No. 07-1122

IN THE

Supreme Court of the United States

STATE OF ARIZONA,
Petitioner,
v.
LEMON MONTREA JOHNSON,
Respondent.

On Writ of Certiorari to the Arizona Court of Appeals

BRIEF OF THE NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a police officer may conduct a pat-down search of a passenger in a lawfully-stopped vehicle when there is a reasonable basis to think the passenger is armed and dangerous.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] Law enforcement and public safety are among their most important responsibilities to their citizens. *Amici* also have a compelling interest in maximizing police officer safety in potentially dangerous situations. They accordingly submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

A. The sole purpose of a pat-down is "the protection of the police officer and others nearby" when an officer reasonably believes that an individual she is "investigating at close range is armed and dangerous" to herself or others. *Terry v. Ohio*, 392 U.S. 1, 24, 29 (1968). This common-sense principle, which is not dependent upon reasonable suspicion of criminal activity, should control this case.

Like the on-the-street encounter in *Terry*, a traffic stop is a nonconsensual seizure that requires officers to approach potentially dangerous persons. When an officer investigates a traffic violation, she must initiate contact with the car's occupants and obtain documentary information. This Court has "specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile," *Pennsylvania v. Mimms*, 434 U.S. 106,

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[1] The parties have consented to the filing of this *amicus* brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their members, has made a monetary contribution to the preparation or submission of this brief.

110 (1977), and noted that the motivation of passengers to employ violence to prevent apprehension at least equals that of the driver.

For their own protection, officers are thus authorized to instruct all occupants in a stopped car to exit the vehicle "pending completion of the stop." *Maryland v. Wilson*, 519 U.S. 408, 415 (1997). Upon reasonable suspicion that any person—driver or passenger—is armed and dangerous, officers are further authorized to conduct a pat-down for weapons. Because Officer Trevizo reasonably suspected that respondent was an armed and dangerous gang member, requesting that he exit the car and patting him down for weapons was reasonable and thus valid under the Fourth Amendment.

B. Because of the risks inherent in traffic stops, police officers must have discretion as to when and how to exercise their authority during the stop. Sometimes they may order all occupants out of the car, sometimes none, and sometimes they may single out a passenger to exit once reasonable suspicion that he is a threat crystallizes. In any event, an officer does not forfeit the authority to order a passenger out of a car merely by not doing so at the beginning of the stop.

Allowing officers discretion to decide when and how to direct occupants to exit the car is vital because traffic stops require quick decision-making under a variety of circumstances. As this Court has long recognized, discretionary judgments in the field are often difficult to second-guess, and officers require clear and simple rules to follow.

This is particularly true when officers must confront not only the threat of violence but an array of

conditions that require specialized training to make tactical choices. *See* New York City Police Dept. Police Acad., *Recruit Training Section, Car Stop Lesson Plan* 3-5 (2006); District of Columbia Metro. Police Dept., *Unknown/High Risk Traffic Stops Lesson Plan* 4-6 (2007). Thus, during a traffic stop, officers must be able to respond to perceived threats from the driver or passengers at any time from the commencement of the stop to its conclusion.

Conversely, officers in the field should not be hamstrung by unrealistic and technical jurisprudential distinctions that prevent them from protecting themselves. Yet the court below made such a distinction in reasoning that because Officer Trevizo did not immediately order respondent to exit the car, and because she engaged in a cooperative conversation with him, his seizure was transformed into a consensual encounter. This decision subverts the premise of this Court's cases which hold that an officer must be able to control a traffic stop because of the risk it presents to her safety.

This *sine qua non* of effective law enforcement is not lost merely because an officer engages in a brief and cooperative conversation with a passenger. It is within the discretion of an officer to make basic inquiries of a seized person in order to confirm or dispel her suspicions. Indeed, it is within her discretion to make inquiries outside of the scope of the purpose of the stop, as long as the questioning does not prolong it. And given such scrutiny, no reasonable passenger would feel free to leave the scene. Thus, respondent remained seized throughout the duration of the stop and Officer Trevizo retained the authority to pat him down.

ARGUMENT

A POLICE OFFICER MAY CONDUCT A PAT-DOWN SEARCH OF A PASSENGER IN A LAWFULLY-STOPPED VEHICLE WHEN THERE IS A REASONABLE BASIS TO THINK THE PASSENGER IS ARMED AND DANGEROUS

A. Every Traffic Stop Is a Nonconsensual Seizure Requiring Police to Be in Close Proximity to the Car's Potentially Dangerous Occupants.

In situations requiring a police officer to be in close contact with a person that she believes is armed and dangerous, the sole purpose of a pat-down is "the protection of the police officer and others nearby." *Terry v. Ohio*, 392 U.S. 1, 29 (1968). As the Court explained in *Terry*:

> When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Id. at 24. This principle was illustrated in *Terry* by an on-the-street seizure of three men that was justified by an officer's reasonable suspicion that they were about to rob a store. Once the officer had reason to be within close range—and with reason to fear for his safety—he had the authority to pat them down for weapons.

The same principle applies to traffic stops, which require police officers to be in close proximity to persons who may be armed and dangerous.[2] A traffic stop is a nonconsensual seizure, *see Brendlin v. California*, 127 S. Ct. 2400 (2007), and conducting an investigative inquiry invariably requires the officer to approach the car, initiate contact with its occupants, and obtain license, registration, and insurance information. *See Berkemer v. McCarty*, 468 U.S. 420, 437-39 (1984) (in this respect, "the usual traffic stop is . . . analogous to a so-called '*Terry* stop' . . . .").

This Court has "specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile."[3] *Pennsylvania v.*

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[2] This Court has long recognized that the principles of *Terry* are not restricted to its facts as an on-the-street "stop and frisk" which was based on suspicion of criminal activity. *See Maryland v. Buie*, 494 U.S. 325 (1990) (protective sweep in a home of areas where armed persons could be hiding justified by *Terry* principles); *Michigan v. Long*, 463 U.S. 1032 (1983) (protective search of a car's passenger compartment justified by *Terry* principles); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam) (order to exit the car and subsequent pat-down justified by *Terry* principles).

[3] As the New York City Police Department teaches trainees,

> One of the most dangerous tasks that a law enforcement officer must do is stopping a motor vehicle. We classify vehicle stops into categories of 'unknown risk' and 'high risk' stops. There is no such thing as a 'routine' vehicle stop. An officer can never know what he or she might encounter during any vehicle stop. Officers must remain on guard at all times. It is important to remain alert and remain professional in your interaction with the occupants of any stopped vehicle.

New York City Police Dept. Police Acad., *Recruit Training Section: Curriculum Pertaining to the Dangers of Car Stops* 2 (2008).

Mimms, 434 U.S. 106, 110 (1977) (per curiam); *Michigan v. Long*, 463 U.S. 1032, 1047 (1983) (traffic stops are "especially fraught with danger to police officers"). And as this Court has recognized, "[i]t would seem that the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop." *Maryland v. Wilson*, 519 U.S. 408, 414 (1997). In such a situation, "the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver." *Id.*

Indeed, traffic stops present unique risks that have led the Court to authorize *per se* measures to ensure police safety, even in the absence of reasonable suspicion. In *Mimms*, for example, the Court held that it was reasonable for police to order a driver to exit a stopped car. 434 U.S. at 106. Noting the "significant percentage of murders of police officers [that] occurs when the officers are making traffic stops," *id.* at 110 (citation omitted), as well as the hazard from passing traffic, *id.* at 111, the Court determined that the weighty interest in officer safety always outweighs the *de minimis* intrusion of exiting the car. Further, once a stop has been made, there is no constitutional distinction between drivers and passengers: both present threats to officer safety and both must exit the car if instructed to do so. *Wilson*, 519 U.S. at 414-15.

Likewise, there is no constitutional difference between drivers and passengers in determining whether a seizure has occurred. *See Brendlin*, 127 S. Ct. at 2410 (passenger "was seized from the moment [the driver's] car came to a halt on the side of the road").

This reasonable exercise of police authority enables an officer, even absent particularized suspicion, to minimize risks to her safety by ordering the driver and passengers out of the car "pending completion of the stop." *Wilson*, 519 U.S. at 415.

Once a car's occupants have exited, police must have reasonable suspicion that a person is armed and dangerous in order to conduct a pat-down for weapons.[4] *See Terry*, 392 U.S. at 23-30; *Mimms*, 434 U.S. at 111-12 (once the driver exited the car, pat-down search was justified by the officer's observation of a bulge under the driver's coat); Opp. 7-8 (acknowledging that "[a]n officer" may "conduct a pat down if justified by reasonable safety concerns related to the stop").[5] Because the sole justification for a pat-down is to protect the police, not to investigate possible criminal activity, *see Terry*, 392 U.S. at 29,

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[4] During a traffic stop, it does not matter for purposes of the Fourth Amendment whether reasonable suspicion that a passenger is armed and dangerous is acquired before or after an officer orders the passenger out of the car. *Cf. Thornton v. United States*, 541 U.S. 615, 620-21 (2004) (validity of a search incident to custodial arrest does not depend on whether "the arrestee exited the vehicle at the officer's direction, or whether the officer initiated contact with him while he remained in the car"). In either case, the officer has both the power to order an occupant from the car pending completion of the stop, *see Wilson*, 519 U.S. at 415, and sufficient reason to conduct a protective search. *See Terry*, 392 U.S. at 1.

[5] *See also Knowles v. Iowa*, 525 U.S. 113, 118 (1998) (police "may order out of a vehicle both the driver, and any passengers; [and] perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous"); *Long*, 463 U.S. at 1047-48 ("[P]olice may order persons out of an automobile during a stop for a traffic violation, and may frisk those persons for weapons if there is a reasonable belief that they are armed and dangerous.").

as long as the pat-down follows a lawful seizure its validity is based upon reasonable suspicion that a person is armed and dangerous—not that criminal activity may be afoot.[6] *See id.*

Thus, under the Court's clear mandate, Officer Trevizo had the power to order respondent out of the car. And since she had an articulable basis to suspect that respondent was armed and dangerous, *see* Pet. Br. 4-7, she was further justified in conducting a limited search for weapons on his person.

B. Officer Trevizo Reasonably Exercised Her Discretion in Deciding When and How to Remove Respondent from the Car Pending Completion of the Traffic Stop.

Because of the risks inherent in traffic stops, police officers need discretion as to when and how to exercise their authority depending on the circumstances of the stop. For example, it was the practice of the officer in *Mimms* "to order all drivers out of their vehicles as a matter of course whenever they had been stopped for a traffic violation." 434 U.S. at 110. But "[k]eeping the driver of a vehicle in the car during a routine traffic stop is probably the typical police practice."[7] *New York v. Class*, 475 U.S. 106,

[6] Accordingly, the question that the court of appeals declined to address—"whether officers, in the interests of their own safety, and based solely on the seizure resulting from the initial traffic stop, may routinely pat down passengers whom they suspect of no crime but whom they reasonably suspect might be dangerous," Pet. App. 16—is not only presented in this case but has been affirmatively answered by this Court.

[7] According to a survey by the Arizona Department of Public Safety, 96.1% of law enforcement agencies reported that violators remained in their cars while an officer was writing a ticket.

115 (1986). This does not mean, however, that if an officer does not immediately order a passenger out of the car when it is initially seized, the officer forfeits the right to protect herself. *See* Pet. App. 12-13.

Allowing police officers reasonable discretion to decide when and how to direct occupants from the car is vital because traffic stops often require quick decision-making in response to a wide range of circumstances. *See Terry*, 392 U.S. at 20 ("[W]e deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat . . . ."). As this Court explained in *Atwater v. City of Lago Vista*, because the Fourth Amendment often applies "on the spur (and in the heat) of the moment . . . the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." 532 U.S. 318, 347 (2001). Particularly in situations involving the threat of violence, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving . . . ." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989) (describing standard in the context of exces-

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Arizona Dept. of Public Safety Research & Planning, *Police Practices Survey: Final Report* 1, 5 (Sept. 2003), *available at* http://www.dps.state.az.us/operations/policepractices.asp. *See also* International Assn. of Chiefs of Police & U.S. Dept. of Transp., National Highway Traffic Safety Admin., *Law Enforcement Stops & Safety Subcommittee: Staff Study* 25, 32-33 & tbl. A (2004), *available at* http://www.theiacp.org/div_sec_com/committees/LESS/LESSManualPrintQuality.pdf (surveying highway patrol practices).

sive force); *see also Thornton v. United States*, 541 U.S. 615, 621-22 (2004) (describing the "highly volatile situation" of a custodial arrest).

Furthermore, because traffic stops occur under a variety of conditions, police are trained to make tactical decisions based on road and weather conditions, lighting, neighborhoods known to be hostile to police, and traffic hazards posed by other motorists. *See* New York City Police Dept. Police Acad., *Recruit Training Section, Car Stop Lesson Plan* 3-5 (2006); District of Columbia Metro. Police Dept., *Unknown/High Risk Traffic Stops Lesson Plan* 4-6 (2007) (describing factors such as traffic congestion, visibility, and road design). Officers must make similar tactical decisions once they have identified the occupant of a car as a potential threat. To best ensure their safety, sometimes this may mean ordering all occupants out of the car immediately, and other times this may require singling out one passenger to exit the car once an officer suspects that the passenger is armed and dangerous. *Cf. Thornton*, 541 U.S. at 621; *compare* New York City Police Dept. Police Acad., *Advanced Level Training Unit, Felony/High Risk Car Stops* (2005) (when a stop is "known" to be high risk, police should utilize public address system in police car to give orders to car occupants), *with* N.Y.P.D. Police Acad., *Dangers of Car Stops*, at 5 (when the level of risk is "unknown," police should approach driver's side door with caution). Accordingly, police officers must be able to respond to perceived threats from passengers at any time until the stop has concluded—"lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Atwater*, 532 U.S. at 347.

As noted above, police must not be constrained by legal rules based on unrealistic and technical jurisprudential distinctions that deny them the ability to protect themselves. *See Atwater,* 532 U.S. at 347. Yet the court below did precisely that by second-guessing when and how Officer Trevizo exercised her authority during the traffic stop. It concluded that because the police did not immediately order all occupants out of the car, and Officer Trevizo singled out respondent to ask him questions unrelated to the traffic stop, his seizure was converted into a separate and consensual encounter that precluded Officer Trevizo from patting him down. Pet. App. 12-16.

Not only is the court of appeals' decision contrary to the holding of *Wilson* that police may order a passenger from the car pending completion of the stop, it undercuts the basic premise of *Wilson*: that police officers must be able to exercise control over a traffic stop due to the risk of danger it presents to themselves and to others. An officer's reasonable suspicion that a passenger is armed and dangerous may arise well after the car is initially stopped; for example, after an officer approaches the car, looks inside, and assesses its occupants.[8] An officer who does not immediately order a car's occupants to exit, as the officer did in *Wilson*, should not be required to withdraw because she reasonably suspects that a passenger is a threat.

Moreover, this Court has held that an officer has discretion to make "reasonable inquiries" of a seized

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[8] After stopping a car, police may look inside, *see Coolidge v. New Hampshire*, 403 U.S. 443, 464 (1971), move around the car to gain better visual access, *Texas v. Brown*, 460 U.S. 730, 740 (1983), and use a flashlight to illuminate the car's interior. *Id*.

person, and "where nothing in the initial stages of an encounter serves to dispel his reasonable fear for his own or others' safety," the officer may pat that person down. *Terry*, 392 U.S. at 30. There is no basis for the conclusion of the court below that an officer relinquishes her authority to remove a person from a car and conduct a pat-down simply because the officer first engaged in a brief and cooperative conversation with that person.

Once Officer Trevizo suspected that respondent was an armed and dangerous gang member, she asked him for his name, date of birth, where he was from, and whether he had spent time in prison. Pet. App. 4. These basic questions fell well within the scope of an inquiry as to whether respondent was in fact an armed and dangerous gang member,[9] and when respondent's answers did not dispel Officer Trevizo's suspicions, she was justified in requesting that he exit the car for a pat-down.[10]

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[9] Gangs are a particularly pervasive problem in Tucson. *See* Josh Brodesky & Dale Quinn, *Gang Violence Spreads Across City*, Arizona Daily Star, Dec. 3, 2006. *See generally* Arizona Criminal Justice Commn., *2006 Gangs in Arizona* (2007), *available at* http://azcjc.gov/pubs/home/GangReport_091407.pdf. During the stop, Officer Trevizo suspected that respondent was a member of the Crips, a gang with a national reputation for violence. *See* Avis Thomas-Lester, *West Coast Gangs Are Making Inroads: Bloods, Crips Tied To Area Crimes*, Washington Post, August 29, 2008, at B1 ("The Crips and Bloods are the focus for law enforcement now, not only here but around the region, because of the violence they perpetrate." (quoting Captain Bill Lynn, commander of the Gang Unit of the Prince George's County (Md.) Police Department)).

[10] Contrary to the reasoning of the court of appeals, *see* Pet. App. 12-13, a police officer's "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren v. United States*, 517 U.S. 806, 813 (1996). Because the

Indeed, an officer has discretion to ask questions beyond the scope of the stop's purpose. This Court recently held in *Muehler v. Mena*, 544 U.S. 93, 100-01 (2005), that it was permissible for police conducting a search of a gang safe-house for weapons to question a detained occupant about her immigration status—an inquiry unrelated to the purpose of the search or detention. As the Court explained, so long as the questioning did not prolong the detention, the police did not need independent reasonable suspicion to conduct the inquiry. *See id.* at 101 ("We have held repeatedly that mere police questioning does not constitute a seizure.") (internal quotation marks omitted). The same reasoning applies here. *United States v. Mendez*, 476 F.3d 1077, 1080-81 (9th Cir. 2007) (Reinhardt, J.) (holding that the "reasoning [of *Muehler*] is equally applicable in the traffic stop context"); *cf. Illinois v. Caballes*, 543 U.S. 405 (2005) (dog sniff during a traffic stop for speeding was permissible as long as it did not extend the duration of the stop).

To be sure, at some point the seizure of passengers terminates. But this point will ordinarily be when the traffic stop ends—that is, when an officer returns a driver's license and registration and informs the driver that he is free to go. *See, e.g.*, *United States v. Farrior*, 2008 U.S. App. LEXIS 16575, No. 07-4498, at *13 (4th Cir. Aug. 5, 2008); *United States v. Ramirez*, 476 F.3d 1231, 1238-39 (11th

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record demonstrates that it was objectively reasonable to believe that respondent was an armed and dangerous gang member, any additional subjective beliefs—including her belief about her own authority over the situation, Pet. App. 5, 12, or any pretextual intentions—are irrelevant to the propriety of the search. *See Whren,* 517 U.S. at 813-18.

Cir.), *cert. denied*, 127 S. Ct. 2924 (2007); *United States v. Hernandez*, 93 F.3d 1493, 1498 (10th Cir. 1996). As the Court explained in *Brendlin*, "a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing." 127 S. Ct. at 2407. Because "a passenger cannot assume, merely from the fact of a traffic stop, that the driver's conduct is the cause of the stop," *id.* at 2407 n.3, a passenger will not feel free to terminate the encounter. And even if the passenger were to know that "the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place." *Id.* at 2407.

Therefore, a conversation indicating that respondent was under police scrutiny while the stop was ongoing would not have communicated to a reasonable person that he was free to leave the scene. On the contrary, it would have been unreasonable for him to expect to "move around in ways that could jeopardize [her] safety." *Id.* Far from terminating the seizure by her questioning, Officer Trevizo validly exercised her discretion during the traffic stop.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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