No. 07-1122

In the Supreme Court of the United States

STATE OF ARIZONA, PETITIONER

v.

LEMON MONTREA JOHNSON

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ARIZONA, DIVISION TWO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a police officer who is participating in a lawful traffic stop may frisk a passenger when the officer has reasonable suspicion that the passenger is armed and dangerous but lacks reasonable suspicion that the passenger is committing or has committed a criminal offense.

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INTEREST OF THE UNITED STATES

This case presents the question whether a police officer who is participating in a lawful traffic stop may frisk a passenger when the officer has reasonable suspicion that the passenger is armed and dangerous but lacks reasonable suspicion that the passenger is committing or has committed a criminal offense. The Court's resolution of that question will affect the admissibility of evidence in federal prosecutions. In addition, federal law enforcement officers regularly stop vehicles, and the conduct of those officers in that dangerous and recurring situation will be governed by the Court's ruling in this case. Accordingly, the United States has a substantial interest in the resolution of the question presented.

STATEMENT

1. On April 19, 2002, Officer Maria Trevizo and two other officers were on patrol in Tucson, Arizona, in an area close to a neighborhood associated with the Crips gang. At approximately 9 p.m., the officers pulled over a car after a license plate check revealed that the vehicle's registration had been suspended for insurance-related reasons. As the officers made the stop, Officer Trevizo saw respondent, who was sitting in the back passenger seat, look back at the officers' car, say something to the two people in the front seat, and continue looking back towards the officers. Pet. App. A2-A3 & n.1.

Once the car was stopped, one of the other officers instructed the occupants to keep their hands visible and directed the driver to get out of the car. The second officer approached the passenger side and spoke with the front-seat passenger, who remained in the vehicle. Pet. App. A3-A4.

Officer Trevizo approached the rear of the vehicle and made contact with respondent. Officer Trevizo was a member of a gang task force, and she observed that respondent was wearing clothing, including a blue bandana, that she considered consistent with Crips membership. J.A. 17. Officer Trevizo also saw that respondent had a scanner in his jacket pocket, something she found highly unusual and of concern because a person would not ordinarily carry a scanner "unless they're going to be involved in some kind of criminal activity or going to try to evade the police by listening to the scanner." J.A. 16. In response to questions from Officer Trevizo, respondent provided his name and date of birth but said he did not have any identification. Respondent stated that he was from Elroy, Arizona, a place Officer

Trevizo knew was home to a Crips gang. Respondent also said that he had served time in prison for burglary and had been out for about a year. Pet. App. A3-A4.

Officer Trevizo asked respondent to exit the vehicle and respondent complied. Pet. App. A4; J.A. 19, 35. After respondent was outside of the car, Officer Trevizo directed him to turn around and "patted him down for officer safety" because she "had a lot of information that would lead [her] to believe [respondent] might have a weapon on him." Pet. App. A4-A5 (first pair of brackets in original). During the pat-down, Officer Trevizo felt the butt of a gun near respondent's waist. *Id.* at A5. Respondent began to struggle, and Officer Trevizo placed him in handcuffs. *Ibid.*

2. Respondent was charged in state court with, *inter alia*, possession of a weapon by a prohibited possessor. He moved to suppress the evidence seized during the pat-down search, arguing that, even if Officer Trevizo had reasonable suspicion that respondent was armed, she lacked reasonable suspicion that he was engaged in criminal activity. J.A. 57-58. The trial court denied the motion, and a jury found respondent guilty on the firearm charge. Pet. App. A5; J.A. 75-78.

3. A panel of the Arizona Court of Appeals reversed by a 2-1 vote. Pet. App. A1-A23.

a. The majority determined that respondent had been seized for Fourth Amendment purposes when the officers stopped the car in which he had been a passenger. Pet. App. A8-A9 (citing *Brendlin* v. *California*, 127 S. Ct. 2400, 2410 (2007)). It also stated that Officer Trevizo could have "order[ed] [petitioner] out of the car after it had been stopped," *id.* at A11, and it "[a]ssum[ed], without deciding, that [Officer] Trevizo had

reasonable suspicion that [respondent] was armed and dangerous," *id.* at A13-A14.

The majority concluded, however, that respondent's interaction with Officer Trevizo "had evolved into a consensual encounter before [she] patted him down." Pet. App. A9; see *id.* at A14. According to the court, "a reasonable person in [respondent's] position would have felt free to remain in the vehicle." *Id.* at A14. And relying on its own previous decision in *In re Ilono H.*, 113 P.3d 696 (Ariz. Ct. App. 2005), the majority further concluded that "when an officer initiates an investigative encounter with a passenger that was consensual and wholly unconnected to the original purposes of the routine traffic stop of the driver, that officer may not conduct a *Terry* frisk of the passenger without reasonable cause to believe 'criminal activity may be afoot.'" Pet. App. A15-A16 (quoting *Terry* v. *Ohio*, 392 U.S. 1, 30 (1968)); see *id.* at A6. The majority stated that it did "not * * * reach the broader question [of] * * * whether officers, in the interest 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." *Id.* at A15.

b. Judge Espinosa dissented. Pet. App. A17-A23. In his view, the majority erred in equating the pat-down of respondent with a situation in which police simply approach individuals in a park and then conduct a protective search for safety reasons alone. *Id.* at A18-A19 (discussing *Ilono H.*). Unlike in that case, the dissent reasoned, the frisk here "was preceded by a lawful traffic stop based on founded suspicion." *Id.* at A19. And, the dissent believed, respondent was not free to leave at the time of the frisk. *Ibid.* The dissent thus concluded

that "the majority ha[d] interpreted the facts of this case in a less than realistic fashion to essentially conclude that an officer reasonably fearing for her safety during a lawful roadside vehicle stop may not ensure her own safety and that of others present by patting down a suspicious passenger for weapons." *Id.* at A17.

4. The Arizona Supreme Court denied a petition for review. Pet. App. B1-B2.

SUMMARY OF ARGUMENT

The Arizona Court of Appeals erred in concluding that Officer Trevizo's pat-down of respondent violated the Fourth Amendment.

A. "The touchstone of the Fourth Amendment is reasonableness," *United States* v. *Knights*, 534 U.S. 112, 118 (2001), and this Court has repeatedly recognized that traffic stops are "especially fraught with danger to police officers," *Michigan* v. *Long*, 463 U.S. 1032, 1047 (1983). Accordingly, the Court has held that officers may frisk the driver of a lawfully stopped vehicle if they have reasonable suspicion that the driver is armed and dangerous, see *Pennsylvania* v. *Mimms*, 434 U.S. 106, 112 (1977) (per curiam), and it has twice stated in dicta that the same rule applies with respect to passengers, see *Knowles* v. *Iowa*, 525 U.S. 113, 117-118 (1998); *Long*, 463 U.S. at 1047-1048. In *Maryland* v. *Wilson*, 519 U.S. 408 (1997), the Court held that "the rule * * * that a police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle[] extends to passengers as well," *id.* at 410, and it did so based on the conclusion that the risks to officer safety posed by passengers are every bit as great as those posed by drivers, see *id.* at 413-414. Accordingly, the logic of this Court's cases inexorably produces the conclusion that an officer

may frisk a passenger in a lawfully stopped vehicle if the officer has reasonable suspicion that the passenger is armed and dangerous.

B. The Arizona Court of Appeals erred in concluding that the constitutionality of the frisk in this case turns on whether a reasonable person in respondent's position would have felt free to terminate the encounter at the point when Officer Trevizo asked him to get out of the car. As an initial matter, on the facts of this case, a reasonable person in respondent's position would not have felt free to leave at the time of the frisk. The stop of the car in which respondent was riding effected a seizure of him, and a reasonable person in his position would not have felt "free to depart without police permission." *Brendlin* v. *California*, 127 S. Ct. 2400, 2407 (2007). Nothing transpired during the interval between the initial stop and the frisk that would have communicated to a reasonable person that respondent was at liberty to move about as he pleased. *Ibid.*

In any event, this Court has never held that an officer may not perform a *Terry* frisk of a person reasonably believed to be armed and dangerous simply because the encounter was consensual until the point of the pat-down. To the contrary, the Court has repeatedly made clear that the societal interests in investigating crime and in protecting officer safety are distinct and that officer safety interests may justify certain actions that could not be justified solely to investigate crime.

The Arizona Court of Appeals' observation that police officers, like ordinary citizens, may simply avoid people they reasonably believe to be armed and dangerous is unrealistic. An officer often has the responsibility to enter dangerous situations and to investigate potentially dangerous persons. The court's position also over-

looks the perverse incentives that its rule would give suspects, who could deter the police from approaching simply by arming themselves. In addition, the Arizona Court of Appeals erred in reasoning that a pat-down in a consensual encounter is prohibited because citizens generally have the right to refuse to speak with the police absent reasonable suspicion that they have engaged in unlawful conduct. When an individual chooses instead to remain in the presence of an officer, in a place where the officer has the lawful right to be, the fact that the individual is reasonably suspected of being armed and dangerous justifies the limited intrusion of a frisk for the officer's protection.

C. The rule adopted by the court of appeals would be particularly inappropriate in the context of traffic stops. This Court has repeatedly recognized the unique nature of traffic stops, both in terms of the reduced expectations of privacy enjoyed by drivers and passengers and the risks to officers while conducting such stops. Unlike an officer who initiates an on-the-street encounter, a police officer who makes a traffic stop will often be unable to assess the degree of danger until after making the stop. In addition, once a traffic stop is made, a passenger in a stopped car may pose just as great of a potential safety risk to an officer as the driver of the car. Likewise, an officer has no realistic way of avoiding one of the car's passengers, and the Court has recognized that it would be unreasonable to expect officers who are conducting traffic stops "to allow people to come and go freely" or to "move around in ways that could jeopardize [the officer's] safety." *Brendlin* v. *California*, 127 S. Ct. 2400, 2407 (2007). For that reason, the officer may order the passenger out of the car and, if the facts provide

reasonable suspicion that the individual is armed and dangerous, may conduct a protective frisk.

ARGUMENT

A POLICE OFFICER WHO IS PARTICIPATING IN A LAWFUL TRAFFIC STOP MAY PERFORM A BRIEF PAT-DOWN SEARCH OF ANY PASSENGER WHOM THE OFFICER HAS REASON TO BELIEVE MAY BE ARMED AND DANGEROUS

"[T]he central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry* v. *Ohio*, 392 U.S. 1, 19 (1968); see *United States* v. *Knights*, 534 U.S. 112, 118 (2001) ("The touchstone of the Fourth Amendment is reasonableness."). This Court has repeatedly recognized that traffic stops are "especially fraught with danger to police officers," *Michigan* v. *Long*, 463 U.S. 1032, 1047 (1983), and that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation," *Brendlin* v. *California*, 127 S. Ct. 2400, 2407 (2007) (citations omitted; brackets in original). As a result, officers who conduct traffic stops must have sufficient authority "to search for weapons and protect themselves from danger." *Knowles* v. *Iowa*, 525 U.S. 113, 117 (1998) (citations omitted). Accordingly, the Court has stated that officers who conduct "routine traffic stop[s]" may "perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous." *Id.* at 117-118.

The Arizona Court of Appeals dismissed that clear statement from *Knowles* as "unexplained *dicta*." Pet. App. A15; see *id.* at A10 n.3. It then further concluded that, in situations where a traffic stop has "evolved into

a separate, consensual encounter" with respect to a passenger, a police officer "ha[s] no right" to frisk that passenger for weapons, "even if [the officer] ha[s] reason to suspect [that the passenger is] armed and dangerous," unless the officer also has reasonable suspicion that the passenger has committed or is committing a crime. *Id.* at A14-A15.

That decision is seriously flawed and should be reversed by this Court. A police officer must have the ability to protect the officer's own safety from a person reasonably believed to be armed and dangerous whenever the officer encounters that person in a place where the officer has a lawful right to be. That principle has particular force in traffic stops, where officers inevitably seize passengers along with drivers and thus inevitably encounter dangerous individuals who are not suspected of any particular criminal activity. Accordingly, Officer Trevizo's frisk of respondent was constitutionally reasonable regardless of whether at that point a reasonable person in respondent's position would otherwise have felt free to terminate the encounter and regardless of whether Officer Trevizo had reasonable suspicion that respondent was or had engaged in criminal activity.

A. A Police Officer May Frisk A Passenger During A Routine Traffic Stop If The Officer Has Reasonable Suspicion That The Passenger Is Armed And Dangerous

The Arizona Court of Appeals did not question the lawfulness of the stop of the car in which respondent was a passenger. That stop effectuated a lawful seizure of respondent. See *Brendlin*, 127 S. Ct. at 2403, 2410 (holding that a passenger is seized "from the moment [the] car [comes] to a halt on the side of the road" and thus "may challenge the constitutionality of the stop").

The Arizona Court of Appeals also assumed for purposes of its decision that Officer Trevizo "had reasonable suspicion that [respondent] was armed and dangerous." Pet. App. A13-A14.[1] Those premises alone establish the constitutionality of a frisk for weapons.[2]

1. In *Terry* v. *Ohio*, *supra*, this Court observed that "a perfectly reasonable apprehension of danger may arise long before [a police] officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime." 392 U.S. at 26-27. Noting the large number of law enforcement personnel who have been killed in the line of duty, *id.* at 23-24, the Court stated that "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties," *id.* at 23. Accordingly, the Court held that "there must be a nar-

[1] Respondent has acknowledged that the question upon which this Court granted review "is premised on the claim that [Officer] Trevizo reasonably suspected [respondent] to be armed and dangerous." Br. in Opp. 15; see Pet. i. The question presented further presumes that Officer Trevizo lacked reasonable suspicion that respondent "[was] committing, or ha[d] committed, a criminal offense." Pet. i. The record supports the first proposition and nothing justifies questioning the State's concession on the second proposition. Cf. *United States* v. *Leon*, 468 U.S. 897, 905 (1984) (accepting the court of appeals' conclusion that probable cause for a warrant was absent where the government did not seek review of that holding).

[2] Respondent's assertion that the frisk was constitutionally invalid because Officer Trevizo was not actually motivated by officer safety in performing it, see Br. in Opp. 5, 7, 11, is without merit. "An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed *objectively,* justify the action. The officer's subjective motivation is irrelevant." *Brigham City* v. *Stuart*, 547 U.S. 398, 404 (2006) (internal quotation marks, brackets, and citation omitted); accord *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996).

rowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual." *Id.* at 27; see *id.* at 24. The Court emphasized that "[t]he officer need not be absolutely certain that the individual is armed" and that "the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* at 27.

In *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977) (per curiam), this Court held that "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." *Id.* at 111 n.6. The Court concluded that the government's "legitimate and weighty" interest in officer safety outweighed the "*de minimis*" additional intrusion of requiring a driver who has already been lawfully stopped to exit the car. *Id.* at 110-111. Then, applying the principles announced in *Terry*, the Court further held that a driver who has exited the vehicle may be patted down for weapons if a reasonable officer could conclude that the driver is "armed and thus pose[s] a serious and present danger to the safety of the officer." *Id.* at 112.

In *Maryland* v. *Wilson*, 519 U.S. 408 (1997), the Court held that "the rule * * * that a police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle[] extends to passengers as well." *Id.* at 410; see *id.* at 415. The Court acknowledged that whereas "[t]here is probable cause to believe that the driver has committed a minor vehicular offense, * * * there is no such reason to stop or detain the passengers." *Id.* at 413. But the Court emphasized that

"traffic stops may be dangerous encounters," *ibid.*, and it stated "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," *id.* at 414. As a result, the Court concluded that "the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger." *Id.* at 413.

2. As this Court stated in *Knowles*, see 525 U.S. at 117-118, *Terry*, *Mimms*, and *Wilson* together establish that a police officer who is conducting a routine traffic stop may always order a passenger to get out of the car and may perform a brief pat-down search for weapons if the officer has reasonable suspicion that the passenger is armed and dangerous. *Terry* explains that a police officer's "more immediate interest * * * in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him" is distinct from the more general "governmental interest in investigating crime." 392 U.S. at 23; see *id.* at 26-27. *Wilson* states that a passenger's "motivation * * * to employ violence" is "every bit as great as that of the driver," 519 U.S. at 414, and it expressly equates drivers and passengers for purposes of a police officer's ability to order them out of the car "as a matter of course," *id.* at 410. Drivers and passengers should therefore be treated the same on the related issue of whether, once a person is out of a stopped car, an officer may perform a brief pat-down in order to protect the officer's own safety. See *Long*, 463 U.S. at 1047-1048 (stating in *dicta* that *Mimms* "held that police 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") (emphases added).

As was the case with drivers in *Mimms*, the Court "need not * * * go so far as to suggest that an officer may frisk [the passengers] of any car stopped for a traffic violation." 434 U.S. at 110 n.5. Instead, the Court need only apply in this particular context *Terry*'s "controll[ing]" holding that an officer may conduct a protective frisk in circumstances where the officer could reasonably conclude that a person with whom the officer is dealing "[i]s armed and thus pose[s] a serious and present danger to the safety of the officer." *Id.* at 111-112.[3] The courts of appeals that have confronted that specific question have uniformly held that a police officer may perform a pat-down search of a passenger who has been ordered out of a car as part of a lawful traffic stop if the officer has reasonable suspicion that the passenger is armed and dangerous.[4]

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[3] Although this Court has analogized traffic stops to *Terry* stops for certain purposes, see *Knowles*, 525 U.S. at 117; *Long*, 463 U.S. at 1051; *Mimms,* 434 U.S. at 110-112, it has taken care to avoid "suggest[ing] that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop." *Berkemer* v. *McCarty*, 468 U.S. 420, 439 n.29 (1984). Because the police conduct in this case was fully consistent with *Terry*, the Court need not determine how much additional latitude officers possess during a stop that is supported by probable cause.

[4] See, *e.g.*, *United States* v. *Soares*, 521 F.3d 117, 119-122 (1st Cir. 2008); *Holeman* v. *City of New London*, 425 F.3d 184, 191-192 (2d Cir. 2005); *United States* v. *Moorefield*, 111 F.3d 10, 13-14 (3d Cir. 1997); *United States* v. *Colin*, 928 F.2d 676, 678 (5th Cir. 1991); *United States* v. *Montgomery*, 377 F.3d 582, 586 (6th Cir. 2004), cert. denied, 543 U.S. 1167 (2005); *United States* v. *Hernandez-Rivas*, 348 F.3d 595, 599 (7th Cir. 2003); *United States* v. *Woodall*, 938 F.2d 834, 837 (8th Cir. 1991);

B. The Arizona Court Of Appeals' Conclusion That Respondent Was No Longer Seized At The Time Of The Frisk Does Not Warrant A Different Result

The Arizona Court of Appeals concluded that it need not decide "whether officers, in the interest of their own safety, and based solely on the seizure resulting from [an] initial traffic stop, may routinely pat down passengers whom they suspect of no crime but whom they reasonably suspect might be dangerous." Pet. App. A15. Instead, the court held that the "initial lawful seizure of [respondent] incident to the traffic stop of the driver [had] evolved into a separate, consensual encounter" by the time Officer Trevizo asked respondent to step out of the car. *Id.* at A14. The court then further held that, under those circumstances, the Fourth Amendment barred Officer Trevizo from conducting a pat-down search for weapons unless she also had reasonable suspicion that respondent was or had engaged in criminal activity. *Id.* at A6, A14-15.

The court of appeals' reasoning is incorrect. The question whether a particular encounter is consensual involves whether a reasonable person in the position of the person with whom an officer is dealing would feel free to terminate the encounter and depart the scene without interference by the officer. See, *e.g.*, *Brendlin*, 127 S. Ct. 2405-2406; *Florida* v. *Bostick*, 501 U.S. 429, 435-436 (1991). The answer to that question, however, has no bearing on whether a police officer who is in a place where the officer has lawful authority to be may

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United States v. *Vaughan*, 718 F.2d 332, 335-336 (9th Cir. 1983); *United States* v. *Dennison*, 410 F.3d 1203, 1211 (10th Cir.), cert. denied, 546 U.S. 955 (2005); see also *United States* v. *Howard*, 151 Fed. Appx. 221, 224 (4th Cir. 2005) (per curiam), cert. denied, 546 U.S. 1145 (2006).

take appropriate steps to protect the officer's own safety. Rather, Officer Trevizo's "legitimate and weighty" (*Mimms*, 434 U.S. at 110) interest in protecting herself from a person she had reasonable suspicion was armed and dangerous had the same urgency regardless of whether a reasonable person in respondent's position would have felt free to leave or whether Officer Trevizo also had reasonable suspicion that respondent was or had engaged in criminal activity.

1. As an initial matter, the Arizona Court of Appeals' conclusion that respondent was no longer seized when Officer Trevizo frisked him is legally incorrect. In *Brendlin*, this Court stated that "any reasonable passenger" would understand that, once a car is stopped, "no one in the car [is] free to depart without police permission." 127 S. Ct. 2406-2407. The court of appeals was correct that an involuntary detention may evolve into a consensual interaction, see Pet. App. A9, but its opinion fails to demonstrate that that is what occurred here.

First, the court stated that the interaction had been "cooperative" until Officer Trevizo frisked respondent and that "her questions to him were wholly unrelated to the purpose of the traffic stop." Pet. App. A11. But police officers are obviously not required to adopt a hostile tone with people they have detained, and this Court has held that officers may ask questions that are unrelated to the justification for an initial seizure so long as they do not prolong the seizure's length. See *Muehler* v. *Mena*, 544 U.S. 93, 100-101 (2005). Second, the court of appeals cited Officer Trevizo's testimony about her purposes in speaking with respondent and her opinion about whether respondent could have refused her request to get out of the car. Pet. App. A8-A9. But the test for whether a person has been or remains seized is an "ob-

jective" one and does not depend on "the motive of the police for taking" certain actions or the "subjective" beliefs of individual officers. *Brendlin*, 127 S. Ct. at 2408-2409. Finally, the court of appeals noted that "neither [Officer] Trevizo nor the other officers ordered all the occupants to get out of the vehicle during the traffic stop for officer safety reasons" and that "the front seat passenger remained in the car throughout the encounter." Pet. App. A12. The court of appeals did not explain how those facts would have conveyed to a reasonable person in respondent's position that he was "free to decline [Officer Trevizo's] request[]" that he get out of the car, *Brendlin*, 127 S. Ct. at 2406 (citation omitted), and there is no apparent reason why they would have done so.

Because, as *Brendlin* recognizes, the stop of a car communicates to a reasonable passenger that the passenger is not free to terminate the encounter with the police and move about at will, an officer must take some action to communicate to the passenger that the passenger is free to leave. Nothing occurred in this case that would have sent that message.[5]

2. a. In any event, this Court has never held that a police officer's ability to conduct a *Terry* frisk is contingent upon the officer having reasonable suspicion that a person with whom the officer is dealing has committed or is committing a crime. To the contrary, the Court has repeatedly reaffirmed the basic principle that it is constitutionally reasonable for officers who have reasonable

[5] The question whether respondent remained seized at the time of the frisk appears "fairly included [with]in" (Sup. Ct. R. 14.1(a)) the question upon which the Court granted review. See Pet. i. If the Court were to disagree with the Arizona Court of Appeals' resolution of that issue, the question would still remain whether the frisk was consistent with the Fourth Amendment. It was. See pp. 9-13, *supra*.

concerns for their own safety to take protective measures.

The Court's opinion in *Terry* does not state that an officer's ability to conduct a pat-down is limited to situations where the officer has reasonable suspicion that a potentially armed and dangerous person is committing or has committed a crime. *Terry* applied the Fourth Amendment's general reasonableness standard to "two independent actions, each requiring separate justifications." *United States* v. *Flippin*, 924 F.2d 163, 165 n.2 (9th Cir. 1991). First, *Terry* concluded that a police officer may make an investigatory stop—that is, halt a person's movement and require the person to remain in the officer's presence for a brief period—so long as the officer has reasonable suspicion that the person is engaging, or has engaged, in criminal activity. 392 U.S. at 21, 30-31. Second, the Court held that, even "in situations where [an officer] may lack probable cause for an arrest," the officer may perform a limited pat-down search for weapons "where he has reason to believe that he is dealing with an armed and dangerous individual." *Id.* at 24, 27. In so holding, the Court specifically distinguished between "the governmental interest in investigating crime"—the justification for an investigatory stop—and a police officer's "more immediate interest * * * in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him"—the justification for a frisk. *Id.* at 23. In short, "*Terry* did not cabin the use of officer safety patdowns to lawful investigatory detentions." *United States* v. *Orman*, 486 F.3d 1170, 1173 (9th Cir. 2007).

This Court's post-*Terry* decisions have reiterated that an officer's interest in protecting the officer's own

safety is distinct from—and may justify actions that could not be supported by reference to—the general societal interest in investigating crime. In *Michigan* v. *Summers*, 452 U.S. 692 (1981), for example, the Court described *Terry* as having "approved a 'frisk' for weapons as a justifiable response to an officer's reasonable belief that he *was dealing with* a possibly armed and dangerous suspect." *Id.* at 698 (emphasis added); see *Ybarra* v. *Illinois*, 444 U.S. 85, 93 (1979) (stating that, under *Terry*, "a law enforcement officer, for his own protection and safety, may conduct a patdown to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted"). In *Michigan* v. *Long*, *supra*, the Court stated that its decisions establish "that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger," 463 U.S. at 1049, and it applied that principle to hold that officers may perform a protective sweep of those places in a vehicle's passenger compartment that may conceal a weapon whenever they have a reasonable belief that the driver of the vehicle poses a danger, *id.* at 1045-1051.

In *Maryland* v. *Buie*, 494 U.S. 325 (1990), the Court held that police officers who have apprehended the subject of an arrest warrant within a home may conduct a protective sweep of any areas that they have reasonable suspicion may "harbor[] an individual posing a danger to the officer or officers." *Id.* at 327. The Court acknowledged that, once the subject of the warrant has been found, "the search for him [i]s over, and there [i]s no longer that particular justification for entering any rooms that ha[ve] not yet been searched." *Id.* at 333. But the Court stated that officers possess an independent interest "in taking steps to assure themselves that

the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack." *Ibid.* And the Court said nothing to suggest that a police officer's entitlement to frisk someone the officer encounters during a *Buie* sweep turns on whether the officer has reasonable suspicion that the person has committed a crime. To the contrary, the *Buie* Court described *Terry* and *Long* as having been "concerned with the immediate interest of the police officers in taking steps to assure themselves that the persons *with whom they were dealing* were not armed with, or able to gain immediate control of, a weapon that could unexpectedly and fatally be used against them." *Ibid.* (emphasis added).

This Court's decision in *Mimms* further undermines the Arizona Court of Appeals' conclusion that a police officer's ability to conduct a pat-down search for weapons depends on whether there is "reasonable cause to believe the suspect may have committed a crime." Pet. App. A15. Nothing about the process of writing a citation for a minor traffic violation would ordinarily require ordering the driver to get out of the car. Yet this Court made clear in *Mimms* that an officer's ability to impose that "incremental intrusion" (434 U.S. at 109) does not depend on whether the "objective observable facts * * * support a suspicion that criminal activity [is] afoot." *Id.* at 108 (citation omitted).

b. In addition, the Arizona Court of Appeals' conclusion that the constitutionality of the frisk in this case depends on whether respondent was still at that point seized as part of the initial traffic stop cannot be reconciled with this Court's decision in *Wilson*. The question in *Wilson* was whether an officer may order a passenger to exit a stopped vehicle in the absence of reasonable

suspicion as to the passenger. Although the Court stated that "as a practical matter, the passenger[] [is] already stopped by virtue of the stop of the vehicle," 519 U.S. at 413-414, the Court found it unnecessary in *Wilson* to decide whether a passenger is "seized" as a constitutional matter when the car is initially pulled over. See *Brendlin*, 127 S. Ct. at 2406 (stating that the Court's previous decisions had not "squarely answered" that question). An officer's entitlement to order the driver and passengers out of a stopped car and to conduct a *Terry* frisk are justified by precisely the same interest: ensuring the safety of those to whom society entrusts enforcement of its laws. Yet, under the Arizona Court of Appeals' view, an officer's ability to conduct the frisk would turn on precisely the same question—that is, whether a passenger is "seized" at a given point during a traffic stop—that the Court found unnecessary to reach in order to resolve the former issue in *Wilson*.

c. None of this Court's other decisions is to the contrary. In *United States* v. *Place*, 462 U.S. 696 (1983), the Court noted that *Terry* "implicitly acknowledged the authority of the police to make a *forcible stop* of a person when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity." *Id.* at 702. In support of that reading of *Terry*, the Court quoted language from Justice Harlan's concurring opinion that argued that police officers must be entitled to make a forcible stop based on less than probable cause because, in Justice Harlan's view, "if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop." *Id.* at 702 n.4 (quoting *Terry*, 392 U.S. at 32 (Harlan, J., concurring)). But the

Court was not required to, and did not, adopt that gloss on *Terry*'s holding in order to decide *Place*, because the defendant in *Place* had "refused to consent" to either his luggage's initial detention or its subsequent search. *Id.* at 699.

The same is true of *Adams* v. *Williams*, 407 U.S. 143, 146 (1972), and *Florida* v. *J.L.*, 529 U.S. 266, 272, 274 (2000). *Adams* did not state that an officer is entitled to conduct a pat-down *only* "[s]o long as the officer is entitled to make a forcible stop," 407 U.S. at 146, and the Court expressly noted that the government had not argued that the pre-frisk encounter in that case had been consensual, *id.* at 146 n.1. Consent was similarly not at issue in *J.L.*, because the approaching officers ordered the defendant to place his hands on a wall and immediately frisked him. 529 U.S. at 268; see *id.* at 274 ("We speak in today's decision only of cases in which the officer's authority to make the initial *stop* is at issue") (emphasis added).

3. The Arizona Court of Appeals and other courts that have reached the same conclusion have offered several arguments in support of the view that it is constitutionally unreasonable for a police officer to "conduct a pat-down search during a consensual encounter if the officer lacks reasonable suspicion that criminal activity is occurring, even if the officer has reason to believe a suspect may be armed and dangerous." Pet. App. A6. None is persuasive.

First, the court of appeals reasoned that because "[a]ny person, including a policeman, is at liberty to avoid a person he considers dangerous," a police officer may simply refrain from approaching a potentially armed and dangerous individual unless the officer also has reasonable suspicion that the person has committed

or is committing a criminal offense. Pet. App. A8 (quoting *Terry*, 392 U.S. at 32 (Harlan, J., concurring)); see *In re Ilono H.*, 113 P.3d 696, 700 (Ariz. Ct. App. 2005). The court of appeals made no effort to explain, however, how that principle would work in practice when a potentially dangerous individual—for example, a person who appears to be a bodyguard or, for that matter, a passenger in a car—remains in the immediate vicinity of a person, such as the driver, whom the officer reasonably suspects of specific criminal activity. The officer cannot choose to avoid the passenger without abandoning the officer's legitimate investigatory pursuit of the driver, which is plainly an unreasonable outcome.[6]

More fundamentally, the argument that police officers can simply avoid dangerous people ignores the nature of an officer's job. "Asking questions is an essential part of police investigation," *Hiibel* v. *Sixth Judicial Dist. Ct.*, 542 U.S. 177, 185 (2004), and good police work will often require an officer to venture into places or situations that private citizens might sensibly choose to avoid. Because "consensual encounter[s] * * * implicate[] no Fourth Amendment interest," *Florida* v. *Rodriguez*, 469 U.S. 1, 5-6 (1984) (per curiam), the rule

[6] Nor can the officer solve the problem by ordering the passenger to leave the area. A passenger whom the officer reasonably suspects of being armed and dangerous cannot be trusted to obediently leave the scene. (Nor, even if the passenger would leave the scene, would it be good police work to order a person reasonably believed to be armed and dangerous to go back into society at large.) And officers should not have to divert their attention from the business of a traffic stop to monitor the activities and movements of passengers who were ordered to disperse but may choose to return. Cf. *Brendlin*, 127 S. Ct. at 2407 ("[T]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.") (citation omitted).

adopted by the court of appeals would encourage those who wish to avoid any contact with the police to arm themselves so as to deter officers from approaching them in the absence of particularized suspicion of unlawful conduct. This Court has previously refused to construe the Fourth Amendment to create precisely those sorts of "perverse incentives." *Scott* v. *Harris*, 127 S. Ct. 1769, 1779 (2007); see *ibid.* (declining "to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger"). Cf. *California* v. *Hodari D.*, 499 U.S. 621, 627 (1991) (stating that because "[s]treet pursuits always place the public at some risk, * * * compliance with police orders to stop should therefore be encouraged").

Second, the Arizona Court of Appeals reasoned that permitting a brief pat-down search for weapons in the absence of reasonable suspicion of criminal wrongdoing would be "inconsistent with" the principle that "a person is allowed to disregard or flee from a consensual encounter with law enforcement officers." Pet. App. A7-A8; see *Ilono H.*, 113 P.3d at 700; see also *Terry*, 392 U.S. at 33 (Harlan, J., concurring); *United States* v. *Gray*, 213 F.3d 998, 1000 (8th Cir. 2000). Citizens may as a general matter decline to interact with a police officer in the absence of reasonable suspicion that they have engaged or are engaging in criminal wrongdoing. A person who has consented to speak with an officer may also—in the absence of reasonable suspicion—choose to terminate the encounter and depart the scene in a manner that does not threaten the safety of the officer or others in the vicinity. But neither of those propositions establishes that a person whom an officer has reason to believe may be armed and dangerous has a right *both* to remain in

the presence of an officer in a place where the officer has lawful authority to be *and* to be immune from a limited pat-down search designed to ensure the officer's safety. Such a rule would compel police officers either to retreat from places where they have lawful authority to be or to expose themselves to unreasonable risks.

Finally, some courts have emphasized that, whereas a consensual encounter does not implicate the Fourth Amendment at all, "[a] protective frisk is both a search and a seizure for Fourth Amendment purposes." *Gray*, 213 F.3d at 1000; see *State* v. *Giltner*, 537 P.2d 14, 16 (Haw. 1975). But the Fourth Amendment does not say that searches and seizures may be conducted only for the purpose of investigating crime. Rather, "[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340 (1985); see *Florida* v. *Jimeno*, 500 U.S. 248, 250 (1991); *Terry*, 392 U.S. at 19. And this Court has repeatedly recognized that the compelling interest in officer safety will sometimes make it constitutionally reasonable for police officers to take actions that cannot be justified by reference to society's more general interest in enforcing the criminal law. See pp. 12-13, 16-19, *supra*; see also *Brigham City* v. *Stuart*, 547 U.S. 398, 400 (2006) (holding that "police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury").

C. Traffic Stops Provide A Particularly Compelling Context For Recognizing An Officer's Authority To Frisk A Suspicious Passenger Who Remains On The Scene

For the reasons stated above, the Arizona Court of Appeals erred in concluding that a police officer's ability to frisk a person whom the officer has reasonable suspicion is armed and dangerous turns on whether the officer's encounter with that person has been consensual until the point of the frisk and, if so, whether the officer nonetheless has reasonable suspicion that the person has committed or is committing a crime. In any event, such a rule would be especially unwarranted in the particular context of traffic stops.

This Court has long noted that "[p]assengers, no less than drivers, possess a reduced expectation of privacy" when traveling in cars. *Wyoming* v. *Houghton*, 526 U.S. 295, 303 (1999). An automobile "seldom serves as one's residence or as the repository of personal effects," and it "travels public thoroughfares where both its occupants and its contents are in plain view." *New York* v. *Class*, 475 U.S. 106, 112-113 (1986) (citation omitted). A person's reasonable expectation of privacy when traveling in a car is further diminished by the government's "pervasive regulation" of automobiles, *id.* at 113, and by the possibility of "traffic accidents that may render all [of a car's] contents open to public scrutiny," *Houghton*, 526 U.S. at 303.

In addition, traffic stops differ from on-the-street encounters in numerous respects. This Court has repeatedly recognized that traffic stops "are especially fraught with danger to police officers," *Long*, 463 U.S.

at 1047,[7] and an officer who makes a traffic stop will often be unable to assess the degree of danger until after making the stop. The officer may have difficulty determining how many people are in a vehicle before it has come to a halt on the side of the road. See *Wilson*, 519 U.S. at 414 (stating that the "danger to an officer * * * is likely to be greater when there are passengers in addition to the driver"). The vehicle's body and seats may make it impossible to detect weapons or other indicia of danger until the officer reaches the car. And whereas an officer who wishes to approach a particular person in a public place could, at least in certain circumstances, wait until that person is no longer in the company of another person whom the officer considers armed and dangerous, a police officer cannot realistically avoid a passenger in a lawfully stopped vehicle.

The Court has already recognized that the degree of danger posed by a passenger during a traffic stop does not depend on whether the officer has reason to believe that the passenger has committed a crime. See *Wilson*, 519 U.S. at 413-414. The degree of danger posed by a particular passenger likewise bears no necessary relationship to whether a reasonable person in the passenger's position would feel free to terminate the portion of the encounter that involves the passenger or whether a

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[7] See *Brendlin*, 127 S. Ct. at 2407; *Wilson*, 519 U.S. at 413; *Long*, 463 U.S. at 1047, 1052; *Summers*, 452 U.S. at 702-703; *Mimms*, 434 U.S. at 110; *United States* v. *Robinson*, 414 U.S. 218, 233-234 & n.5 (1973); *Adams*, 407 U.S. at 148 n.3. Statistics maintained by the FBI show that, in 2006 alone, 6490 law enforcement officers were assaulted and eight officers were killed during traffic pursuits and stops. See Federal Bureau of Investigation, Department of Justice, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted, 2006,* tbls. 23 & 66 (Oct. 2007), <www.fbi.gov/ucr/killed/2006/index.html>.

passenger who exits the vehicle does so voluntarily or at the direction of the officer. Danger may still exist even when an encounter has become consensual and no other crime is suspected, as this Court has recognized. Cf. *Long*, 463 U.S. at 1050 ("If a suspect is 'dangerous,' he is no less dangerous simply because he is not arrested.").

This case illustrates the point. Respondent's continued observation of the officers as they approached, his apparent gang colors, his possession of a portable scanner useful to intercept police band communications, his prior conviction, and his residence in a place known for a particular gang, J.A. 12, 16-21, reasonably led a trained officer to be concerned for her safety, even though she could not put her finger on particular criminal activity in which he was involved, J.A. 36. In that situation, an officer must be permitted to conduct a frisk to protect against sudden deployment of a weapon. Indeed, the Arizona Court of Appeals' decision would create the absurd result that a passenger who, after the completion of a traffic stop, exits the car and begins moving towards an officer in a manner that the officer reasonably perceives to be threatening could not be frisked for weapons unless the officer also has reasonable suspicion that the passenger has already committed a crime.

This Court's decision in *Brendlin* further underscores that there are important differences between traffic stops and on-the-street encounters. In *Brendlin*, the Court held that a passenger is "seized" for Fourth Amendment purposes when an officer stops the car in which the passenger is traveling. 127 S. Ct. at 2403. In reaching that conclusion, the Court stated that a reasonable person in the passenger's position "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" or "let people move around in ways that could jeopardize [the officer's] safety." *Id.* at 2407. The Arizona Court of Appeals' opinion, however, is expressly premised on the notion that, because the encounter had become consensual, Officer Trevizo was constitutionally required to give respondent an opportunity to depart the scene after he exited the vehicle *without* first ensuring that, in so doing, she was not permitting a dangerous person to get behind her. Such a regime would be a far cry from the "unquestioned command of the situation" that this Court has stated will best minimize "[t]he risk of harm to both the police and the occupants" of a stopped car. *Ibid.* (citations omitted; brackets in original).

CONCLUSION

The judgment of the Arizona Court of Appeals should be reversed.

Respectfully submitted.

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