No. 15-1384

IN THE

Supreme Court of the United States

JEFFREY R. GILLIAM,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEBRASKA SUPREME COURT

REPLY BRIEF OF PETITIONER

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INTRODUCTION

This case presents an important Fourth Amendment question that arises repeatedly across the country and has sharply divided the state supreme courts and the federal courts of appeals: Would a reasonable person behind the wheel of a parked car feel free to drive away when a police officer pulls up behind him, illuminates the cruiser's flashing overhead lights, and approaches the driver (with uniform, badge, and all)?

As the vast majority of courts have concluded, the answer is no. A driver in such a setting has been "seized" under the Fourth Amendment, because "[f]ew, if any, reasonable citizens, while parked, would simply drive away" with emergency lights flashing in the rearview mirror and a police officer approaching the vehicle. *State v. Morris*, 72 P. 3d 570, 577 (Kan. 2003) (internal citations omitted). A few courts, however, have rejected that line of cases, based on the general observation that a police officer "may have … non-coercive and safety-related reasons for turning on the lights"—an observation about the officer's subjective intent that has nothing do with whether a reasonable person would feel free to leave. *Jacobs v. United States*, 981 A.2d 579, 582 (D.C. 2009). In this case, the Nebraska Supreme Court joined the minority position, both in outcome and in reasoning. The court's decision implicates and exacerbates a conflict in authority on an important and recurring issue of federal constitutional law, and warrants this Court's review.

The state's brief in opposition misstates the nature of the split and misunderstands Petitioner's position. The state observes that "[n]early all" of the decisions the petition cites "rely on the totality of the circumstances as the test to determine whether or not the contact was a seizure." BIO 6. Of course they do; it's been the rule for 30 years that a seizure occurs when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988). The split is not over whether courts announce the correct standard at the highest level of generality, but rather over their conclusions regarding how a reasonable person would react in *this* important and recurring factual scenario—where the circumstances are identical.

Likewise, and also contrary to the state's assertions, Petitioner does not ask this Court to replace the established Fourth Amendment test with "a one dimensional analysis." BIO 9. The cases the petition cites on the majority side of the split correctly apply the established test, concluding that, when the police pull up behind a parked vehicle, activate their flashing lights, and approach the vehicle, the totality of the circumstances would leave a reasonable driver feeling decidedly not free to leave. Indeed, the few courts that have diverged from that view are the ones that have contravened the established Fourth Amendment test. By focusing on the motives that might lead officers to use their lights rather than on what those lights would convey to a reasonable person, these courts have improperly "shift[ed] the issue from the intent of the police as objectively

manifested to the motive of the police." *Brendlin v. California*, 551 U.S. 249, 260 (2007).

This Court has "repeatedly rejected attempts to introduce [that] kind of subjectivity into Fourth Amendment analysis." *Id*. It should grant certiorari here to reaffirm the established test for a Fourth Amendment seizure and to ensure uniformity in the application of that test to a recurrent scenario in which police and members of the public interact.

ARGUMENT

I. Courts Are Split On An Important And Recurring Fourth Amendment Question.

This case presents the very definition of a split: On the same facts, courts have reached diametrically opposite conclusions.

The petition identifies 13 state appellate court decisions holding that, where an officer pulls up behind a legally parked vehicle and activates the police cruiser's flashing overhead lights before approaching the vehicle, the vehicle's occupant has been seized. Pet. 5-7.[1] Decisions within that "line of cases" repeatedly cite one another, and recognize that they pose the same question in substantively indistinguishable factual circumstances. *Morris*,

[1] There are others. *See, e.g.*, *Wallace v. Commonwealth*, 528 S.E.2d 739, 741-42 (Va. Ct. App. 2000); *Lawson v. State*, 707 A.2d 947, 951 (Md. Ct. Spec. App. 1998); *People v. Bailey*, 222 Cal. Rptr. 235, 236–37 (Ct. App. 1985); *State v. Walp*, 672 P.2d 374, 375 (Or. Ct. App. 1983); *State v. Stroud*, 634 P.2d 316, 318 (Wash. Ct. App. 1981).

72 P.3d at 579. The Tennessee Supreme Court, for instance, observed that "[m]ost appellate courts considering the issue, under facts similar to those presented in this case, agree that a person in a parked vehicle is seized at the moment when the officer activates the emergency lights." *State v. Williams*, 185 S.W.3d 311, 317 (Tenn. 2006).[2]

Those decisions share the same reasoning. They begin with the settled rule: A Fourth Amendment "seizure" occurs when an "officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). A person's liberty has been restrained "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *INS v. Delgado*, 466 U.S. 210, 215 (1984). And they apply that rule to this scenario: "[B]ecause a reasonable person would not believe he is free to leave when a police car is parked directly behind him with the police car's emergency lights activated," most courts have concluded that those circumstances give rise to a seizure. *State v. Thompson*, 793 N.W.2d 185, 187 (N.D. 2011); *see also Commonwealth v. Smigliano*, 694 N.E.2d 341, 343 (Mass. 1998) (use of lights effected a seizure even though "the defendant had

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[2] The state notes that *State v. Williams* was abrogated in *State v. McCormick*, 2016 WL 2742841 (Tenn. May 10, 2016). BIO 7-8. But that abrogation concerned the "community caretaking doctrine," which plays no role in this case. As the state acknowledges, *McCormick* "did not alter the 'totality of the circumstances' test for determining whether a seizure occurred." BIO 8.

already stopped his car before the officer activated the blue lights"); *State v. Burgess*, 657 A.2d 202, 203 (Vt. 1995) (where "defendant's vehicle was the sole subject of the officer's use of the flashing blue lights," a reasonable person would not "feel free to leave"); *People v. Laake*, 809 N.E.2d 769, 772 (Ill. App. Ct. 2004) ("We agree … that a police officer's use of overhead emergency lights, when directed at a particular person, would be interpreted by that person as a command to stay put.").

This does not mean that these courts follow a categorical rule that a police officer's use of flashing overhead lights always effects a seizure. *Williams*, 185 S.W.3d at 318 ("Not all use of the emergency blue lights on a patrol car will constitute a show of authority resulting in the seizure of a person."); *State v. Willoughby*, 211 P.3d 91, 96 (Idaho 2003) ("we do not hold that a law enforcement officer's action of turning on his vehicle's overhead lights creates a *de facto* seizure commanding the driver to remain stopped"); *Burgess*, 657 A.2d at 203. Other circumstances still matter. In particular, several courts finding seizures have noted that, in other cases, where "evidence of an accident or other peril" might exist, a reasonable person might conclude that the officer had illuminated the lights for safety reasons rather than to communicate that the person is not free to leave. *Williams*, 185 S.W.3d at 318; *see also Morris*, 72 P.3d at 579 (where "[t]here was no showing that other traffic necessitated activating the emergency lights," holding that "a reasonable person would not believe that the lights had been activated for safety reasons"). Absent such special circumstances, however, the majority view is that a

reasonable driver in a parked car, confronted with a police officer's flashing overhead lights behind him, would not feel free to simply drive away.

The decisions that reject that prevailing view reflect a sharply distinct mode of analysis—on the same facts. They look not to how a reasonable driver would understand an officer's use of flashing overhead lights, but, instead, to the motives police officers might have for using their lights. For example, in rejecting the argument that the use of flashing overhead lights effected a seizure, the Seventh Circuit observed that "[t]he officers illuminated their flashing lights to alert the car's occupants that they were going to approach the vehicle. Without identifying themselves appropriately to the car's occupants," the court continued, "the officers would have put themselves at risk in approaching a parked car late at night." *United States v. Clements* 522 F.3d 790, 794-95 (7th Cir. 2008); *see also Jacobs*, 981 A.2d at 582 (because "[t]here may have been non-coercive and safety-related reasons for turning on the lights that night, … turning on the emergency lights alone [did not] amount[] to a stop"); *State v. Baldonado*, 847 P.2d 751, 754 (N.M. Ct. App. 1992) (the use of flashing lights alone does not constitute a stop because "officers may well activate their emergency lights for reasons of highway safety or so as not to unduly alarm the stopped motorists").

The case law, then, features two distinct lines of authority, based on two irreconcilable analytical approaches. As a result, the constitutionality of a frequently recurring type of encounter between the

police and members of the public turns on the jurisdiction in which the encounter happens to occur. This Court regularly grants certiorari to resolve unsettled questions regarding the application of the "free to leave" test to particular common scenarios. *See Brendlin*, 551 U.S. at 254; *United States v. Drayton*, 536 U.S. 194 (2002); *Florida v. Bostick*, 501 U.S. 429 (1991). The split in authority on the question presented here likewise warrants this Court's intervention.

II. This Case Squarely Presents The Question That Has Divided The Courts.

The state argues that the decision below is not in conflict with the long line of decisions the petition cites because "each court … comes to a conclusion based on the totality of the circumstances in that individual case." BIO 6. Yet the state supports that assertion simply by quoting snippets from some of those decisions to show that they correctly state the general standard for a Fourth Amendment seizure. BIO 6-9. The state makes no attempt to distinguish this case from any of the decisions we cited by identifying specific factual differences that could explain the divergence in outcomes.

Nor could it: There is nothing distinctive about the facts surrounding Petitioner's encounter with Officer Wagner that sets it apart from other cases in which courts have assessed analogous encounters and concluded that there *is* a Fourth Amendment seizure. When Officer Wagner came upon Petitioner's vehicle,

it was parked legally on the side of the street.[3] The Nebraska Supreme Court identified no evidence of an accident or other peril that would lead a reasonable person in Petitioner's position to conclude that Officer Wagner activated his flashing overhead lights for any reason other than to communicate that Petitioner was not free to leave. Hence, had Petitioner been prosecuted in one of the more than a dozen jurisdictions in which courts have held that a police cruiser's flashing overhead lights generally constitute a "show of authority … from which a reasonable person would not have felt free to leave," the court would have determined that Petitioner was seized. *Williams*, 185 S.W.3d at 317.

The Nebraska Supreme Court, moreover, plainly did not base its decision on any special circumstance presented in this case, but on the general reasoning underlying the minority line of cases described above. Indeed, in rejecting Petitioner's Fourth Amendment argument, the court relied exclusively on the Seventh Circuit's decision in *Clements*. As in *Clements*, the Nebraska Supreme Court's analysis focused on the police officers' potential subjective motives in

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[3] The state suggests—without citation—that Petitioner's vehicle was not legally parked. BIO 1. The Nebraska Supreme Court found otherwise. *See* Pet. App. 2. The state also suggests—again, without citation—that Petitioner rolled down his window on his own initiative. BIO 2. This, too, is contrary to the Nebraska Supreme Court's factual recitation. *See* Pet. App. 3. Because this Court defers to the state court's factual findings, it would have no need to weigh the state's mistaken assertions. *Hernandez v. New York*, 500 U.S. 352, 366 (1991) (plurality opinion); *see also 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 351 (1987).

activating their patrol car lights, and treated the "reasonable person" test as purely derivative of that inquiry into an officer's motives. The court thus observed that "there are a variety of reasons officers may activate their overhead lights," before concluding that, therefore, "the overhead lights, standing alone, would not have caused a reasonable person to believe that he was not free to leave." Pet. App. 10-11. The decision consequently provides an ideal vehicle for assessing the minority's reasoning and resolving the entrenched split in authority.

III. The Prevailing Approach Is Correct, While The Minority View Reflects A Misunderstanding Of The Objective "Free To Leave" Test.

The decisions that adopt the prevailing view correctly apply the established test for a Fourth Amendment seizure. A police officer's flashing blue lights plainly constitute a show of authority. In Nebraska—as in other states—use of such lights is restricted by law. *See* Neb. Rev. Stat. §§ 60-6,230, 60-6,233. And a person who is driving is not free to disregard that show of authority; indeed, failing to stop when the police activate their emergency lights is dangerous, and is a criminal offense in Nebraska, as in other states. *See* Neb. Rev. Stat. §§ 28-905, 28-906; *State v. Armagost*, 856 N.W.2d 156, 162-63 (Neb. App. Ct. 2014) (sufficient evidence to convict defendant of "operat[ing] any motor vehicle … in an effort to avoid arrest or citation" where officer "attempted to initiate a traffic stop … with his cruiser's overhead emergency lights and siren activated"); *see also, e.g.,* Tex. Transp. Code Ann. §

545.421 (criminal offense where driver "refuses to bring the vehicle to a stop … when given a visual or audible signal to bring the vehicle to a stop," including by means of officer's "emergency light"). Everyone knows this. So would a reasonable person really think that he can just step on the gas and drive away from a police cruiser that pulls up behind him with its overhead lights flashing, simply because he was already parked when the officer arrived—even though the exact same conduct would be criminal if he had been moving when the officer arrived? The majority of courts have correctly recognized that reasonable people do not make such distinctions in the face of an obvious show of police authority.

The state maintains that we are advocating a new test that would replace the established Fourth Amendment seizure test with a "one dimensional analysis—whether the police turned on emergency lights." BIO 9. We advocate no such thing. As noted, the courts that have adopted the prevailing approach acknowledge that the analysis still looks to all of the circumstances surrounding the encounter, and that in special circumstances the lights might not effect a seizure. If a police officer pulls up behind a driver as she is changing a flat tire, for instance, she might well think that the officer is just checking to see if she needs help. *Cf. Laake*, 809 N.E.2d at 772. But most cases—including this one—do not involve special circumstances that would suggest to a reasonable person that the lights communicate anything other than to stay put.

It is, rather, the minority position as reflected in the ruling below that is inconsistent with the

established test. The test for whether a seizure has occurred is objective; the "subjective intent of the officers is relevant … only to the extent that that intent has been conveyed to the person confronted." *Chesternut*, 486 U.S. at 575 n.7. Yet the decision below and the other decisions embracing the minority approach evince precisely that focus on the motives that might lead police officers to activate their overhead lights, rather than on how a reasonable person would understand an officer's use of those lights.

The state's defense of the decision below likewise relies on the subjective motives of the police officer, rather than the objective circumstances confronting Petitioner. The Nebraska Supreme Court, the state asserts, decided the case correctly because "the record showed that Wagner activated the overhead lights to alert the occupant of the parked vehicle that he was going to approach, and to warn oncoming vehicles of a potential traffic hazard. For Officer Wagner to have done otherwise," the state continues, "would have put both him and other drivers at risk because it was still dark at the time he contacted Petitioner in his truck." BIO 4. The test for a Fourth Amendment seizure, however, hinges not on a police officer's unexpressed motives for taking a certain action, but on an "objective … test of what a reasonable [person] would understand" from the officer's conduct. *Brendlin*, 551 U.S. at 260.

By focusing on how a reasonable person would understand an officer's conduct, the proper Fourth Amendment test provides a crucial safeguard against "arbitrary and oppressive interference by law

enforcement officials with the privacy and personal security of individuals." *Id.* at 262 (internal citations and alterations omitted). The state court's decision here undermines that safeguard by holding that the encounter at issue fell altogether "outside the realm of Fourth Amendment protection," even though a reasonable person in Petitioner's position would not have felt free to leave. Pet. App. 8. And because several other courts have similarly misapplied the established seizure test, and their decisions implicate a very common kind of encounter between police officers and members of the public, this important Fourth Amendment issue merits this Court's review.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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