

As for *amici*'s related concerns of increased litigation, Resp't Amici Br. 13-14, these concerns are misdirected. The government would have the courts determine the "reasonableness" of a stop "in light of all the circumstances" while detaching the duration of the stop from its underlying traffic justification and opening it up to all manner of "investigatory inquiries." Resp't Br. 12, 26-30, 36. This test is a recipe for increased litigation, even if the deck is decidedly stacked in the government's favor. Compared to the government's approach, a bright-line rule that preserves the stop's traffic-related purpose will actually reduce the "complex hindsight analysis" that *amici* hopes to avoid. Resp't Amicus Br. 13.

IV. EVEN UNDER THE GOVERNMENT'S TEST, THE DOG SNIFF EXTENDED THE TRAFFIC STOP BEYOND THE BOUNDS OF "REASONABLENESS."

The government's "overall reasonableness" test would have the courts consider "the duration of the stop [including the time after the purpose of the stop was resolved], the length of the dog sniff, and the officer's diligence" to determine whether the officer "unreasonably prolonged" the traffic stop. Resp't Br. 37. It would require courts to "[e]valuat[e] the total length of the stop in question against the range of ordinary traffic stops"[3] and determine "the proportion of the total stop that represents the delay attributable to the dog sniff (or other unrelated inquiry)." Resp't Br. 38. Even if the Court adopts this test, the detention in this case was unreasonable.

The overall "stop" under the government's test lasted 29 minutes. The government argues that this time falls within the "range of ordinary traffic stops," which it claims is anywhere from "several minutes to 40 minutes or more." Resp't Br. 38. As support for its contention that an "ordinary" traffic stop can be 40 minutes, however, the government directs the Court to LaFave's treatise on *Search and Seizure*. Resp't Br. 16, 38 (citing 4 Wayne R. LaFave, *Search and*

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[3]The government also suggests it would be preferable to compare the stop to "stops involving similar underlying circumstances." Resp't Br. 37. But it does not explain how a court would go about identifying those stops. The only people with sufficient incentive to challenge the length of a traffic stop are people in whose vehicle contraband was found, and each case will be different in all but the most basic aspects. Thus, the range of cases to which the court may look for "similar circumstances" will be narrow and add no objective value to the task the government expects the court to undertake.

Seizure § 9.3(c), at 508-09 & n.155, 512 n.170). The 40-minute case referenced in LaFave was not "ordinary" but an outlier. In that case, *United States* v. *Barragan*, 379 F.3d 524, 529 (8th Cir. 2004), routine computer checks took 40 minutes because the vehicle was registered in a state other than where it was purchased, making the registration harder to verify. Because the delay in that case was "longer than normal," *id.*, it should not be used to establish the time it takes to conduct an "ordinary" traffic stop.[4] Studies like the Illinois Traffic Stop Study, *supra* note 2, which track the duration of *all* traffic stops, including those of millions of innocent motorists, are a far better gauge of the "range of ordinary traffic stops." Judged against this standard (and against the government's own hypotheticals), Mr. Rodriguez's stop was nearly three times the length of an average stop. See Ill. Dep't of Transp., *supra* note 2, at 6-7 & Figure 6 (median length of a traffic stop in Illinois is ten minutes).

The time attributable to the dog sniff was approximately eight minutes, which represents about 27 percent of the overall stop by the government's measure. However, under the government's test, a court must consider all of the time spent on activities unrelated to the traffic stop. Resp't Br. 41. Officer Struble initiated the stop at 12:06 a.m. and concluded his questioning at 12:19 a.m., when he went back to his car to run Mr. Pollman's driver's license, call for backup, and write out the warning ticket. J.A. 26-27. Officer Struble's exchange with Mr. Rodriguez consisted of requesting his driver's license and registration, asking him why his passenger-side tires had crossed the

[4]Indeed, because the cases cited in LaFave are strictly those of people in whose vehicle contraband was found, they are universally a poor representation of what is "ordinary."

fog line, informing him that crossing the line was a traffic violation, and asking him to sit in the patrol car. J.A. 22-23. The refusal of that request necessitated a brief acknowledgment that Mr. Rodriguez was not required to do so, at which time Mr. Rodriguez replied that he preferred to stay in his own vehicle. J.A. 23.

Officer Struble's interaction with the passenger, on the other hand, focused on Mr. Rodriguez's and Mr. Pollman's interest in purchasing a vintage Mustang, the price that the seller was asking for it, whether they had looked at pictures of the car before driving to Omaha, the fact that the seller did not have the title, and their resulting decision against buying the car. J.A. 24-26, 60-61. This discussion was wholly unrelated to Mr. Rodriguez's traffic violation of driving on the shoulder. It was not information that was "reasonably required" to address that violation and can only be described as a fishing expedition to develop a reason to hold the men longer.

Even estimating, conservatively, that only half of the thirteen minutes of questioning was about a vintage car, that brings the non-traffic-related activities up to close to half of the entire encounter. Although the government's reasonableness mark is a moving target, even the government seems to believe that such a delay would be significant, as it states that the "additional delay" in this case "did not represent the bulk of the total time, or even one-half or one-third of it." Resp't Br. 44-45.[5] When one half of a stop is devoted to activities that are not "reasonably required"

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[5]As an example of unreasonable delay, the government also cites *Wells* v. *State*, 922 N.E.2d 697, 700 (Ind. Ct. App. 2010), in which the delay attributable to the dog sniff "doubl[ed] the length of the stop." Resp't Br. 39.

to resolve the traffic violation,[6] that traffic stop fails even the government's test for reasonableness.

V. THE SEIZURE FOR A DOG SNIFF WAS NOT JUSTIFIED BY REASONABLE SUSPICION OF CRIMINAL ACTIVITY.

The government asserts that the stop is independently supported by reasonable suspicion of criminal activity. Resp't Br. 45-47. But it fails to address contrary evidence in the record, including the Magistrate Judge's factual findings.

The government claims that the odor of air freshener was "overwhelming." Resp't Br. 46. But Officer Struble also said it was pleasant, and no objective evidence, such as the presence of several air fresheners, supports the claim. J.A. 20, 51. The government finds it suspicious that Mr. Rodriguez was agitated and gave an "implausible explanation" for his traffic violation,[7] which the government describes as "driv[ing] for several seconds on the shoulder of the road." Resp't Br. 2, 46. When one considers that "several seconds" of driving "on the shoulder of the road" was merely Mr. Rodriguez's passenger-side tires crossing the fog line for one to two seconds, J.A. 30, 46, agitation is to be expected, as is the desire to avoid a ticket for such a minor infraction. The government describes Mr. Pollman as "attempt[ing] to avoid being looked at closely," Resp't Br. 46, but skips over the fact that he was literally stuck in the middle while Officer Struble and Mr. Rodriguez talked across him about the traffic violation. Moreover, when Of-

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[6] *Caballes*, 543 U.S. at 407.

[7] Whether Mr. Rodriguez's explanation that he was avoiding a pothole is "implausible" is a matter of opinion, as neither side attempted to prove or disprove the existence of the pothole.

ficer Struble spoke to Mr. Pollman directly, Officer Struble did not note any signs of nervousness.

The government argues that Officer Struble had every reason to question Mr. Pollman's story about "the reason for making the long trip to Omaha in the middle of the night." Resp't Br. 46. But it has no answer for the fact that this "long trip . . . in the middle of the night" is a trip entirely of Officer Struble's creation, as he did not ask when the men had started their journey to Omaha or how long they had been there before driving back home.

Finally, the government asks the court to consider the fact that, after Officer Struble "asked [Mr. Rodriguez] to step out of his vehicle to await the arrival of the backup officer,"—an extremely generous characterization of Officer Struble's response to Mr. Rodriguez's refusal to consent to a dog sniff—Mr. Rodriguez rolled up his car windows. Resp't Br. 47. But this factor has no place in the reasonable suspicion analysis, as the order to exit the vehicle came after the traffic-related tasks were complete. By the time Mr. Rodriguez was ordered out of the vehicle, independent justification was already required. Reasonable suspicion must be based on the facts known to the officer at the time of the seizure in question, not on facts that come to light after the seizure is initiated. See *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996) ("The principal components of a determination of reasonable suspicion . . . will be the events which occurred leading up to the stop . . . ."); *Terry*, 392 U.S. at 21-22 (reasonable suspicion analysis requires an assessment of "facts available to the officer at the moment of the seizure or the search").

The holes in the government's argument are the same ones that led the Magistrate Judge and district court to conclude that the seizure for the dog sniff

was not supported by reasonable suspicion. J.A. 95, 103-04, 115. This conclusion was based on Magistrate Judge Gossett's factual finding that Officer Struble was not credible with respect to the facts he gave for suspecting criminal activity.[8] J.A. 95, 103-04. After hearing the testimony and observing Officer Struble's demeanor, Judge Gossett found him credible only as to "the issues that really make a difference," J.A. 102, which the judge identified as: 1) the initial justification for the stop; 2) the duration of the stop; and 3) the time it took for the officer to conduct a dog sniff, compared to other traffic stop extensions that the Eighth Circuit had found to be "*de minimis*." J.A. 98-109. With respect to the facts relating to reasonable suspicion, Judge Gossett found that Officer Struble was not credible. J.A. 95, 102. "One can take difference with some of these conclusions as to what he's suspicious of and what he's not suspicious of, and I do, as well as [defense counsel], have some doubts about the fact that he has these suspicions . . . ." J.A. 95. Summing up his findings on reasonable suspicion, Judge Gossett said that all that Officer Struble had was "just a lot of things and a big hunch." J.A. 104.

The credibility findings that form the basis of Judge Gossett's reasonable suspicion ruling deserve deference, *Ornelas*, 517 U.S. at 699, and leave nothing on

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[8]The government resists the characterization of Judge Gossett's findings as credibility findings, asserting that "petitioner's counsel did not argue that Struble's testimony should not be credited." Resp't Br. 46 n.28. This assertion is inaccurate. Defense counsel repeatedly challenged Officer Struble's credibility. J.A. 37, 54, 60-64, 66, 84-89, 94-95. Judge Gossett's comments suggest that this is precisely why he did not believe Officer Struble about the factors relevant to reasonable suspicion. J.A. 95.

which a reviewing court could reach a contrary conclusion. Given that no reviewing court could find reasonable suspicion under these circumstances (or indeed, even under *de novo* review), the most appropriate resolution of this issue is for the Court to explicitly hold that the seizure for a dog sniff was not independently supported by reasonable suspicion. Mr. Rodriguez has already served nearly two years of his 60-month sentence after two years of litigation. J.A. 1, 7, 117. It would make little sense for the Court to order further litigation and invite further delay on a question that is easily determined within the confines of this record.

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,

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
WASHINGTON, D.C. 20005
(202) 736-8000

SARAH O'ROURKE SCHRUP
NORTHWESTERN
UNIVERSITY SUPREME
COURT PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-8576

DAVID R. STICKMAN *
Federal Public Defender
SHANNON P. O'CONNOR
First Assistant Federal
Public Defender
JENNIFER L. GILG
Research and Writing
Specialist
FEDERAL PUBLIC
DEFENDER'S OFFICE
DISTRICT OF NEBRASKA
222 South 15th Street
Suite 300 North
Omaha, NE 68102
(402) 221-7896
david_stickman@fd.org

Counsel for Petitioner

* Counsel of Record

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