No: _____

IN THE
SUPREME COURT OF THE UNITED STATES

TOMMY GURULE,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

If the driver of a car consents to its search, may officers frisk non-consenting passengers and detain them for the duration of the search?

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Petition for a Writ of Certiorari

Petitioner Tommy Gurule respectfully petitions for a writ of certiorari for this Court to review the judgment of the Tenth Circuit Court of Appeals.

Opinions Below

The relevant opinion of the Tenth Circuit Court of Appeals is reported at 935 F.3d 878 (10th Cir. 2019), as revised (Oct. 10, 2019), and is included in the appendix at A3. The relevant decision of the district court is unpublished and included in the appendix at A20.

Jurisdiction

The final judgement of the Tenth Circuit was entered on July 11, 2019. Justice Sotomayor extended the time for the filing of a petition for a writ of certiorari to and including January 27, 2020. *See* NO19A572. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

Relevant Constitutional Provision

The Fourth Amendment states in relevant part that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

Statement of the Case

1. Petitioner Tommy Gurule was the back-seat passenger in a car that was pulled over by West Valley City, Utah, Detective Jeffrey Smith for an improper lane change and failure to use a turn signal. Pet. App. A21. The driver, Mr. Gurule, and the front-seat passenger all gave Detective Smith their identification and the

detective returned to his car to check their records. *Id*. Detective Benjamin Watson soon arrived on the scene and made idle conversation with all three people in the car while Detective Smith worked in his car. *Id*. Nothing in Mr. Gurule's behavior made either detective suspicious. *Id*.

Detective Smith eventually left his car and asked the driver to exit hers. *Id*. Detective Smith asked the driver about the contents of her car and said he would not arrest her on her misdemeanor warrants if she told him the truth. *Id*. at A5, A21. The driver volunteered to let the officers search her car, in which she was living at the time. *Id*.

The officers told both passengers to get out of the car to facilitate its search and asked them to submit to a protective frisk to enhance the officers' safety while they searched. *Id*. A5, A21–22. Mr. Gurule and the front-seat passenger complied with the order to leave the car, but only the front-seat passenger consented to a search. *Id*. Detective Smith ordered Mr. Gurule to sit on the curb, but grew increasingly suspicious of his manner, and ordered him to stand up. *Id*. A22–23. Detective Watson saw a bulge in Mr. Gurule's pocket. *Id*. A23. The detectives frisked Mr. Gurule and retrieved a gun from that pocket. *Id*. A14.

2. The government indicted Mr. Gurule on a single count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Mr. Gurule filed a motion to suppress and the district court granted it, finding that officer-safety concerns did not warrant detaining Mr. Gurule for the consent search of the car. Pet. App. A25–26. The district court held that discovery of the gun was the result of

an illegal detention and the search for it unjustified by reasonable suspicion. *Id*. A26–28.

3. The Tenth Circuit reversed the district court's grant of Mr. Gurule's motion to suppress, finding that officer-safety concerns justified detaining Mr. Gurule during the consent search of the car. *Id*. A8–10. Reasoning that officer-safety concerns justified the detention of the passengers for the duration of the consent search, the court did not reach any question related to a third-party consent to the seizure of another person.

4. Mr. Gurule filed a petition for rehearing *en banc*, arguing that the Tenth Circuit's reliance on officer safety during traffic stops was misplaced and that the court had failed to properly identify and weigh the individual liberty interests at stake. The Tenth Circuit denied the petition, but *sua sponte* altered a single sentence in its previously issued opinion.

5. This petition follows.

Reasons for Granting the Writ

I. Courts are Intractably Divided Over Whether it is Reasonable Under the Fourth Amendment to Frisk and Detain Non-Consenting Passengers Whenever the Driver Consents to a Search of the Car.

Mr. Gurule's detention can be analyzed in two different ways: as part of a traffic stop or as the result of a third-party's consent to a search. Under either approach, the Tenth Circuit's opinion entrenches a circuit split.

This Court has long recognized the right to security of the person as one of the highest order: "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person…" *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). The Fourth Amendment's protections of this right are not limited to private spaces; the "inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study..." *Terry v. Ohio*, 392 U.S. 1, 8–9 (1968).

This right is limited during traffic stops, both by the business of the stop and by whatever steps officers take to protect themselves during it. This Court has taken an incremental approach to determining whether officer-safety measures impose reasonable limits on drivers and passengers during traffic stops. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), approved an officer's order that the driver of a stopped car step out of it on officer-safety grounds, and *Maryland v. Wilson*, 519 U.S. 408 (1997), authorized the same order for passengers.

Mimms and *Wilson* approve these officer-safety measures because their effect on driver and passenger is "*de minimis*." *Mimms*, 434 U.S. at 111. An order to get out of the car changes the driver's circumstances only slightly; the driver will be "briefly detained" during the traffic stop and "the only question is whether he shall

spend that period sitting in the driver's seat of his car or standing alongside it." *Id.* An officer's choice of the latter option "hardly rises to the level of a 'petty indignity.'" *Id.* (quoting *Terry*, 392 U.S. at 17). The considerations are almost identical for a passenger in a stopped car. A passenger is seized whenever the driver is and the intrusion on the passenger's interests is as minimal: "The only change in their circumstances which will result from ordering them out of the car is that they will be outside of, rather than inside of, the stopped car." *Wilson*, 519 U.S. at 414. The majority of the circuits have taken the same analytic approach, approving only measures that impose negligible additional restraints on drivers and passengers in the absence of any reason to believe they pose a danger to officers.

The seizure in *Gurule* can also be analyzed as the result of a consent rather than a traffic stop. Two circuits have considered the extent to which passengers can be seized as the result of a third-party consent. *United States v. Woodrum*, 202 F.3d 1 (1st Cir. 2000); *United States v. Hernandez-Zuniga*, 215 F.3d 483, 484 (5th Cir. 2000). These circuits ultimately impose even stricter limits on seizures justified by third-party consent than those required under *Mimms*, *Wilson*, and their progeny.

The Tenth Circuit's opinion in *Gurule* deepens that circuit's departure from the majority position under either approach. *Gurule* authorizes a dramatic expansion of the rule in *Wilson*, permitting the suspicionless and likely hours'-long seizure of nonconsenting passengers whenever a driver consents to a police search of her car. This significant infringement is very likely to be compounded by another, as it was in Mr. Gurule's case. When officers prepare to detain passengers for the

consent search, they will automatically seek to frisk the detained passengers, likely finding any refusals grounds for heightened suspicion, heightened observation, and a frisk. *Gurule* additionally permits one person's consent to authorize the automatic, lengthy seizure of another, broadening the reach of its departure from the other circuits. This Court's intervention is necessary, both to vindicate the right of passengers to be free of frisks and lengthy detentions based solely on third-party consent, and to clarify the law regarding novel extensions of *Wilson*.

A. Absent a reason to believe a driver or passenger is dangerous, the majority of circuits permit only de minimis intrusions on individual liberty in the name of officer safety during traffic stops.

The majority of federal circuits strictly adhere to the principles articulated in *Mimms* and *Wilson* when evaluating the reasonableness of additional intrusions on passengers' liberty interests taken to enhance officer safety. Even when approving officer-safety measures other or more intrusive than the one approved in *Wilson*, the majority approach is to examine carefully the nature and extent of the intrusion on a passenger's liberty interest before approving it.

Several circuits have approved police action that is the opposite of that in *Wilson*: ordering passengers back into cars instead of out of them. In *United States v. Moorefield*, 111 F.3d 10 (3d Cir. 1997), a passenger attempted to exit a car when the driver stopped for the police, and the officers ordered him back into the car and instructed him and the driver to put their hands up or at least to show them at all times. *Id.* at 11–12. The Third Circuit held that these orders were "a minimal intrusion on personal liberty" because, like the officer-safety measures in *Wilson*,

"the only change in Moorefield's circumstances … was that he remained inside of the stopped car with his hands in view, rather than inside of the stopped car with his hands lowered." *Id*. at 13. The Eighth Circuit came to the same conclusion regarding an order to a passenger to get back into a car, and for the same reasons: "the only change in [the passenger's] circumstances was that he was inside of, rather than outside of, the stopped car," an intrusion on his liberty interest that was "minimal." *United States v. Sanders*, 510 F.3d 788, 791 (8th Cir. 2007).

At least two other circuits have approved officers opening the passenger door as an officer-safety measure by reasoning from the degree of intrusion on personal liberty permitted in *Wilson*. Meredith, the passenger in *United States v. Meredith*, refused the officer's order to get out of the car during a traffic stop, telling the officer "that he was a paraplegic." 480 F.3d 366, 368 (5th Cir. 2007). The officer responded by opening Meredith's door and "conducted a visual inspection of Meredith only." *Id*. The Fifth Circuit invoked *Wilson* in approving this step, finding that opening the door was the "only practical way" to check on the passenger's claim and, "[e]qually important for Fourth Amendment purposes, that allowing an officer to open the car door and view a handicapped occupant is less intrusive than other options." *Id*. at 370, 371. Finally, the Fifth Circuit concluded that opening a door is "not significantly more intrusive" than looking through a car window. *Id*. at 371.

The Fourth Circuit came to a similar conclusion in *United States v. Stanfield*, 109 F.3d 976 (4th Cir. 1997), when officers opened the passenger door during a traffic stop because the car's windows were tinted too darkly for them to see the

interior. The Fourth Circuit reasoned that opening the door revealed little more than the officers would inevitably see when the driver had to roll down his window to give the officers what they would need to resolve the traffic stop. *Id*. at 982. The *Stanfield* court compared this intrusion to those this Court authorized in *Mimms* and *Wilson*, observing that opening a car door allowed occupants to retain their liberty interest in remaining seated in the car and did not force them to expose their entire bodies to the view of the public and the police. *Id*. at 982–83. Opening the passenger door was reasonable because "the actual invasion of privacy entailed… is indistinguishable from, if not precisely the same as" an order to exit the car "under the authority of *Mimms* or *Wilson*." *Id*. at 983.

The Seventh Circuit has also relied on the authority and analysis of *Wilson* in approving a much more significant intrusion on a passenger's liberty interests. The officer in *United States v. Howard* spotted a man he had probable cause to arrest for a recent violent crime emerging from a van with another man. 729 F.3d 655, 657 (7th Cir. 2013). The officer followed the two men, but then two more men came out of the van and the officer found himself caught between the two groups. *Id*. The officer ordered all four men to the ground, pointing his gun at Howard and the other man who had come out of the van after the suspect. *Id*. The Seventh Circuit approved the detention, citing *Wilson* for its example of one of the "limited situations" in which this Court has approved detentions of people who are not suspected of crimes. This approval rests on the fact that the "additional intrusion on individual liberty is marginal and is outweighed by the governmental interest" in

officer safety during the course of an encounter necessary to effect an arrest. *Id*. at 659.

While the infringement of Howard's liberty interest was "substantial," what the officer knew about the suspect's violent history and the presence of the other men in the van made "the concern for officer safety specific and strong." *Id*. at 660. The Seventh Circuit emphasized the limits on the holding, both on the officer safety and the personal liberty side of the equation. As for officer safety, the court pointed out that "similar detentions of bystanders" violate the Fourth Amendment if the police do not have probable cause to believe the target is dangerous, and that the police must not take "shortcuts" while arresting suspects that "leave them in dangerous situations requiring greater uses of force." *Id.* As for Howard, the court observed that the infringement on his liberty, while significant, lasted "for only a few minutes." *Id*.

B. *The Tenth Circuit uses generic officer-safety concerns to justify frisking non-consenting passengers and seizing them for the duration of any consent searches that may follow a traffic stop.*

In *Gurule*, the Tenth Circuit reasoned from the principles that protect officer safety during traffic stops to an indeterminate detention based on third-party consent. Pet. App. A8–10. The Tenth Circuit began with the conclusion in *Mimms* that a driver required to exit his car during a traffic stop is subject to a "mere inconvenience," and then moved on to the extension of that rule to passengers in *Wilson*. *Id*. A8 (quoting *Mimms*, 434 U.S. at 111). Since this Court has also held that the detention of driver and passengers remains reasonable "'for the duration of

the stop,'" the Tenth Circuit concluded that these principles lead to "an inescapable conclusion." *Id.* A9 (quoting *Arizona v. Johnson*, 555 U.S. 323, 333 (2009)). The conclusion the Tenth Circuit found inescapable was that officer-safety considerations warrant detaining passengers until any consent searches authorized by the driver are complete, a conclusion that deepens this circuit's division from the majority's careful extensions of *Mimms* and *Wilson*.

C. Passenger seizures based on third-party consent are even more limited than those allowed during ordinary traffic stops.

Two circuits have considered the detention of a passenger based on third-party consent, both arriving at the conclusion that such a search is permissible only when it serves an important government interest, when the detention is narrow in scope and duration, and when the passenger is on notice of the possibility of such a seizure. In other words, analyzing third-party consents to passenger seizures results in a test similar to the test in *Mimms* and *Wilson*, but with an additional notice requirement.

Woodrum arose from the stop of a cab that was conducted in accordance with the Boston Police Department's Taxi Inspection Program for Safety (TIPS). In the wake of the murder of two Boston taxi-drivers and the robbery of many others, the Boston Police Department created TIPS, which permitted police officers to stop participating taxis without any suspicion of wrongdoing to check on driver safety. 202 F.3d at 4. TIPS stops allowed an officer only to check on the driver's safety and quickly glance into the passenger compartment; the stops were brief and focused.

Id. at 11–12. When a passenger complained that such a stop violated his Fourth-Amendment rights, the First Circuit determined that the cab owner's consent justified the seizure of the passenger. The First Circuit achieved this result by extending the third-party consent-to-search doctrine of *United States v. Matlock*, 415 U.S. 164, 169 (1974). If one person can consent to the search of a shared space, *Woodrum* reasons, then one person who shares control over common travel with another can consent to a police stop. 202 F.3d at 10–11.

In *Hernandez-Zuniga*, the Fifth Circuit relied on the same theory of third-party consent by a bus-owner to justify the seizure of a passenger. The bus in which Hernandez-Zuniga was a passenger routinely made unscheduled stops to let on anyone who flagged down the bus, including border patrol agents. 215 F.3d at 485. These stops were a part of the policy of the bus company, which encouraged immigration inspections of its buses because its practice of picking up passengers on the side of the road left it with very little knowledge of who was riding its buses and what they might carry with them. *Id*. Relying on the First Circuit's expansion of *Matlock* in *Woodrum*, the Fifth Circuit found that the third-party consent principles of *Matlock* could authorize such a detention. *Id*. at 487. The stops lasted only ten or fifteen minutes, and were limited to a few questions about citizenship and (sometimes) requests for papers. *Id*. at 488.

Both *Woodrum* and *Hernandez-Zuniga* rely on the gravity of the government's law-enforcement interest and the *de minimis* nature of the intrusion on the passenger in finding the seizures reasonable. *Woodrum*, 202 F.3d at 11–12;

Hernandez-Zuniga, 215 F.3d at 488. Neither circuit suggests that officer safety considerations can serve as a reason for officers to convert what was justified as a brief stop for one purpose into an extended detention of the passenger for another.

D. Gurule allows passenger seizures authorized by third-party consent to be considerably more expansive than those permitted during traffic stops.

Under the Tenth Circuit's analysis, the officer-safety concerns that warrant *de minimis* officer-safety measures during traffic stops justify considerably more intrusive officer-safety measures during consent searches. Unlike the circuits that have considered the effect of third-party consent on non-consenting passengers, the Tenth Circuit does not analyze the "the additional intrusion to Mr. Gurule's personal liberty" occasioned by his frisk and detention for the duration of the driver's consent search. Pet. App. A10. The Tenth Circuit also requires no intrinsic limits on the scope and duration of the search and no evidence the passenger has knowingly undertaken the risk of a detention of this magnitude. Finally, because the Tenth Circuit permits automatic frisks of drivers who consent to a car search, *United States v. Manjarrez*, 348 F.3d 881 (10th Cir. 2003), *Gurule* makes the detention and frisk of passengers automatic when the driver consents.

II. The Question Presented is Crucially Important to the Administration of Justice

This Court should clarify the law affecting passengers detained during traffic stops, a problem growing increasingly pressing as driving patterns change.

1. Traffic stops remain the most common type of contact between the public

and police officers, and many of those contacts involve passengers in a stopped car. U.S. Dep't of Justice, Bureau of Justice Statistics, Contacts Between Police and the Public, 2015, at 1 (2018). According to data from the Department of Justice, in 2015 nearly six million people were passengers in cars involved in traffic stops. *Id.* at 4. The number of people who are passengers in cars that police pull over is only likely to rise with the increasing popularity of ride-sharing services. A recent analysis from the San Francisco County Transportation Authority reports that transportation network companies (TNCs) like Lyft and Uber make 170,000 trips on a typical weekday within San Francisco. San Francisco County Transportation Authority, TNCs Today: A Profile of San Francisco Transportation Network Company Activity, at 1 (2017). TNC trips account for 15% of all vehicle trips in the area. *Id.*

2. Deciding whether police can detain passengers in a stopped car for the duration of a search based only on the driver's consent will provide essential guidance to law enforcement agencies and courts. Law enforcement agencies and officers need clear rules regarding the scope of their authority to detain passengers during consent searches that often arise after the business of a traffic stop is complete. Courts also need clear rules regarding the admissibility of evidence obtained during such detentions.

III. This Case Presents an Ideal Vehicle for Resolving the Conflict.

There are two reasons why this case is particularly suitable for resolving the question of whether the police can detain nonconsenting passengers for the duration of a consent search authorized by a car's driver.

1. This case turns on a single question of law. The Tenth Circuit justified its holding on one basis: that the officer-safety principles this Court articulated in *Mimms* and *Wilson* justify the indeterminate detention and frisk of any and all passengers in a car when the driver gives police consent to search it. Pet. App. 8–10. The driver's consent was in turn the only basis for the search; the court of appeals did not suggest that the officers had any degree of suspicion that would have justified a search of the car absent the driver's consent.

2. The resolution of the question is outcome determinative. The government's only evidence against Mr. Gurule resulted directly from the officers' decision to remove him from the car to facilitate the consent search. The court of appeals did not find that the officers could have detained Mr. Gurule on any other basis.

IV. The Tenth Circuit's Opinion is Incorrect.

Contrary to the Tenth Circuit's holding, neither concerns for officer safety during traffic stops nor consent principles can justify the automatic detention of nonconsenting passengers during a consent search authorized by a third party.

A. Ordinary Traffic Stop Principles Cannot Justify Detaining Passengers when a Driver Consents to a Search of a Car.

1. While *Mimms* and *Wilson* recognize the weight of the government's interest in officer safety, they are equally cognizant of the intrusion on individual liberty occasioned by each additional officer-safety measure undertaken during a traffic stop. *Wilson* approves an officer-safety measure that leaves a passenger in almost exactly the same position as before the order; the detention lasts the same length of time and the passenger is standing by the car instead of sitting in it.

The majority of circuits that have relied on *Mimms* and *Wilson* to authorize new officer-safety measures have adopted the same insistence on the circumscribed scope of each new measure. In approving orders that passengers reenter stopped cars, the Third and Eighth Circuits rest on the conclusion that the liberty interest affected is precisely the same—and equally insignificant—as that at issue in *Wilson*. *Moorefield*, 111 F.3d at 13; *Sanders*, 510 F.3d at 791. *See also United States v. Williams*, 419 F.3d 1029, 1033 (9th Cir. 2005) (approving order to reenter car because "[j]ust as in *Wilson* and *Mimms*, little is changed upon compliance with the officer's order except the position of the passenger.").

Even when allowing the officer to take the more active step of opening the passenger door, the Fifth and Fourth Circuits measure the additional intrusion against the standard set in *Wilson*. An additional measure is reasonable if it infringes on individual liberty no more than the *de minimis* standard authorized by *Wilson*. *Meredith*, 480 F.3d at 371; *Stanfield*, 109 F.3d at 983.

Meredith and *Stanfield* also consider the government interest side of the balance when expanding *Wilson* to include new officer-safety measures. Neither

circuit treats generic officer-safety concerns as sufficient. Instead, *Meredith* considers whether the officers could have done anything differently to lessen the degree of the intrusion on the passenger's liberty interest. 480 F.3d at 371. The intrusion is reasonable in part because the Fifth Circuit decides that there were no other, less-intrusive means available to the officers.[1] *Id.* A focus on both sides of the Fourth Amendment balance prevents officer safety from becoming an automatic counterweight to any and all Fourth Amendment interests, and protects against *Wilson* becoming a mechanism for approving new intrusion on passengers' liberty interests.[2]

In *Stanfield*, the Fourth Circuit also considers the officer-safety side of the balance before approving a new step under *Wilson*. *Stanfield* does not rest on the fact that traffic stops pose dangers to officers, but on the dangers presented by the circumstances of the specific case, finding that heavily tinted windows create heightened dangers that can be met with additional officer-safety measures. *Stanfield*, 109 F.3d at 981–82. *See also United States v. May*, 203 F.3d 53, *3 (D.C.

[1] The ordinary rule is that officers' actions can still be reasonable even if less intrusive means of achieving the same result are available. "The fact that the protection of the public might, in the abstract, have been accomplished by less intrusive means does not, by itself, render the search unreasonable." *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973) (quotation and citation omitted). The Fifth Circuit's departure from that rule follows directly from the Fourth-Amendment balancing test in *Mimms* and *Wilson*, a test that requires that suspicionless intrusions on individual liberty be *de minimis*.

[2] As *Wilson* recognizes, an officer generally has no suspicion of any kind that the passenger in a traffic stop is guilty of wrongdoing, a fact of some note in determining how intrusive officer-safety measures directed at passengers may be. 519 U.S. at 413.

Cir. 1999) (unpubl.) (questioning driver about guns is "less intrusive than ordering a driver out of his car, [and] it is also an expedient way for the officer to evaluate his personal safety and the need to take further precautions.").

The Seventh Circuit extends *Wilson* significantly when approving a lone officer's decision to order a passenger to the ground at gunpoint without any individualized suspicion of that passenger. *Howard*, 729 F.3d at 660. In doing so, though, the court takes into account special circumstances on both sides of the reasonableness equation. The court recognizes that the intrusion on the passenger's liberty interest is "substantial" and that the officer's action could reasonably have "terrified" Howard. *Id*. Balanced against that is the fact that the detention was brief—"only a few minutes"—and the "concern for officer safety *specific and strong*." *Id.* (emphasis added). Moreover, the court stresses the limitations of its ruling, emphasizing previous holdings that bystanders cannot be detained based on a generic interest in officer safety, but only when officers have probable cause to believe "the target of the arrest or search had committed a violent crime or was otherwise dangerous." *Id*. The court also admonishes the police generally that it is unreasonable to take shortcuts that created dangerous situations requiring additional officer-safety measures. *Id*. at 660–661.

2. The Tenth Circuit's analysis in *Gurule* is a significant departure from the careful extensions of *Wilson* undertaken by the majority of other circuits. Rather than giving careful attention to the nature of the intrusion on the passenger's liberty interest, *Gurule* ignores that interest altogether. Indeed, the *Gurule* court's

entire consideration of the passenger's liberty interest is limited to the conclusory statement that it is outweighed by a generic interest in officer safety during traffic stops: "the additional intrusion to Mr. Gurule's personal liberty created by the investigatory detention does not outweigh the longstanding governmental interest in officer safety." Pet. App. A10 (citing *Johnson*, 555 U.S. at 333).

The problem is not just that *Gurule* fails to consider the liberty interest affected, but that it fails to identify that interest in the first place. This is especially problematic since *Gurule* effects a considerable extension of *Wilson*. The Tenth Circuit adopts *Wilson* as authority for what police can do to protect their safety during a traffic stop and then broadens that reasoning to include detaining third parties during the entirety of a driver's consent search following a traffic stop. Under the Tenth Circuit's view, the police could detain Mr. Gurule for an indeterminate period because "the officers here needed to control the scene for the duration of the consent search." Pet. App. A10. This new rule creates difficulties on both sides of the balancing test for assessing reasonableness under the Fourth Amendment.

On the individual liberty side, the Tenth Circuit has authorized an intrusion that is wholly incommensurate with the "*de minimis*" intrusion in *Wilson*. The Tenth Circuit routinely approves consent searches of considerable length. *See, e.g., United States v. Rosborough*, 366 F.3d 1145, 1147–48 (10th Cir. 2004) (just over two hours); *United States v. Guerrero-Sanchez*, 412 F. App'x 133, 137 (10th Cir. 2011) (unpubl.) (three hours); *United States v. Carbajal-Iriarte*, 586 F.3d 795, 802 (10th

Cir. 2009) (first search of one-half hour, then driver agreed to drive to another location for a second search lasting over an hour); *United States v. Diaz*, 356 F. App'x 117, 122 (10th Cir. 2009) (unpubl.), as amended on reh'g in part (Jan. 28, 2010) (affirming search of 2 hours 10 minutes); *United States v. Bejarano-Ramirez*, 35 F. App'x 740, 743 (10th Cir. 2002) (unpubl.) (search ended one hour and forty minutes after traffic stop). Subject to the driver's malleability and the officer's energy, passengers can now be detained under *Gurule*'s authority for hours.

Nor is the Tenth Circuit alone in this respect. *See United States v. Hornbecker*, 316 F.3d 40, 43 (1st Cir. 2003) ("[N]early 23 minutes after being pulled over, Hornbecker voluntarily signed the [consent to search] form. About an hour and a quarter later, the troopers breached the space behind the cab and discovered the marijuana."); *United States v. Alcantar*, 271 F.3d 731, 738 (8th Cir. 2001) (approving at least the first hour of two hour and forty-five minute search and holding "when an officer receives consent to search for an item that can be easily hidden, the officer may conduct a sufficiently thorough search to find those items."). While the driver has the ability to place limits on the scope of the consent given or to revoke consent altogether, *United States v. Mendoza*, 817 F.3d 695, 701 (10th Cir. 2016), that ability is of no use to a passenger, who remains at the mercy of the consenting party and the police.

Mimms and *Wilson* authorize officer-safety measures that do not extend the duration of a traffic stop. *Gurule* approves, without analysis, the suspicionless and

involuntary detention of a passenger for what is very likely to be hours after the traffic stop has concluded—based solely on the driver's consent.

The other side of the equation, the government's interest, is also distinct from that in *Mimms* and *Wilson*, which rest on the danger to officers during a traffic stop. The Tenth Circuit treats the consent search as an intrinsic part of the traffic stop. Consent searches are justified and limited differently than traffic stops, however, and so they must be analyzed differently. Consent searches require no Fourth Amendment justification: "even when officers have no basis for suspecting a particular individual," they may still approach that individual and ask questions "as long as the police do not convey a message that compliance with their requests is required." *Fla. v. Bostick*, 501 U.S. 429, 434–35, (1991). Since the person who consents to such an encounter supplies the only justification for it, that person also sets the limits on the scope and duration of any consent search. *See Fla. v. Jimeno*, 500 U.S. 248, 251 (1991).

The justifications for and limits on traffic stops are entirely different, and this Court has imposed limits on both. *See Rodriguez v. United States*, 575 U.S. 348, 354 (2015). Absent any additional reasonable suspicion, a traffic stop normally consists of issuing some sort of warning or citation for the violation (or not) and "the ordinary inquiries incident to such a stop." *Illinois v. Caballes*, 543 U.S. 405, 408 (2005). "Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Rodriguez*, 575 U.S. at 355.

Activities designed to uncover evidence of wrongdoing other than the traffic violation are not part of these ordinary inquiries, and so are "not fairly characterized as part of the officer's traffic mission." *Id*. at 356. A consent search, like the dog sniff at issue in *Rodriguez*, is "a measure aimed at 'detect[ing] evidence of ordinary criminal wrongdoing,'" rather than part of the traffic stop that made the additional search possible. *Id*. at 355 (quoting *Indianapolis v. Edmond*, 531 U.S. 32, 40–41 (2000)). The officer-safety measures permissible during traffic stops are not permissible during investigations unrelated to the traffic stop. Indeed, *Rodriguez* explicitly holds that an unrelated investigation, *and* the officer-safety measures that might facilitate it, are equally "detours" from the mission of the traffic stop. *Id*. at 356. *See also United States v. Landeros*, 913 F.3d 862, 870 (9th Cir. 2019) (citing *Rodriguez* for the holding that *Wilson* does not justify ordering a passenger out of the car after the traffic stop should have been completed).

3. *Wilson* and *Mimms* also rely on the fact that the driver or passenger ordered out of a stopped car is not subject to a more intrusive detention than one allowed to remain in the car. But the officers who ordered Mr. Gurule and the other passenger out of the car immediately asked for the additional officer-safety measure of frisking them both. Pet. App. A21–22. Neither officer felt there was any reason to suspect that Mr. Gurule was dangerous or engaged in illegal activity while he chatted with them from his seat in the car. *Id*. A5–6, A21, A26. It was only when the officers removed him from the car to detain him for the duration of the consent

search that they asked for permission to frisk him and, when he refused, grew suspicious. *Id*.

In *Manjarrez*, the Tenth Circuit explicitly approves the automatic search of a party who consents to a search of his or her car. 348 F.3d at 887.[3] Since the officer was alone with the person who consented to the search, the officer "could not reasonably be expected to leave Defendant in his patrol car, turn his back on Defendant, insert his head into Defendant's car, and search the car without first checking Defendant for weapons." *Id*. *Gurule* extends this "minimally intrusive pat-down of [the driver] … based on [the driver's] prior consent to search his car," *id*., to any passengers who accepted a ride with the driver. If officers cannot be expected to search a car without frisking the person who consented, they can hardly be expected to do so without frisking the multiple people who didn't. *Gurule* thus authorizes not just the detention, but the automatic and suspicionless search of any passengers in a car when the driver consents to a search.

Unlike the passenger in *Wilson*, Mr. Gurule underwent a profound change in circumstances as a result of the officer-safety measures used to facilitate the

[3] This approach has been expressly disapproved in at least one treatise. *See* 4 Wayne R. LaFave, Search & Seizure: A Treatise on the Fourth Amendment § 8.1(c), at 26 (5th ed. 2012) (criticizing *Manjarrez* and observing that " if a consent to search a vehicle gives rise to a need for a frisk of the person that otherwise would not exist, one wonders why the frisk should not be expressly included in the requested consent.").

consent search. This substantial and unwarranted expansion of *Wilson* deepens the Tenth Circuit's division from the circuits and requires this Court's intervention.

B. *Third-Party Consents to Seizures Depend for their Validity on an Assumption of the Risk and on their Narrow Confines.*

It was the consent, rather than the traffic stop, that determined the duration and scope of the detention and search in *Gurule*. Two circuits have analyzed the detention of passengers as the result of a third-party consent. Both the First and Fifth Circuits require substantive law-enforcement interests on the government side and an assumption of the risk as well as narrowly circumscribed intrusions on the individual liberty side of the balance to find such a detention reasonable.

1. The First Circuit begins with *Matlock*'s holding that co-inhabitants assume the risk that "one of their number might permit the common area to be searched." *Matlock*, 415 U.S. at 171 n.7. Even as the occupants of a shared space have a shared ability to consent to its search, the First Circuit reasons that a taxi driver and passenger "plainly allocate shared control over their intertwined freedom of movement." *Woodrum*, 202 F.3d at 11. The *Woodrum* court finds that this shared control means that the passenger was on notice that the driver might take routes or make stops that passenger had not authorized; the passenger "assumes the risk

that the driver may exercise his right to stop briefly along the way (say, to converse with a police officer)." *Id*.

The Fifth Circuit takes the same approach. The bus on which Hernandez-Zuniga was a passenger made unscheduled stops to pick up passengers on the side of the road, so the court concludes that Hernandez-Zuniga assumed the risk of such stops "as well as the risk that during these stops the bus might be boarded by Border Patrol agents." *Hernandez-Zuniga*, 215 F.3d at 488.

2. Although *Woodrum* and *Hernandez-Zuniga* extend *Matlock* from the search of places to the seizure of people, it is not clear that such an expansion was necessary to achieve the same result. The *Woodrum* court notes that passengers in participating cabs were on notice of the TIPS program: the "decals [that] festooned" participating cabs and publicity about TIPS created "avenues through which a reasonable passenger might be aware that the police were stopping taxis to check the drivers' well-being." 202 F.3d at 10, 12. The Fifth Circuit comes to the same conclusion for similar reasons. The bus on which *Hernandez-Zuniga* rode made frequent and unscheduled stops to pick up people on the side of the road; the passengers were on notice that anyone could board the bus at any time. 215 F.3d at 488. The passenger detentions at issue in *Woodrum* and *Hernandez-Zuniga* are detentions to which the passengers themselves implicitly consented when they purchased a fare.[4]

[4] Mr. Gurule accepted a ride from an acquaintance rather than purchasing a fare. Determining what risk he undertook is best analyzed under the rubric of shared

3. Whether analyzed as the consent of the owner/operator or the passenger, *Woodrum* and *Hernandez-Zuniga* both insist on the limits of the consent. The consent in *Woodrum* imposed significant limitations on the duration and scope of TIPS stops; since the consent was "narrow in scope and purpose," officers did not have "unfettered discretion" to expand TIPS stops beyond "limited inquiries to the driver and a quick visual inspection of the cab's interior." 202 F.3d at 11–12. These limitations ensured that the intrusion on the passenger's liberty interests would be limited to a brief stop and a quick check of the driver's safety. *Id*. at 12. The consent and resulting detentions in *Hernandez-Zuniga* were similarly "narrow in scope and purpose." 215 F.3d at 489. The detentions rarely took more than ten or fifteen minutes and consisted of "little more than each passenger being asked some brief questions about his citizenship and, perhaps, being asked to show proof of citizenship." *Id*. at 488.

The intrusions on the passengers' liberty were also justified against specific and weighty government interests. The stops in *Woodrum* were a response to the robbery of many and murder of two cab drivers. 202 F.3d at 11. The buses in

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social expectations: "The constant element in assessing Fourth Amendment reasonableness in the consent cases, then, is the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules." *Georgia v. Randolph*, 547 U.S. 103, 111 (2006).

Hernandez-Zuniga operated within less than a mile of the border with Mexico and the company that operated them asked for border patrol assistance in preventing their buses from being used for the transportation of illegal immigrants and illicit drugs. 215 F.3d at 484 n1, 488.

In stark contrast, the Tenth Circuit permits one party's consent to authorize the indeterminate seizure and search of another, nonconsenting, person. In so doing, *Gurule* does not insist on the intrinsic limitations in duration and scope of the seizures permitted in *Woodrum* and *Hernandez-Zuniga*. Apart from the general interest in officer safety attendant on traffic stops, *Gurule* also fails to identify a government interest in detaining the passengers of a car during a consent search authorized by its driver. Finally, there is no suggestion that Mr. Gurule was on notice that accepting a ride also meant accepting the risk of an hours' long detention and frisk.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari ought to be granted.

Respectfully submitted,

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Salt Lake City, Utah
January 27, 2020

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

TOMMY GURULE,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

AFFIDAVIT OF SERVICE

Bretta Pirie, Assistant Federal Public Defender for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid or by delivery to a third party commercial carrier for delivery within 3 calendar days, and addressed to:

Noel Franscisco

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave, N.W.
Washington, D.C. 20530-001

It is further attested that the envelope was deposited with UPS on January 27, 2020, and all parties required to be served have been served.

_____

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Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

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