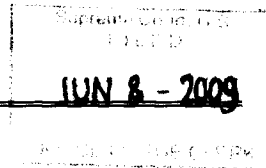


No. 08-1385



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In The  
Supreme Court of the United States

— ♦ —  
COMMONWEALTH OF VIRGINIA,  
*Petitioner,*

v.

JOSEPH A. MOSES HARRIS, JR.,  
*Respondent.*

— ♦ —  
ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF VIRGINIA

— ♦ —  
BRIEF OF MOTHERS AGAINST DRUNK DRIVING  
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

— ♦ —  
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<i>State v. Golotta,</i> 837 A.2d 359 (N.J. 2003).....	12, 14
<i>State v. Melanson,</i> 665 A.2d 338 (N.H. 1995).....	14

---

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#### OTHER AUTHORITIES

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- H. Moskowitz et al., Nat'l Highway Safety Admin., U.S. Dep't of Transp., *Driver Characteristics and Impairment at Various BACs* (2000), available at [http://www.nhtsa.dot.gov/people/injury/research/pub/impaired\\_driving/BAC/impairment.pdf](http://www.nhtsa.dot.gov/people/injury/research/pub/impaired_driving/BAC/impairment.pdf)..... 5
- Kyran P. Quinlan et al., *Characteristics of Child Passenger Deaths and Injuries Involving Drinking Drivers*, 283 J. Am. Med. Ass'n 2249 (2000) ..... 6
- Letter from Jim Burnett, Chairman of National Transportation Board, to Governors of the 50 States and the Mayor of the District of Columbia, excluding Colorado, Michigan, Nebraska, Utah, and Washington (Sept. 9, 1982), available at [http://www.nts.gov/Recs/letters/1982/H82\\_35.pdf](http://www.nts.gov/Recs/letters/1982/H82_35.pdf) ..... 8, 9
- Nat'l Highway Traffic Safety Admin., U.S. Dep't of Transp., *2007 Traffic Safety Annual Assessment-Alcohol Impaired Driving Fatalities* (2008), available at <http://www-nrd.nhtsa.dot.gov/Pubs/811016.PDF>. ..... 4, 5, 6
- Nat'l Highway Traffic Safety Admin., U.S. Dep't of Transp., *2007 Traffic Safety Facts: Children*, available at <http://www-nrd.nhtsa.dot.gov/Pubs/810987.PDF> ..... 6
-



- Nat'l Highway Traffic Safety Admin., U.S.  
 Dep't of Transp., *Impaired Driving in the United States* (2002), available at  
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- Nat'l Highway Traffic Safety Admin., U.S.  
 Dep't of Transp., *Motor Vehicle Traffic Crash Fatality Counts and Estimates of People Injured for 2006* (2008), available at <http://www-nrd.nhtsa.dot.gov/Pubs/810837.PDF>.....7
- Nat'l Highway Traffic Safety Admin., U.S.  
 Dep't of Transp., *Programs Across the United States That Aid Motorists in the Reporting of Impaired Drivers to Law Enforcement* (2007), available at <http://www.nhtsa.dot.gov/people/injury/alcohol/StopImpaired/3674ProgramsAcrossUS/3674FinalReport2.pdf> .....9
- Nat'l Highway Traffic Safety Admin., U.S.  
 Dep't of Transp., *Volume I: Summary Report, National Survey of Drinking and Driving Attitudes and Behaviors: 2001* (2003), available at  
<http://www.nhtsa.gov/staticfiles/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/DD2001v1.pdf>.....7, 8, 10

Nat'l Highway Traffic Safety Admin., The Visual Detection of DWI Motorists, <a href="http://www.nhtsa.dot.gov/people/injury/alcohol/dwi/dwihtml/index.htm">http://www.nhtsa.dot.gov/people/injury/alcohol/dwi/dwihtml/index.htm</a> (last visited June 6, 2009) .....	5
Nat'l Highway Traffic Safety Admin., You Drink and Drive, You Lose: Talking Points, <a href="http://www.nhtsa.dot.gov/people/outreach/safe-sobr/ydydyl/media/talkpoints.html">http://www.nhtsa.dot.gov/people/outreach/safe-sobr/ydydyl/media/talkpoints.html</a> (last visited June 6, 2009) .....	4
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Ross J. Homel, <i>Random Breath Testing the Australian Way: A Model for the United States?</i> , 14 <i>Alcohol Health &amp; Res. World</i> 70 (1990) .....	11
Steven D. Levitt & Jack Porter, <i>How Dangerous Are Drinking Drivers?</i> , 109 <i>J. Pol. Econ.</i> 1198 (2001) .....	5, 6

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INTEREST OF AMICUS CURIAE<sup>1</sup>

Mothers Against Drunk Driving (“MADD”) was founded in May 1980. MADD’s mission is to stop drunk driving, support the victims of this violent crime, and prevent underage drinking. MADD mobilizes victims and their allies to establish the public conviction that impaired driving is unacceptable and criminal, in order to promote corresponding public policies, programs, and personal accountability. Two of MADD’s goals are to eliminate alcohol-impaired driving and to help meet the needs of the victims of drunk driving crimes. In pursuit of these goals, MADD has participated actively in public and private studies, legislative initiatives, and law enforcement programs aimed at reducing the incidence of alcohol-related highway tragedies.

The recent decision of the Virginia Supreme Court limiting a law enforcement official’s ability to stop a suspected drunk driver on the basis of an anonymous tip threatens to interfere with MADD’s nationwide efforts to reduce the incidence of drunk driving.

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<sup>1</sup> This brief is filed with the consent of the parties. No person or entity other than the Amicus Curiae or its counsel made a monetary contribution to this brief. The Amicus Curiae and its counsel are grateful to Sarah Campbell, James Healy, Matthew Levy, Eugenie Montague, Jonathan Tam, and Eric Wiener, 2009 Duke University School of Law graduates, for their assistance in preparing this brief.

## SUMMARY OF ARGUMENT

Drunk driving is a serious public health hazard. Indeed, this Court has noted the “tragic frequency” with which drunk drivers cause frightful “carnage.” *South Dakota v. Neville*, 459 U.S. 553, 558 (1983). The National Highway Traffic Safety Administration (NHTSA) estimates that, on average, someone is killed by a drunk driver every forty minutes, and that “three in every 10 Americans will be involved in an alcohol-related crash at some point in their lives.” Even at legal levels, the consumption of alcohol impairs skills that are critical for driving.

The public is very familiar with and alarmed by the dangers of drunk driving. State legislatures have responded to these concerns with programs designed to identify drunk drivers before they cause harm and to deter individuals from getting behind the wheel while under the influence of alcohol; some of these programs rely upon anonymous tips, thereby encouraging people who observe or are aware of drunk driving to report it.

By requiring law enforcement officials to personally observe erratic driving before acting on an anonymous tip, the decision of the Virginia Supreme Court dangerously limits law enforcement officials’ ability to intervene and stop drunk driving *before an accident occurs*, and undermines government efforts to deter drunk driving. The decision is not required by the Fourth Amendment.

Interpreting this Court’s decision in *Florida v. J. L.*, 529 U.S. 266 (2000), most state courts have

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upheld police stops based on anonymous tips when the innocent details of the tip are verified. A small minority of states have interpreted the case in the manner that the Virginia Supreme Court did. The Court should make clear that these latter courts have misapplied *Florida v. J. L.*

Police officers can sufficiently verify anonymous tips of drunk or erratic driving without themselves witnessing the alleged dangerous behavior. Requiring the officer to wait to witness erratic driving unnecessarily increases the risk of a sudden and potentially devastating accident. In *Florida v. J. L.*, 529 U.S. 266, the Court reserved judgment in cases where the danger revealed by an anonymous tip might be “so great as to justify a search even without a showing of reliability.” *Id.* at 273. “We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk.” *Id.* at 273–74. Much like a bomb, a driver whose judgment and skills are impaired by alcohol poses a substantial risk of injury or death to unsuspecting motorists and pedestrians with little or no warning. For that reason, we submit that, consistent with *Florida v. J. L.*, a police officer should be permitted to conduct a traffic stop on the basis of an anonymous tip without independently observing the dangerous conduct.

## ARGUMENT

## I. DRUNK DRIVING IS A SERIOUS PUBLIC HEALTH HAZARD.

Just over a quarter-century ago, this Court noted the “tragic frequency” with which drunk drivers cause frightful “carnage.” *South Dakota v. Neville*, 459 U.S. 553, 558 (1983); *see also Tate v. Short*, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring). That observation remains accurate today, as drunk drivers continue to commit “slaughter upon our Nation’s highways.” *Welsh v. Washington*, 466 U.S. 740, 755 (1984) (Blackmun, J., concurring). Indeed, the National Highway Traffic Safety Administration (NHTSA) estimates that, on average, someone is killed by a drunk driver every forty minutes,<sup>2</sup> and that “three in every 10 Americans will be involved in an alcohol-related crash at some point in their lives.”<sup>3</sup>

Driving under the influence of alcohol is inherently dangerous. Studies show, for example, that a blood alcohol concentration (BAC) as low as

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<sup>2</sup> See Nat’l Highway Traffic Safety Admin., U.S. Dep’t of Transp., *2007 Traffic Safety Annual Assessment-Alcohol Impaired Driving Fatalities 1* (2008), available at <http://www-nrd.nhtsa.dot.gov/Pubs/811016.PDF> (“In 1997, an estimated 12,998 people were killed in alcohol-impaired driving crashes.”), available at <http://www-nrd.nhtsa.dot.gov/Pubs/811016.PDF> [hereinafter *2007 Traffic Safety Statistics*].

<sup>3</sup> Nat’l Highway Traffic Safety Admin., *You Drink and Drive, You Lose: Talking Points*, <http://www.nhtsa.dot.gov/people/outreach/safesobr/ydydyl/media/talkpoints.html> (last visited June 6, 2009).

0.02 grams per deciliter (g/dL) may impair major driving-related skills in some individuals.<sup>4</sup> Higher BAC levels increase both the likelihood that a driver will be impaired and the severity of the damage a resulting accident is likely to cause.<sup>5</sup> According to NHTSA, drivers under the influence of alcohol experience difficulty “maintaining proper lane position,” as well as problems with speed and braking, vigilance, and judgment—skills that are essential to operate a vehicle safely.<sup>6</sup>

Some studies have estimated that persons who drive under the influence of alcohol—even those within the legal limits—are at least seven times more likely to cause a fatal crash than drivers who have consumed no alcohol.<sup>7</sup> Since 1998, at least 12,500 alcohol-impaired driving fatalities have occurred annually.<sup>8</sup> In 2007, car accidents involving

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<sup>4</sup> H. Moskowitz et al., Nat’l Highway Traffic Safety Admin., U.S. Dep’t of Transp., *Driver Characteristics and Impairment at Various BACs* 22 (2000), available at [http://www.nhtsa.dot.gov/people/injury/research/pub/impaired\\_driving/BAC/impairment.pdf](http://www.nhtsa.dot.gov/people/injury/research/pub/impaired_driving/BAC/impairment.pdf).

<sup>5</sup> See *id.* at 22–23.

<sup>6</sup> Nat’l Highway Traffic Safety Admin., The Visual Detection of DWI Motorists, <http://www.nhtsa.dot.gov/people/injury/alcohol/dwi/dwihtml/index.htm> (last visited June 6, 2009) [hereinafter The Visual Detection of DWI Motorists].

<sup>7</sup> Steven D. Levitt & Jack Porter, *How Dangerous Are Drinking Drivers?*, 109 J. Pol. Econ. 1198, 1223–24 (2001).

<sup>8</sup> *2007 Traffic Safety Statistics*, *supra* note 2, at 2. “Alcohol-impaired driving” involves a driver with a BAC level of at least 0.08 g/dL. *Id.* at 2 n.1.

alcohol-impaired drivers killed an estimated 12,998 people.<sup>9</sup> Of those fatalities, 245 were children fourteen years old or younger.<sup>10</sup> In that same year, drunk driving in sixteen states accounted for more than sixty-six percent of each state's total traffic fatalities.<sup>11</sup>

The statistics for non-fatal alcohol-related injuries are equally alarming. Studies suggest that drivers with a BAC of at least 0.10 g/dL are at least thirteen times more likely to be involved in a car accident than drivers who have consumed no alcohol.<sup>12</sup> In 2006, alcohol-related crashes injured

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<sup>9</sup> *Id.* at 2. These deaths amounted to 31.7 percent of the 41,059 total traffic fatalities in 2007. *Id.*

<sup>10</sup> Nat'l Highway Traffic Safety Admin., U.S. Dep't of Transp., *2007 Traffic Safety Facts: Children 2*, available at <http://www-nrd.nhtsa.dot.gov/Pubs/810987.PDF>. Between 1985 and 1996, there were 5,555 child passenger deaths involving an alcohol-impaired driver. Kyran P. Quinlan et al., *Characteristics of Child Passenger Deaths and Injuries Involving Drinking Drivers*, 283 J. Am. Med. Ass'n 2249, 2250 (2000), available at <http://jama.ama-assn.org/cgi/reprint/283/17/2249> (follow "Begin manual download" hyperlink).

<sup>11</sup> *2007 Traffic Safety Statistics*, *supra* note 2, at 2.

<sup>12</sup> Levitt & Porter, *supra* note 7, at 1224; see also P.L. Zador et al., Nat'l Highway Traffic Safety Admin., U.S. Dep't of Transp., *Relative Risk of Fatal Crash Involvement by BAC, Age, and Gender* 9 (2000), available at <http://www.nhtsa.dot.gov/people/injury/research/809050pdf>.



approximately 278,000 people.<sup>13</sup> Such accidents impose considerable economic costs on society; in 2000 alone, alcohol-related crashes cost the public an estimated \$114.3 billion.<sup>14</sup> Sixty-three percent of those costs fell on persons other than the impaired driver.<sup>15</sup>

The public is well aware of and alarmed by the dangers of drunk driving. In a 2001 study, virtually all those surveyed considered drunk driving a “threat to their own personal safety and that of their family.”<sup>16</sup> An overwhelming majority considered drunk driving a “major threat” and favored more severe penalties for drunk driving.<sup>17</sup> Nearly half of those surveyed believed that increasing law enforcement efforts to arrest drunk

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<sup>13</sup> Nat’l Highway Traffic Safety Admin., U.S. Dep’t of Transp., *Motor Vehicle Traffic Crash Fatality Counts and Estimates of People Injured for 2006*, at 79 (2008), available at <http://www-nrd.nhtsa.dot.gov/Pubs/810837.PDF>.

<sup>14</sup> Nat’l Highway Traffic Safety Admin., U.S. Dep’t of Transp., *Impaired Driving in the United States 1* (2002), available at <http://www.nhtsa.dot.gov/people/injury/alcohol/impaired-drivingusa/US.pdf>.

<sup>15</sup> *Id.*

<sup>16</sup> Nat’l Highway Traffic Safety Admin., U.S. Dep’t of Transp., *Volume I: Summary Report, National Survey of Drinking and Driving Attitudes and Behavior: 2001*, at 8 (2003), available at <http://www.nhtsa.gov/staticfiles/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/DD2001v1.pdf> [hereinafter *National Survey of Drinking and Driving Attitudes and Behavior*].

<sup>17</sup> *Id.* at 8–9.

drivers would help curtail the problem of drunk driving; an even higher percentage believed that it was "extremely important" to dedicate tax dollars to reducing drunk driving.<sup>18</sup>

State legislatures have responded to the public's concerns with programs designed to identify drunk drivers before they cause harm and to deter individuals from getting behind the wheel while under the influence of alcohol. Such programs can provide crucial on-the-spot flexibility to law enforcement officials, who bear the primary burden of preventing drunk driving and responsibility for protecting the public.

## II. THE DECISION OF THE VIRGINIA SUPREME COURT DANGEROUSLY HAMPERS THE EFFORT OF LAW ENFORCEMENT OFFICIALS TO PROTECT THE PUBLIC FROM DRUNK DRIVERS.

In light of the grave dangers that drunk drivers pose to themselves and the general public, state and local governing bodies and law enforcement officials have sought the greatest flexibility permitted by law to deter and intercept drunk drivers before they cause accidents.<sup>19</sup> The

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<sup>18</sup> *Id.* at 8, 17.

<sup>19</sup> See Letter from Jim Burnett, Chairman of National Transportation Board, to Governors of the 50 States and the Mayor of the District of Columbia, excluding Colorado, Maryland, Nebraska, Utah, and Washington (Sept. 9, 1982), available at [http://www.nts.gov/Recs/letters/1982/H82\\_35.pdf](http://www.nts.gov/Recs/letters/1982/H82_35.pdf) [hereinafter Letter from Jim Burnett].

decision of the Virginia Supreme Court unnecessarily restricts such flexibility and increases the risk that drunk driving will result in injuries and fatalities.

The Virginia Supreme Court's decision hinders government officials' ability to combat drunk driving in two significant ways. First, it dangerously limits the ability of law enforcement officials to intervene and stop drunk driving before an accident occurs. Several states have instituted public awareness programs under which motorists are asked to use their cell phones to report suspected drunk drivers to law enforcement officials.<sup>20</sup> Some of these programs encourage motorists to report suspected drunk drivers anonymously as a way to increase public participation.<sup>21</sup> The decision below undermines such programs by mandating that law enforcement officials personally observe narrowly-defined evidence of drunk driving before they can act on an anonymous tip. The decision prevents an officer from acting until he observes erratic driving, the very danger he seeks to prevent; at that point, however, it may be too late to intervene.

Second, the decision below undermines efforts to deter drunk driving. Studies suggest that a critical factor in the ability to deter drunk driving is

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<sup>20</sup> See Nat'l Highway Traffic Safety Admin., U.S. Dep't of Transp., *Programs Across the United States That Aid Motorists in the Reporting of Impaired Drivers to Law Enforcement v* (2007), available at <http://www.nhtsa.dot.gov/people/injury/alcohol/StopImpaired/3674ProgramsAcrossUS/3674FinalReport2.pdf>.

<sup>21</sup> See Letter from Jim Burnett, *supra* note 19.

the perception of a significant risk of apprehension.<sup>22</sup> Deterrence theory suggests that increased risks of apprehension will decrease the percentage of persons likely to drive under the influence of alcohol.<sup>23</sup> The problem, however, is that a significant number of impaired drivers perceive little risk of being caught. A 2001 survey, for example, found that forty percent of drivers “believe[d] it [was] unlikely that police would stop them for driving after they had too much to drink.”<sup>24</sup> A study from 1999 found that only two percent of respondents believed it was “almost certain” drinking and driving would result in being stopped, arrested, and convicted.<sup>25</sup>

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<sup>22</sup> See H. Laurence Ross, *Drinking and Driving: Beyond the Criminal Approach*, 14 *Alcohol Health & Res. World* 58, 58–59 (1990) (noting most policies designed to reduce the prevalence of drunk driving are based on deterrence theory, and those policies designed to increase the certainty and swiftness of punishment—as opposed to the severity of punishment—appear to be most effective).

<sup>23</sup> See Anthony M. Bertelli & Lilliard E. Richardson, Jr., *The Behavioral Aspects of Drinking and Driving Laws*, 36 *Pol’y Stud. J.* 545, 559–60 (2008) (finding that a perceived risk of being stopped and arrested affected all but ‘hardcore’ drinking drivers); see also Ross, *supra* note 22, at 59 (suggesting policies implemented to reduce the incidence of drunk driving lose effectiveness over time as individuals come to realize their low risk of apprehension).

<sup>24</sup> *National Survey of Drinking and Driving Attitudes and Behaviors*, *supra* note 16, at 12.

<sup>25</sup> Ralph Hingson & Michael Winter, *The Epidemiology and Consequences of Drinking and Driving*, 27 *Alcohol Res. & Health* 63, 77 (2003) (referencing a 1999 national survey of adults 16 and older).

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To combat drunk driving, states have lowered the legal limit for BAC, stiffened penalties, established anonymous tip programs, and set up sobriety checkpoints. Such efforts increase the risk—both perceived and actual—that drunk drivers will be penalized.<sup>26</sup> But these strategies lose their effectiveness if not combined with vigorous enforcement and massive public awareness. Vigorous enforcement is hampered, however, if impaired drivers such as Respondent know they can escape apprehension as long as law enforcement officials do not personally observe their erratic driving. The evidence in this case suggests that Respondent attempted to avoid driving erratically until it became difficult to do so, at which point he pulled off the road. (See J.A. at 5.) Such apparently evasive behavior, observed by the law enforcement official as a result of a tip that accurately described the car and location where Respondent was driving, is sanctioned by the decision below. Under that decision's rationale, the only permissible option for the officer was to wait for Respondent to pull back into traffic and engage in objectively erratic driving, thus subjecting the public to an unnecessary risk of significant harm.

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<sup>26</sup> See Ross, *supra* note 22, at 59; see also Ross J. Homel, *Random Breath Testing the Australian Way: A Model for the United States?*, 14 Alcohol Health & Res. World 70, 74 (1990) ("If visible enforcement and publicity are maintained, the deterrent impact is maintained. If visible enforcement is relaxed, the deterrent impact wanes.").

**III. THE COURT SHOULD CLARIFY FOR LAW ENFORCEMENT OFFICIALS WHEN THEY MAY ACT ON ANONYMOUS TIPS TO PROTECT THE PUBLIC FROM DRUNK DRIVERS.**

**A. State Courts Do Not Agree On The Circumstances Under Which Law Enforcement Officials May Act on Anonymous Tips.**

This Court should provide clear guidance on what the Fourth Amendment requires for a valid traffic stop based on an anonymous tip. Most state courts that have addressed the issue have upheld a stop based on an anonymous tip so long as police verify the innocent details of the tip before making the stop. These courts have not required that the officers also witness unlawful driving. *See, e.g., State v. Sousa*, 855 A.2d 1284, 1290 (N.H. 2004), *State v. Golotta*, 837 A.2d 359, 366–69 (N.J. 2003), *State v. Walshire*, 634 N.W.2d 625, 627–30 (Iowa 2001), *State v. Rutzinski*, 623 N.W.2d 516, 523–24 (Wis. 2001), *State v. Boyea*, 765 A.2d 862, 867–68 (Vt. 2000), *Kaysville City v. Mulcahy*, 943 P.2d 231, 234 (Utah Ct. App. 1997), *People v. Rance*, 644 N.Y.S.2d 447, 447 (N.Y. App. Div. 1996), *State v. Smith*, 638 N.E.2d 1353, 1355 (Ind. Ct. App. 1994). However, several courts, like the court below, have interpreted this Court’s decision in *Florida v. J. L.*, 529 U.S. 266 (2000) to require the police to observe illegal or dangerous driving before making an investigatory stop. *See, e.g., McChesney v. State*, 988 P.2d 1071, 1075–78 (Wyo. 1999), *Anderson v. Dir., North Dakota Dep’t of Transp.*, 696 N.W.2d 918,

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921–23 (N.D. 2005), *Commonwealth v. Lubiejewski*, 729 N.E.2d 288, 291–92 (Mass. App. Ct. 2000). Because the latter interpretation of *J. L.* creates a significant danger to the public, this Court should grant the petition for certiorari to clarify what is required to justify an investigatory stop based on an anonymous drunk-driving tip.

The majority of state courts have held that the Fourth Amendment does not require police corroboration of illegal or impaired driving before making an investigatory stop on the basis of an anonymous tip. Rather, all that is required is a temporally proximate corroboration that a defendant's car matches the one described in the anonymous tip. *Bloomingtondale v. Delaware*, 842 A.2d 1212, 1221 (Del. 2004), is typical of these cases. In that case, the Supreme Court of Delaware held that an anonymous tip with "sufficient indicia of reliability" provided a reasonable suspicion for police to stop the defendant's vehicle even though the officer did not observe any erratic driving before making the stop. *Id.* at 1216. The court found that the tip provided "sufficient quality and quantity of information" by accurately indicating the vehicle's license plate, the driver's route, and the make, model, and color of the vehicle. *See id.* at 1222. In contrast, this Court described the tip in *J. L.* as "bare-boned." 529 U.S. at 273. The court in *Bloomingtondale* identified two factors that give credence to an anonymous tip: (1) "the precise description of the vehicle," and (2) "the officer's corroboration of the descriptive features of the vehicle and the location of its travel in close temporal proximity to when the report was made."

842 A.2d at 1221. Likewise, many other states have held officers responding to anonymous tips of drunk or reckless driving need not personally observe illegal behavior when the reliability and accuracy of the tip's information can be verified in other ways. See *California v. Wells*, 136 P.3d 810 (Cal. 2006); *State v. Predergast*, 83 P.3d 714 (Haw. 2004); *Kansas v. Crawford*, 67 P.3d 115 (Kan. 2003); *State v. Golotta*, 837 A.2d 359 (N.J. 2003); *State v. Rutzinski*, 623 N.W.2d 516 (Wis. 2001); *State v. Sampson*, 669 A.2d 1326 (Me. 1996); *State v. Melanson*, 665 A.2d 338 (N.H. 1995).

In contrast to this overwhelming majority, a handful of courts, including the court below, require police to have actually witnessed the illegal or impaired behavior reported by an anonymous tip before making an investigatory stop. *McChesney v. Wyoming* is typical of these decisions. In that case, the court held that an anonymous tip alone was “not sufficiently reliable to warrant an investigatory stop.” 998 P.2d at 1078. There, the anonymous caller identified the color and make of the car and the direction in which the car was traveling. *Id.* at 1076–77. However, the court held that because the informant had not provided information indicating future behavior of the driver, thereby demonstrating “inside information,” the officer needed to corroborate the tip before making the stop. *Id.* at 1076–77. See also *Anderson*, 696 N.W.2d at 919; *Lubiejewski*, 729 N.E.2d at 214–15. In such states, anonymous tips serve only to help the police to locate a possible drunk driver; to intervene, however, the officer must wait until he or she observes the driver engage in imminently dangerous driving.

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**B. The Decisions of This Court Permit Law Enforcement Officials to Act on Certain Anonymous Tips Without Evidence of Actual Erratic Driving.**

- 1. Anonymous tips of drunk or erratic driving do not fall under the framework of this Court's decision in *Florida v. J. L.***

Several important factors distinguish anonymous tips of drunk or erratic driving from the facts underlying this Court's decision in *Florida v. J. L.*, 529 U.S. 266 (2000). In *J. L.*, this Court held that an anonymous tip of a concealed firearm did not, by itself and without corroboration, provide officers sufficient reasonable suspicion to justify publicly frisking an individual. *Id.* at 274. This specific reasoning does not apply directly in the context of drunk driving, however, where both the intrusion on privacy and the harm being prevented are categorically different.

As this Court held in *Terry v. Ohio*, there exists “no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.” 392 U.S. 1, 21 (1968) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534–35 (1967)). As lower courts have observed, a traffic stop is much less intrusive than the public frisking that occurred in *J. L.* *United States v. Wheat*, 278 F.3d 722, 737 (8th Cir. 2001) (“[S]uch stops are considerably less

invasive, both physically and psychologically, than the frisk on a public corner that was at issue in *J.L.*”).

Additionally, the harm that law enforcement officers are trying to prevent in cases of drunk or erratic driving is usually more immediate than the harm posed by the concealed firearm in *J. L.* Although this Court abstained from fashioning a special rule for firearms in *J. L.*, 529 U.S. at 272, it reserved judgment in cases where the danger revealed by the anonymous tip might be “so great as to justify a search even without a showing of reliability.” *Id.* at 273. The Court continued: “We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk.” *Id.* at 273–74. A drunk driver who, often without warning, endangers the lives of nearby motorists and pedestrians poses a threat similar to that of a bomb, which can go off without warning and injure many people. *See, e.g., Boyea*, 765 A.2d at 857 (“Indeed, a drunk driver is not at all unlike a ‘bomb,’ and a mobile one at that.”).

This case presents an appropriate opportunity for the Court to decide whether the imminent danger inherent in drunk driving is sufficient to justify the minimum intrusion on privacy entailed in a traffic stop to investigate drunk driving.

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2. **A police officer can sufficiently verify an anonymous tip of drunk or erratic driving without observing actual erratic driving.**

In light of this Court's ruling in *J. L.*, federal circuit courts have held that police officers can sufficiently verify anonymous tips of drunk or erratic driving without themselves witnessing the alleged dangerous behavior. *United States v. Elston*, 479 F.3d 314, 318–19 (4th Cir. 2007); *United States v. Wheat*, 278 F.3d 722, 735 (8th Cir. 2001). As this Court affirmed in *Alabama v. White*, 496 U.S. 325, 330 (1990), the reliability of an anonymous tip will depend on the totality of the circumstances. In *White*, the Court upheld the search of a suspect based on an anonymous tip because the tip accurately predicted the suspect's future activity. *Id.* at 330–31. In *J. L.*, this Court found the tip insufficiently reliable because it “d[id] not show that the tipster ha[d] knowledge of concealed criminal activity.” 529 U.S. at 272.

In contrast, a police officer can verify an anonymous tip of drunk or erratic driving by observing telltale behavior or activity short of erratic driving. For example, an officer could corroborate the tip if the driver exhibited braking problems, as was the case here. The NHTSA identifies “speed and

braking problems” as indicators of drunk driving.<sup>27</sup> The NHTSA’s DWI detection guide was intended to help law enforcement officers identify drunk drivers, with or without a tip.<sup>28</sup> Here, it appears Respondent was braking in an unusual manner. (See J.A. at 5.) But even if an officer’s observation of such an indicator alone is not enough to warrant an investigatory stop, it ought to be enough to corroborate a tip of drunk driving, given the imminent danger such driving poses.

Moreover, under the “totality of the circumstances” test, an officer following a suspected drunk driver pursuant to an anonymous tip would find the tip to be credible if the driver appeared to react to being followed by the police in a predictable manner: driving overly cautiously and, as in this case, pulling over to the side of the road and stopping. (See J.A. at 21–23.) An officer’s

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<sup>27</sup> The Visual Detection of DWI Motorists, *supra* note 6. The guide notes four categories of driving behaviors affected by alcohol including speed and braking. “Any type of stopping problem” is said to predict “a good chance the driver is DWI,” though the guide offers some examples such as “stopping too short or beyond a limit line” and “accelerat[ing] or decelerat[ing] rapidly for no apparent reason.” *Id.* (follow “Explanations of the 24 driving cues” hyperlink). Moreover, the guide states “the cues presented in these categories predict that a driver is DWI at least 35% of the time” while certain behaviors like swerving have “single cue probabilities greater than 70 percent.” *Id.* Behaviors in more than one category increase the probability the driver is intoxicated. *Id.*

<sup>28</sup> *Id.* “The research suggests these training materials will be helpful to officers in: [d]etecting impaired motorists, [a]rticulating observed behaviors on arrest reports, and [s]upporting officers’ expert testimony.” *Id.*

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observation of such behavior after receiving an anonymous tip provides sufficient reliability to justify a minimally invasive traffic stop. The observation corroborates more than just the suspect's location and appearance; it shows that the tipster had "knowledge of concealed criminal activity."<sup>29</sup>

Finally, the harm inherent in drunk or erratic driving can best be prevented if a police officer is able to corroborate a tip without actually witnessing erratic driving. Forcing a police officer to witness erratic driving before stopping the vehicle raises the risk that someone might be harmed. For example, the swerve that corroborates the tip may be lethal. As the Eighth Circuit distinguished in *Wheat*, police officers responding to an anonymous tip of a concealed weapon can safely and quietly observe the suspect to ascertain whether or not he has a gun, or whether he appears to be engaged in illegal activity. 278 F.3d at 736. If, however, officers must wait to witness erratic driving, there are "three possible outcomes: the suspect drives without incident for several miles; the suspect drifts harmlessly onto the shoulder, providing corroboration of the tip and probable cause for an arrest; or the suspect veers into oncoming traffic, or fails to stop at a light, or otherwise causes a sudden and potentially devastating accident." *Id.* at 736–37. Certainly, when officers have been able to corroborate the tip

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<sup>29</sup> Although the officer could not confirm it before the stop, the anonymous caller also provided police the driver's full name and a description of his shirt. (J.A. at 22.) Such specific "inside information" at least suggests the anonymous tip was a serious effort to help police, and not just a hoax.

by observing behavior other than erratic driving, this Court's rationale in both *White* and *J. L.* would support and encourage the officer to stop the driver before he causes a devastating accident.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Virginia Supreme Court.

Respectfully submitted,

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