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No. 12-9490

IN THE
Supreme Court of the United States

LORENZO PRADO NAVARETTE
AND JOSE PRADO NAVARETTE,

Petitioners,

v.

THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Unlike the State of California, petitioners do not believe this Court intended to limit its unanimous holding in *Florida v. J.L.* 529 U.S. 266 (2000) to illegal gun possession cases. Respondent's Brief ("Resp. Br.") 18. Petitioners also do not agree that the reasonable suspicion standard established in *Terry v. Ohio*, 392 U.S. 1 (1968), should vary depending on the type of crime under investigation. Resp. Br. 12, 18-19. Although the State bases its argument primarily on the risk of a drunk driver causing a fatal accident while officers try to corroborate erratic driving, Resp. Br. 21, 24, 32-33, 35-36, no such risk was presented by the facts in this case, and neither the State nor its *amici* cite a single instance where such a tragedy has occurred. The State similarly fails to demonstrate that drunk driving in general is a sufficiently greater danger to public safety than concealed, illegal firearms to require any dilution of the Fourth Amendment protections established in *Terry* and *J.L.*.

Under the State's proposed rule, a tip asserting drunk or reckless driving justifies an immediate stop, no matter how vague the tip might be, as long as the officers can locate the vehicle. Resp. Br. 24-25. But officers who only corroborate the type of readily observable, descriptive details that this Court found inadequate in *J.L.* do not have the reasonable suspicion necessary to constitutionally seize vehicles and their occupants. 529 U.S. at 272-274. Officers who want to stop a vehicle must either corroborate the assertion of illegality through personal observation of erratic driving, corroboration by other motorists, or corroboration of inside, predictive information, or they must observe some other traffic violation.

This Court should protect the right of the people to be secure against the significant intrusion caused by traffic stops based on anonymous and potentially malicious tips. Allowing officers to seize citizens based on nothing but vague, uncorroborated tips about drunk or reckless driving undermines the Fourth Amendment's central teaching that officers must base their acts upon specific information about criminal activity, rather than hunches. *Terry*, 392 U.S. at 21 n.18, 27.

ARGUMENT

I. Corroboration Of A Tip's Readily Observable Descriptive Facts Does Not Show That A Tipster Has Knowledge Of Illegal Activities Whether The Tip Involves Illegal Gun Possession Or Erratic Driving, And There Is No Reason To Limit J.L.'s Holding To Its Facts

The State contends that this Court's holding in *J.L.* is limited to its "specific circumstances, namely an anonymous report of a possessory gun offense." Resp. Br. 18; see also Resp. Br. 28-29. This narrow reading of *J.L.* is not supported by the decision itself and is particularly inappropriate in this case, given the many parallels between tips about erratic driving and the tip in *J.L.*

J.L. held that a search and seizure based on an anonymous tip was unreasonable because the officers failed to verify that the tip was "reliable in its assertion of illegality" as well as in its depiction of readily observable but innocent details. 529 U.S. at 272-274. The Court in *J.L.* rejected Florida's contentions that corroboration of innocent, readily observable details demonstrated

that a tip was reliable, because Florida's "contentions misapprehend the reliability needed to justify a *Terry* stop." *J.L.*, 529 U.S. at 272. Although it would help officers correctly identify the suspect, "[s]uch a tip ... does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Id.*[1]

J.L.'s rationale fully applies in the context of an anonymous tip about erratic driving, because identification of a particular vehicle does not corroborate the tipster's assertion of erratic driving. As in *J.L.*, innocent details about a vehicle's appearance and location are readily observable by anyone, in contrast to the concealed "inside information" that the informants provided in *Illinois v. Gates*, 462 U.S. 213, 243-246 (1983), and *Alabama v. White*, 496 U.S. 325, 329-332 (1990).

Unless the vehicle is being driven erratically when the officer arrives, drunk driving – like illegal gun possession – is effectively concealed criminal activity. "[T]he crime of driving while intoxicated is not readily observable unless the suspected driver operates his or her vehicle in some fashion objectively indicating that the driver is intoxicated; such conduct must be observed before an investigatory stop is justified." *Harris v. Commonwealth*, 276 Va. 689, 668 S.E.2d 141, 146 (2008). If there is no reason to assume

[1] By requiring corroboration of an assertion of "illegality" rather than an assertion of gun possession, and by analyzing reliability in the context of any *Terry* stop, not just those involving alleged illegal gun possession, 529 U.S. at 272, the Court forecloses the State's contention that *J.L.*'s holding should be ignored in all non-gun possession cases. Resp. Br. 18, 28-29.

that the tipster who accurately described J.L. was also reliable in asserting J.L. had a gun that was concealed when the officers arrived, *J.L.*, 529 U.S. at 272, then there is no reason to assume that a tipster who can accurately describe a particular vehicle is also reliable in asserting erratic driving that is not visible to the officers upon arrival.

Applying *J.L.* to cases involving tips about erratic driving is not, despite the State's claims, the same as trying to impose a categorical, *per se* rule on such cases that is contrary to this Court's holdings. Resp. Br. 9-10, 28-30. In contrast to the State's proposed rule, which treats all tips about drunk or reckless driving identically, Resp. Br. 23-25, petitioners recognize the variable reliability of such tips. *Adams v. Williams*, 407 U.S. 143, 147-148 (1972). Under the totality of the circumstances approach, the courts must consider the veracity, reliability and basis of knowledge of the informant, *Gates*, 462 U.S. at 230, 231 n.6, 233, 240. In the typical case, the veracity of the anonymous tipster is "by hypothesis largely unknown, and unknowable, " *id.* at 237, and tipsters "generally do not provide extensive recitations of the basis of their everyday observations." *Id.* Unless the tip is an exception to the "general rule" of anonymous tips described in *Gates*, reasonable suspicion will require some form of police corroboration. *White*, 496 U.S. at 329-330.

The State argues that every tip about erratic driving is an exception to the "general rule" of *Gates*, because drunk or reckless driving is "open criminal behavior committed in front of strangers," and so tips about erratic driving will "typically" be based upon personal observation, providing a basis of knowledge absent in

J.L. Resp. Br. 23, 34. The California Supreme Court followed the approach suggested by the State in *People v. Wells*, 38 Cal.4th 1078, 1086-1087, 136 P.3d 810, 45 Cal.3d 8 (2006), where there was apparently no evidence of personal observation. The dissent noted that any claim of personal observation "is no more than conjecture," *id.* at 1092 (Werdegar, J., dissenting) and the majority admitted that it was "reasonably infer[ring] that the tip came from a passing motorist. Where else would it have come from?" *Id.* at 1088.

This presumption of personal observation does not alter the totality of the circumstances analysis if it is limited to the readily observable details identifying the vehicle that are corroborated by the police, just as the Court expressed little concern for the basis of the informant's knowledge that J.L. was "a young black male standing at a particular bus stop and wearing a plaid shirt ..." *J.L.*, 529 U.S. at 268, 272. The problem arises when the presumption of personal observation extends to the assertion of illegality itself. The tip in *Wells*, and in most other cases involving accusations of erratic driving, could have come from another motorist, but it could also have come from someone who was familiar with a suspect's vehicle, travel plans or routine, *White*, 496 U.S. at 333 (Stevens, J., dissenting), from someone who had spoken to such people, or from anyone who wished to harass the people in the vehicle being identified. *J.L*, 529 U.S. at 272. According to the State, the presumption automatically makes tips about erratic driving sufficiently reliable to justify a stop, Resp. Br. 23, 34, even though doubts about the tipster's veracity and reliability remain because only readily observable, descriptive details have been corroborated. *J.L.*, 529 U.S. at 272; *White*, 496 U.S. at 329-330.

A tipster's claim to have personally observed some undefined act of drunk or reckless driving removes the need for the presumption but does not affect the reliability of the tip. As this Court has explained, it takes an "explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, [to] entitle[s] [a] tip to greater weight than might otherwise be the case." *Gates*, 462 U.S. at 234. Even where a caller "specifically alleged that he had personally observed several different traffic violations involving erratic driving," *United States v. Wheat*, 278 F.3d 722, 732 (8th Cir. 2001), officers have no basis for determining whether those allegations are true until those traffic violations are corroborated.

The Fourth Amendment precludes any seizures based solely on anonymous tips without corroboration of something more than readily observable, innocent details. Tips about erratic driving may, but typically will not, provide the type of inside, predictive information the police were able to corroborate in *Gates* and *White*, such as a claim that the vehicle is headed toward a particular bar, or will get off the highway at a specific exit.[2] Corroboration of erratic driving may be available from other motorists who contact authorities with similar tips. Officers who

[2] Based apparently on a single sentence from Pet. Br. 21, the United States as *amicus* argues at length that petitioners improperly focus on whether a tip contains predictive or inside information. Brief For The United States As Amicus Curia Supporting Respondent ("U.S. Amicus Br.") 13-16, 29. Petitioners were explaining that such information was absent from the tip in this case, Pet. Br. 21, as it will be in most tips about erratic driving, leaving corroboration of the alleged erratic driving as the primary means of making the officers' suspicion reasonable.

observe even relatively minor driving irregularities, such as weaving within a lane, will have the reasonable suspicion necessary to stop a vehicle, *Wells*, 38 Cal.4th at 1094 (Werdegar, J., dissenting), while observation of any actual traffic violations will provide probable cause for an immediate stop. *Whren v. United States*, 517 U.S. 806, 810 (1996). Contrary to the State's claims, Resp. Br. 32-33, 35, there are actually more nonintrusive avenues of investigation available in erratic driving cases than in illegal gun possession cases.[3]

There was no such corroboration in this case. The tipster advised a dispatcher that petitioner's truck had run her off the roadway around mile marker 88 at around 3:40 in the afternoon, JA 36a, 42a, providing no other details. Another dispatcher advised officers to be on the lookout for a reckless driver. JA 36a-37a, 48a, 57a. Officers spotted and began following the truck at 4:00 p.m. near mile marker 69, ultimately stopping the truck about five miles further south at 4:05 p.m. JA 39a, 42a-44a, 46a-47a, 49a-51a. The prosecution did not introduce any evidence: that anyone reported any erratic driving during the nineteen miles between the alleged incident and the initial sighting by the officer, that either of the trained CHP officers observed any erratic driving while following the vehicle for nearly five miles, or that the officers observed any other traffic or equipment violations that would justify a stop. JA 39a, 46a-47a, 49a-51a.

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[3] The Brief of Florida, ... In Support Of The Respondent State of California ("Florida Amicus Br.") i, modifies the Question Presented to ask whether officers must "personally observe dangerous driving," rather than "corroborate dangerous driving," Pet. Br. i, but corroboration does not necessarily require personal observation, and once officers have spotted a vehicle they can stop it for other violations, however minor.

In this case, not only was the assertion of illegality uncorroborated, but the officers' inability to corroborate any erratic driving despite following the truck for nearly five miles undermined whatever suspicion the tip had raised. Under the totality of the circumstances, the officers' ability merely to locate the vehicle described in the tip did not provide the reasonable suspicion necessary to justify the stop.

II. Despite Its Emphasis On Governmental Interest, The State Has Not Provided Any Doctrinal Or Evidentiary Basis For Diluting The Reasonable Suspicion Standard Established By This Court

Assuming *J.L.*'s holding applies in non-gun possession cases, the State argues that because drunk driving presents a more serious threat to public safety than concealed weapons, tips about erratic driving "require a less demanding showing of the reliability of an anonymous tip to supply reasonable suspicion." Resp. Br. 12, see also 18-19, 28. The State's claim that *Terry's* reasonable suspicion standard is actually a sliding scale that changes depending on the nature of the crime under investigation is not supported by this Court's decisions over the more than forty years since *Terry* was decided, and was specifically rejected in *J.L.*, 529 U.S. at 272-274.

Balancing between the opposing interests of the government and the people is necessary to determine whether it is reasonable to require probable cause or reasonable suspicion, or whether no suspicion at all is required. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37-44 (2000); *Dunaway v. New York*, 442 U.S. 200, 207-211 (1979). But the probable cause standard is not dependent

on the crime under investigation, *Gates*, 462 U.S. at 238; *Dunaway,* 442 U.S. at 207-211, and the reasonable suspicion standard does not change depending on whether officers are investigating shoplifting, the "serious threat that armed criminals pose to public safety," or murder. *J.L.*, 529 U.S. at 272; *Dunaway*, 442 U.S. at 208-211.

If the Court adopts the State's approach, prosecutors will undoubtedly argue that other crimes deserve their own reasonable suspicion standard, contending for example that the government interest in combating gang activities or domestic violence requires other dilutions of *Terry*. Logically, if more dangerous crimes justify a reduced form of reasonable suspicion, officers would need a higher level of suspicion to justify a stop to investigate shoplifting or receipt of stolen property. The result would be chaotic for the lower courts and for officers in the field, converting " every discretionary judgment in the field ... into an occasion for constitutional review." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001).

Even if the Court were considering adopting a reduced reasonable suspicion standard for particularly dangerous crimes, the State has not shown any basis for departing from *Terry* and *J.L.* in this case. The lynchpin of the State's argument is that it is too dangerous for officers to corroborate erratic driving because, unlike the merely "inchoate" threat posed by concealed firearms, Resp. Br. 31, "additional confirmation [of erratic driving] could come at the price of injury or death to innocent motorists and pedestrians." Resp. Br. 24; see also 21, 33, 35-36. This alarming scenario has been used to distinguish the holding in *J.L.* for over a decade, beginning in *State v. Boyea*, 171 Vt. 401, 765 A.2d 862, 862, 867 (2000), and continuing in

Wheat, 278 F.3d at 729-730, 736-737, and *Wells*, 38 Cal.4th at 1086-1087; see Resp. Br. 21. *Wheat* specifically noted the "substantial government interest in effecting a stop as quickly as possible." 278 F.3d at 737.

The facts of this case completely undermine the State's primary justification for not following the holding in *J.L.* The tipster did not say there were any "drunk drivers behind the wheel of one- or two-ton vehicles" endangering everyone else "on or near the road they are traveling," Resp. Br. 32, but described a single instance of allegedly reckless driving that had occurred nineteen miles away from where the officers spotted the truck. While they were not required to do so under *Wells*, the officers followed the truck for nearly five more miles, confirming that it did not present a threat to anyone else on or near Highway 1. JA 39a, 46a-47a, 49a-51a. There is simply no reason for this Court to adopt a new rule in this case based on a hypothetical scenario that is contrary to the facts.

Going beyond this case, and despite access to the voluminous archives of the California Highway Patrol ("CHP") and the California Department of Motor Vehicles, the State does not provide even anecdotal evidence that such a tragedy has ever occurred, much less any statistics demonstrating the magnitude of the risk. The State is supported by *amici* who enjoy access to similar databanks and who make the same argument, U.S. Amicus Br. 22-24; Florida Amicus Br. 11, 17-18, yet none of the other jurisdictions has cited a single instance where a drunk driver has caused an accident while being followed by officers.

In short, more than thirteen years after it was first raised in *Boyea*, the State's primary argument against applying *J.L.* to tips about erratic driving has no factual support, either within the confines of this case or beyond it. While it is certainly possible that a suspect will crash while officers are trying to corroborate erratic driving, it is also possible that a suspect will pull out a gun and start firing while officers are trying to confirm concealed firearms. Such possibilities do not compel dilution of the people's Fourth Amendment right against unreasonable seizures.

The State has also not shown that drunk driving in general poses a greater threat to public safety than firearms, and *J.L.* specifically rejected a "firearms exception" to *Terry*, despite acknowledging the "extraordinary dangers" posed by firearms. 529 U.S. at 272-273. Not only do firearm homicides kill more people each year than drunk driving, as the State acknowledges, Resp. Br. 30-31 n.4, but the annual toll for drunk driving has dropped from around 25,000, *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 451 (1990), to under 10,000, and approximately two-thirds of the people killed by drunk driving are the drunk drivers themselves. NHTSA, Traffic Safety Facts 2011 Data, Alcohol Impaired Driving 1 (DOT HS 811 700 December 2012); Florida Amicus Br. 5.

Last year, multiple opinions in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), acknowledged the government's interest in combating the serious problem of drunk driving, but the Court refused to dilute the warrant requirement by adopting a *per se* rule of exigency for blood draws. 133 S.Ct. at 1565-1566 (Sotomayor, J., plurality),

1568, 1571 (Roberts, C..J., concurring and dissenting). Despite repeatedly mentioning the government's heightened interest in this case, the State has simply not demonstrated that drunk driving poses the type of extreme danger imagined by this Court in *J.L.*, 529 U.S. at 273-274. Contrary to Resp. Br. 26, petitioners are not suggesting that governmental interest in public safety constitutes an exception to the general rules governing search and seizure. Petitioners argue that this Court, in speculating about a situation where the danger was "so great as to justify a search even without a showing of reliability," 529 U.S. at 273-274, was referring to "potentially cataclysmic events like a terrorist attack," Pet. Br. 26-27, not to routine tips about erratic driving.[4] In refusing to deviate from *Terry*'s reasonable suspicion standard despite the extraordinary danger presented by firearms, the Court reasoned that it had already struck the appropriate balance in *Terry*. 529 U.S. at 272-273.

This Court should adhere to its Fourth Amendment jurisprudence and reject the State's unsupported claim that tips about erratic driving require any dilution of the reasonable suspicion standard. Resp. Br. 12, 18-19.

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[4] Petitioners note that, in rejecting the use of suspicionless checkpoints to interdict narcotics in *Edmond*, the Court similarly speculated that the Fourth Amendment might permit checkpoints in other situations, including "to thwart an imminent terrorist attack,..." 531 U.S. at 44.

III. The State's Proposed Rule Would Allow Officers To Seize Vehicles And Their Occupants Based On The Hunches Of Anonymous Tipsters

Under the State's proposed rule, an anonymous tip would automatically provide reasonable suspicion for a vehicle stop as long as the tip described a vehicle at a particular location and stated it had been driven recklessly, and an officer was able to locate that vehicle. Resp. Br. 24. Such a rule directly violates this Court's precedents, which preclude officers from seizing a vehicle unless they have reasonable suspicion based on articulable facts that the occupants of a vehicle are engaged in criminal activity. *United States v. Cortez*, 449 U.S. 411, 417-418 (1981).

The rule proposed by the State unconstitutionally gives anonymous tipsters the power to make the reasonable suspicion determination that should be reserved to trained police officers, while reducing those officers to quasi-bounty hunters, seizing vehicles based on the hunches of others.

Although the State denies that the cases it relies upon have created any type of automatic "automobile exception" to *Terry* and *J.L.*, Resp. Br. 24-25, the State has proposed a rule so overly inclusive that it would establish an automatic exception if one did not already exist. The State claims to be following the totality of the circumstances test adopted in *Gates*, Resp. Br. 24-25, 28-30, but in practice its proposed rule takes a sledgehammer approach, not the "finely tuned approach" envisioned in this Court's cases. *McNeely*, 133 S.Ct. at 1559.

The State summarizes the rule it has gleaned from "*Wells* and similar cases from other states" as follows:

> [A]n anonymous 911 call reporting the caller's personal observation of drunk or reckless driving and providing a detailed description of the vehicle, its location, and direction of travel, is sufficient to justify an investigatory detention, even though officers, upon encountering the vehicle, are able to corroborate only the innocent details of the tip.

Resp. Br. 24.

The State lists cases from other states, Resp. Br. 19-20 n. 2, but only discusses *Wells*, and *Wells* simply does not support a rule that would find reasonable suspicion based on bare assertions of erratic driving. The California Supreme Court stated that an anonymous tip, in addition to providing identifying information that was verified by the officers, should specify "a contemporaneous traffic violation that compels an immediate stop, rather than merely speculating or surmising unlawful activity." *Id.* at 1086, citing *Wheat*, 278 F.3d at 732. *Wheat* had explained, "A law enforcement officer's mere hunch does not amount to reasonable suspicion, see *Terry*, 392 U.S. at 27, ...; *Illinois v. Wardlow*, 528 U.S. 119, 123-24, ...(2000); *a fortiori*, neither does a private citizen's." 278 F.3d at 732.[5] Distinguishing state supreme court cases that had

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[5] In summarizing cases that had upheld uncorroborated stops, the Iowa Supreme Court similarly determined that in each of those cases, "the caller described specific examples of traffic violations, indicating the report was more than a mere hunch." *State v. Kooima*, 833 N.W.2d 202, 209 (Iowa 2013).

found stops to be unjustified because the uncorroborated allegation of drunken driving was "'short on specifics,'" or was based on the tipster's "'belief,'" *Wheat* found the stop in the case before it justified because the caller claimed to have personally observed specific traffic violations. *Id.*

The State's proposed rule allowing officers to stop vehicles based on vague, anonymous assertions of drunken or reckless driving disregards the "demand for specificity in the information upon which police action is predicated [that] is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry*, 392 U.S. at 21 n.18. Unlike *Wells* and *Wheat*, the State refuses to acknowledge that *any* tip about drunk or reckless driving could be too vague to justify a vehicle stop. Resp. Br. 24-25. As discussed in section I, *supra*, the State's purported requirement of "personal observation" does not increase the reliability of a tip. Resp. Br. 24. A tipster's claim to have personally observed something the tipster concluded was drunk or reckless driving is not the sort of "explicit and detailed description of alleged wrongdoing" envisioned in *Gates*, 462 U.S. at 234.

Any sincere attempt to apply a totality of the circumstances test could not treat identically the tip in *Wells* and the one in this case, yet the State purports to see no distinction between them, lumping together all tips asserting drunk or reckless driving. Resp. Br. 37-38. Disregarding for the moment the problems of veracity and reliability discussed in section I, *supra*, the *Wells* tip asserted that a possibly intoxicated driver was "weaving all over the roadway" a few miles away from the officer, who promptly stopped the vehicle without attempting to corroborate any weaving. 38 Cal.4th at 1081. The tip

in this case alleged a single incident of reckless driving that was completed long before and twenty-four miles away from the vehicle stop, JA 37a, 39a, 42a-46a, which only occurred after officers had followed the truck for a significant distance without apparently observing so much as an equipment violation. JA 39a, 46a-47a, 49a-51a; *Whren*, 517 U.S. at 810. Even if the officer in *Wells* had a reasonable suspicion that he was pulling over a drunk driver, which petitioners deny, the officers in this case had negated whatever suspicion the tip had raised.

The tip in this case stated that the truck had allegedly run the tipster "off the roadway." JA 25a, 36a. Even this assertion of illegality, which was

not conveyed to the officers,[6] was not sufficiently specific to satisfy *Cortez* and *Terry*, because the officers could only speculate about what petitioners had allegedly done. Without any indication which way the tipster was traveling, the officers had no idea whether petitioners had, allegedly, engaged in a game of "chicken" and forced the tipster off the road to avoid a head-on collision, or had in

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[6] The State contends that the dispatcher told the officers to be on the lookout for a "reckless driver who had run the reporting party off the roadway." Resp. Br. 2. The State cites only the testimony of the dispatcher at JA 35a-37a, who testified that the broadcast said to be on the lookout for a reckless driver, JA 36a, as did Officer Williams. JA 48a, 57a. The State also cites pages a20-a23 of the Court of Appeal Opinion which, as explained in Pet. Br. 4 n.2, 22, concluded that the magistrate had impliedly found that the dispatch stated the reporting party had been run off the roadway, despite the testimony of the dispatcher and Williams. Even the Court of Appeal did not conclude that the dispatch included both "reckless driver" and "ran off the roadway," as the State now asserts.

the opinion of the tipster simply come too close to his or her car while lawfully passing it on a two-lane highway. Either way, the stop is based on the tipster's conclusory assertion of illegality, not on specific information provided to the officer. *Terry*, 392 U.S. at 21 n.18, 27.

The information actually conveyed to the officers was even less specific, merely a vague direction to be on the lookout for a reckless driver going south on Highway 1. JA 36a, 48a, 57a. When the officers pulled over the truck containing petitioners, they had no idea what petitioners had allegedly done, or why the tipster or the dispatcher had concluded the truck was being driven recklessly. The information actually provided to the officers is important because the "reasonableness of official suspicion must be measured by what the officers knew before they conducted their search." *J.L.*, 529 U.S. at 271. The Fourth Amendment requires that trained police officers determine whether there is reasonable suspicion to seize an individual, and precludes even trained officers from acting on an "inchoate and unparticularized suspicion or 'hunch.'" *Terry*, 392 U.S. at 27. The State's proposed rule allows the constitutional determination of reasonable suspicion to be made by anyone in possession of a cell phone. *Wheat*, 278 F.3d at 732.

IV. Advances In 911 Technology Have No Relevance In This Case, And Do Not Enhance The Reliability Of Anonymous Tips Because Tipsters Still Understand That They Cannot Be Held Accountable

In an attempt to demonstrate that the Court should view anonymous tips with less skepticism, the State and its *amici* devote considerable attention to improvements in the 911 system which arguably make anonymous 911

tips more like tips from known informants. Resp. Br. 39-42; U.S. Amicus Br. 16-18; Florida Amicus Br. 8-11, 19-20.

While such technological advances may affect the reliability of a tip in an appropriate case, those issues should be addressed in a case where the prosecution has raised them "[o]n the record created at the suppression hearing." *J.L.*, 529 U.S. at 275 (Kennedy, J., concurring).

There was no evidence in this case as to whether the CHP in rural counties like Humboldt and Mendocino routinely tracked informants' phone numbers or knew where 911 calls originated. According to the actual testimony, the tipster's call in this case could have come from either county. JA 33a-34a. While there was evidence that the call was recorded, JA 33a, and the prosecution indicated that the tape contained the informant's name, JA 18a, the tape itself was not introduced at the motion to suppress, so the parties and courts have "properly treated the call as anonymous." Resp. Br. 1, n.1. As a result, the record simply does not provide a basis for the Court to consider technological advances that played no role in the detention here.

On a broader scale, the State has not demonstrated that any advances in 911 technology have been adopted so universally that the Court should consider any alteration of its treatment of anonymous tips. As explained in The Brief of National Association of Criminal Defense Lawyers And National Association of Federal Defenders As Amici Curiae In Support of Petitioners ("NACDL Amici Br.") 8-10, many law enforcement agencies do not track 911 calls, while others specifically promise anonymity; the New York Police Department, for example, promises all 911 callers anonymity if requested. http://www.nyc.gov/html/nypd/html/faq/faq_police.shtml#5

(last visited 1/3/14). According to Florida Amicus Br. 9, California began a crackdown on drunk driving in 2007, the year before the call that started this case, and published a fact sheet advising motorists to call 911 to report erratic driving but promising, "You do not have to give your name." The ability to trace emergency calls itself is actually diminishing, because 25 percent of mobile phone users in this country now use prepaid cell phones, which are usually untraceable. NACDL Amici Br. 9-10. Finally, technological advances also allow those who wish to harass others to disguise their numbers so that it appears someone else is making the tip, a dangerous practice that has drawn the attention of the FBI, NACDL Amicus Br. 11-12, and further undermines the reliability of uncorroborated anonymous tips.

Unless 911 callers feel they have placed their credibility at risk and may be prosecuted for a false tip, law enforcement's ability to trace emergency calls does not increase their reliability. 4 Wayne R. LaFave, *Search and Seizure* § 9.5(i), p. 815-816 (4th ed. 2012). Few harassers are likely to be concerned that officers will investigate an unconfirmed tip about erratic driving, particularly given the difficulty of establishing that such a tip was false, much less intended to harass. The State cites statutes governing misuse of the 911 system, Resp. Br. 40, but assuming malicious California tipsters are aware of them, the worst punishment they face for one call is a written warning.[7] By contrast, the informant in *Adams,* 407 U.S. at 147, was subject to immediate arrest for a false complaint.

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[7] See California Penal Code sections 653y (written warning issued for first misuse of 911 system, $50 fine for second), and 653x (use of 911 line with intent to harass is considered a misdemeanor, but an "intent to harass is established by repeated calls over a period of time,...").

While the State does not share this Court's skepticism about anonymous tips, Resp. Br. 38-39, it provides "no data about the reliability of anonymous tips." *J.L.,* 529 U.S. at 275(Kennedy, J., concurring). The State simply dismisses the problem of disguised 911 calls, arguing obliquely that if a 911 caller claimed he had shot one family member and "might kill others in the house," NACDL Amici Br. 11-12, petitioners would insist that the police would have to either ignore the call or, at most, "send an officer to knock on the door,..." Resp. Br. 40-41, n.6. In reality, and considering the totality of the circumstances, petitioners do recognize a distinction between an anonymous tip about reckless driving, and a distraught caller threatening to kill members of his family, which would trigger an obvious exception to the warrant requirement. *McNeely*, 133 S.Ct. at 1570 (Thomas, J., dissenting).

V. The Fourth Amendment Protects The People From Unreasonable Seizures On Public Highways

Neither the gravity of a particular threat nor the professed need for efficient law enforcement trumps the Fourth Amendment rights of the people. *Arizona v. Gant*, 556 U.S. 332, 349 (2009); *Edmond*, 531 U.S. at 42. While petitioners recognize that it would be easier for officers to initiate vehicle stops if they did not have to corroborate any erratic driving, the Fourth Amendment precludes them from seizing vehicles and their occupants based on the hunches of unknown informants.

The State demonstrates little regard for its citizens' "right to be let alone – the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928)(Brandeis, J.,

dissenting)(overruled by *Katz v. United States*, 389 U.S. 347, 357 (1967). The State dismisses that right with a single citation to *United States v. Brignoni-Ponce*, 422 U.S. 873, 879-880 (1975), at Resp. Br. 37. Significantly, although *Brignoni-Ponce* described the intrusion of vehicle stops by Border Patrol officers on motorists as modest, and recognized the validity of the governmental interest in preventing illegal immigration, the Court still held the stops to be unconstitutional unless they were based on reasonable suspicion that a particular vehicle contained illegal aliens. *Id.* at 881-883. The Court recognized that suspicionless stops affected the rights, not only of smugglers and illegal immigrants, but also of the "large volume of legitimate traffic" in the areas involved, subjecting those motorists to "potentially unlimited interference with their use of the highways,..." *Id.* at 882.

The year after it decided *Brignoni-Ponce*, the Court found in *United States v. Martinez-Fuerte*, 428 U.S. 543, 557-559 (1976), that the intrusion suffered by those subjected to individual vehicle stops was more significant, distinguishing that intrusion from the much lower intrusion experienced by motorists stopped at checkpoints. As discussed in Pet. Br. 12, 15, 36-38, the Court has since addressed in detail the extent of the intrusion of individual vehicle stops on drivers and passengers, recognizing that many people probably feel a greater sense of privacy and security in their cars than they do as pedestrians. *Delaware v. Prouse*, 440 U.S. 653, 662 (1979). Whether a stop occurs on a busy urban street where friends and acquaintances can observe it, or in the middle of the night on a lonely country road, *Wells*, 38 Cal.4th at 1093 (Werdegar, J., dissenting), the intrusion is not a slight one, particularly now that the Court has

also clarified that officers can order passengers as well as drivers to get out of a stopped vehicle, and can even frisk the vehicle's occupants if warranted under *Terry*. *Arizona v. Johnson*, 555 U.S. 323, 330-334 (2009).

Before officers activate their emergency lights, turn on their sirens, and pull over vehicles that in most cases will contain law-abiding drivers and passengers, they must have a reasonable suspicion based on articulable facts that the occupants of a vehicle are engaged in criminal activity. *Cortez*, 449 U.S. at 417-418. Anonymous tips indicating the location of a possibly drunk or reckless driver do not supply the reasonable suspicion necessary to seize a vehicle without further corroboration. While anonymous tipsters perform a valuable function in alerting authorities to vehicles that are possibly being driven dangerously, this Court should not delegate to those tipsters the constitutional role played by law enforcement officers in determining whether a vehicle can be constitutionally seized.

The officers themselves can ensure they have the requisite reasonable suspicion without any intrusion on the motorists or their passengers. Once officers have a vehicle under surveillance, they can stop it immediately if they corroborate any erratic driving, if the erratic driving is corroborated by other informants making the same assertions, or if they observe any other traffic violation. *Whren*, 517 U.S. at 810; *Wells*, 38 Cal.4th at 1094 (Werdegar, J., dissenting).

Unlike the State's proposed rule, such an approach properly accommodates "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry*, 392 U.S. at 19.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the California Court of Appeal.

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