No. 08-1385

In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

JOSEPH A. MOSES HARRIS, JR.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF OF PETITIONER

I. STATE AND FEDERAL COURTS ARE DEEPLY DIVIDED OVER THE QUESTION PRESENTED.

The Eighth Circuit and five state supreme courts[1] have *expressly acknowledged* a division on the question presented. This division is deep and mature. Harris attempts to sidestep the conflict principally by arguing that the decision below is not in conflict with the decisions of "most jurisdictions." Br. in Opp. 9. The premise behind this argument is that lower courts consistently refuse to uphold a stop based on "bare accusations of drunk driving, absent factual details of specific driving behavior supporting the accusation." Br. in Opp. 18. In his view, for example, the tip must say that a driver is driving into oncoming traffic. The cases do not support Harris's argument.

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[1] *United States v. Wheat*, 278 F.3d 722, 729 (8th Cir. 2001); *California v. Wells*, 136 P.3d 810, 814 (Cal. 2006); *Hawaii v. Prendergast*, 83 P.3d 714, 720-23 (Haw. 2004); *New Hampshire v. Sousa*, 855 A.2d 1284, 1288 (N.H. 2004); *New Jersey v. Golotta*, 837 A.2d 359, 372 (N.J. 2003); *Vermont v. Boyea*, 765 A.2d 862, 866 (Vt. 2000).

A. Harris's assertion that the lower courts are largely consistent in their approach to the question presented does not withstand scrutiny.

1. For many courts, no "specific details of the accused's *driving behavior*" are necessary.[2]

In *Kansas v. Slater*, 986 P.2d 1038 (Kan. 1999), an officer had received information from the dispatcher that "a possible drunk driver was leaving Burger King . . . [T]he vehicle was a black pickup bearing license tag HEK 477." *Id.* at 1040. The officer "followed the truck for a block while observing no signs of poor driving, and stopped the vehicle." *Id.* The Supreme Court of Kansas held that this stop was proper under the Fourth Amendment. The court reasoned that the caller's statement that the person was intoxicated, "although conclusory," is simply "the kind of shorthand statement of fact that lay witnesses have always been permitted to testify to in court." *Id.* at 1045 (citation omitted). Although a tip containing

> more specific details regarding the objective reasons for the conclusion that the suspect was intoxicated might rank higher on the reliability scale, the mere fact that the tip includes only the conclusory statement that the suspect was drunk would not necessarily foreclose the prospect of the tip's reliability,

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[2] Br. in Opp. 15 (emphasis added).

> especially where other information contained in the tip is corroborated.

Id. at 1046.

Similarly, in *Maine v. Sampson*, 669 A.2d 1326 (Me. 1996), a police officer received an anonymous tip that "a possible drunk driver had just been through the drive-in window at Dunkin' Donuts, that the vehicle was headed northbound on Main Street, and that both subjects in the vehicle appeared to be intoxicated and had been drinking." *Id.* at 1327. The suspect vehicle was described as "a dark-colored Dodge with Massachusetts license plate 493ACJ." Within two minutes of receiving this tip, the officer encountered a purple-colored Dodge in a parking lot near Main Street. The license plate matched the description relayed to the officer. *Id.* The officer then stopped the vehicle and the driver was arrested for operating a vehicle under the influence. *Id.* The court upheld the stop, concluding that the prompt corroboration of the tip's details sufficed. *Id.* Significantly, the court made no mention of a need for specific details concerning the driving behavior of the suspect.

Other courts have likewise upheld tips such as the one here, in spite of the fact that they lacked "a detailed report of dangerous or erratic driving behavior." Br. in Opp. 5. *See New York v. Jeffery,* 769 N.Y.S. 2d 675 (N.Y. App. Div. 2003); *Louisiana v. Barras*, 2009 WL 1717166 (La. Ct. App. June 19,

2009); *New Mexico v. Van Ruiten*, 760 P.2d 1302 (N.M. Ct. App. 1988).

As the Kansas Supreme Court noted, a statement that a driver is "drunk" is a shorthand way for a caller to express what they are observing. *Slater*, 986 P.2d at 1045.

> The objective signs of intoxication are matters of common knowledge and experience. Implicit in the motorist's statement [that defendant's car was being driven by a "drunk"] is that he had observed defendant and believed him to be drunk. We find no other common sense explanation for his statement.

California v. Willard, 228 Cal. Rptr. 895, 897 (Cal. App. Dep't Super. Ct. 1986).

In *Wheat*, the Eighth Circuit explained that "[t]he rationale for allowing less rigorous corroboration of tips alleging erratic driving is that the imminent danger present in this context is substantially greater (and more difficult to thwart by less intrusive means) than the danger posed by a person in possession of a concealed handgun [that was at issue in *Florida v. J.L.*]."[3] 278 F.3d at 732 n.8. The key is whether "the moving violation or violations alleged . . . suggest real exigency." *Id.* The court reasoned that "[a]n allegation of erratic driving will generally pass this test [of a real exigency] since it strongly suggests that the

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[3] *Florida v. J.L.*, 529 U.S. 266 (2000).

driver is operating under the influence of alcohol or drugs and is unable to control his vehicle." *Id.* A statement, as here, that the driver is intoxicated is equally suggestive of an exigency.

Consistent with this logic, other courts have upheld anonymous tips of drunk driving that contained conclusory statements of "reckless" or "erratic" driving. Such a tip is no more descriptive than a tip that the driver is "drunk" or "intoxicated." These are simply two different ways of saying the same thing: a dangerous driver is on the road, and the situation creates a grave hazard to pedestrians and other motorists.

In *Kansas v. Crawford*, 67 P.3d 115 (Kan. 2003), the court stated the question presented as follows:

> Whether a stop is legal when it is based upon an anonymous tip stating a vehicle's make, model, style, color, the state of origin of its license plate, highway location, and direction of travel all of which was corroborated by the law enforcement officer before the stop and also stating the conclusory allegation that the vehicle was being driven recklessly, which the officer did not attempt to corroborate before the stop.

Id. at 116. The court upheld the stop as proper under the Fourth Amendment. *Id.* The Kansas Supreme Court was not disturbed by the conclusory nature of the allegation that the driver was "reckless." The court equated the allegation that the driver was "reckless" with the allegation made in *Slater* that a

driver was "drunk." *Id.* at 119. *See also New Mexico v. Contreras*, 79 P.3d 1111, 1112 (N.M. Ct. App. 2003) (upholding stop based on an anonymous tip that "a possible drunk driver who was driving a grey van, towing a red Geo, and driving erratically").

The Supreme Court of Vermont upheld a stop based on an anonymous tip, even though the caller stated in conclusory fashion that the driver was "operating erratically," and the caller did not provide any additional detail about the driver's behavior. *Boyea*, 765 A.2d at 863. The officer in *Boyea* corroborated the innocent details of the call, but did not observe any erratic driving. *Id.* Like the Kansas Supreme Court, the Supreme Court of Vermont drew the obvious parallel between a report of "erratic" driving and the possibility that the driver was driving drunk. *Id.* at 862.

Although the caller in *Wheat* happened to provide a fairly detailed tip, stating that the suspect car was "passing on the wrong side of the road, cutting off other cars, and otherwise being driven as if by a 'complete maniac,'" *Wheat*, 278 F.3d at 724, the court in dictum provided examples of tips that would be sufficient to warrant a stop. In the court's view, "[a]n allegation of erratic driving" or "an anonymous tip of drag racing or a game of 'chicken'" would be sufficient to justify a *Terry* stop. *Id.* at 732 n.8. These illustrations of what the court considered sufficient are no more conclusory than the tip at issue here.

2. A few courts have required the anonymous tip to contain specific details of the defendant's drunk driving.

It is true, as Harris notes, that the Minnesota Supreme Court, in a civil proceeding to revoke a driver's license, held that an anonymous caller must provide significant detail about the anonymous caller's observations—although the court was divided 4-3. *See Olson v. Comm'r of Public Safety*, 371 N.W.2d 552, 556-57 (Minn. 1985).

Harris also correctly notes that some state intermediate appellate courts, also in the civil context, raise the bar even higher than the *Olson* decision. They have invalidated a stop based on a tip that was *not* anonymous when the tip failed to include extensive detail about the driver's behavior. *Campbell v. Dep't of Licensing*, 644 P.2d 1219 (Wash. Ct. App. 1982); *Anderson v. Director, North Dakota Dep't of Transp.*, 696 N.W.2d 918 (N.D. 2005). However, other courts reject such a reading of the Fourth Amendment. *See Kaysville City v. Mulcahy*, 943 P.2d 231 (Utah Ct. App. 1997); *Willard*, 228 Cal. Rptr. at 897-98.

3. A third group of courts invalidate stops based on anonymous tips even when the tip does provide detail concerning the driving behavior of the suspect.

A final group of courts invalidate anonymous tips of drunk driving even when the caller *does provide* specific details of the defendant's driving behavior. In *McChesney v. Wyoming*, 988 P.2d 1071 (Wyo. 1999), the police received an anonymous report that a red Mercury with temporary plates was driving erratically by weaving between lanes, passing cars, and slowing down to pass again. *Id.* at 1073. In other words, the caller did exactly what Harris said must be done to warrant a *Terry* stop. In spite of this level of detail, the Supreme Court of Wyoming held that the stop violated the Fourth Amendment. *Id.* at 1074 n.1, 1078. *See also Massachusetts v. Lubiejewski*, 729 N.E.2d 288, 290 (Mass. App. Ct. 2000) (stop based on anonymous tip held invalid even though the caller, who called from his car phone, stated that the specific vehicle, in a specific location, was "traveling on the wrong side of the road").

The cases do not support the respondent's claim that the lower courts are consistent in their approach to the question presented. In fact, they show the opposite.

B. At the heart of the lower court split on the question presented is a division concerning the balancing required by the Fourth Amendment, not the level of descriptive detail of the driver's behavior.

The crux of the division in the lower courts is a court's conception of the balancing required by the Fourth Amendment—not, as Harris contends, a need for factual detail of the suspect driver's behavior. Some lower courts, like the Supreme Court of Virginia, the Supreme Court of Wyoming,[4] the Court of Appeals of Massachusetts[5] and the Second Circuit Court of Appeals of Louisiana,[6] stress the dangers associated with anonymous tips and the need to limit police intrusion.

Other courts, like the Eighth Circuit Court of Appeals,[7] and the Supreme Courts of California,[8] Delaware,[9] Hawaii,[10] Iowa,[11] New Hampshire,[12] Kansas,[13]

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[4] *McChesney*, 988 P.2d at 1076-77.

[5] *Lubiejewski*, 729 N.E.2d at 290.

[6] *Louisiana v. Boyle*, 793 So. 2d 1281, 1284-85 (La. Ct. App. 2001).

[7] *Wheat*, 278 F.3d at 735-37.

[8] *Wells*, 136 P.3d at 814-16.

[9] *Bloomingdale v. Delaware*, 842 A.2d 1218-22 (Del. 2004)

[10] *Prendergast*, 83 P.3d at 723-24.

[11] *Iowa v. Walshire*, 634 N.W.2d 625, 630 (Iowa 2001).

[12] *Sousa*, 855 A.2d at 1290.

[13] *Crawford*, 67 P.3d at 119-20.

New Jersey,[14] and Vermont,[15] emphasize the public danger associated with drunk driving, the lesser degree of intrusion of traffic stops compared with personal frisks, and the diminished likelihood of successful pranks in this context.

II. THE SUPREME COURT OF VIRGINIA STRUCK THE WRONG FOURTH AMENDMENT BALANCE.

A. The details contained in the tip, along with the officer's corroboration, merited the brief intrusion of an investigative stop of a potentially dangerous drunk driver.

Contrary to Harris's characterization, the tip here was not a "bare allegation" of drunk driving. Although the tip did not provide an extensive description of the suspect's driving behavior, it described in detail the driver, the make, model and color of the vehicle, provided a partial license plate number, gave a detailed description of the driver's location, and stated that the driver was intoxicated. *App.* 2. Once the officer promptly corroborated the innocent details of the tip, the limited intrusion of a *Terry* stop was justified to confirm or dispel the possibility that a dangerous drunk driver was on the

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[14] *Golotta*, 837 A.2d at 366-68.

[15] *Boyea*, 765 A.2d at 862.

road—especially when the officer observed additional behavior that was suggestive of an impaired driver.

The Supreme Court of Virginia should have upheld the traffic stop here, for all of the reasons cited by the Eighth Circuit in *Wheat*, as well as the decisions of nine state supreme courts. The court below ignored the fact that a drunk or erratic driver "poses an imminent threat to public safety" and there are no realistic investigative alternatives to a traffic stop. *Wheat*, 278 F.3d at 736-37. Furthermore, a short traffic stop is "less invasive, both physically and psychologically, than the frisk on a public corner that was at issue in *J.L.*" *Id.* at 737. And calls of drunk or dangerous driving overwhelmingly tend to report readily observable criminal activity. *Id.* at 734.

The error is all the more apparent because the officer here corroborated aspects of the tip. The officer followed Harris, noticed that Harris inexplicably slowed down through an intersection even though Harris had the right of way, slowed down well in advance of a traffic light, and, after Harris had been followed by a police vehicle for a time, he unaccountably pulled over to the side of the road and stopped. *App.* 2-3.[16]

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[16] It may be, as Harris contends, that there is an innocent explanation for his "unusual" driving behavior. Br. in Opp. 28-29. It is settled law, however, that the "determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct." *United States v. Arvizu*, 534 U.S. 266, 277 (2002).

Although not directed at Virginia's primary submission, Harris contends that the issue of the officer's corroboration of the tip through his observation of Harris's unusual driving is waived. Br. in Opp. 27. He is wrong. The question presented expressly raises the question of the degree of corroboration needed to make a stop, and Virginia specifically argued the point in the petition. Cert. Pet. 27. Virginia argued that to the extent an officer corroborates an anonymous caller by observing "unusual" driving, "those observations strongly support the propriety of the stop." *Id.* Virginia contended that the actions of the officer here were reasonable. *Id.* Harris's waiver argument is devoid of merit.

B. Harris's fears of abuse are greatly exaggerated.

Contrary to Harris's hyperbolic argument, Virginia does not "seek[ ] a complete abrogation of any reasonable suspicion standard when police are presented with a bare accusation that a driver is intoxicated." Br. in Opp. 4. Virginia's position is straightforward. Virginia urges this Court to grant certiorari and to adopt the view set forth in the decision in *Wheat*, 278 F.3d at 731-32, which has been embraced by many state supreme courts, and, to the extent that the officer does not immediately stop the vehicle and corroborates the anonymous caller by observing "unusual" driving, those observations would further support the propriety of the stop. Cert. Pet. 27.

Harris offers a "parade of horribles" of prank calls, or calls by "hypersensitive callers," that he says would ensue if this rule were to be adopted.[17] Br. in Opp. 21. Harris does not offer any real world examples. Moreover, the "prankster" scenario is less likely here because the target is a fast moving vehicle, likely to frequently change direction. *Bloomingdale*, 842 A.2d at 1220. In addition, although the extent of prank calls of drunk driving is unknown, the fearsome toll taken by drunk drivers is all too obvious.

Besides, Harris's proposed interpretation of the Fourth Amendment does very little to alleviate any prankster problem. In his view, if the anonymous caller provides significant detail about the suspect's driving behavior, the officer can make the stop. Harris's interpretation of the Fourth Amendment would thus inhibit only unimaginative pranksters—and this at the cost of preventing law enforcement *from taking prompt, life-saving action.*

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[17] Harris also suggests that the solution is for police to train dispatchers to elicit more information from the callers. Br. in Opp. 23. Eliciting more information may not always be possible.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be

GRANTED.

Respectfully submitted,

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