No. 07-1122

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA

Petitioner,

v.

LEMON MONTREA JOHNSON

Respondent.

On Petition for Writ of Certiorari
to the Arizona Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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May 2008

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RESPONDENT'S BRIEF IN OPPOSITION

The Arizona Court of Appeals followed established Fourth Amendment jurisprudence in determining under the totality of the circumstances that, after a stop for a minor traffic violation, Respondent Lemon Johnson, a passenger in the car, was no longer seized but was engaged in a consensual encounter. Therefore, it held that the pat down was not justified because the officer did not possess a reasonable suspicion of criminal activity. Pet. App. A-15, A-16, ¶ 29. The dissent reached a contrary conclusion simply because it interpreted the facts differently. Pet. App. A-17, A-19, ¶¶ 31, 35. The Court of Appeals specifically declined to reach the broader issue of "whether officers, in the interests of their own safety, and based solely on the seizure resulting from the initial traffic stop, may routinely pat down passengers whom they suspect of no crime but whom they reasonably suspect might be dangerous;" it found that question was not presented because the officers did not immediately order Johnson out of the vehicle and frisk him to assure their safety during the stop of the driver, at a time when Johnson's seizure would have been uncontested. Pet. App. A-15, ¶ 28. However, that is precisely the issue Petitioner has asked this Court to review.

This case instead turns on whether or not Johnson had remained seized when the pat down occurred. Disagreement over this fact-intensive question is not worthy of this Court's review. Indeed, the Arizona Supreme Court declined to take the case. The cases cited by Petitioner to challenge the Court of Appeals' ruling did not address whether the defendant was still subject to seizure and thus do not conflict on the legal issue decided by Arizona's intermediate appellate court. None of the supposedly

conflicting cases cited in the petition involved a situation in which the defendant was no longer seized at the time of the search. There is no conflict in the lower courts for this Court to resolve, and the Arizona decision is not contrary to this Court's precedents.

Moreover, Petitioner's argument wholly depends on the assumption that the traffic stop was still in progress at the time of the frisk, something that was not established at the suppression hearing. Petitioner's question also assumes that the officer possessed a reasonable belief that Johnson was armed and dangerous at the time of the pat down, but the Court of Appeals specifically did not decide this issue. Pet. App. A-13, ¶ 26. Thus, even if the question presented merited review by this Court, which it does not, this case is not the appropriate vehicle to resolve it.

STATEMENT OF THE CASE

Johnson, a young black male, was a back seat passenger in a car stopped on a major thoroughfare by gang task force officers for a civil insurance violation that raised no concerns about possible criminal behavior. Reporter's Transcript (RT) 11-7-05, 6, 10, 25, 32, 44; Record on Appeal (ROA) 12; Pet. App. A-2, ¶¶ 2, 3. The officers stopped the car after running the license plate; they did not target the vehicle because of any known or suspected connection to gang activity, and they had received no reports of a crime nearby. RT 11-7-05 at 28, 32, 39; Pet. App. A-2, ¶ 3.

After Officer Machado made his initial contact, the driver stepped out of the vehicle to talk to him, but the front seat passenger remained in the car. Neither was frisked. RT 11-7-05, 12-13, 30; Pet. App. A-3, A-4, ¶¶ 4, 8. Officer Trevizo then made contact with Johnson, who was still in the back seat. She noticed that he had a police

scanner in his front pocket and found that unusual but not unlawful. She did not recall whether the scanner was turned on or off. RT 11-7-05, 14-16, 3; Pet. App. A-3, A-4, ¶ 6. She noted that "plenty of people . . . like to listen to scanners" for noncriminal purposes, including her own uncle. RT 11-7-05, 15-16. Johnson also wore blue-accented clothing, which she associated with the Crips gang, but the driver of the car wore red. RT 11-7-05, 9, 26; Pet. App. A-2, A-3, ¶¶ 2, 5. Contrary to Petitioner's assertion, Trevizo did not testify that Crips gang members were known to possess firearms. She merely stated vaguely that "gang members will often, in general, possess firearms." RT 11-7-05, 9; Pet. App. A-2, ¶ 2. In response to her questioning, Johnson said he did not have identification with him but provided his name and date of birth. RT 11-7-05, 13, 18, 30; Pet. App. A-4, ¶ 7. When asked, he also said he was from Eloy,[1] had served time for burglary, and had been out of prison for about a year. RT 11-7-05, 18; Pet. App. A-4, ¶ 7.

Trevizo then requested that Johnson step out of the car so that she could ask him some questions. Her sole intention was to gather intelligence for her gang task force work. RT 11-7-05 at 32; Pet. App. A-4, ¶ 8. She wanted to isolate him in the hope that he would be more comfortable contributing gang-related information. RT 11-7-05, 18-19, 32-33; Pet. App. A-4, ¶ 8. She was not compelled to question him by the immediate circumstances but simply wanted to get his insights in order to further the mission of her task force. She did not seek information related to the traffic stop. RT 11-7-05, 18-19, 25; Pet. App. A-4, ¶ 8.

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[1] Eloy is a town approximately halfway between Tucson and Phoenix.

Johnson was cooperative. According to Trevizo, nothing in his behavior indicated his involvement in criminal activity. RT 11-7-05, 28-31; Pet. App. A-5, ¶ 9. She characterized her interaction with Johnson as consensual; as she testified, he "certainly" could have refused to exit the car to answer her questions if he had so desired. RT 11-7-05, 41; Pet. App. A-4, ¶ 8.[2] Contrary to Petitioner's and the dissent's assertion, Trevizo did not recall what was transpiring between Machado and the driver while she conversed with Johnson and he exited the vehicle. RT 11-7-05, 42-43. The record does not reveal whether the driver was still the subject of an investigative detention by the time Johnson got out of the car.

Johnson made no swift or furtive movements and displayed no hostility when he exited. RT 11-7-05, 33; Pet. App. A-4, ¶ 9. Nevertheless, *after* he exited, Trevizo decided to do a protective frisk.[3] RT 11-7-05, 22; Pet. App. A-5, ¶ 9. She directed him to turn around and told him she was going to pat him down for weapons. She did not ask permission to do so. RT 11-7-05, 33-35; Pet. App. A-4, A-5, ¶ 9. Trevizo conceded that she had "not observed anything that appeared to be criminal" at the time of the pat down. RT 11-7-05, 28-31; Pet. App. A-5, ¶ 9. After a brief struggle, she handcuffed Johnson. RT 11-7-05, 23-24; Pet. App. A-5, ¶ 9.

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[2] The dissent claimed the encounter was non-consensual because Trevizo did not disagree when counsel asked "in fact, you weren't seeking [Johnson's] permission?" Pet. App. A-20, ¶ 36. However, the dissent omitted the material part of counsel's question, which asked "in fact, you weren't seeking [Johnson's] permission or authority to search him for weapons?" RT 11-7-05, 35. Counsel's question had nothing to do with whether Johnson had the option to remain in the vehicle and decline to answer more questions. Johnson has never contended that the pat down was consensual, just that his interaction with Trevizo and his exit from the vehicle prior to the pat down were consensual.

[3] Petitioner claims that Trevizo suspected Johnson was armed before he exited the vehicle, but the record does not support this contention.

The trial court denied Johnson's motion to suppress. The Arizona Court of Appeals reversed, finding that the pat down violated the Fourth Amendment because Johnson was no longer seized and, as the State admitted, Pet. App. A-14, ¶ 27, Trevizo did not possess a reasonable suspicion of his involvement in criminal activity.[4] The dissent took issue with the majority on the fact-bound question of whether Johnson remained seized at the time of the frisk. Pet. App A-17, A-19, ¶¶ 31, 35. Although the dissent agreed that a passenger's seizure must end "at some point during the encounter," it contended that "that point had not yet occurred." Pet. App. A-19, ¶ 35. The Arizona Supreme Court denied review.

REASONS FOR DENYING THE WRIT

The Court of Appeals' opinion does not conflict with lower court opinions and follows this Court's established principles protecting the right to be free from unreasonable search and seizure under the Fourth Amendment. Given the fact-intensive circumstances of this case, it was unreasonable for Trevizo to frisk Johnson because, under the totality of the circumstances, he was no longer seized at the time of the search and, as Petitioner has admitted, Trevizo "had no reason to believe [he] was involved in criminal activity." Pet. App. A-14, ¶ 27. As the Court of Appeals found, Petitioner simply did not establish that Trevizo frisked Johnson due to safety concerns related to the traffic stop. Pet. App. A-16, ¶ 29, n. 5. Petitioner claims that the Court of Appeals' opinion addresses whether a pat down of a passenger can be conducted for officer safety "while the passenger is detained as part of a lawful investigative stop,"

[4] The Court of Appeals did not address Johnson's claims under the Arizona constitution's broader right to privacy, and it did not rule on his claim that Trevizo lacked reasonable grounds to believe that he was armed and dangerous.

Pet. 5, but the Court of Appeals specifically held that Johnson was no longer detained when Trevizo conducted the frisk. Contrary to Petitioner's assertion, this Court has never held that a passenger must be detained for the "full duration" of an investigative traffic stop, and such a ruling would be inconsistent with this Court's guiding principle that Fourth Amendment questions must be determined on a case-by-case basis by evaluating the totality of the circumstances. In any event, the record does not even establish that the investigative detention of the driver was ongoing at the time of the pat down. Moreover, the Court of Appeals did not decide that the officer had a reasonable belief that Johnson might be armed and dangerous – the factual predicate of the question presented. In short, there is no basis for further review in this Court.

I. The Court of Appeals Decision Does Not Conflict With This Court's Precedents or Lower Court Decisions.

Petitioner lists several cases evaluating whether a pat down of a driver or passenger is supported by reasonable officer safety concerns. Pet. 8. In all of these cases, the continued seizure of the occupant by virtue of the traffic stop was not in dispute. None of these courts considered whether the encounter with the passenger had become consensual.

Petitioner also cites dicta from this Court's opinions in *Knowles v. Iowa*, 525 U.S. 113, 118 (1998), and *Michigan v. Long*, 463 U.S. 1032, 1047-48 (1983), stating that officers may order persons from an automobile during a traffic stop and conduct a frisk upon reasonable suspicion that they are armed and dangerous, *see* Pet. 7-8, but these cases are inapposite. *Knowles*, which held that a full search of an automobile based on a speeding citation violated the Fourth Amendment, did not even analyze a situation involving a frisk, much less a frisk following a cooperative conversation with a

passenger. In *Long*, which also did not involve a frisk, this Court held that, during a lawful investigatory stop of a driver behaving erratically, a protective search of the vehicle's passenger compartment before allowing the driver to return to the vehicle was reasonable, since the driver could have gained access to a weapon when he re-entered the vehicle. In any event, Trevizo did *not* order Johnson out of the vehicle; she asked him to leave the car, not for officer safety reasons, but to pursue the mission of her task force. Petitioner also misrepresents the holding of *Pennsylvania v. Mimms,* 434 U.S. 106 (1977), in which the majority said nothing about the circumstances in which a passenger can be frisked. In *Mimms,* the officer, after observing a traffic violation and stopping a vehicle, immediately ordered the driver out of the car to show his paperwork and frisked him after observing bulge in his pocket. The additional cases cited by Petitioner for the proposition that any person initially detained for a traffic violation can be frisked upon reasonable suspicion of dangerousness likewise did not involve a detention that had become a consensual encounter. *See Adams v. Williams,* 407 U.S. 143, 146 (1972) (officer seized gun based on reliable tip that suspect possessed drugs and a weapon); *Terry v. Ohio,* 392 U.S. 1, 28 (1968) (stop and frisk based on reasonable suspicion of armed robbery).

II. The Court of Appeals Applied This Court's Well-Established Standards to Fact-Specific Circumstances in Reaching its Decision.

Johnson does not dispute that passengers are initially seized by virtue of a traffic stop and can thus challenge its basis. *Brendlin v. California,* 127 S. Ct. 2400 (2007). An officer may order a passenger out of a car "pending completion" of a valid traffic stop, *Maryland v. Wilson,* 519 U.S. 408, 415 (1997), and may then conduct a pat down if justified by reasonable safety concerns related to the stop. *United States v.*

Rice, 483 F.3d 1079 (10th Cir. 2007); *United States v. Hartz*, 458 F.3d 1011, 1018 (9th Cir. 2006).

However, if the traffic stop has concluded, the passenger cannot be lawfully seized unless a reasonable suspicion of criminal activity has arisen. *Terry*, 392 U.S. 1 (seizure must be supported by reasonable suspicion of illegality); *see also Illinois v. Caballes*, 543 U.S. 405, 407 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."). Moreover, a person's seizure by virtue of a traffic stop may evolve into a consensual encounter if the interaction becomes one of "voluntary cooperation of a private citizen in response to non-coercive questioning by a law enforcement officer," *United States v. Hernandez*, 93 F.3d 1493, 1498 (10th Cir. 1996), even if the person is not explicitly advised that he or she is free to leave. *Ohio v. Robinette*, 519 U.S. 33, 36, 39 (1996) (following detention in a traffic stop, encounter between driver and officer could evolve into consensual encounter even if officer did not explicitly tell driver he was free to go); *United States v. Kimball*, 25 F.3d 1, 8 (1st Cir. 1994) (seizure of passenger ended when officers asked him in nonthreatening and noncoercive manner if he would agree to go to police station and answer questions). Nothing in *Brendlin*, which protects the privacy rights of passengers, casts doubt on the ability of a police officer to end the seizure and commence a consensual encounter once it becomes clear that the passenger is not implicated in the reason for the traffic stop.

Officers may question citizens without implicating Fourth Amendment protections "so long as the officers do not convey a message that compliance with their

requests is required." *Florida v. Bostick*, 501 U.S. 429, 437 (1991). Under such circumstances, a person is authorized to disregard an officer who merely seeks to initiate a consensual encounter. *Id.* at 437; *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). An encounter is not consensual if, in light of all the circumstances, the police conduct would have communicated to a reasonable person that he was not free to leave, *Mendenhall*, 446 U.S. at 554, or to "decline the officers' requests . . . ." *Bostick*, 501 U.S. at 436. Although the inquiry is objective, the subjective intent of the officer about whether an interaction is consensual is relevant "to the extent that that intent has been conveyed to the person confronted." *Brendlin*, 127 S. Ct. at 2409 (citing *Michigan v. Chesternut*, 486 U.S. 567, 575, n. 7 (1988)). Here, contrary to Petitioner's claim, Pet. 10, the Court of Appeals correctly applied the objective test in determining that "[n]one of Trevizo's verbal or nonverbal communications with Johnson before the pat down can reasonably be construed to convey to him that his encounter with her was anything other than consensual." Pet. App. A-12, ¶ 22; A-13, ¶ 25. There is no conflict in the lower courts on this fact-bound question for this Court to resolve.

Contrary to Petitioner's implication, Pet. 7, during a consensual encounter, an officer is not entitled to conduct a protective search unless the officer has a reasonable suspicion, supported by articulable facts, that criminal activity may be afoot. *Terry*, 392 U.S. at 32-33 (Harlan, J., concurring); *United States v. Burton*, 228 F.3d 524, 528 (4th Cir. 2000); *United States v. Gray*, 213 F.3d 998, 1000 (8th Cir. 2000); *In Re Ilono H.*, 113 P.3d 696, 699, ¶ 11 (Ariz. App. 2005); *Gomez v. U.S.*, 597 A.2d 884, 890-91 (D.C. 1991); *People v. Stewart*, 359 N.E.2d 379, 382 (N.Y. 1976); *State v. Giltner*, 537 P.2d 14, 17 (Haw. 1975); *cf. Adams*, 407 U.S. at 146 (officer seized gun based on reliable tip that

suspect possessed drugs and a weapon). Indeed, an individual is free to ignore an officer who lacks reasonable suspicion of illegality. *Bostick,* 501 U.S. at 437; *Mendenhall,* 446 U.S. at 554. In the context of such a consensual encounter, the desire of police officers to protect themselves must yield to the right of citizens who are not reasonably suspected of criminal activity to be free from governmental intrusion. *Terry,* 392 U.S. at 32-33 (Harlan, J., concurring). Here, Petitioner admitted that the officer did not possess reasonable suspicion of criminal activity when she searched Johnson. Pet. App. A-14, ¶ 27.

As this Court has repeatedly emphasized, the "touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno,* 500 U.S. 248, 250 (1991). Reasonableness must be measured in objective terms by examining the totality of the circumstances. *Robinette,* 519 U.S. at 39 (1996). In applying this test, this Court has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry" in determining whether a police-citizen encounter is consensual or a seizure. *Id.*; *Bostick,* 501 U.S. at 439 (court must consider all circumstances in deciding whether questioning aboard a bus constitutes a seizure); *Chesternut,* 486 U.S. at 572-73; *Florida v. Royer,* 460 U.S. 491, 506 (1983).

Following these principles, the Court of Appeals evaluated the totality of the circumstances in a specific factual scenario and determined that the frisk of Johnson was unconstitutionally predicated on a consensual encounter, rather than on a stop justified by reasonable suspicion of criminal activity. Though, apparently, the officers stopped the car due to a legitimate registration violation, and Johnson was initially seized as part of that traffic detention, he was not ordered out of the vehicle and his

subsequent exit had nothing to do with the stop. Instead, Trevizo asked Johnson to step out of the car solely because she wanted to gather intelligence for the gang task force and, based on what she had surmised during their cooperative interaction, she believed he might be able to provide useful information. She did not ask him to get out for officer-safety reasons. RT 11-7-05, 18-19, 25, 32; Pet. App. A-4, ¶ 8.

The Court of Appeals' opinion did not turn on whether the investigation of the driver was ongoing when Trevizo frisked Johnson. Nevertheless, contrary to the assertions of Petitioner and the dissent, Petitioner did not establish that the frisk occurred during an ongoing seizure based on the traffic stop. *See* Pet. App. A-19, A-20, ¶¶ 35-36; Pet. 4. Trevizo merely testified that Machado was speaking with the driver outside of the car when she *initiated* her exchange with Johnson while he was still in the vehicle. She did not recall and had not paid attention to what was transpiring between Machado and the driver at the time she frisked Johnson. RT 11-7-05, 12-14, 42-43. Given the routine nature of the traffic stop, it is quite possible that Machado had concluded his investigation of the driver and had already returned his license and registration. If the traffic stop had concluded as to the driver, then Trevizo had no conceivable legitimate basis upon which she could have continued Johnson's detention.

In any event, regardless of whether the driver remained seized, by the time Trevizo asked Johnson if he would get out of the car and answer some questions, Johnson's initial seizure by virtue of the traffic stop had evolved into a consensual encounter. *See Robinette*, 519 U.S. at 36, 39 (traffic detention could evolve into consensual encounter even if officer did not explicitly tell driver he was free to go). By the officer's own admission, nothing in Johnson's behavior suggested his involvement

in criminal activity; indeed, nothing about the circumstances of the traffic stop suggested criminality on the part of anyone in the car in which he was a passenger. RT 11-7-05, 39, 44. Trevizo herself characterized her interaction with Johnson as consensual and said he could have declined her request to exit the car and answer questions. *Id.* at 41; Pet. App. A-4, ¶ 8. She had no plans to detain him. RT 11-7-05, 42. Absent reasonable suspicion of illegality, she certainly had no authority to *require* him to answer questions unrelated to the reasons for traffic stop.

There was also no reason for Johnson to believe that he was required to comply with Trevizo's requests. As the Court of Appeals noted, "[n]one of Trevizo's verbal or nonverbal communications with Johnson before the pat down can reasonably be construed to have conveyed to him that his encounter with her was anything other than consensual." Pet. App. A-12, ¶ 22. In reaching this conclusion, the Court of Appeals reasonably applied this Court's precedents. Indeed, in *United States. v. Drayton,* 536 U.S. 194 (2002), this Court held that police officers did not seize passengers on a bus when, as part of a routine drug and weapons interdiction effort, they boarded the in-transit bus at a rest stop and began asking passengers questions. The circumstances did not reasonably indicate that passengers were required to answer the questions even though the officers did not inform them of the right to refuse to cooperate, one officer was stationed by the door while two officers went to the rear and worked their way forward and, during the exchanges, the officers displayed their badges and stood and looked down at seated passengers. *Id.* at 197-200.

Trevizo agreed that Johnson's interaction with her had been part of a "cooperative situation" and that he had not been "responding to [her] as a police

officer." RT 11-7-05, 45. Coercion would have been inconsistent with her goal of gathering "intelligence" for her gang task force. If she had acted in a coercive manner, she would have been far less likely to develop a rapport with Johnson and obtain useful information. Moreover, Petitioner did *not.* establish the length of time that Trevizo engaged in discussion with Johnson. *See id.* at 12-14, 42-43. By her own admission, Trevizo was not caught up in the moment, but had time to make a deliberate decision to pursue "gang intelligence." *Id.* at 18-19, 25.

Petitioner contends that, since Johnson was a passenger in a stopped vehicle, he would not have believed he could ignore Trevizo's request to exit the vehicle and answer questions. But Trevizo's questions had nothing to do with the reason for the stop, which reasonably could have implicated only the driver or owner of the car.[5] Since Johnson was neither, it was reasonable for him to believe that he was not the focus of the investigation and thus did not have to comply with Trevizo's request for cooperation, particularly given her manner and tone.

Petitioner emphasizes this Court's observation in *Brendlin* that passengers in a car stopped by authorities are unlikely to believe that they can leave or disregard an officer's requests as soon as the vehicle stops. Pet. 10. However, Johnson does not contend that he reasonably believed he could decline Trevizo's requests at the inception of the traffic stop, but only after Trevizo had engaged him in a cooperative conversation and conveyed to him that their interaction had become consensual. Petitioner apparently would like this Court to establish a bright-line rule that passengers incidentally seized by virtue of a traffic stop must remain seized until the driver is free

[5] Just after the stop, Trevizo "just stood there while Officer Machado made contact initially with the driver," RT 11-7-05, 12, and Machado presumably announced the reason for the stop.

to go or until an officer verbalizes to a passenger that he or she is free to leave. Such a rule is inconsistent with this Court's unwavering adherence to the "totality of the circumstances" approach.

III. The Court of Appeals' Opinion Is Reasonable.

By her tone and manner, Trevizo conveyed to Johnson that he was not required to get out of the car and engage in a discussion with her. Indeed she testified that she would not have pursued the matter if he had declined her request. RT 11-7-05, 41-42. If he had not voluntarily alighted from the vehicle, he would not have been frisked and would not have been charged and convicted. Effective law enforcement depends upon the cooperation of the citizenry. Petitioner's position would only discourage such cooperation.

It is also significant that, since Crips membership is predominantly black, *see Johnson v. California*, 543 U.S. 499, 527 (2005), Trevizo almost certainly never would have speculated that Johnson was a Crip,[6] and thus never would have wanted to pursue "gang intelligence" from him, if he had not been a young black man present near Sugar Hill, an area with many black residents. Giving the police the broad power urged by Petitioner to frisk passengers in routine traffic stops, regardless of the nature of the interaction, will encourage more pat downs that are either consciously or subconsciously motivated by race or other improper considerations. *See* Office of the Arizona Attorney General, Civil Rights Division and Office of Intergovernmental Affairs, *Report on Racial Profiling* (January 2001); Daniel Gonzalez, "Racial Profiling Must be Stopped, Panel Says," *The Arizona Republic* (March 7, 2008); Paul Davenport,

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[6] She so speculated despite the fact that he wore blue and his companion wore red, a color associated with a rival gang. Pet. App. A-3, ¶ 5.

"Arizona Settles Lawsuit on Racial Profiling," *Arizona Daily Star* (February 2, 2005). The only reasonable interpretation of the Fourth Amendment is to prohibit a pat down in the type of consensual situation at issue here. *See Robinette*, 519 U.S. at 39 (reasonableness is the touchstone of the Fourth Amendment).

IV. The Question Presented Will Not Be Dispositive Because of Unresolved Issues.

The Court of Appeals based its decision on the Fourth Amendment, but Johnson also argued that the pat down violated Arizona's broader right to privacy. Ariz. Const., art. 2, § 8; *State v. Bolt*, 142 Ariz. 260, 264-65, 689 P.2d 519, 523-24 (1984) (as a matter of state law, officers may not make a warrantless entry of a home in the absence of exigent circumstances; noting contrary U.S. Supreme Court holding). If this Court were to grant the petition and reverse, the Arizona courts would have to decide this issue.

Moreover, the Petition is premised on the claim that Trevizo reasonably suspected Johnson to be armed and dangerous. The Court of Appeals did not decide this issue. Pet. App. A-13, ¶ 26. Trevizo did *not* possess reasonable officer safety concerns, particularly since the stop, which raised no suspicion of criminality, occurred at 9 p.m. on a major thoroughfare with three officers present. RT 11-7-05, 10, 29-30. Johnson was then cooperative, unevasive, made no furtive movements, identified himself, and readily volunteered much of the information used by Trevizo to justify the pat down. If this Court were to grant the petition and reverse, it would be doing so based on a predicate not decided by the Arizona courts. The state tribunals would then have to determine whether the pat down was supported by a reasonable suspicion of dangerousness.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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