No. 18-1166

In The

Supreme Court of the United States

COLTON W. SIEVERS,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nebraska

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Should this Court address whether *Illinois v. Lidster*, 540 U.S. 419 (2004), supports the traffic stop in this case where the Nebraska Supreme Court separately found that the stop was justified by reasonable suspicion, a finding which Petitioner has not asked this Court to review?

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STATEMENT OF THE CASE

1. In the early morning hours of February 22, 2016, the York County Sheriff's Department received a report of a burglary at a home in York, Nebraska. Pet. App. 3a. According to the report, a large John Deere gun safe had been stolen; the safe contained several firearms, a large amount of cash, legal documents, jewelry, and gold coins. *Ibid.* A few days later, members of the Sheriff's Department arrested two suspects, one of whom confessed to the burglary and agreed to cooperate with investigators. *Id.* at 3a–4a.

According to the burglar informant, he had taken the safe to a residence in Lincoln, Nebraska, where he had cut it open and traded gold coins and money for methamphetamine. *Id.* at 4a. The informant said that the safe and the firearms would still be at that residence. *Ibid.*

The next day, on February 26, 2016, officers transported the informant to Lincoln. *Ibid.* Once there, a York County sheriff's deputy and the informant met with a local law enforcement officer and the informant directed them to the residence. *Ibid.* The residence was a "single-story garage-type outbuilding" on the same property as another house. *Ibid.*

Next to the residence, parked in an off-street driveway, was a black Volkswagen Beetle, which the informant said belonged to the resident, whom he described as a "big methamphetamine dealer." *Ibid.* The informant said that when he delivered the safe to the residence, he witnessed the resident sell his accomplice

2 ounces of methamphetamine for $3,000 in cash. *Ibid.* Also, the informant said that he had seen between 6 to 10 ounces of methamphetamine in the residence at that time and that he had purchased methamphetamine from the resident on a previous occasion. *Id.* at 4a–5a. Officers confirmed that the Volkswagen's license plate was registered at the residence's address and, with the informant's help, obtained a photograph of the resident, which matched the driver's license photograph of the Volkswagen's registered owner. *Id.* at 5a.

Officers then set up a "pre-warrant investigation," with multiple surveillance units monitoring and observing activity at the residence. *Ibid.* Plainclothes narcotics officers were located near and in sight of the residence, in an unmarked van. *Ibid.* Uniformed gang officers parked their marked cruiser a few blocks away, out of view of the residence. *Ibid.* This occurred at around 5 p.m. *Ibid.* At the same time, officers were preparing an affidavit for a search warrant for the residence and a "camper-style vehicle" located on the property. *Id.* at 6a.

As part of the surveillance, one of the narcotics officers drove the unmarked van through an alley behind the residence and saw a "white work type pickup truck" parked next to the Volkswagen. *Ibid.* The truck had an open bed with a ladder rack and a large, closed toolbox against the truck's cab. *Ibid.* The vehicles were parked side by side in the back yard of the residence. *Ibid.*

At around 5:20 p.m., the narcotics officer saw the truck drive through the alley and turn onto the street. *Ibid.* Upon seeing this, the narcotics officer contacted his supervisor and asked how to proceed. *Ibid.* The supervisor instructed the narcotics officer to stop the truck. *Ibid.* The narcotics officer relayed that to the gang officers, who then stopped the truck. *Id.* at 6a–7a. The stop occurred five blocks from the residence. *Id.* at 7a. None of the officers observed the truck make any traffic or other law violations before the stop. *Ibid.*

Petitioner Colton Sievers was the driver and sole occupant of the truck. *Ibid.* As the gang officers approached the truck, one of the officers saw Sievers "lean over and reach toward the center console area," which the officer characterized as "furtive movements." *Ibid.* Because of that, and because of the nature of the investigation, the officers were "extra assertive" in contacting Sievers. *Ibid.* They ordered Sievers to put his hands on the steering wheel and to not move as they helped him get out of the truck. *Ibid.* The officers then searched the interior driver's side of the truck, but did not find any narcotics or stolen items from the burglary. *Ibid.*

The narcotics officers, who were following in their unmarked van, arrived at roughly the same time as the gang officers. *Ibid.* When the narcotics officers arrived, they took over the contact with Sievers and sat him in the back of the marked police cruiser, with the door open. *Ibid.* They informed Sievers that he was not under arrest, but that he was being detained because of a stolen property and narcotics investigation at the

residence. *Ibid.* Sievers admitted that he had just been inside that residence and had just smoked marijuana before leaving, but said that "that was it." *Id.* at 7a–8a. The officers asked Sievers for consent to search the truck several times, but Sievers refused, stating that there were no illegal items in the truck and that the truck belonged to his boss. *Id.* at 8a.

Meanwhile, the supervisor had instructed another group of officers to "lock down" the residence to prevent anyone inside from destroying evidence. *Ibid.* The supervisor was concerned that Sievers might have had an opportunity to contact someone inside the residence. *Ibid.* Those officers "knocked and announced" and after 30 seconds, they saw movements inside the residence which they believed indicated that evidence was being destroyed; thus, the officers forced entry into the residence and took the resident into custody. *Ibid.* Once inside, the officers saw several items of drug paraphernalia in plain view. *Ibid.*

Based on that evidence, as well as Sievers' admission that he had just smoked marijuana, the supervisor instructed the officers to search the truck. *Id.* at 8a, 54a–56a. The resulting search revealed two small plastic bags containing methamphetamine inside of a soda pop can found near the center console. *Id.* at 8a.

2. The State charged Sievers with possession of a controlled substance, methamphetamine, a Class IV felony. *Id.* at 9a. After being charged, Sievers moved to suppress the relevant evidence on various grounds, among them that the stop was unlawful. *Id.* at 9a,

70a–73a. At a hearing on Sievers' motion, several of the officers involved testified. *Id.* at 9a. In short, as relevant here, the officers testified that they stopped the truck because it was parked in the driveway of the residence and because they suspected that it was carrying narcotics or stolen items from the burglary. *Id.* at 34a–36a, 51a–52a, 61a, 67a.

A few weeks after the hearing, the district court issued a written order denying the motion to suppress. *Id.* at 70a–73a. As relevant here, the district court concluded that there was reasonable suspicion for the stop. *Ibid.* Thereafter, the parties proceeded with a stipulated bench trial. *Id.* at 10a. Sievers renewed his motion to suppress, which the district court again denied. *Ibid.* The district court subsequently found Sievers guilty and sentenced him to 90 days' imprisonment and 1 year's post-release supervision. *Ibid.* The district court allowed Sievers to defer his sentence and post bond pending appeal. Pet. 4–5.

3. Sievers appealed to the Nebraska Court of Appeals. He argued that the district court erred in denying his motion to suppress because there was not reasonable suspicion for the stop and, thus, the stop violated his Fourth Amendment rights. *Id*. at 5. The State disagreed, arguing that the stop was justified by reasonable suspicion. *Ibid.* By order of the Nebraska Supreme Court, the case was moved from the Court of Appeals' docket to the Nebraska Supreme Court's docket. *Ibid.*

At the time, the Nebraska Supreme Court was short on members, so two Court of Appeals judges and one district court judge sat on the case. Pet. App. 3a. In its opinion, the Nebraska Supreme Court did not address whether there was reasonable suspicion for the stop. *Id.* at 1a–25a. Instead, the court framed the issue as "whether the suspicionless stop of Sievers to gather information about stolen property and possible criminal activity at the residence he drove from, for which a search warrant was being sought, violated Sievers' Fourth Amendment rights." *Id.* at 10a–11a. The court concluded that it did not. *Id.* at 24a–25a.

In reaching that conclusion, the court explained that, in line with *Illinois v. Lidster*, 540 U.S. 419 (2004), "[a] seizure for the purpose of seeking information when police are investigating criminal activity that might pose a danger to the public . . . may be reasonable under the Fourth Amendment even in the absence of reasonable articulable suspicion of criminal conduct." *Id.* at 11a–12a. In such a situation, whether the seizure was reasonable (and therefore constitutional) depended on the three-part balancing test from *Brown v. Texas*, 443 U.S. 47 (1979). *Id.* at 13a–14a. That test required a balancing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. *Ibid.*

Because the stop of Sievers, in the Nebraska Supreme Court's view, qualified as a suspicionless, information-seeking stop, application of the *Brown* balancing test was appropriate. *Id.* at 10a–17a. And

after considering the *Brown* factors, the court concluded that the stop of Sievers was reasonable. *Id.* at 18a–25a. Accordingly, the court affirmed Sievers' conviction and sentence. *Id.* at 24a–25a.

Following issuance of the Nebraska Supreme Court's opinion, Sievers moved for rehearing. Pet. 6. In his motion, Sievers argued that the court erred in relying on *Lidster* and that ordinary reasonable suspicion analysis was required. *Ibid.* In response, the court ordered simultaneous supplemental briefs. *Ibid.* In his brief, Sievers reiterated the arguments he made in his motion for rehearing. *Ibid.* In the State's supplemental brief, the State essentially agreed with Sievers that the court erred in relying on *Lidster* and that ordinary reasonable suspicion analysis was required. *Id.* at 6–7; Pet. App. 74a–90a.

The Nebraska Supreme Court overruled Siever's motion for rehearing, but modified its opinion in several respects. Pet. App. 26a–30a. Of note, the court reframed the issue presented as no longer concerning a "suspicionless" stop; rather, the issue was "whether the stop of Sievers to prevent the truck from leaving with any stolen items from the residence that the truck had just left, a residence for which a search warrant was being sought, violated Sievers' Fourth Amendment rights." *Id.* at 27a. The court then offered new analysis regarding the reasonableness of the stop, applying traditional notions of individualized suspicion and concluding that "it was reasonable for the officer to infer . . . that the truck may contain evidence of criminal

activity and to direct the stop of the truck." *Id.* at 28a–30a.

REASONS FOR DENYING CERTIORARI

In his petition, Sievers argues that plenary consideration is warranted or, in the alternative, that summary reversal is warranted because the court erred in relying on *Lidster* to find the stop reasonable. Pet. 7–18. The State disagrees. Because this Court reviews judgments, not opinions, and because there is an unchallenged, alternate basis for the judgment—that there was reasonable suspicion for the stop—this Court should deny certiorari on whether the court erred in also relying on *Lidster* to find the stop reasonable.

1. It is well established that "this Court reviews judgments, not opinions." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). On appellate review, "[t]he question before an appellate Court is, was the *judgment* correct, not the *ground* on which the judgment professes to proceed." *McClung v. Silliman*, 19 U.S. 598, 603 (1821). Part of the reason for that is this Court is "not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after [this Court] corrected its views of federal laws, [this Court's] review could amount to nothing more than advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945). Accordingly,

when the challenged issue will not affect the judgment below, certiorari is not appropriate.

2. As the State reads the Nebraska Supreme Court's supplemental opinion, the court held in the alternative that there was reasonable suspicion for the stop. Pet. App. 27a–30a. This reading is based on a couple of things. First, the court changed the issue presented to eliminate the characterization of the stop as a "suspicionless" stop and to shift the focus away from stopping the truck to gather information to stopping the truck to prevent it from leaving with stolen items. *Id.* at 27a. Second, as stated previously, the court offered new analysis indicating that the stop was supported by reasonable suspicion. Specifically, toward the end of the opinion, the court noted Sievers' argument that there was no reasonable suspicion for the stop and then recited various propositions of law regarding the nature of reasonable suspicion, followed by this finding:

> Under the totality of the circumstances and the individualized and specific knowledge of the criminal activity afoot and its grave risk to public safety, it was reasonable for the officer to infer the driver of the truck had information about criminal activity in the target residence and that the truck may contain evidence of criminal activity and to direct the stop of the truck.

Id. at 28a–30a. The court included other statements indicating that it found reasonable suspicion for the stop. For example, the court stated: "[W]e find that the

officer at the hub of the collective intelligence gathered, taking into account the totality of the circumstances, had reasonable objective bases for believing the truck had evidence of criminal activity even though no law violation was observed." *Id.* at 28a. The court also stated: "Despite the unusual circumstances here, the totality of these circumstances arising from the critical mass of law enforcement concerns was sufficient to justify this investigatory stop." *Id.* at 29a–30a.

That there was reasonable suspicion for the stop—that is, a particularized and objective basis for suspecting the particular person stopped of criminal activity, see *Navarette v. California*, 572 U.S. 393, 396–97 (2014)—is supported by the record. Whether reasonable suspicion exists depends on "both the content of information possessed by police and its degree of reliability." *Id.* at 397 (citing *Alabama v. White*, 496 U.S. 325, 330 (1990)). The standard takes into account "the totality of the circumstances—the whole picture." *Ibid.* (citing *United States v. Cortez*, 449 U.S. 411, 417 (1981)). Although a mere " 'hunch' " does not create reasonable suspicion, the level of suspicion the standard requires is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than is necessary for probable cause. *Ibid.* (citing *United States v. Sokolow*, 490 U.S. 1, 7 (1989)).

Here, based on all the information known about the various crimes, the truck being parked next to the resident drug dealer's car, and the apparent observation of Sievers walking between the residence and the

"camper-style vehicle" on the property while appearing to conceal items in his hands before getting into the truck, there was reasonable suspicion for the stop. Pet. App. 3a–10a, 89a.

3. In his petition, Sievers never challenged the court's alternate holding that there was reasonable suspicion for the stop. Rather, Sievers' question presented rested on the mistaken belief that the court never found reasonable suspicion, Pet. i, as evidenced by his later assertion that the court's supplemental opinion "made only minor modifications to its original opinion that did not meaningfully change the court's holding or analysis." *Id*. at 7. Sievers' amici seem to hold the same mistaken belief. See Policing Project at New York University Law School, et al., Amicus Br. 4–5, 16–19. Because Sievers does not challenge the court's alternative holding, there exists an independent and unchallenged basis for the judgment. Thus, certiorari is not appropriate, since even if this Court were to agree that the court erred in also relying on *Lidster* to find the stop reasonable, the judgment would remain unchanged.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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