No.

IN THE

Supreme Court of the United States

COURTNEY C. BROWN,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Court reverse *Pennsylvania v. Mimms*, 434 U.S. 106, 109-10 (1977), wherein, based on "the inordinate risk confronting an officer as he approaches a person seated in an automobile" and "*de minimis*" nature of an intrusion which "hardly rises to the level of a 'petty indignity,'" the Court announced a blanket rule permitting officers to conduct a search by ordering a person from his or her car during a routine traffic stop without a reasonable articulable investigative or policing purpose or suspicion the person is armed or dangerous?
2. May an officer extend a stop by ordering a person from their car on the basis of *Mimms* after the mission of the stop has, or should reasonably have, been completed, in seeming violation of *Rodriguez v. U.S.*, 575 U.S. 348 (2015)?

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JURISDICTION

The Supreme Court of Wisconsin issued its decision on July 3, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

This case presents pressing issues concerning the scope of permissible police conduct in searching a person without a particularized basis by ordering the person out of his or her car during a routine traffic stop. This case challenges the continued validity of the rationale underpinning *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), blanket rule which grants police

unfettered discretion, de-coupled from standard Fourth Amendment reasonableness based on totality of circumstances analysis, to order stopped suspected traffic offenders out of their cars. The *Mimms* Court deemed it "too plain for argument" that such stops are inherently dangerous, as balanced against a type of search the Court characterized a "*de minimis*" intrusion that "hardly rises to the level of a 'petty indignity.'" *Id.* at 110-11. More detailed and comprehensive data and a more nuanced analysis or understanding of that data, as well as the ubiquity of dash cam and cell phone footage, at minimum undermine both points and arguably prove them false.

This case also asks the Court to resolve whether police may extend a stop and order a person from their car on the basis of *Mimms* after the mission of the stop has or should reasonably have been completed, in seeming contradiction of the Court's decisions in *Rodriguez v. U.S.*, 575 U.S. 348 (2015), and *Kansas v. Glover*, __ U.S. __ 140 S.Ct. 1183, 1190 (2020).

The Wisconsin Supreme Court has ruled "Because the Fourth Amendment and Article I, § 11, provide substantially identical protections, we have historically interpreted this section of the Wisconsin Constitution in accordance with United States Supreme Court interpretations of the Fourth Amendment." *State v. Smith*, 2018 WI 2, ¶ 12, 379 Wis. 2d 86, 905 N.W.2d 353. The circuit court, court of appeals, and Wisconsin Supreme Court decided the issues presented based upon this Court's

decisions governing U.S. Const. amend IV jurisprudence.

A. Factual Background

In the early morning of August 23, 2013, Courtney Brown, a 32-year-old African-American man from Milwaukee, was in Fond du Lac, WI, to "spend time" with a woman whom Mr. Brown met on line. (App. 123a-124a). After dropping the woman off at her house at approximately 2:45 a.m. as she anticipated her babysitter returning with her child, Mr. Brown left, stopped to get gas, and then resumed driving. (App. 117a, 124a). When the woman phoned wanting him to return, Mr. Brown reversed direction, driving into a cul de sac to turn around.[1] (App. 118a).

Fond du Lac police officer Christopher Deering saw Mr. Brown pull out from the cul de sac in a mini-mall area of town with all-closed businesses. (App. 83a). Deering had not seen Mr. Brown stopped anywhere in the cul de sac, and did not testify to seeing any other cars or people. (App. 97a, 104a). As Deering followed Mr. Brown a records check showed Brown's car to be a rental. (App. 84a). Deering continued to follow until he was able to execute a traffic stop upon observing Mr. Brown allegedly fail

[1] Per Wis. Stat. § 346.33(1)(b), executing a U-turn mid-block in a business district would violate Wisconsin's rules of the road.

to come to a complete stop while turning at a stop sign. *Id.*

Upon foot approach after the stop Deering noticed Mr. Brown not wearing a seatbelt. (App. 85a). Responding to Deering's questions, Mr. Brown told Deering he was from Milwaukee, had just come from a Speedway gas station, had been at a girlfriend's house at 3rd and Ellis earlier, and was not driving to any place in particular. (App. 89a, 92a). Deering thought Brown stating he came from a gas station a lie because he saw Brown drive out of the cul de sac; though Deering acknowledged he did not see Brown stopped anywhere in the cul de sac and only saw Brown driving the whole time. (App. 85a, 87a, 92a, 97a, 104a). Two back-up "safety" officers Deering called while executing the stop arrived and stood by as Deering and Brown talked. (App. 89a, 107a).

Deering stated there were no "extenuating circumstances" that would render the encounter "a high-risk traffic stop." (App. 101a). Deering did not observe Mr. Brown's vehicle swerving or moving erratically; there was no odor of drugs, sign of impairment, or other physical signs or evidence of drug possession or use. (App. 101a). Deering acknowledged Mr. Brown made "no furtive movement in the vehicle" and stated "there was—I guess, there's no specific factors to lead to" a concern Mr. Brown had any sort of weapon. (App. 101a-102a, 113a).

Deering took Mr. Brown's driver's license and returned to his squad to write out a seatbelt violation warning. (App. 100a, 108a).[2] While in his squad, Deering had dispatch check first city, then county, for a canine unit but neither was available. (App. 90a, 108a). Deering did this because Mr. Brown "said he was up from Milwaukee, which…would be what's called a source city for drugs;" because "people that traffic drugs often use rental cars;" and because "people will come down—or drive drugs up from Milwaukee because you can sell them at a much higher cost up here in the suburbs." (App. 92a). While Deering was writing the warning, a warrant check revealed Brown had an arrest record for drugs and an armed robbery. (App. 90a, 103a, 104a).

Upon completing the paperwork necessary to the mission of the stop by writing the warning, Deering walked back to Mr. Brown's car with the warning in hand. (App. 90a, 111a). Deering did not hand the warning to Mr. Brown or return his license. (App. 111a-112a). Instead, Deering walked up to Mr. Brown's driver's side door, opened it and directed Mr. Brown to step out. (App. 90a, 111a, 121a). Deering decided prior to walking back that he was

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[2] Wis. Stat. § 347.48(2m)(b), makes it a civil forfeiture offense to "operate [a] motor vehicle unless the person is properly restrained in a safety belt." (App. 247a). The statute also provides at § 347.48(2m)(gm), "A law enforcement officer may not take a person into physical custody solely for a violation of this subsection…." (App. 248a).

going to ask Brown's consent to perform a search. (App. 113a). Deering stated he directed Brown to step out because "that would be an awkward encounter to ask for someone's consent when they're sitting in a vehicle." (App. 113a).

Mr. Brown complied with Deering's directives to get out and to place his hands behind his back as Deering walked him to Deering's squad car. (App. 90a, 111a). Deering testified he asked Brown "if he had anything on him I needed to know about" and Brown responded "no." (App. 91a, 122a). Deering then asked "mind if I search you to double check? He said no."[3] (App. 91a). Deering then patted Brown down and found "13 bags of crack" and "500 something dollars." *Id.*

B. Proceedings Below

The state charged Mr. Brown with possession with intent to deliver between 1-5 grams of cocaine. Mr. Brown moved to suppress the drug evidence, arguing Deering unlawfully extended the stop after the mission of the traffic stop should reasonably have been completed by handing Brown the written warning and returning his license, in violation of Mr. Brown's Fourth Amendment rights. (App. 148a-153a). Based upon suppression hearing testimony as

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[3] Mr. Brown denied granting Deering consent to search. (App. 122a). The circuit court did not resolve the factual dispute, but the issue of consent is not relevant to this appeal. (App. 139a).

set forth above, and stating it "maybe the closest case that I've had in the 20 years I've been doing this," the circuit court ruled "the scope of the stop and length of the stop were extended," but Mr. Brown being "from Milwaukee," which Deering considered "a source city for drugs;" and where Brown "was coming from at the time of night;" and Deering believing it a "lie;" was enough "barely" to allow the extension. (App. 138a, 145a). Thereafter, Mr. Brown pled guilty, was sentenced, and timely initiated an appeal arguing the suppression issue. (App. 71a-73a).

The Wisconsin Court of Appeals affirmed, ruling it did not need to address reasonable suspicion as the issue presented was controlled by two recent Wisconsin Supreme Court cases: *State v. Wright*,[4] and *State v. Floyd*.[5] (App. 61a at ¶17). Citing this Court's decisions in *Mimms* and *Rodriguez*, the Wisconsin Supreme Court in *Wright* and *Floyd* ruled as a matter of law a traffic stop is never unlawfully extended by ordering a stopped suspected traffic violator to step out of his or her car because doing so is an action always related to the mission of any traffic stop. (App. 61a-62a, ¶¶ 19, 20).

Concurring because binding precedent would not permit a dissent, Reilly, J., drew an analogy to *Scott v. Stanford (Dred Scott)*, 60 U.S. 393 (1857); writing courts make mistakes. (68a-69a, ¶ 33). The

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[4] 2019 WI 45, 386 Wis. 2d 495, 926 N.W.2d 157.

[5] 2017 WI 78, 377 Wis. 2d 394, 898 N.W.2d 560.

concurrence states: "*Wright* and *Floyd*, continue, albeit implicitly, the bias that not all people are created equal by authorizing police to pick and choose who they will pull from cars for minor traffic violations when no articulable factors are present that the person has committed or is committing a crime." *Id.* Reilly added the decisions "are flawed by focusing only on the government;" noting "[o]ur Constitution was not written to protect the government or its agents; it was adopted to protect us from unfettered power in the hands of the government." *Id.* Judge Reilly would rule unfettered power to arbitrarily search suspected traffic violators without a particularized reasonable basis "condon[es] profiling" and violates the Fourth Amendment; adding "We should have the intellectual honesty to call the 'mission' what it is—an independent, but unconstitutional ground to continue an investigation and not a mission to protect officer safety…that allows the government to search and seize on nothing more than a hunch." (App. 67a-69a, at ¶¶ 31, 34).

The Wisconsin Supreme Court granted review stating "We tread no new ground," but took the case to reaffirm police in all circumstances may execute a bundle of tasks inherent to the mission of all traffic stops, one such task being an officer may order a stopped suspected traffic violator from a vehicle without any particularized suspicion, even after the traffic violation mission is completed or basis justifying the stop has abated. (App. 22a-23a, at ¶¶ 32, 33). Citing *Whren v. United States*, 517 U.S. 806, 812-13 (1996), the court ruled an officer's "subjective

intentions play no role" in Fourth Amendment analysis, and further ruled engaging in any objective totality-of-circumstances reasonableness analysis unnecessary or irrelevant under the inherent danger rubric set forth in *Mimms*. (App. 18a-23a, at ¶¶ 23-30).

Responding to Judge Reilly's concurrence and to a dissenting Justice's concern about and reference to scientific research and data regarding implicit bias, the court stated:

> Considering the consequences of a decision for certain groups of people conflicts with the judicial oath to 'administer justice without respect to persons' and inappropriately assumes a role in developing policy more appropriate for the political branches of government than an impartial judiciary tasked with declaring what the law is rather than what it should be. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 353 (2012)"

(App. 28a, at ¶ 40, Bradley, R. and Kelly concurring).

The court stated implicit bias research "has nothing whatsoever to say about the meaning of the Fourth Amendment or any other provision of the constitution." (App. 28a, at ¶ 41). The court added the dissent:

> …says I 'disregard[ ] the important role of social science research in guiding' judicial decision

> making. Dissent, ¶ 74 n.7. I don't disregard it; I emphatically reject it.

(App. 32a, at ¶ 45). In the Wisconsin Supreme Court's view, ordering a suspected traffic violator from his car, if done arbitrarily and in a manner that impacts populations disproportionally, "is of 'no constitutional moment.'" (App. 15a, at ¶ 20).

REASONS FOR GRANTING THE PETITION

At the conclusion of a traffic stop, rather than hand Mr. Brown the completed written seatbelt warning, Officer Deering chose to open Brown's car door and order him to step out, which itself constitutes a Fourth Amendment search. Deering did this because he was going to ask Brown's consent for a full search and "that would be an awkward encounter to ask for someone's consent when they're sitting in a vehicle." (App. 113a). The directive was not based on reasonable suspicion of danger or criminal activity, but on *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), which grants police unfettered discretion to do so. The Court should grant review to reverse or reinterpret *Mimms*, and, consistent with *Terry v. Ohio*, 392 U.S. 1 (1968), hold that for an officer conducting a traffic law violation stop (as distinct from a criminal investigation stop) to go beyond the stop and search the driver or occupants by ordering them to step out of their car, the officer must have a reasonable articulable safety concern or investigative purpose based on the totality of circumstances.

The Court last term ruled reasonableness in a Fourth Amendment context can be determined by "combining database information and common sense judgments;" noting "statistical evidence … is almost daily expanding in sophistication and scope." *Kansas v. Glover*, __ U.S. __ 140 S.Ct. 1183, 1190, 1193 (2020). The balance the *Mimms* Court struck in assessing reasonableness based on a supposed "inordinate risk" inherent to traffic stops, as balanced against a "*de minimis*" intrusion which "hardly rises to the level of a 'petty indignity,'" can no longer be viewed as valid in light of better and more comprehensive data showing the very low risk traffic violation stops (as distinct from criminal stops) actually pose. *Mimms*, 434 U.S. at 110-11. *Mimms* also does not accurately or reasonably balance the harm an arbitrary police order to step out from the safety and security of one's car during a routine non-criminal traffic stop causes. The humiliation, trauma and sometimes tragedy which too often ensue from the arbitrary exercise of this unfettered police power render such searches or intrusions hardly *de minimis* or a mere petty indignity. Exempting this type of search from the relatively low bar standard Fourth Amendment analysis sets does not protect officers, does not protect the public, undermines confidence in institutions and damages our founding document.

The Court should also grant review to establish police may not extend a stop to undertake otherwise "'ordinary inquiries' incident to [the traffic] stop," after the reasonable suspicion-based mission has, or should reasonably have, been completed. *Rodriquez v.*

U.S., 575 U.S. 348, 355 (2015), quoting *Illinois v. Caballes*, 543 U.S. 405, 408 (2005). The Court must resolve whether the "ordinary inquiries" referenced in *Rodriquez* and *Caballes* (checking license, proof of insurance, registration, or a *Mimms* "safety" search) constitute a separate stand-alone justification for a seizure untethered to resolution the suspected traffic law wrong-doing (and therefore untethered to the Fourth Amendment which requires reasonable suspicion to justify a seizure). The Court must decide whether the Constitution can abide a show-me-your-papers or get-out-of-your-car seizure or search when police do not have, or no longer have (after issuing a ticket or warning), reasonable suspicion of on-going or new suspected wrong doing.

Some states, on state constitution grounds, reject *Mimms*' blanket rule[6] and reject the concept of "duel-mission" traffic stops,[7] thus granting protections the Fourth Amendment (through the Fourteenth) should guarantee to all. Wisconsin emphatically does not; with Wisconsin ruling here such searches, even when done arbitrarily with a disproportionate impact, to be of "no constitutional moment." (App. 15a, at ¶ 20). The Court is asked to grant review for the narrow purpose of removing the constitutional imprimatur *Mimms* extends to police in ordering a person from

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[6] *E.g. Com. v. Gonsalves*, 711 N.E.2d 108 (MA 1999); *State v. Sprague*, 824 A.2d 539 (VT 2003).

[7] *E.g. State v. Coleman*, 890 N.W. 2d 284 (IA 2017).

his or her car during (or after) a routine traffic stop on a constitutional justification amounting to nothing more than "because I said so."

I. The Court should reverse or reconsider *Pennsylvania v. Mimms* blanket rule granting police unfettered discretion to order suspected traffic law violators from their cars without a reasonable articulable safety concern or investigative purpose based on totality of circumstances.

Officer Deering had no reason to believe Mr. Brown was armed or that the circumstances of the traffic stop for Brown's alleged failure to come to a full stop at a stop sign or wear a seatbelt presented any particular danger. An objective view of undisputed facts confirms Deering's testimony it was not "a high-risk traffic stop." (App. 101a). Mr. Brown was not driving erratically; there was no odor of drugs, sign of impairment, or other physical signs or evidence of drug possession or use. (App. 101a). Brown made "no furtive movement in the vehicle" and, as Deering testified, "there was—I guess, there's no specific factors to lead to" a concern Brown had any sort of weapon. (App. 101a-102a, 113a). Deering knew he did not have sufficient cause to search Mr. Brown; he ordered Brown out of his car because *Mimms* and Wisconsin cases relying on *Mimms* permit it, and because, as Deering testified, it "would be an awkward encounter to ask for someone's consent when they're sitting in a vehicle." (App. 113a). The search in ordering Mr. Brown out of

the car violated Brown's Fourth Amendment right to be free from an objectively unreasonable search.

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause…." U.S. Const. amend. IV. The "ultimate touchstone of the Fourth Amendment is 'reasonableness,'" as determined objectively from the totality of circumstances. *Kansas v. Glover*, *Id.*, 140 S.Ct. at 1191; *Riley v. California*, 573 U.S. 373, 381 (2014). Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable. *Katz v. United States*, 389 U.S. 347, 357 (1967). However, the Court has recognized a few "well-delineated" "jealously and carefully drawn" exceptions to the warrant requirement, tested by the general proscription against unreasonable searches, with reasonableness turning "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law enforcement." *Mimms*, 434 at 109, quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). One such exception is a search-incident-to-arrest [*Weeks v. United States*, 232 U.S. 383, 394 (1914)], another is a *Terry*-stop. *Terry v. Ohio*, 392 U.S. 1 (1968).

The Court has ruled a basic traffic stop (as distinct from a criminal investigation stop/arrest) to be "more analogous to a so-called *Terry* stop … than

to a formal arrest." *Knowles v. Iowa*, 525 U.S. 113, 117 (1998), quoting *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). While the Fourth Amendment does not forbid a warrantless arrest for a minor forfeiture offense, such as a seatbelt violation (if the jurisdiction so permits),[8] an ordinary traffic stop is not an arrest, which would trigger *Miranda* requirements and rules governing search-incident-to-arrest.[9] *McCarty*, *Id.*, 468 U.S. at 440. Fourth Amendment reasonableness, and the first prong of the *Terry* analysis in a traffic stop context, is satisfied when an officer has reasonable suspicion a traffic violation occurred. *Whren v. U.S.*, 517 U.S. 806, 809-10 (1996). The second prong of *Terry*, though, for a conventional *Terry*-stop, requires a separate particularized articulable basis to go beyond a mere stop and execute a search. *Terry*, 392 U.S. at 19, 21-22. A "mere 'hunch' is not reasonable suspicion." *Kansas v. Glover*, *Id.* 140 S.Ct. at 1187.

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[8] *See Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). But, note Wis. Stat. § 347.48(2m)(gm) ("A law enforcement officer may not take a person into physical custody solely for a violation of this subsection or sub. (1) or (2) ...."). (App. 247a-248a).

[9] This is not a search-incident-to-arrest case and the considerations which justify search-incident-to-arrest are not present for a traffic violation *Terry*-stop. Here, Officer Deering did not arrest Mr. Brown for the alleged stop sign or seatbelt violation prior to ordering him to exit his car, did not issue a citation, and instead chose to write out a warning. (App. 108a).

The Court has stated "reasonable suspicion is an 'abstract' concept that cannot be reduced to 'a neat set of legal rules.'" *Kansas v. Glover*, *Id.*, at 1190, quoting *United States v. Arvizu*, 534 U.S. 266, 274 (2002). Officers "may rely on probabilities in the reasonable suspicion context" by "combining database information and commonsense judgments." *Glover*, *Id.*, citing *United States v. Sokolow*, 490 U.S. 1, 8-9 (1989). The Court clarified this "do[es] not delegate to officers 'broad and unlimited discretion'" and that officers must "base reasonable suspicion on 'specific and articulable facts' particularized to the individual." *Glover*, *Id.*, quoting *Terry*, 392 U.S. at 21.

In *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), the Court abrogated the second prong of *Terry* by holding police have unfettered blanket-rule discretion to search a suspected traffic law violator by ordering the person to get out of his or her car without any additional reasonable articulable suspicion of danger. *Mimms* thus becomes an exception to the *Terry* exception. The crux of *Mimms* is a balance the Court struck with an exceedingly thinly supported assertion traffic stops pose "inordinate risk," and the primacy of officer safety being "too plain for argument," weighed against an intrusion the Court deemed "*de minimis*" and which "hardly rises to the level of a 'petty' indignity.'" *Id.* 434 U.S. at 110, 111.

A. *Mimms*' conclusion that traffic stops present "inordinate risk" sufficient to justify blanket-rule authority to search exempt from totality-of-circumstances reasonableness analysis, is wrong.

Citing a pilot study published in 1963 and a single over-inclusive and statistically insignificant FBI data point from 1961, *Mimms* states "it too plain for argument" the "inordinate risk confronting an officer as he approaches a person seated in an automobile." *Mimms*, 434 U.S. at 110; citing Allen P. Bristow, *Police Officer Shootings—A Tactical Evaluation*, 54 Crim. L. Criminology & Police Sci. 93, 93 (1963). (App. 153a-156a); herein after "Bristow study." The Bristow study does not establish that point. The study's author acknowledged the "validity and reliability" of any conclusion drawn from his pilot study "is easily challenged on the size of the sample (35 cases)." *Id.* at 94. (App. 155a). Bristow further states "[t]hese statistics, if valid, *debunk* the old police saying that the most dangerous thing a patrolman does is to 'walk up' on a vehicle he has stopped." *Id.* (emphasis added). Yet the study as referenced in *Mimms* is widely cited to make the erroneous claim one-third of all officer killings involve a routine traffic stop. It is not clear any of Bristow's 35 officer-death cases involved routine traffic stops and the limited information suggests many, if not most, were not.

The *Mimms* Court's assertion of an "inordinate risk" or inordinate danger during a traffic violation

stop (as distinct from a criminal investigation stop) cannot be justified practically or empirically. As noted, the data point *Mimms* relied on, which Bristow took from an FBI report, referenced a sample size of only those officer death cases (35 of 110 total) which related to vehicles generally, the majority of which involved officers shot while still driving, dismounting or approaching a suspect's vehicle prior to contact.[10] The FBI data point encompassed without distinction *all* car-related deaths—e.g. those related to a hot pursuit or active shooter call, a felony arrest or felony investigation stop, and not just traffic violation stops. The data point, thus, is not useful to analyze risk or danger for a routine traffic stop because it is over inclusive.

In *Kansas v. Glover*, last term the Court noted a challenge to reasonable suspicion may rely on "statistical evidence which is almost daily expanding in sophistication and scope." *Glover*, *Id.* 140 S.Ct. at 1193 (Kagan, J. & Ginsburg, J., concurring). Such is the case here with the nearly 60-year-old pilot study and data point upon which *Mimms* rests. Beginning in 1937 the FBI started tracking police officer death incidents, and in 1960 added data about officer assaults; producing the "Law Enforcement Officers Killed and Assaulted" (LEOKA) report. But until 2012 the LEOKA report still grouped all car-related cases together, whether a mere traffic violation stop

[10] Bristow study, *Id.* at 93 (App. 154a).

or something more; and grouped all assaultive behavior together, whether trivial (e.g. a woman pushing a hand away during a lingering or too-familiar pat-down) or actually violent; whether injurious or not; or whether involving a weapon or not. The Court continued to rely on this over-inclusive data when extending *Mimms* to searches of passengers in vehicle stop cases. *Maryland v. Wilson*, 519 U.S. 408, 413 (1997) ("Regrettably, traffic stops may be dangerous encounters. In 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops.").

Starting in 2013, though, the LEOKA report in the automobile category started separating traffic violation stops from felony stops, and started providing data on weapons and injuries.[11] This new and better data at minimum seriously undermines and arguably disproves the dominant danger-narrative foundation upon which *Mimms*, and *Wilson*, rest.

Mimms and *Wilson*, and the old and new LEOKA reports for that matter, do not account for risk rate, or provide comparative context. They do not account for the denominator in the calculus. For example, in terms of raw total incident numbers, traffic stops do not show up near the top of the list of

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[11] *See*, Jordan B. Woods, *Policing Danger Narratives, and the Routine Traffic Stops*, 117 Mich. L. Rev. 635, 650 (2019) (App. 168a-246a).

police call- or incident-type resulting in assault or death,[12] yet traffic stops are by far the most common police/citizen interaction with more than 60 million traffic filings and an estimated 120-180 million total traffic stops occurring annually.[13] The *Mimms* Court could not have known better data would show that in an otherwise routine and calm situation with no exigent circumstances or articulable safety concern, when police escalate the situation by ordering a person out from the safety and security of his or her car, doing so actually increases danger to the officer, and is a predictive factor in determining which routine stops might potentially lead to being one of the statistically very small number with a very small risk of an assaultive incident in the exceedingly large world of traffic stop occurrences.[14]

The first major published study to focus on the actual dangerousness or danger rate traffic stops pose for officers was Illya D. Lichtenberg & Alisa Smith, *How Dangerous Are Routine Police-Citizen Traffic Stops?*, 29 Crim. Just. 419 (2001). (App. 158a-167a). The study used 10 years of LEOKA data which in the "traffic pursuits and stops" category showed 89 officers killed (12.9% of the total) and 58,502 assaultive incidents (9.4% of the total). *Id.* at 423-24. (App. 162a-163a). The study utilized three different

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[12] Woods study at 649, 651. (App. 183a, 185a).

[13] Woods study at 658, 685-91 (App. 187a, 219a-225a).

[14] *Id.* at 691-96. (App. 225a-230a).

denominators to calculate danger rate—a low number based upon traffic filings (60 million cases annually), and two scholarly estimates of total stops to include those where no ticket or written warning was issued (120 million and 180 million total stops annually). *Id.* The most conservative ratio for officer deaths based only on those stops with filings showed a risk rate of 1 in 6.7 million stops; and 1 in 20.1 million stops at the high estimate of total stops. The assaultive incident risk ratio based upon cases with filings was 1 in 10,256 stops and rate for estimated the high end of total stops 1 in 30,768. *Id.* at 424-25. (App. 163a-164a).

While the Lichtenberg & Smith study shed light on the risk-rate of police/citizen automobile-related encounters sufficient to call the dominate inherent-danger or "inordinate risk" narrative into question, the study suffered from same limitation as the LEOKA data relied upon in *Mimms*, and *Maryland v. Wilson*. That is, the then-extant LEOKA data did not parse traffic *Terry*-stops from criminal stops or provide context or detail to parse cases with actual violent assaultive encounters from more trivial non-dangerous mere touch cases.

A truer picture of the actual danger police face in a routine traffic stop scenario is brought into tighter focus by post-2012 LEOKA data and a granular study of a particular state's (Florida) data undertaken in Jordan B. Woods*, Policing, Danger Narratives, and Routine Traffic Stops*, 117 Mich. L. Rev. 635 (2019). (App. 168a-246a). The risk ratios for felonious officer death and assaultive incident during routine traffic

stops are similar to those in the Lichtenberg & Smith study (officer death in 1 in every 5.42 million to 27.6 million stops and assaultive incident in 1 in every 5,856 to 29,550 stops).[15] Though traffic stops dwarf all other types of police-citizen contact, data shows traffic violation stops account for fewer felonious officer deaths than six other major policing scenarios: attempting arrest, disturbance calls, investigating suspicious person, premeditated ambush, unprovoked attack, and tactical situations.[16] Four scenarios produce more assaultive incidents: disturbance call, attempting arrest, handling prisoner, investigating suspicious person.[17] For risk-rate comparison, by one measure an assaultive incident occurs in 1 of every 323 general disturbance calls and 1 of every 385 domestic disturbance calls; rates 14 and 12 times higher than for traffic stops.[18]

In 94% of the very small fraction of vehicle stops with an officer-assault incident, four contextual factors preceded the violent or assaultive incident: (1) the stop resulted from a criminal enforcement rather than a routine traffic stop; (2) the driver refused to pull over or fled; (3) the officer observed signs of intoxication; or, (4) the officer invoked authority beyond requesting basic information,

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[15] Woods study at 683. (App. 217a).

[16] *Id.* at 651. (App. 185a).

[17] *Id.* at 649. (App. 183a).

[18] *Id.* at 680. (App. 214a).

requesting documentation or running a records check; and escalated the situation by, for example, ordering the driver out of the car or placing hands on the driver.[19] In the first three categories, comprising more than 76% of total assaultive incident cases, an officer would be able to order a person out from their car without the *Mimms* blanket-rule exception based on the second prong of *Terry*, or to conduct a search incident to arrest.

For the very small fraction of total vehicle stops where an assaultive incident occurred [1 in every 5,856 to 29,550 stops], in 98% of cases composing that very small fraction there was no serious injury; and 80% involved no injury at all.[20] For traffic violation stops the most common instrument of assault (60% of cases) was a personal weapon—i.e. the offender's hands or feet; suggesting removing the driver actually increases danger rather than protects police or promotes safety.[21] For criminal enforcement stops the assaultive instrument was hands or feet only 30% of the time.[22] A gun or knife was present in 3% of the 1 in roughly 6,000 to 30,000 assault-incident cases and in less than 1% of that very small number did use of a gun or knife result in serious injury to or

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[19] Woods study at 686. (App. 220a).

[20] *Id.* at 640, 671. (App. 174a, 205a).

[21] *Id.* at 673. (App. 207a).

[22] *Id.* at 673. (App. 207a).

felonious killing of an officer.[23] The most common assaultive instrument in non-traffic violation criminal stops was the car itself—by for example opening a door and hitting an officer or the officer diving out of the way or being hit by the moving car.[24]

The Court in *Kansas v. Glover* emphasized the important role accurate data can have in determining Fourth Amendment reasonableness—noting that 75% of drivers with suspended or revoked licenses continue to drive and 19% of motor vehicle fatalities involve drivers with invalid licenses. *Id.*, 140 S.Ct. at 1188. When *Mimms* and *Wilson* were decided the Court relied on the best available data to show the risks officers face during routine traffic stops. The data, though, and conclusions drawn therefrom, was insufficient, over inclusive and flawed.

The weight the *Mimms* Court assigned on the public or government interest side of the balance test, attributed to perceived inherent "inordinate risk," must be reconsidered. The inherent danger narrative foundation for the blanket-rule exception cannot be supported empirically. The very low risk-rate cannot justify the blanket rule granting police unfettered discretion for a type of search which, inevitably, is not utilized uniformly or equally, as occurs with the other major blanket-rule Fourth Amendment search exception—a search-incident-to-

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[23] Woods study at 640. (App. 174a).

[24] *Id.* at 673. (App. 207a).

arrest. Justification for searching a person who has just been arrested is far more compelling in order to protect the arrestee, fellow detainees, and officers or jailors from potential harm. *Knowles*, 525 U.S. at 117. Critically, too, that rule is applied equally in that almost everyone arrested is also searched.

The *Mimms* rule is based upon an inaccurate understanding of the risk such searches pose for both officers and the public. While officer safety certainly is a legitimate and weighty concern, the rule granting police officers unfettered discretion, exempt from standard Fourth Amendment analysis, to search any motorist stopped for a suspected traffic law violation by ordering the motorist to get out his or her car, promotes neither officer safety nor citizen safety, and likely endangers both.

B. *Mimms*' assertion that unfettered police authority to order a motorist to exit his or her car during a routine traffic stop imposes a "*de minimis*" intrusion which "hardly rises to the level of a 'petty indignity,'" is wrong.

Just as the weight the *Mimms* Court assigned to the "public interest" side of the reasonableness balance test is too large, the weight the Court assigned to the "individual's right to personal security free from arbitrary interference by law officers" side is too small. *Mimms*, 434 U.S. at 109. Because the Court applies a "reasonable person"

standard in resolving Fourth Amendment issues,[25] *Mimms* must mean that to a reasonable person, a police "order to get out of the car" "can only be described" as a "*de minimis*" intrusion which "hardly rises to the level of a 'petty indignity.'" *Mimms*, 434 U.S. at 110.

The fallacy of such a privileged view; which does not account for the fear and humiliation such an order engenders generally, but particularly when done in front of one's family or community; is exposed by a mountain of body-cam or cell phone footage posted or broadcast almost daily. It does not account for the indignity and trauma, such as that befalling two Black women and their young nieces handcuffed and ordered to lie face down on the pavement when stopped during a family shopping trip[26] or a Black man in a ride-share vehicle with a broken taillight beaten after questioning why he needed to produce identification.[27] It does not account for the all too often resulting tragedy, such as that befalling another Black woman, Sandra Bland, removed from her car for questioning an officer's order to put her

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[25] See e.g. *Florida v. Royer*, 460 U.S. 491, 502 (1983).

[26] *See* Washington Post article: "Colorado police apologize over viral video of officers handcuffing girls in mistaken stop" at:

https://www.washingtonpost.com/nation/2020/08/04/aurora-pd-handcuffs-family-gunpoint/ (App. 249a-250a).

[27] https://www.nytimes.com/2020/09/13/us/Roderick-Walker-Georgia-police.html. (App. 251a-252a)

cigarette out during a stop for failing to signal a lane change.[28]

The Court uses a "reasonable person" standard but does not define who a reasonable person is or what characteristics a reasonable person possesses. In *J.D.B. v. North Carolina*, 564 U.S. 261 (1996), the Court indicated a person's youth can be a factor. In *U.S. v. Mendenhall*, 446 U.S. 544, 558 (1980), the Court noted the fact the defendant was "female and a Negro" was "not irrelevant," but nor was it "decisive" in its Fourth Amendment "reasonable person" analysis. The Court thus seems to acknowledge or at least hint at understanding the complexity, variety and breadth of experience that must be accounted for in any valid "reasonable person" analysis. It should account for the weight of history, of lived experience, of common sense, of data, of news reports, of scholarly research, in establishing all people or all groups of people do not move through the world or have the same collective experience or have the same relationship to police or to the criminal justice system as all others.

As noted in *United States v. Curry*, 965 F.3d 313, 332 (4th Cir. 2020), aff'd *en banc* (Gregory, C.J., concurring):

> There's a long history of black and brown communities feeling unsafe in police presence.

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[28] *See* description of incident in Woods study at 700 (App. 234a).

> *See e.g.* James Baldwin, *A report from Occupied Territory*, The Nation, July 11, 1966 ("[T]he police are simply the hired enemies of this population. … This is why those pious calls to 'respect the law,' always to be heard from prominent citizens each time the ghetto explodes, are so obscene."). And at least "[s]ince Reconstruction subordinated communities have endeavored to harness the criminal justice system toward recognition that their lives have worth." Deborah Tuerkheimer, *Criminal Justice and the Mattering of Lives*, 116 Mich. L. Rev. 1145, 1146 (2018). … [The dissent] mitigates the concerns of some that any encounter with an officer could turn fatal. *See Utah v. Strieff*, __ U.S. __, 136 S.Ct. 2056, 2070 (2016) (Sotomayor, J. dissenting) (describing "the talk" that black and brown parents frequently give to their children "all out of fear of how an officer with a gun will react to them.").

The weight of evidence, experience, and data demonstrate not all communities or populations are policed in the same manner; not all are stopped or searched at the same rate or for the same reasons. *See e.g.* Eric Ortiz, *Inside 100 million traffic stops: New evidence of racial bias*;[29] citing data and analysis from the Stanford Open Policing Project.[30] *See also*

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[29] https://www.nbcnews.com/news/us-news/inside-100-million-police-traffic-stops-new-evidence-racial-bias-n980556

[30] https://openpolicing.stanford.edu/

the lengthy list of studies and articles related to the topic of driving-while-Black, Woods study at p. 643, n. 35. (App. 176a).

This is not to suggest the Court must adopt separate "reasonable person" standards for Black men or other groups. But nor should the Constitution be cabined to a dominant-culture cis-gendered white male standard. The point is that if all persons were policed in the manner people of color are policed, no reasonable person would consider a police officer's order to get out their car during a routine traffic stop to be a *de minimis* intrusion or mere petty indignity.

The Court here is asked to do nothing more than what it did in *Arizona v. Gant*, 556 U.S. 332 (2009), where the Court reconsidered or clarified what had widely been interpreted as a blanket rule established in *New York v. Belton*, 453 U.S. 454 (1981), allowing a search of the passenger compartment of a vehicle incident to arrest of the driver, without reasonable suspicion of danger or evidence of the crime of arrest was present, as standard Fourth Amendment analysis requires. Just as the *Belton* rule could not be sustained by a properly balanced reasonableness totality-of-circumstances analysis, nor can the *Mimms*' blanket rule.

The Court here is asked to apply standard totality-of-circumstances reasonableness analysis to alleged traffic law violation *Terry*-stops, and to any police search that occurs during such a stop. The low bar the second-prong of the *Terry* standard sets in requiring a reasonable articulable safety concern to

justify a search of an alleged traffic law violator by ordering the person from his or her car grants police sufficient flexibility to address any legitimate safety issue. If the circumstances of the stop (e.g. exposure to traffic) necessitate moving the driver because the driver is not stopped in a safe place, or could not easily maneuver his or her car to a safe place out of traffic; or if an officer has any reasonable articulable reason to believe the driver may pose a danger, the officer will be able to conduct a search in ordering the person from his or her car under the second prong of *Terry*. What an officer will not be able to do, as Officer Deering did here, is arbitrarily conduct such a search on the basis of "an inchoate and unparticularized suspicion or hunch" [*Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000)], or because it would somehow in the officer's view be "awkward" to ask for consent to search while a person is seated in his car.

II. The Court should rule that police may not extend a routine traffic stop by conducting a *Mimms* search after the mission of the stop has, or should reasonably have, been completed without a reasonable articulable safety, investigative or policing concern based on the totality of circumstances.

Rodriquez v. U.S., 575 U.S. 348 (2015), stands for the seemingly unremarkable proposition that when the basis upon which the government has seized a person abates, the government continuing to

seize the person is unreasonable. *Rodriquez* relied on *Illinois v. Caballes*, 543 U.S. 405 (2005), where the Court ruled a traffic stop "can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of the stop which in *Caballes*, as in the case at bar, ultimately was to issue a written warning for a traffic law violation. *Rodriquez*, *Id.* at 354-55, quoting *Caballes*, *Id.* at 407. Citing *Florida v. Royer*, 460 U.S. 491, 500 (1983) ("The scope of the detention must be carefully tailored to its underlying justification."), the Court ruled "[a]uthority for [a] seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Rodriquez*, *Id.* at 354.

Rodriquez and *Caballes* state an officer's mission during a traffic stop to issue a ticket or warning typically includes "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*, *Id.* at 355. . These "ordinary inquiries" have some general safety-related value, but they are also directly related to the actual mission of the stop in terms of evaluating whether to issue a ticket or just a warning, or possibly even make an arrest. The Court clarified, though, that "a measure aimed at 'detect[ing] evidence of ordinary criminal wrong-doing'" is "not an ordinary incident of a traffic stop." *Rodriquez*, *Id.* at 355-56, quoting *Indianapolis v. Edmond*, 531 U.S. 32, 40-41 (2000).

Caballes ruled it permissible for police to run a drug dog around an alleged traffic violator's car while

another officer diligently executes the mission of the stop because "[o]fficial conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment." *Caballes*, *Id.* at 408 (citation omitted). That is, just as another officer would be free to have a plain-view walk around the detained driver's car while the investigating officer diligently executes the stop's mission, so too could a drug dog do a plain-smell lap around the car without any Fourth Amendment implication. *Rodriquez* simply rules it unreasonable for the government to continue to detain a person for that purpose when the mission of the stop has been, or should reasonably have been, completed by issuing the warning or ticket.

Last term in *Kansas v. Glover*, __ U.S. __, 140 S.Ct. 1183 (2020), the Court reaffirmed that a traffic law violation stop is akin to a *Terry*-stop, and ruled it reasonable to execute a traffic stop if an officer in checking plates learns a car is registered to a driver with a suspended or revoked license. The Court stated "stops of this nature do not delegate to officers 'broad and unlimited discretion' to stop drivers at random." *Id.* at 1190. The court emphasized the "narrow scope" of its holding, noting "[f]or example, if an officer knows that the registered owner of the vehicle is in his mid-sixties but observes that the driver is in her mid-twenties, then the totality of circumstances would not 'raise a suspicion that the particular individual being stopped is engaged in wrongdoing." *Id.* at 1191. This suggests when the basis upon which reasonable suspicion to

make a seizure abates, so too does any basis for continuing the seizure. Numerous jurisdictions agree. *See e.g. United States v. Trestyn*, 646 F.3d 732, 736 (10th Cir. 2011) (when upon approach it became clear suspicion of expired plate abated, improper to continue to detain driver by asking for license questioning about travel); *United States v. Valadez*, 267 F.3d 395 (5th Cir. 2001) (same); *United State v. Jones*, 479 Fed.Appx. 705 (6th Cir. 2012) (same); and other cases cited in *State v. Coleman*, 890 N.W.2d 284, 289-96 (IA 2017).

Although *Rodriquez* did not say anything about "usual inquiries" constituting a stand-alone dual-mission separate from that based on reasonable suspicion, the Wisconsin Supreme Court has ruled that to be the case. Wisconsin interprets *Rodriquez* as permitting the continued seizure under some sort of general safety concern, and not particularized totality of circumstances reasonable suspicion. Illinois agrees. *See People v. Cummings*, 46 N.E.3d 248 (IL 2016). Iowa does not. *See Coleman*, *Id.* (decided on state constitution grounds in event such suspicionless searches do not violate the Fourth Amendment). Here Officer Deering properly obtained Brown's license, checked registration, checked for warrants and inquired about Brown's business, during the course of resolving the mission of what turned out to be a seatbelt violation seizure. If *Mimms* remains good law Deering could have ordered Brown out of his car while resolution of the seatbelt mission was on-going or before it should reasonably have ended. At issue is whether after the mission

upon which the seizure was predicated should reasonably have ended by handing Brown the warning and returning his license, Deering could continue to seize Brown by ordering Brown out of his car to ask for consent to search. Deering would not have needed consent had he reasonable suspicion for such action. But he did not.

"The reasonableness of a search … depends on what the police in fact do." *Rodriquez*, 575 U.S. at 357, citing *Knowles*, 525 U.S. at 115-17. Here Deering stopped Brown on suspicion Brown failed to come to a complete stop at a stop sign. Deering, though, abandoned that inquiry when he saw Brown not wearing a seatbelt. The seatbelt violation is the only reasonable suspicion-based mission Deering undertook after the stop. That mission should reasonably have ended by Deering handing Brown the completed written warning and returning his license when Deering walked from his squad back to Brown's car. Instead Deering, with license and warning in hand, ordered Brown out of his car seeking Brown's consent for a search. This was irrefutably "a measure aimed at 'detect[ing] evidence of ordinary criminal wrongdoing,'" not tied to the reasonable suspicion-based seatbelt violation mission, and therefore impermissible under *Rodriguez*. *Id.* at 355-56.

Deering knew he did not have reasonable suspicion to search Brown or his car, and hence his attempt to get a drug dog or consent to search in order to gin up a basis to pursue what was at best Deering's hunch something more than a seatbelt

violation was afoot. An objective view of the facts confirms Deering's subjective view. Officer Deering testified he called for backup officers "because of the suspicious nature of … the driving behavior and such." (App. 114a-115a). Since other than allegedly not coming to a complete stop at a stop sign Brown drove perfectly, the "and such" could only mean Deering called backup based on seeing a Black man driving a rental car late at night. Deering learning Brown was from Milwaukee adds nothing, despite Deering's baseless claim of it somehow being a "source city" for drugs. There is nothing to suggest drug use is higher in Milwaukee than elsewhere, and Milwaukee certainly does not have marijuana or poppy fields about; nor is there evidence distinct from Madison, Minneapolis, or Chicago any other regional city of it being a particular place through which international or national trafficking flows. Being a Milwaukeean should not dilute one's Fourth Amendment protections. *See United States v. Williams*, 271 F.3d 1262, 1270 (10th Cir. 2001) (Being from a purported known drug source area "is, at best, a weak factor in finding suspicion of criminal activity.").

The fact of a rental car does not create reasonable suspicion and at best can be but a negligible consideration. *United States v. Williams*, 808 F.3d 238, 247 (4th Cir. 2015). The same is true regarding Brown driving in the very early morning. *United States v. Sigmond-Ballesteros*, 285 F.3d 117, 1125 (9th Cir. 2002). Deering inferring Brown lied about coming directly from a gas station when

Deering had not seen Brown stopped elsewhere and had no reason to believe Brown had stopped in the cul de sac he had driven into to turn around, was baseless and unreasonable. Zero plus zero still equals zero. The fact Deering learned Brown had an arrest record is not a zero but it also does not with these other negligible facts establish reasonable suspicion. *United States v. Santos*, 403 F.3d 1120, 1132 (10th Cir. 2005) ("Even people with prior convictions retain Fourth Amendment rights; they may not be roving targets for warrantless searches."). The negligible general facts here are not coupled with any fact such as excessive nervousness, furtive gestures, or presence of excessive air fresheners etc., to create a particularized reasonable suspicion of drug activity.

As noted, the Wisconsin Supreme Court did not reach the reasonable suspicion issue concluding it did not have to because in the court's view *Rodriquez* created a stand-alone basis for a seizure, or a continued seizure, to check paperwork or search a person by ordering from their car after the reasonable suspicion-based seizure has, or should have, ended. The Court should grant review to resolve a conflict among states on that issue and rule that police continuing to seize or search a person after a traffic stop has, or should have, been completed by issuance of a ticket or warning, is unreasonable and violates protections guaranteed to all persons under the Fourth Amendment.

CONCLUSION

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

Respectfully submitted.

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