No. 08-

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

LACEY RANA SMITH,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of the State of Kansas

PETITION FOR WRIT OF CERTIORARI

STEVE SIX
Attorney General of Kansas
STEPHEN R. MCALLISTER
Solicitor General
(*Counsel of Record*)
JARED S. MAAG
Deputy Solicitor General
COLIN D. WOOD
Assistant Attorney General
120 S.W. 10th Ave., 2nd Fl.
Topeka, Kansas 66612-1597
(785) 296-2215

Counsel for Petitioner

QUESTION PRESENTED

Whether—during a lawful traffic stop—an officer's request for consent to search a passenger's purse "without reasonable suspicion unconstitutionally broadens a traffic investigation," *Illinois v. Caballes*, 543 U.S. 405, 421 n.3 (2005) (Ginsburg, J., dissenting), when the officer's actions do not prolong the stop?

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

CONSTITUTIONAL PROVISION AND STATUTE

RULE

SECONDARY AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

Page

PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of Kansas respectfully requests that this Court grant the petition for a writ of certiorari to review the judgment of the Kansas Supreme Court in this case.

OPINIONS BELOW

The May 30, 2008, opinion of the Kansas Supreme Court (Pet. App. 1a–28a) is reported at 184 P.3d 890 (Kan. 2008). The Kansas Court of Appeals' opinion (Pet. App. 29a–35a) is unpublished. No. 96,189, 2007 WL 220162 (Kan. Ct. App. Jan. 26, 2007).

JURISDICTION

The Kansas Supreme Court rendered its decision on May 30, 2008. This petition has been filed within 90 days of that date, as required by Supreme Court Rule 13.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

STATEMENT

1. In the early morning hours of September 22, 2005, Officer Nick Carter lawfully stopped a car with

a broken taillight in Winfield, Kansas. Pet. App. 3a. Respondent, Lacey Rana Smith, was a passenger in that car. She exited the vehicle and sat on nearby steps. *Id.* Officer Carter spoke to the driver and checked the car's license plate information (the tag was expired and turned out to be illegal). Aside from briefly greeting Respondent, Officer Carter interacted solely with the driver. *Id.* at 4a.

Meanwhile, Officer Cory Gale learned of the stop by his police radio and arrived at the scene to provide backup assistance. Pet. App. 4a. Officer Gale recognized Respondent and, based on previous knowledge of her, he suspected she might possess illegal drugs. *Id.* He approached Respondent and asked her "how she was doing and if he could look inside her purse." *Id.* Respondent consented to a search of her purse, and Officer Gale discovered a bag containing methamphetamine. *Id.*

Officer Gale arrested Respondent and took her to the police station. Pet. App. 4a. When Officer Gale and Respondent departed for the police station, Officer Carter was still in the process of issuing a citation to the driver and had not completed the traffic stop. *Id.* At the station, Officer Gale discovered drug paraphernalia in Respondent's possession and Respondent made some incriminating statements. *Id.*

2. Respondent was charged in state court with felony possession of methamphetamine and misdemeanor possession of drug paraphernalia. Pet. App. 4a. She moved to suppress the meth-amphetamine that Officer Gale seized from her

purse, the drug paraphernalia he found in her possession, and the incriminating statements she made at the police station. *Id.* The State conceded that Officer Gale did not have reasonable suspicion to support his request to search Respondent's purse, but argued that Respondent gave valid consent to the search. *Id.* at 5a. The trial court suppressed the evidence, holding that Respondent had been lawfully seized when Officer Carter stopped the car in which she was a passenger, but that Officer Gale's questions to her exceeded the proper scope of the traffic stop. *Id.* The State appealed.

3. The Kansas Court of Appeals reversed the trial court. First, the court of appeals held that Respondent was "seized," but lawfully, as the passenger in a car stopped for a traffic violation. Pet. App. 32a. The court of appeals focused on whether Officer Gale's questions invalidated the otherwise lawful traffic stop. Opining that prior to the Court's decision in *Muehler v. Mena*, 544 U.S. 93 (2005), Officer Gale's questions unrelated to the purpose of the stop would have rendered the seizure illegal, Pet. App. 33a, the court of appeals declared that *Mena* had altered the legal landscape: "Pursuant to the Supreme Court's holding in *Mena*, however, police officers may now question a person during a detention about matters unrelated to the reason for the detention." Pet. App. 33a–34a.

Applying *Mena*, the court of appeals observed that "[h]ere, since the initial stop was legal, it was permissible for Gale to question Smith about matters unrelated to the purpose of that stop so long as the

questions did not increase the duration of the stop." Pet. App. 34a. In terms of prolonging the stop, the court of appeals pointed out that "[n]either of these questions extended the length of the stop. Carter was still in the process of issuing the citation to the driver when Gale arrested Smith." *Id.* Thus, the only remaining issue was whether Respondent's consent was valid. On that point, the court concluded that Respondent "has offered nothing to indicate she was forced or coerced in any fashion to allow Officer Gale to search her purse." *Id.* at 35a.

4. The Kansas Supreme Court reversed the Court of Appeals. The supreme court framed the issue as whether *Mena* alters the proposition that a police officer violates the Fourth Amendment and the Kansas Constitution "by asking a passenger in a vehicle stopped for a traffic violation to consent to a search that is unrelated to the purpose of the stop." Pet. App. 2a. The court answered in the negative, holding that "*Mena* does not overrule longstanding precedent limiting the scope of an investigatory detention, does not address the question of the scope of an investigatory detention, and is factually and legally distinguishable from this case." *Id.* at 3a.

After reviewing the facts and lower court proceedings, the supreme court first concluded that Respondent had been subjected to a "seizure" within the meaning of the Fourth Amendment, relying primarily on this Court's decision in *Brendlin v. California*, 551 U.S. ___, 127 S. Ct. 2400 (2007), holding "that a passenger in a vehicle is seized for Fourth Amendment purposes when a law

enforcement officer stops the vehicle through a show of authority and the passenger does not flee." Pet. App. 10a. The court then focused on the proper scope of the traffic stop. Acknowledging that Respondent conceded the initial vehicle stop was lawful, the supreme court stated that the key question was "whether the detention was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 12a.

The supreme court recognized that, "[a]fter the *Mena* decision, the Tenth Circuit adopted a broader approach to a law enforcement officer's questioning during a traffic stop, holding 'there is no Fourth Amendment issue with respect to the content of the questions' if the stop's duration is not extended." Pet. App. 15a (quoting *United States v. Wallace*, 429 F.3d 969, 974 (10th Cir. 2005)). Recognizing that the Kansas Court of Appeals "relied upon this contemporary line of Tenth Circuit decisions," Pet. App. 15a, in reversing the trial court, the supreme court opined that the court of appeals' "reliance on these cases was misplaced, however." *Id.* The Kansas Supreme Court further opined that the Tenth Circuit cases were distinguishable from this case, because generally they involved police officers asking questions and developing reasonable suspicion as a result of the answers, not police officers asking for consent to search with no basis for suspicion. *Id.* Finally, the supreme court cited Tenth Circuit cases that it read as declining to apply the *Mena* rule when the officers simply asked for consent to search. *Id.* at 15a–16a.

The supreme court next opined that the Tenth Circuit's cases might be internally contradictory, offering "no explanation of why the rule [against asking for consent without any basis for suspicion] remains valid in light of the [Tenth Circuit's] expanded view regarding the permissible scope of a traffic stop." Pet. App. 16a. The supreme court suggested that the Tenth Circuit's cases raise unanswered questions, such as whether consent searches in these circumstances exceed the proper scope of a *Terry* stop, whether consent searches impermissibly prolong the duration of a stop, and whether the consent in such cases was to be deemed involuntary as a matter of law? *Id.* Finding the Tenth Circuit precedent lacking in "clarification," *id.*, the Kansas Supreme Court declared that it must look to this Court's cases to resolve the issue presented.

The Kansas court began with this Court's decision in *Muehler v. Mena*. In *Mena*, in the context of the search of a residence pursuant to a valid warrant, the Court held that police questioning unrelated to the purpose of the search, when such questioning does not prolong the search or seizure, does not violate the Fourth Amendment. The Kansas court recognized that *Mena* stands for the proposition that questioning alone does "not create an additional seizure" subject to Fourth Amendment requirements. Pet. App. 18a. And the Kansas court pointed out that *Mena* cited *Illinois v. Caballes*, 543 U.S. 405 (2005), Pet. App. 19a, a traffic stop case in which the Court held that deploying a trained drug canine to sniff the exterior of a car during a traffic stop lawful at its inception and otherwise executed in a reasonable manner does

not change the encounter into a drug investigation, nor are police required to have independent reasonable suspicion of criminal activity for such deployment.

The Kansas Supreme Court opined that "[n]either the *Mena* or the *Caballes* majority decisions discussed *Terry* nor the scope of a *Terry* stop." Pet. App. 19a. Instead, the Kansas court focused on two other decisions which predate *Mena* and *Caballes*. First, the court considered *Michigan v. Summers*, 452 U.S. 692 (1981), a case in which the Court applied the *Terry* analysis in addressing "the reasonableness of detaining occupants of a residence while a search warrant was executed." Pet. App. 20a. Second, the Kansas court relied on *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County*, 542 U.S. 177 (2004), a case in which the Court applied the *Terry* analysis in upholding the constitutionality of a state statute that made it a crime to refuse to identify oneself if requested to do so by a police officer. Pet. App. 22a.

The Kansas court read *Hiibel* as a "recent reaffirmation of *Terry* principles" and opined that the Court had made a "careful limitation of the issue in *Caballes* and *Mena* to the question whether there was an additional search or seizure." Pet. App. 26a. "Consequently, we hold that the Court of Appeals erred in ruling that *Mena* allows law enforcement officers to expand the scope of a traffic stop to include a search not related to the purpose of the stop, even if a detainee has given permission for the search." *Id.* Finally, the Kansas Supreme Court concluded that

Respondent's consent was invalid because it was tainted by Officer Gale exceeding the proper scope of the traffic stop, and thus all evidence and statements flowing from Officer Gale's questions were fruit of the poisonous tree. *Id.* at 27a–28a.

REASONS FOR GRANTING THE WRIT

I. The Kansas Supreme Court Decided An Important And Recurring Fourth Amendment Question In A Factual Context That This Court Has Never Addressed, And Did So In A Way That Conflicts With Recent Decisions Of This Court, Of The Federal Circuits, And Of Several State Supreme Courts

A. The Court Has Never Addressed The Fourth Amendment Scenario This Case Presents

In *Terry v. Ohio*, 392 U.S. 1, 20 (1968), the Court held that, in determining whether a temporary investigative stop is reasonable, the Fourth Amendment requires the following two inquiries: (1) whether an officer's actions were justified at their inception; and, (2) whether the officer's subsequent actions were reasonably related in scope to the basis for the intrusion in the first place. Although *Terry* creates a general framework for analyzing temporary police stops, the Court since *Terry* has decided many cases involving such encounters, sometimes applying the *Terry* factors to the specific facts of a case, and sometimes announcing general rules governing police conduct during investigative stops.

The Court has never addressed an investigative stop in the factual context presented in this case:

during a lawful traffic stop, police question a passenger on matters unrelated to the basis for the stop, including a request for permission to search a passenger's purse or bag. Indeed, in a recent case involving the use of a drug sniffing dog during routine traffic stops, Justice Ginsburg pointed out in dissent that "[t]he question whether a police officer inquiring about drugs without reasonable suspicion unconstitutionally broadens a traffic investigation is not before the Court." *Caballes*, 543 U.S. at 421 n.3. (This Court has granted certiorari in two Fourth Amendment cases involving traffic stops and passengers for this Term, but neither involves the *questioning* of passengers. *See Arizona v. Gant*, No. 07-542 (cert. granted Feb. 28, 2008) ("Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?"); *Arizona v. Johnson*, No. 07-1122 (cert. granted June 23, 2008) ("In the context of a vehicular stop for a minor traffic infraction, may an officer conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense?").)

This case implicates important Fourth Amendment questions that arise regularly in the course of routine traffic stops. These questions include (1) whether police questioning of a passenger in a lawfully

stopped vehicle on matters unrelated to the reasons for the stop is subject to *Terry* analysis and, if so, (2) whether such questioning satisfies the second *Terry* requirement when an officer's actions do not prolong the stop.

The two decisions closest to the facts of this case may be *Mena* and *Caballes*, but neither presents the same factual scenario. *Mena* involved the search of a residence pursuant to a valid search warrant, and during the search police questioned one of the occupants about a matter unrelated to the search, eliciting incriminating information. The Court unanimously held that there was no Fourth Amendment violation because, unless "the detention [is] prolonged by the questioning, there [is] no additional seizure within the meaning of the Fourth Amendment." 544 U.S. at 101. Nowhere in the majority opinion did the Court cite *Terry* or discuss or apply the *Terry* analysis.

In *Caballes* the Court held that deploying a trained drug canine to sniff the exterior of a car during a traffic stop that was both lawful at its inception and otherwise executed in a reasonable manner does not change the encounter from a lawful traffic stop into a drug investigation requiring the police to have independent reasonable suspicion before deploying the dog. 543 U.S. at 408. Like *Mena*, the Court in *Caballes* did not cite or discuss *Terry*.

Justice Ginsburg dissented in *Caballes*, arguing that the Court had limited or undermined the second prong of *Terry*—which is whether the officers' actions were reasonably related in scope to the initial basis

for the stop. Justice Ginsburg would have applied the second *Terry* inquiry and concluded that the canine sniff impermissibly expanded the scope of the initially lawful vehicle stop, opining that

> [t]he unwarranted and non-consensual expansion of the seizure here from a routine traffic stop to a drug investigation broadened the scope of the investigation in a manner that, in my judgment, runs afoul of the Fourth Amendment. The Court rejects the Illinois Supreme Court's judgment and, implicitly, the application of *Terry* to a traffic stop converted, by calling in a dog, to a drug search.

543 U.S. at 420–21.

In any event, the Court has not decided a case involving the recurring factual scenario at issue here. At a minimum, Justice Ginsburg's *Caballes* dissent and the Kansas Supreme Court's decision below certainly suggest that it may not be clear how this Court would resolve the important Fourth Amendment question that this case presents. Though Petitioner believes, as explained below in Part I.C., that the Court's recent decisions go a long way toward answering the question presented here, a grant of certiorari and a decision by this Court would settle the matter for the lower courts and for law enforcement officers across the nation.

B. The Kansas Supreme Court Decision Conflicts With Federal Circuit And State Supreme Court Decisions

Since *Mena* and *Caballes*, the federal circuits have uniformly held that the Fourth Amendment allows police to ask questions unrelated to the reasons for

the original detention, so long as the questions do not prolong the detention. *See*, *e.g.*, *United States v. Soriano-Jarquin*, 492 F.3d 495, 501 (4th Cir. 2007) (because the police request did not extend the stop, it did not alter the stop's lawfulness); *United States v. Martin*, 422 F.3d 597, 601–02 (7th Cir. 2005) (a traffic stop does not become unreasonable merely because an officer asks questions unrelated to the initial purpose of the stop), *cert. denied*, 546 U.S. 1156 (2006); *United States v. Slater*, 411 F.3d 1003, 1005 (8th Cir. 2005) (request for identification unrelated to the stop did not violate the Fourth Amendment); *United States v. Turvin*, 517 F.3d 1097 (9th Cir. 2008) (the Fourth Amendment is not violated by a request for consent to search that does not prolong the traffic stop); *United States v. Mendez*, 476 F.3d 1077, 1080–81 (9th Cir. 2007) (because the officer's questions did not prolong stop, they need not be supported by reasonable suspicion), *cert. denied*, 127 S. Ct. 2277 (2007); *United States v. Stewart*, 473 F.3d 1265, 1269 (10th Cir. 2007) (if the initial detention is lawful, the Fourth Amendment inquiry is whether police questioning extended the length of the detention; the content of the questions is irrelevant); *United States v. Hernandez*, 418 F.3d 1206, 1209, n.3 (11th Cir. 2005) (*Mena* applies to traffic stops, and unrelated questioning that does not prolong detention is not determinative of constitutionality), *cert. denied*, 127 S. Ct. 303 (2006); *United States v. Vandyck-Aleman*, No. 06-60128, 2006 WL 2794416, at *2 (5th Cir. 2006) (unpublished) (unrelated questioning is not a seizure implicating the Fourth Amendment), *cert. denied*, 127 S. Ct. 1168 (2007).

At least until this case, state supreme courts also have read *Mena* and *Caballes* to permit unrelated questioning during a lawful stop or detention, again so long as such questioning does not prolong the stop. *See*, *e.g.*, *People v. Harris*, 886 N.E.2d 947, 960–61 (Ill. 2008) (on remand after a grant, vacate, and remand order from this Court in light of *Caballes*, *see* 543 U.S. 1135 (2005)) (during a lawful seizure, the police may ask questions unrelated to the original detention and are not required to form an independent reasonable suspicion of criminal activity before doing so); *Salmeron v. State*, 632 S.E.2d 645, 646 (Ga. 2006) (citing *Mena* and holding that the Fourth Amendment is not violated during a traffic stop when an officer asks the driver or passengers for consent to search); *State v. Stewart*, 181 P.3d 1249, 1255 (Idaho 2008) (under *Mena*, when a suspect is reasonably detained in the first place, officers' questions unrelated to the original reason for that detention do not violate the Fourth Amendment); *Marinaro v. State*, 163 P.3d 833, 835 (Wyo. 2007) (citing *Mena* and *State v. Stewart* and holding that during a legal detention officers may pose questions unrelated to the underlying purpose of the detention without independent reasonable suspicion).

Two of the preceding decisions illustrate how the lower courts have interpreted the Court's decisions in *Mena* and *Caballes*, and they provide a sharp contrast to the Kansas Supreme Court's reading of *Mena* and *Caballes* in this case. In *United States v. Mendez*, 467 F.3d 1162 (9th Cir. 2006), a divided panel of the Ninth Circuit reversed a district court's denial of Mendez's motion to suppress his answers to

police questions unrelated to a traffic stop for a license plate violation. The panel ruled that questions regarding Mendez's tattoos, gang activities, and criminal history exceeded the scope of a permissible traffic stop interrogation. *Id.* at 1175.

The government requested en banc review of the panel's decision, but while that request was pending, the panel withdrew its original opinion and issued a superseding opinion, based on this Court's then-recent decisions in *Mena* and *Caballes*. In the superseding opinion, the panel changed course and affirmed the denial of the motion to suppress. In so doing, the panel unanimously held that police questioning unrelated to the reason for a lawful traffic stop need not be supported by independent reasonable suspicion. *Mendez*, 476 F.3d at 1080.

In *People v. Harris*, the Illinois Supreme Court likewise reversed course after this Court's decisions in *Mena* and *Caballes*. Following a grant, vacate, and remand order by this Court for reconsideration in light of *Caballes*, (543 U.S. 1135 (2005)), the Illinois Supreme Court unanimously overruled its prior decision in *People v. Gonzalez*, 789 N.E.2d 260 (Ill. 2003). In *Gonzalez*, a car stop case, the court had held that the second prong of the *Terry* inquiry contained two sub-parts: whether the duration of the stop was impermissibly prolonged, and whether the police conduct altered the fundamental nature of the stop. *Id.* at 260. After this Court's decisions in *Mena* and *Caballes*, however, the Illinois Supreme Court reversed itself, holding that "[i]n light of *Muehler* [*v. Mena*], it becomes clear that *Caballes* rejected

reasoning that led to this court's adoption of the 'fundamental alteration of the nature of the stop' portion of the 'scope' prong of *Gonzalez*. All that remains is the duration prong." *Harris*, 886 N.E.2d at 960.

At least two criminal procedure scholars have discussed the question whether *Mena* and *Caballes* altered the application of *Terry* in the context of police questioning about matters unrelated to the initial reason for an otherwise lawful stop. First, Professor Maclin asserts that the lower courts have misunderstood *Caballes* and *Mena*, and that the second inquiry of *Terry* remains valid and operative in this context. Professor Maclin argues that police must have independent reasonable suspicion of criminal activity before asking questions unrelated to the justification for the initial stop. *See* Tracey Maclin, *Police Interrogation During Traffic Stops: More Questions Than Answers*, 31 Champion (Nov.) 34 (2007) (publication of the National Association of Criminal Defense Lawyers). In Professor Maclin's view, the Kansas Supreme Court here was correct, but all of the cases cited above were wrongly decided.

Professor LaFave takes essentially the same view. He acknowledges that *Mena* and *Caballes* can be read as the lower courts generally have read them—to allow questioning on any subject so long as the stop is not prolonged. But Professor LaFave argues that, so read, *Mena* and *Caballes* are "dead wrong" on the merits and at odds with the *Terry* line of decisions on the limits applicable to temporary stops. Wayne R. LaFave, 4 *Search and Seizure: A Treatise*

On The Fourth Amendment, § 9.3, p. 20 (4th ed. 2004).

Some individual state supreme court justices have argued that *Terry* continues to limit questioning and police investigative activity during traffic stops, expressing agreement with Justice Ginsburg's dissent in *Caballes*. *See*, *e.g.*, *State v. Cunningham*, No. 2006-024, 2008 WL 1030884, at ¶ 40 (Vt. 2008) (Skoglund, J., concurring) ("As Justice Ginsburg aptly put it in *Illinois v. Caballes*, '[e]ven if [a] drug sniff is not characterized as a . . . 'search,' [a] sniff surely broaden[s] the scope of [a] traffic-violation-related seizure); *Salermon*, 632 S.E.2d at 648-49 (Sears, J., Hunstein, J., Benham, J., dissenting) (*Mena* replaces a reasonableness standard with allowing "any and all manner of interrogation.")

In any event, the Kansas Supreme Court erred in this case, both in its Fourth Amendment analysis and in the ultimate conclusion it reached. It is undisputed that Officer Gale's questions to Respondent did not prolong the lawful traffic stop. The fact that one question was a request for consent to search Respondent's purse does not change the analysis, but rather further emphasizes that the Kansas Supreme Court decided this case in a way that conflicts with the decisions of other courts. *See*, *e.g.*, *United States v. Valenzuela*, 494 F.3d 886, 891 n.2 (10th Cir. 2007) ("As a final note, we point out that the fact [the officer] asked for consent to search . . . instead of some other question is irrelevant. [Tenth Circuit case law post-*Mena*] makes clear that the content of an officer's questions is unimportant so

long as the questions do not unreasonably delay the stop."); *Salmeron*, 632 S.E.2d at 646 ("The Fourth Amendment is not violated when, during the course of a valid traffic stop, an officer questions the driver or occupants of a vehicle and requests consent to conduct a search."); *United States v. Turvin*, 517 F.3d 1097 (9th Cir. 2008) (same).

Ultimately, as the Kansas Supreme Court decision makes clear, some lower courts may be uncertain about the proper analysis in cases such as this. Moreover, the Kansas decision goes against the majority of lower court decisions, and imposes on law enforcement officers in Kansas two different standards for traffic stops—the Tenth Circuit's standard allowing unrelated questions (the majority view) and the Kansas Supreme Court's standard prohibiting such questions. The conflict of authority here is real, and it involves an important Fourth Amendment question that merits a grant of certiorari.

C. The Kansas Supreme Court Decision Conflicts With This Court's Recent Decisions

On the merits, the Kansas Supreme Court erred in this case. This Court has held that, as a general rule, when police stop a vehicle with a show of authority they seize not only the driver but also the passengers. *Brendlin v. California*, 127 S. Ct. at 2407 ("A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver.") But that does not lead to the Kansas Supreme Court's erroneous conclusions that an officer's subsequent questioning of a passenger is subject to the *Terry*

analysis, nor that such questioning must be based on reasonable suspicion.

Instead, the Court has "held repeatedly that mere police questioning does not constitute a seizure." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Thus, the Court has held

> that even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to examine the individual's identification, *and request consent to search* his or her luggage—as long as the police do not convey a message that compliance with their requests is required.

Id. at 434–35 (internal citations omitted, emphasis added); *see also United States v. Drayton*, 536 U.S. 194, 201 (2002) ("Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means.")

Importantly, *Muehler v. Mena*, relying on *Bostick* and *Caballes*, makes clear that, unless "the detention [is] prolonged by the questioning, there [is] no additional seizure within the meaning of the Fourth Amendment." *Mena*, 544 U.S. at 101. Indeed, on that point the Court in *Mena* was ***unanimous***. In this case, it is indisputable that Officer Gale did not violate the "*Mena* rule" (permitting questions unrelated to the stop) by prolonging the stop.

Officer Gale's two, brief questions to Respondent ("how she was doing and if he could look inside her purse"? Pet. App. 4a, 30a) in no way prolonged the

traffic stop. In fact, it is undisputed that Officer Gale discovered methamphetamine in Respondent's purse, arrested her, and departed with her to the police station *before* Officer Carter completed the traffic stop. Pet. App. 4a ("Officer Carter was still in the process of issuing a citation to the driver when Officer Gale and Smith left the scene."); *id.* at 30a ("Carter was still in the process of issuing a citation to the driver when Gale and Smith left.").

Mena, *Bostick*, and *Caballes* should control the outcome here; they may even compel the conclusion that there is no *Terry* violation. Indeed, the Court has held that the Fourth Amendment is not violated by a request to search a person's luggage, so long as it is clear the person has the right to refuse. *E.g. Bostick*, 501 U.S. at 435 (citing *Florida v. Royer*, 460 U.S. 491 (1983)). The same should hold true in the context presented here.

The Kansas Supreme Court erred when it applied the second *Terry* inquiry to invalidate the consensual search of Respondent's purse. As a result, that court has unnecessarily limited the ability of police in Kansas to conduct investigations during lawful traffic stops and other temporary detentions.

* * * * * * *

Kansas believes the Court's decisions in *Mena*, *Bostick*, and *Caballes* control, and that they point to the proper outcome in this case. The Kansas Supreme Court, however, ruled that this Court apparently did not actually mean what it said in *Mena*—that during a lawful detention, police may ask questions unrelated to the initial detention, so

long as the questions do not prolong the detention, at least not if the questions include a request for consent to search.

In her dissent in *Caballes*, Justice Ginsburg recognized that the factual scenario presented by this case was not before the Court there (nor was it before the Court in *Mena* or in any other case Kansas has found), leaving this an open Fourth Amendment question at least in that sense. A grant of certiorari here would permit the Court to put to rest the question whether *Mena*, *Bostick*, and *Caballes* have removed police questioning that does not prolong a lawful traffic stop from the second *Terry* inquiry, including in cases where officers request consent to search and such consent is voluntarily given. This is an important and recurring Fourth Amendment question confronted by the nation's law enforcement officers on a daily basis. This case presents an appropriate vehicle for resolving any remaining uncertainty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEVE SIX
Attorney General of Kansas
STEPHEN R. MCALLISTER
Solicitor General
(*Counsel of Record*)
JARED S. MAAG
Deputy Solicitor General
COLIN D. WOOD
Assistant Attorney General
120 S.W. 10th Ave., 2nd Fl.
Topeka, Kansas 66612-1597
(785) 296-2215
Counsel for Petitioner

August 2008