No. 17-818

In the Supreme Court of the United States

BRANDEN HUERTAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was "seized" within the meaning of the Fourth Amendment when an officer slowly drove his marked police car the wrong way down a short one-way street; shined a spotlight in the direction of petitioner, who was standing on the sidewalk; and asked petitioner a few questions while sitting in his police cruiser, which petitioner began answering before he ran away from the officer.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 864 F.3d 214. The order of the district court (Pet. App. 16a-21a) is unreported but is available at 2015 WL 1517403.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2017. On October 6, 2017, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including December 7, 2017, and the petition was filed on December 6, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Connecticut, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1.

The district court sentenced petitioner to 60 months of imprisonment, to be followed by three years of supervised release. *Ibid.* The court of appeals affirmed. Pet. App. 1a-15a.

1. On May 13, 2014, at around 11 p.m., Officer Thomas Lattanzio was sitting in his parked police cruiser in front of the Bridgeport, Connecticut Police Department when a woman drove her Jeep alongside his cruiser. Gov't C.A. App. GA13-GA14; Pet. App. 16a. Through her open Jeep window, the woman asked Office Lattanzio how to change a police report that had already been filed, and Officer Lattanzio explained the procedure. Gov't C.A. App. GA15; Pet. App. 17a. The woman began to drive away but then reversed her Jeep back alongside the cruiser. Pet. App. 2a, 17a. The woman told Officer Lattanzio that there was a man nearby named Branden who had a gun inside a black bag. Gov't C.A. App. GA15-GA16; Pet. App. 17a. She pointed down the street and said "he's right there," but Officer Lattanzio did not see anyone. Pet. App. 17a. According to the woman, she had felt the gun inside the bag and did not want to get involved. *Ibid.* The woman then drove off. *Ibid.*

Officer Lattanzio tried to learn the woman's identity by calling in the Jeep's license plate number, but the Jeep was registered to a man. Pet. App. 17a. Officer Lattanzio then drove in the direction the woman had pointed. *Id.* at 2a, 17a. After driving a short distance, Officer Lattanzio saw petitioner, who was illuminated by a street lamp, standing on the sidewalk of Lumber Street and holding a black bag "as * * * you would carry a lantern." Gov't C.A. App. GA16; Pet. App. 17a. Officer Lattanzio turned his marked cruiser to face the wrong direction onto the short one-way street, slowly

drove toward petitioner, and used his cruiser's spotlight as a guide. Gov't C.A. App. GA16; Pet. App. 17a. Officer Lattanzio rolled down his cruiser window and asked petitioner a few questions, including: "What's going on? Are you okay? What happened with the girl? Did you have an argument or something like that?" Pet. App. 17a. Petitioner "remained still" and spoke with Officer Lattanzio for a very short time. *Id.* at 18a; Gov't C.A. App. GA25. When Officer Lattanzio began to exit the cruiser and simultaneously asked petitioner what was in the bag, petitioner ran away. Pet. App. 18a. Less than a minute passed between the time Officer Lattanzio saw petitioner and the time petitioner fled. *Ibid.*; Gov't C.A. App. GA26.

Officer Lattanzio chased petitioner on foot, and other officers in the area eventually caught and arrested him. Pet. App. 18a. Officers retraced petitioner's steps and recovered a black duffel bag containing a revolver and some personal items. *Ibid.* Officers later discovered that the woman who had given Officer Lattanzio the tip was petitioner's girlfriend, who had previously obtained a protective order against petitioner after petitioner had strangled her. Gov't C.A. Br. 3. Despite being ordered to stay away from her, petitioner had accompanied his girlfriend to the police department earlier that day to attempt to change a complaint she had filed. *Id.* at 4.

2. A federal grand jury in the District of Connecticut returned an indictment charging petitioner with being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 924(e); and possessing a firearm while subject to a protective order, in violation of 18 U.S.C. 922(g)(8) and 924(a)(2). Indictment 1-2.

Petitioner moved to suppress the firearm on the ground that his initial encounter with Officer Lattanzio was a seizure for which the officer lacked reasonable suspicion. D. Ct. Doc. 36, at 1-9 (Jan. 26, 2015). The district court held an evidentiary hearing at which Officer Lattanzio was the only witness. Gov't C.A. App. GA13-GA30. The government argued that Officer Lattanzio's initial encounter with petitioner was not a seizure under the Fourth Amendment, and that even if petitioner was seized, Officer Lattanzio had reasonable suspicion for an investigative stop. *Id.* at GA27.

The district court credited Officer Lattanzio's testimony. Pet. App. 16a-17a. Relying on *California* v. *Hodari D.*, 499 U.S. 621 (1991), the court explained that a Fourth Amendment "seizure" occurs when: (1) an officer makes a show of authority such that a reasonable person would believe that he is not free to leave; and (2) either (i) the officer uses physical force or, (ii) the individual submits to the officer's show of authority. Pet. App. 18a-19a. The court found that even assuming Officer Lattanzio's actions amounted to a show of authority, petitioner's "brief stop and verbal exchange" with Officer Lattanzio before running away "did not constitute 'submission.'" *Id.* at 19a.

Petitioner pleaded guilty to the felon-in-possession count pursuant to a plea agreement and reserved his right to appeal the district court's suppression ruling. Gov't C.A. Br. 10; Judgment 1. The court sentenced petitioner to 60 months of imprisonment, to be followed by three years of supervised release. Judgment 1.

3. The court of appeals affirmed. Pet. App. 1a-15a.

a. The court of appeals determined that petitioner "never 'submitted' to Officer Lattanzio and therefore was never 'seized' within the meaning of the Fourth

Amendment." Pet. App. 3a. The court expressly disclaimed the use of any "bright-line test for what constitutes seizure." *Id.* at 8a. The court instead explained that court must "look[] at all the factual circumstances to determine whether there was 'submission' to the police before concluding that the defendant was trying to evade rather than submit." *Ibid.* And the court found that under the totality of circumstances in this case, including the "brevity of the interaction and the fact that Officer Lattanzio was never within reach of" petitioner before petitioner ran away, petitioner was "evading police authority, not submitting to it." *Id.* at 5a.

The court of appeals reasoned that petitioner's "behavior was akin to the evasive actions in" *United States* v. *Baldwin*, 496 F.3d 215 (2d Cir. 2007), cert. denied, 552 U.S. 1222 (2008), which had found no submission to police authority by a defendant who pulled over in response to flashing lights and a siren and then sped off when the police exited their vehicles. Pet. App. 4a; see *id.* at 3a-5a. The court explained that petitioner's case was different from *United States* v. *Brodie*, 742 F.3d 1058, 1061 (D.C. Cir. 2014), in which the defendant had "complied with an order that considerably impaired his chance of evasion" by placing his hands on a police cruiser and had run away only after noticing that the officer had become distracted. Pet. App. 6a-7a. The court also explained that petitioner's case differed from *United States* v. *Hernandez*, 847 F.3d 1257 (2017), Pet. App. 7a n.3, in which the Tenth Circuit considered "many factors" not present here to conclude that the defendant in that case had been seized by submitting to an officer's show of authority, including that the defendant had complied with the officer's order to stop walking. *Ibid.* Finally, the court expressed skepticism about the

decision in *United States* v. *Camacho*, 661 F.3d 718 (2011), in which the First Circuit concluded that a defendant had submitted to authority when he responded to questions of police officers who drove a cruiser in front of him, exited the cruiser, and began to ask questions. Pet. App. 7a (citing *Camacho*, 661 F.3d at 722). The court of appeals noted its "doubt that responding to a policeman's questions, without more, amounts to submission for purposes of the Fourth Amendment," but observed that "[i]n any event, we are not bound by the First Circuit's holding." *Ibid.*

Because the court of appeals determined that petitioner did not submit to Officer Lattanzio, it did not consider whether Officer Lattanzio's actions amounted to an assertion of authority in the first place, or, even assuming petitioner had been seized, whether Officer Lattanzio had reasonable suspicion to stop petitioner. Pet. App. 3a.

b. Judge Pooler dissented. Pet. App. 9a-15a. She would have held that "when a suspect does nearly anything more than pausing briefly, including any significant verbal engagement with the officer, that action is strong evidence of submission." *Id.* at 13a.

ARGUMENT

Petitioner contends (Pet. 9-24) that, at the time he discarded the black bag containing a gun, he was unlawfully seized for purposes of the Fourth Amendment, and the gun was thus the fruit of an unlawful seizure. The court of appeals correctly rejected that argument, and further review of its fact-specific determination is not warranted. Moreover, petitioner overstates any conflict among the circuits on the issue of what constitutes submission to police authority. And in any event, this case would be a poor vehicle in which to address that

issue because Officer Lattanzio's actions did not amount to a show of authority in the first place, and because even assuming petitioner was seized, the seizure was constitutional because the officer had reasonable suspicion to conduct an investigative stop pursuant to *Terry* v. *Ohio*, 392 U.S. 1 (1968).

1. An individual is seized within the meaning of the Fourth Amendment only if a law enforcement officer applies physical force to restrict the individual's movement (whether or not successful), or if the officer invokes his authority to stop the individual and the individual submits to that show of authority. See, *e.g.*, *California* v. *Hodari D.*, 499 U.S. 621, 626-627 (1991); *Brower* v. *County of Inyo*, 489 U.S. 593, 596-597 (1989). Accordingly, "[a] police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned." *Brendlin* v. *California*, 551 U.S. 249, 254 (2007). The court of appeals correctly determined that no seizure occurred on the facts of this case.

a. The court of appeals properly recognized that petitioner did not submit to any show of police authority when he remained still and answered Officer Lattanzio's questions for a very short time before he ran away. As the court explained, petitioner's actions were "evasive, and maximized his chance of avoiding arrest." Pet. App. 5a. The encounter began with Officer Lattanzio asking questions through the window of his police cruiser, to which petitioner responded by remaining still and talking to the officer for a few seconds, but as soon as Officer Lattanzio opened the door of his cruiser,

petitioner fled. *Ibid.* Those actions did not constitute submission to police authority. *Ibid.*

Petitioner contends (Pet. 21-22) that the court of appeals erred by relying on the "single fact" of petitioner's flight and by creating a rule that "initial compliance with an assertion of police authority, when followed by flight, is always a first step in evasion and thus cannot ever constitute submission." *Ibid.* (citation and internal quotation marks omitted). But petitioner misconstrues the court's rationale, which rested not just on the fact that petitioner fled, but on "[a]ll [the] circumstances," including "the brevity of the interaction" between petitioner and Lattanzio and "the fact that Officer Lattanzio was never within reach of" petitioner. Pet. App. 5a. Indeed, the court specifically recognized that the issue of submission is always "[s]ubject to the specific circumstances of the case," but it observed that "submission is questionable when a suspect remains out of reach and takes flight when police move to lay hands on him." *Id.* at 9a.

Petitioner also faults (Pet. 22-23) the court of appeals for considering the brevity of the interaction between petitioner and Officer Lattanzio in determining whether there was a seizure. He suggests (*ibid.*) that the court's decision conflicts with statements by this Court noting that seizures can be brief. See *Whren* v. *United States*, 517 U.S. 806, 809-810 (1996) (stating that "[t]emporary detention of individuals during the stop of an automobile, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning" of the Fourth Amendment); *Florida* v. *Royer*, 460 U.S. 491, 498 (1983) (plurality opinion) (explaining that persons cannot be seized "even momentarily without reasonable, objective grounds for doing so"). But

the statements on which petitioner relies described circumstances in which the Court had already determined a seizure to have occurred: in one case, police had approached a car at a stoplight and ordered the driver to put the car in park (*Whren*, 517 U.S. 808-809), and in another case, police had asked an airline passenger to answer questions and then, without handing back his identification and ticket after noticing that those items contained different names, led him to an interrogation room and continued questioning him (*Royer*, 460 U.S. at 494). Nothing in either case suggests that the brevity of the interaction between police and the defendant is categorically irrelevant in considering the "totality of the circumstances" to determine whether a seizure occurred. See *Michigan* v. *Chesternut*, 486 U.S. 567, 573 (1988) (explaining that the test for whether a seizure has occurred is "necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation"). Here, because the district court and court of appeals were addressing whether a seizure had occurred, they properly considered all the circumstances, including the length of the interaction.

b. The lower courts' determination that no seizure occurred is independently confirmed by the fact that Officer Lattanzio's conduct did not amount to an assertion of authority.[1] Although the court of appeals declined to

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[1] Petitioner maintains (Pet. 7) that the government conceded that Officer Lattanzio's initial actions constituted a "show of authority." That is incorrect. In discussing reasonable suspicion in its response to petitioner's motion to suppress, the government described Officer Lattanzio's conduct as an "attempt to initiate an investigative stop of" petitioner, but that statement was prior to the evidentiary

address whether Officer Lattanzio's actions constituted an "assertion of authority" (Pet. App. 3a), the questions of assertion of authority and submission to authority are closely linked.

Where an officer's actions do not show "an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence," the appropriate inquiry is "whether 'a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Brendlin*, 551 U.S. at 256 (quoting *Florida* v. *Bostick*, 501 U.S. 429, 436 (1991)); see *United States* v. *Drayton*, 536 U.S. 194, 201-202 (2002). Relevant circumstances include whether the officer displayed a weapon, gave any commands or conveyed any type of threat, or used language or a tone of voice that indicated that compliance was required, as well as the location of the encounter, the number of officers, the officers' proximity to the citizen, and the timing of the officers' arrival. See *Bostick*, 501 U.S. at 432, 437; *United States* v.

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hearing and was not a concession of the issue. D. Ct. Doc. 41, at 15 (Feb. 10, 2015). To the contrary, at the evidentiary hearing, the government argued that petitioner was not seized during the initial encounter both because no show of authority took place and because petitioner did not submit to any showing of authority. Gov't C.A. App. GA27. The government likewise argued in the court of appeals that Officer Lattanzio's actions before petitioner fled did not amount to a show of authority. Gov't C.A. Br. 13-21. The court of appeals did not address the question only because it was unnecessary in light of its conclusion that petitioner did not submit to Officer Lattanzio. Pet. App. 3a ("We conclude that [petitioner] never 'submitted' to Officer Lattanzio and was therefore never 'seized' within the meaning of the Fourth Amendment. In light of this disposition, we need not consider whether the spotlighting of [petitioner] by a police car going the wrong way down a dark street constituted an 'assertion of authority.'").

Mendenhall, 446 U.S. 544, 554 (1980) (plurality opinion). The reasonable person test "is objective and 'presupposes an innocent person.'" *Drayton*, 536 U.S. at 202 (quoting *Bostick*, 501 U.S. at 438) (emphasis omitted).

Here, Officer Lattanzio drove his cruiser near petitioner and asked him a few questions from inside the vehicle. He did not turn on his lights or siren or draw his gun. Gov't C.A. App. GA27. Officer Lattanzio also "did not block * * * [petitioner] in any way with his car[,]" and "simply approached * * * [petitioner] slowly in his car and inquired" about what happened with the woman who had given him the tip. *Ibid.* There is no seizure when officers "merely approach[] an individual on the street or in another public place, * * * ask[] him if he is willing to answer some questions, [or] * * * put[] questions to him if the person is willing to listen[.]" *Royer*, 460 U.S. at 497; see also *Drayton*, 536 U.S. at 200.[2]

Indeed, this Court has held that no seizure occurred in circumstances analogous to those here. In *Chesternut*, *supra*, the Court found no seizure when four officers riding in a marked police cruiser sped up to catch up with the defendant, who was on foot, and drove alongside him for a short distance before observing the

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[2] Petitioner relies (Pet. 5 n.2) on *United States* v. *Johnson*, 874 F.3d 571 (7th Cir. 2017) (en banc), petition for cert. pending, No. 17-1349 (filed Mar. 23, 2018), to support his contention that Officer Lattanzio's conduct constituted a show of authority. But *Johnson* involved far different facts. In that case, one police cruiser drove parallel to the defendant's stopped car, another police cruiser drove behind the defendant's car and shone the bright light through the car's windows, and an officer approached the defendant's parked car. *Id.* at 572, 574. Moreover, the issue in that case was whether there was probable cause for the stop, not whether the stop was a seizure. See *id.* at 574.

defendant discard drugs. 486 U.S. at 569, 575. The Court noted in *Chesternut* that "[t]he record does not reflect that the police activated a siren or flashers, or that they commanded [the defendant] to halt, or displayed any weapons; or that they operated the car in an aggressive manner to block respondent's course or otherwise control the direction or speed of his movement." *Id.* at 575. The same is true here. Even if Officer Lattanzio's slow approach the wrong way down a one-way street toward petitioner, using his spotlight as a guide was (like the police activity in *Chesternut*) "somewhat intimidating," it does not, standing alone, constitute a seizure. *Ibid.* And the brief conversation between Officer Lattanzio, as he sat in his police cruiser, and petitioner, as he stood on the sidewalk, did not otherwise convert the encounter into a seizure. See *Drayton*, 536 U.S. at 200; *Royer*, 460 U.S. at 497.[3]

2. Petitioner overstates any tension among the circuits about what facts amount to a defendant's submission to a show of authority. See also note 3, *supra*. The

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[3] That questions of assertion of authority and submission to authority are closely linked is reinforced by petitioner's contention that the court of appeals' decision conflicts with the Arizona Supreme Court's decision in *State* v. *Rodgers*, 924 P.2d 1027 (1996). The question in that case was whether it was reasonable for the defendant to feel that he was not free to leave when two officers approached him and one flashed his badge and said "police officers, we need to talk to you." *Id.* at 1028-1030. The court concluded that, "[u]nder the facts of this case, we hold that the trial court appropriately concluded that a reasonable person under the circumstances would not have felt free to disregard the police and go about his business." *Id.* at 1030. The court in that case was considering whether an assertion of authority occurred, not whether the defendant submitted to it. In petitioner's case, unlike in *Rodgers*, Officer Lattanzio did not command petitioner to do anything.

courts' differing outcomes result not from their adoption of conflicting legal approaches but from their consideration of different factual scenarios. Particularly given that the test for a seizure is a factual one that is "necessarily imprecise," *Chesternut*, 486 at 573, such context-dependent outcomes are both predictable and understandable.

In *United States* v. *Morgan*, 936 F.2d 1561 (10th Cir. 1991), cert. denied, 502 U.S. 1102 (1992) (cited at Pet. 10), the defendant was a passenger in a car, which was stopped by police. *Id.* at 1565. After the car was stopped, the defendant exited the car, but an officer told him to "hold up." *Ibid.* The defendant did so momentarily and, asked the officer, "What do you want?" *Ibid.* The officer then told the defendant not to run, but the defendant did so anyway. *Ibid.* The court of appeals held, "since Officer Eubanks had followed the car in which Defendant was a passenger for several blocks with his red lights flashing; since Officer Eubanks exited from a marked police car, in uniform, and asked the Defendant to hold up; and since Defendant, at least momentarily, yielded to the Officer's apparent show of authority, we find [Defendant] was seized for purposes of the Fourth Amendment during the initial portion of the encounter." *Id.* at 1567.

Because the Tenth Circuit's conclusion rested not just on the momentary conversation between the defendant and the officer, but the totality of the circumstances of the case, including other indicia of the defendant's submission, it does not conflict with the court of appeals' decision here. Neither does the decision below conflict with the Tenth Circuit's later decision in *United States* v. *Hernandez*, 847 F.3d 1257 (2017),

which found that a defendant was seized when, in response to the officers' request for the defendant to stop walking, he stopped. *Id.* at 1266. As the court in this case explained, the key difference between *Hernandez* and this case is that the defendant in *Hernandez* did more than simply answer a few of the officers' questions; he obeyed a command. See Pet. App. 7a n.3.

The same was true in *United States* v. *Brodie*, 742 F.3d 1058 (D.C. Cir. 2014). In *Brodie*, the D.C. Circuit found that a defendant, who complied with an order to place his hands on a police cruiser but subsequently ran away after he noticed that the officer had become distracted, had submitted to police authority. *Id.* at 1061. The D.C. Circuit reasoned that the defendant's compliance "would almost surely have culminated in a search but for [the officer's] momentary diversion to speak with his colleague," which resulted in the defendant's flight. *Ibid.* The same cannot be said here. First, Officer Lattanzio never gave petitioner an order of any kind. Second, Officer Lattanzio was still in his cruiser and out of reach of petitioner when petitioner fled. Third, and relatedly, although a search was possible, it was not inevitable.

The First Circuit's decision in *United States* v. *Camacho*, 661 F.3d 718 (2011)—about which the court of appeals expressed skepticism (Pet. App. 7a)—is likewise factually inapposite. In that case, officers responded to reports of a gang fight, saw two men walking away from what appeared to have been a street brawl, and maneuvered their police cruiser to block the mens' path. *Id.* at 721-722. The officers asked the defendant questions, to which he responded, and then ordered him to remove his hands from the pocket of his sweatshirt, which he did. *Ibid.* Officers subsequently felt a gun in

the defendant's waistband. *Id.* at 722. The First Circuit determined that this amounted to a seizure because the officers blocked the defendant's path with their cruiser; and both officers were wearing gang unit uniforms, approached the defendant with "accusatory" questions, and issued orders. *Id.* at 725. The First Circuit also concluded that the defendant submitted to the authority "by responding to [the officer's] questions." *Id.* at 726. But that statement cannot be severed from the overall context, which included other factors supporting submission, such as the fact that the defendant stopped walking when he was blocked by the police cruiser and complied with the officer's order to remove his hands from the pocket of his sweatshirt. See *id.* at 726-727. No such factors were present here. See Pet. App. 2a-3a.

Even assuming petitioner were correct in suggesting (Pet. 16-17) some disagreement between those decisions and the Third Circuit's decision in *United States* v. *Valentine*, 232 F.3d 350, 359 (2000) (finding no submission "[e]ven if [the defendant] paused for a few moments" in response to a police order "and gave his name" before running), cert. denied, 532 U.S. 1014 (2001), any such disagreement is not directly implicated here. As the court of appeals reasoned and as explained above, the cases cited by petitioner are "easily distinguishable." Pet. App. 7a n.3. And the inherently fact-dependent nature is underscored by the fact that the question of submission has resulted in different outcomes within individual circuits. Compare *Brodie*, 742 F.3d at 1061 (finding that defendant who complied with request to place his hands on a police cruiser and thereafter fled had submitted to police authority), with *United States* v. *Washington*, 12 F.3d 1128 (D.C. Cir.) (finding no submission to an officer's attempt to initiate

a traffic stop when the defendant initially complied and stopped but then drove away), cert. denied, 513 U.S. 828 (1994); compare *Hernandez*, 847 F.3d at 1265 (finding a seizure when officers requested that the defendant stop walking and the defendant complied), with *United States* v. *Roberson*, 864 F.3d 1118, 1125 (10th Cir. 2017) (finding that a defendant did not submit to an officer's show of authority by staying in his car because he "furtively hid[] his gun in response to the lights and the officers' approach"), petition for cert. pending, No. 17-7383 (filed Jan. 2, 2018).

3. In any event, this case would be a poor vehicle in which to address petitioner's contention that he was seized, because petitioner would not be entitled to relief even if this Court agreed with that contention. Because Officer Lattanzio had reasonable suspicion for the stop, any seizure was consistent with the Fourth Amendment.

a. Petitioner suggests (Pet. 13 n.3) that the government "effectively abandoned" its argument that even if petitioner was seized, the seizure was supported by reasonable suspicion. That is incorrect.

In the court of appeals, petitioner challenged the district court's determination that he was not "seized" within the meaning of the Fourth Amendment but did not argue that Officer Lattanzio lacked reasonable suspicion for a seizure. Pet. C.A. Br. 12-19. In response, the government argued no seizure occurred and, alternatively, that the court of appeals could affirm the district court's order because Officer Lattanzio had reasonable suspicion to stop petitioner. Gov't C.A. Br. 26-27 n.5. And contrary to petitioner's suggestion (Pet. 13 n.3), the court of appeals did not treat the reasonable suspicion argument as "unpreserved" by the government, but instead explained that the district court had

not reached the issue, and, therefore, it was not before the court of appeals. Pet. App. 3a.

b. In *Terry*, *supra*, this Court held that officers may stop and briefly detain a suspect for investigation if they have reasonable suspicion that criminal activity is afoot. 392 U.S. at 30. Reasonable suspicion requires more than a "hunch," but "considerably less than proof of wrongdoing by a preponderance of the evidence," *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989) (citation omitted), and less than a showing of probable cause, *United States* v. *Arvizu*, 534 U.S. 266, 274 (2002). In determining whether a stop is supported by reasonable suspicion of criminal activity, a court "must look at the totality of the circumstances of [the] case." *Id.* at 273 (citation and internal quotation marks omitted). When a stop is based in whole or in part on information from an informant, the government must show that the information is sufficiently reliable to justify the stop. *Adams* v. *Williams*, 407 U.S. 143, 147 (1972). In making that assessment, "[o]ne simple rule will not cover every situation," because "[i]nformants' tips * * * vary greatly in their value and reliability." *Ibid.*

This Court considered the reliability of anonymous tips in *Navarette* v. *California*, 134 S. Ct. 1683 (2014), *Florida* v. *J. L.*, 529 U.S. 266 (2000), *Alabama* v. *White*, 496 U.S. 325 (1990). In *White*, the Court upheld a stop based on an anonymous telephone tip because the tipster's predictions proved largely accurate. 496 U.S. at 331-332. In *J. L.*, in contrast, the Court found that an anonymous tip did not contain indicia of reliability adequate to justify a stop and frisk. An anonymous caller had reported to the police that "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun." 529 U.S. at 268. Officers

went to the bus stop, saw a young black male wearing a plaid shirt, stopped him, frisked him, and found a gun in his pocket. *Ibid.* This Court held that the anonymous tip lacked indicia of reliability sufficient to supply reasonable suspicion because the tipster "neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J. L." *Id.* at 271.

In a concurring opinion, Justice Kennedy noted that although the tip in *J. L.* did not justify reliance, "a tip might be anonymous in some sense yet have certain other features, either supporting reliability or narrowing the likely class of informants, so that the tip does provide the lawful basis for some police action." 529 U.S. at 275. For instance, "[i]f an informant places his anonymity at risk, a court can consider this factor in weighing the reliability of the tip." *Id.* at 276. And in *Navarette*, the Court found reasonable suspicion for a stop based on an anonymous 911 call reporting that a drunk driver had run the caller off the road. 134 S. Ct. at 1688.

c. Here, the totality of the circumstances created a reasonable suspicion that petitioner was engaged in criminal activity. Officer Lattanzio received an in-person tip from a woman who pointed and said a man named Branden was "right there"; he had a gun concealed in a black bag; and the woman had personally felt the gun in the bag. Pet. App. 17a; see *Navarette*, 134 S. Ct. at 1689 (recognizing stated basis for tip as relevant factor). Officer Lattanzio promptly drove his cruiser in the direction the woman had pointed and saw a man holding a black bag in front of him "as * * * you would carry a lantern." Pet. App. 17a; see *Navarette*, 134 S. Ct. at 1688 (recognizing relevance of corroboration).

Moreover, the informant's tip was not wholly anonymous and was reliable. By reporting the tip to Officer Lattanzio in person, the informant placed her "anonymity at risk." See *J. L.*, 529 U.S. at 276 (Kennedy, J. concurring). Indeed, the circumstances here present the very circumstances that Justice Kennedy opined might render a tipster reliable: the woman "dr[ove] a car the police officer later describe[d][,] stop[ped] for a moment and, face to face, inform[ed] the police that criminal activity [wa]s occurring." *Ibid.*; see *Navarette*, 134 S. Ct. at 1689 (recognizing method of contact as relevant factor). The woman's tip was even more reliable because she claimed to have personally felt the gun inside the black bag and offered the suspect's name, which suggested she knew him. See *Navarette*, 134 S. Ct. at 1689; *J. L.*, 529 U.S. at 271 (suggesting that the informant's explanation of how he knows about the criminal activity would be relevant to assessing the informant's reliability). Under those circumstances, reasonable suspicion supported an investigatory *Terry* stop.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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