No. _____

In the
Supreme Court of the United States

BENJAMIN CALEB TROTT,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether or under what circumstances the Fourth Amendment permits courts to balance the risk of harm posed by drunk driving against the intrusiveness of a vehicle stop when determining whether a *Terry* stop based on an anonymous tip is supported by reasonable suspicion.

2. Whether the *Terry* stop in this case, which was based on an anonymous and conclusory tip of an "intoxicated driver," was supported by reasonable suspicion.

STATEMENT OF RELATED PROCEEDINGS

State of Maryland v. Benjamin Caleb Trott, No. 0R90C7T, District Court of Maryland for Anne Arundel County, Maryland.

State of Maryland v. Benjamin Caleb Trott, No. C-02-CR-19-001378, Circuit Court for Anne Arundel County, Maryland. Judgment entered November 14, 2019.

Benjamin Caleb Trott v. State of Maryland, No. 1853, September Term, 2019, Maryland Court of Special Appeals.

Benjamin Caleb Trott v. State of Maryland, Misc. No. 9, September Term, 2020, Maryland Court of Appeals. Judgment entered April 23, 2021.

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Petitioner, Benjamin Caleb Trott, by counsel, Jeffrey M. Ross, Assistant Public Defender, Maryland Office of the Public Defender, requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, *Trott v. State*, 473 Md. 245, 249 A.3d 833 (2021), is reproduced in Appendix A. Pet. App. 1a-29a. The order of the Court of Appeals granting the certification pursuant to Maryland Rule 8-304 from the Court of Special Appeals of Maryland to the Court of Appeals and issuing the writ of certiorari to the Court of Special Appeals is reproduced in Appendix B. Pet. App. 30a-33a. The certification from the Court of Special Appeals to the Court of Appeals pursuant to Maryland Rule 8-304 is reproduced in Appendix C. Pet. App. 34a-40a. The ruling of the Circuit Court for Anne Arundel County, orally given and transcribed, is reproduced in Appendix D. Pet. App. 41a.

JURISDICTION

The Court of Appeals of Maryland issued its opinion affirming the judgment of the Circuit Court for Anne Arundel County on April 23, 2021. This petition is filed within 150 days of that opinion, as required by Rule 13 of The Rules of the Supreme Court, as modified by the Court's orders of March 19, 2020, and July 19, 2021, relating to COVID-19. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, Amendment IV:

> 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.

CONSTITUTION OF THE UNITED STATES, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 4, 2015, around 11:30 p.m., Corporal Michael Cooper, Anne Arundel County Police Department, was on duty when he was dispatched to a call for an "intoxicated driver" at a specific location identified by street address. Pet. App. 3a, 4a-5a. The tip provided the color of the vehicle and the license

plate number. Pet. App. 4a-5a. Corporal Cooper arrived at the location within two to eight minutes and observed the vehicle described by dispatch parked in front of a liquor store. Pet. App. 5a. The engine was running. Corporal Cooper pulled into the parking lot and parked his cruiser approximately ten to fifteen feet behind the vehicle and activated his emergency lights. Pet. App. 5a.

Corporal Cooper and another officer with him approached the vehicle, with Corporal Cooper approaching the driver's side, where Mr. Trott was seated. Pet. App. 5a. Corporal Cooper knocked on the driver's side window and asked Mr. Trott to roll down the window. Mr. Trott did not immediately roll down the window, appearing to be unfamiliar with the window controls. Pet. App. 5a. Corporal Cooper asked Mr. Trott for his license and registration, and Mr. Trott advised that his license was suspended and that his driver's license was revoked. Pet. App. 5a.

During the conversation with Mr. Trott, Corporal Cooper detected a "strong odor" of alcohol on his breath. Pet. App. 5a. Mr. Trott told Corporal Cooper that he had consumed two beers and a shot and that he was more sober than his girlfriend, who was also in the vehicle. Pet. App. 5a. Corporal Cooper asked Mr. Trott to step out of the vehicle and arrested him after he performed unsuccessfully on a field sobriety test. Pet. App. 5a.

Mr. Trott was charged in the District Court of Maryland for Anne Arundel County with various driving offenses, including driving while impaired by alcohol. Mr. Trott prayed a jury trial, and his case was

transferred to the Circuit Court for Anne Arundel County. Prior to trial, Mr. Trott moved to suppress evidence obtained as a result of the stop. He argued that under *Terry v. Ohio,* 392 U.S. 1 (1968), *Navarette v. California*, 572 U.S. 393 (2014), and Maryland case law applying this Court's Fourth Amendment precedent, Corporal Cooper did not have reasonable suspicion when he seized him. The circuit court orally delivered its ruling:

> All right. Well, viewing what you gentlemen have submitted in writing and your arguments along with the testimony of Officer Cooper, I find that the circumstances were sufficient to support the stop conducted by Officer Cooper and therefore the Motion is denied.

Pet. App. 41a.

Following the denial of his motion to suppress, Mr. Trott entered a plea of not guilty on an agreed statement of facts to one count of driving while impaired by alcohol. The court found Mr. Trott guilty and sentenced him to a three-year term of incarceration, with three years suspended, and a three-year term of supervised probation.

Mr. Trott noted an appeal to the Maryland Court of Special Appeals. *Benjamin Caleb Trott v. State of Maryland*, No. 1853, September Term, 2019. Following the submission of briefs, the Court of Special Appeals certified the following question to the Maryland Court of Appeals:

> Did the circuit court err in finding that a police officer had reasonable suspicion to engage in an

> encounter with appellant based upon the police dispatcher's information conveyed to him over his police radio, following a 911 call, stating "intoxicated driver at 5823 Deale Churchton Road," and indicating further facts limited to the color of vehicle, Maryland tag number, Maryland registration number, and that the vehicle was in a parking lot?

Pet. App. 35a. The Court of Appeals granted the certification and issued the writ of certiorari to the Court of Special Appeals to decide the following question: "Did the circuit court err in denying Petitioner's motion to suppress?" Pet. App. 31a.

The Court of Appeals held that police had reasonable suspicion to seize Mr. Trott.[1] The Court of Appeals characterized Mr. Trott's case as a "close case" and that "on its own, such a 'bare bones,' conclusory allegation would not suffice to support a stop." Pet. App. 22a. Nonetheless, the Court of Appeals concluded "that the anonymous call was reliable" and that Corporal Cooper had a reasonable basis for suspecting criminal activity when he approached Mr. Trott's vehicle. Pet. App. 24a.

The Court of Appeals considered additional factors: "Specifically, in determining the validity of the stop, it is not unreasonable to consider both the level of the

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[1] The State conceded that Mr. Trott was seized "where the officers parked the cruiser ten to fifteen feet behind Mr. Trott's parked car and activated the emergency lights" and when Corporal Cooper then "approached his car and asked him to roll down his window." Pet. App. 9a n.6.

intrusiveness occasioned by the stop, as well as the risk of harm resulting from a failure to detain the driver." Pet. App. 25a. The Court of Appeals viewed its consideration of these factors to be consistent with *Navarette*:

> [W]e do not read *Navarette* as eliminating a court's ability to consider the nature of the crime (and attendant imminent danger to the public), as well as the level of intrusion (such as knocking on the window of a stopped but running vehicle parked in a liquor store parking lot), when undertaking a reasonable suspicion analysis.

Pet. App. 26a n.9. The Court of Appeals also found support for its balancing approach in Chief Justice Roberts's dissent from the denial of a petition for writ of certiorari in *Virginia v. Harris*, 130 S.Ct. 10 (2009). Pet. App. 28a.

Ultimately, the Court of Appeals held that the stop satisfied the Fourth Amendment: "Balancing the public's interest in safety against the minimal intrusion occasioned by the brief investigatory stop here, and considering the totality of the facts presented to Officer Cooper in this case, we conclude that the scales of justice tilt in favor of the stop." Pet. App. 28a.[2]

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[2] Having held that the stop was supported by reasonable suspicion, the Court of Appeals declined to address the State's alternative argument that the stop was justified under the community caretaking exception. Pet. App. 21a. n.7.

REASONS FOR GRANTING THE WRIT

When courts balance the risk of harm posed by drunk driving against the intrusiveness of a vehicle stop, factors common to all possible drunk driving cases, the balancing invariably weighs in favor of upholding the stop. The obvious point to such balancing is to support a finding of reasonable suspicion where the "particular circumstances" of the case alone might not justify the stop. *Terry*, 392 U.S. at 21.

This balancing approach conflicts at once with *Terry*'s particularity requirement and this Court's "established reliability analysis" regarding tips. *Florida v. J.L.*, 529 U.S. 266, 272 (2000). In *J.L.*, this Court declined to recognize an "automatic firearm exception to our established reliability analysis" but left open the possibility that some type of danger, e.g., "a report of a person carrying a bomb," might "justify a search even without a showing of reliability." *Id.* at 272-73. In *Navarette*, this Court was asked to recognize drunk driving as the exception to *J.L.* and responded with conspicuous silence.

In upholding the stop in Mr. Trott's case, the Court of Appeals capitalized on *Navarette*'s silence, concluding that *Navarette* did not preclude the balancing approach that the Court of Appeals relied upon as compensation for a record clearly deficient in indicia of reliability and, hence, reasonable suspicion. The predictable result is ominous: anyone coming from or going to a liquor store, bar, or other venue where alcohol is purchased or consumed, e.g., a concert or a baseball game or a wedding reception, is subject to

being seized by police on the basis of an anonymous and conclusory tip of drunk driving. Every such driver is now *J.L.*'s bomb-carrier; the commonplace is extreme. Making matters worse, the Court of Appeals has not provided a basis for limiting its balancing approach to drunk driving cases.

Before *Navarette*, there was a clear conflict among courts over whether the kind of balancing approach conducted by the Court of Appeals is part of the reasonable suspicion analysis in possible drunk driving cases, i.e., cases involving tips of intoxicated, reckless, or erratic driving. Now that conflict is even more pronounced. This Court should use this case to resolve that conflict and to hold that the Fourth Amendment does not permit courts to balance the risk of harm posed by drunk driving against the intrusiveness of the stop when determining whether a stop based on an anonymous tip is supported by reasonable suspicion. Rather, courts must continue to adhere to *Terry*'s particularized suspicion requirement and this Court's established reliability analysis, and when this reasonable suspicion standard is not met, as in Mr. Trott's case, the analysis is complete.

I. COURTS ARE DIVIDED OVER WHETHER BALANCING THE RISK OF HARM POSED BY DRUNK DRIVING AGAINST THE INTRUSIVENESS OF THE STOP IS PART OF THE REASONABLE SUSPICION ANALYSIS.

A. Background

In *Terry*, this Court was called upon to determine whether a category of police action, "an entire rubric of police conduct," i.e., a stop and frisk based on a standard of proof less than probable cause, was constitutional. 392 U.S. at 20. In doing so, as it often does in deciding to create a new exception to the warrant requirement, this Court "'balanc[ed] the need to search (or seize) against the invasion which the search (or seizure) entails.'" *Id*. at 21 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)).

Having determined that the balancing analysis supported the constitutionality of the "entire rubric" of the stop and frisk, this Court then articulated the standard for analyzing the constitutionality of a "particular intrusion" within this rubric: "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts" so that a judge can "evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." *Id*. "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Id*. at 21 n.18. *See United States v. Cortez*, 449 U.S. 411, 418 (1981) (analyzing the "particularized suspicion" requirement in terms of *Terry*'s "'demand for

specificity'" and this "'central teaching'"). In short, while a balancing of governmental interest and intrusiveness gave rise to the reasonable suspicion rubric, such balancing was not made part of the reasonable suspicion analysis in individual cases.

When police rely on a tip to justify a *Terry* stop, the same particularized suspicion requirement and demand for specificity control. *Navarette*, 572 U.S. at 396 (stating that a stop based on an anonymous tip is permitted "when a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity'" (quoting *Cortez*, 449 U.S. at 417-18, and citing *Terry*, 392 U.S. at 21-22)). Further, when police rely on a tip, the "indicia of reliability [is] critical." *J.L.*, 529 U.S. at 273.

In *J.L.*, this Court held that an anonymous tip regarding the possession of a firearm did not give rise to reasonable suspicion under this Court's "established reliability analysis" to stop and frisk the subject of the tip. *Id*. at 272. This Court declined to recognize an "automatic firearm exception" to its reliability analysis, while leaving open the possibility that some kind of allegation of danger could warrant dispensing with or discounting its reliability requirement:

> The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a

> firearm before the police can constitutionally conduct a frisk.

Id. at 273-74.

Drunk driving, in the eyes of some, is an obvious candidate for turning *J.L.*'s dicta into law. The question presented in the petition in *Harris* addressed whether an anonymous tip of drunk driving had to be corroborated by police observation of suspicious behavior. The Commonwealth of Virginia argued that such corroboration was unnecessary, that *J.L.* was distinguishable, and that the risk of harm posed by drunk driving and the minimal intrusion of a vehicle stop justified an exception to the Court's established reliability analysis. Petition for Writ of Certiorari, *Commonwealth of Virginia v. Moses Harris*, No. 08-1385, 2009 WL 1304726 (U.S.), at *22-26. This Court denied the petition. In dissent, Chief Justice Roberts opined that "it is not clear that *J.L.* applies to anonymous tips reporting drunk or erratic driving" and that "*J.L.* itself suggested that the Fourth Amendment analysis might be different in other situations." 130 S.Ct. at 11 (Roberts, C.J., dissenting).

In *Navarette*, a dispatcher relayed the following tip from an anonymous 911 caller: "'Showing southbound Highway 1 at mile marker 88, Silver Ford 150 pickup. Plate of 8–David–94925. Ran the reporting party off the roadway and was last seen approximately five [minutes] ago.'" 572 U.S. at 395. An officer responded and eventually stopped the truck, which led to the discovery of marijuana. *Id*. at 395-96.

In holding that the stop was supported by reasonable suspicion, this Court began by rejecting the argument "that reasonable cause for a[n investigative stop] can only be based on the officer's personal observation, rather than on information supplied by another person." *Id.* at 397 (alteration in original) (quoting *Adams v. Williams*, 407 U.S. 143, 147 (1972)). With respect to the reliability of the tip, this Court relied on the fact that the caller had "eyewitness knowledge" of a "startling event," which the caller reported contemporaneously with the observation and under the "stress of excitement." *Id.* at 399-400. This Court also reasoned that the use of a 911 call system added to the tip's reliability because 911 call systems generally are equipped with identifying features. *Id.* at 400-01.

Summarizing, this Court emphasized that "the 911 caller in this case reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving" and instead "alleged a specific and dangerous result of the driver's conduct" indicative of drunk driving. *Id.* at 403. Nonetheless, this Court acknowledged, "[T]his is a 'close case.'" *Id.* at 404 (quoting *Alabama v. White*, 496 U.S. 325, 332 (1990)).

Absent from the analysis in *Navarette* is any discussion of the risk of harm posed by drunk driving and the minimal intrusiveness of the stop as supporting the finding of reasonable suspicion. The single reference to the risk of harm came *after* this Court had determined that the stop was supported by reasonable suspicion. Reaffirming the rule that

reasonable suspicion "'does not turn on the availability of less intrusive investigatory techniques,'" *id.* at 404 (quoting *United States v. Sokolow,* 490 U.S. 1, 11 (1989)), this Court added that departure from that rule would be particularly inappropriate "because allowing a drunk driver a second chance for dangerous conduct could have disastrous consequences." *Id. See* The Honorable Charles Burns & Michael Conte, *Terry Stops, Anonymous Tips, and Driving Under the Influence: A Study of Illinois Law*, 45 Loy. U. Chi. L.J. 1143, 1176 (2014) (noting that while *Navarette* "stated in dicta, that 'allowing a drunk driver a second chance for dangerous conduct could have disastrous consequences,' this proposition formed no part of its analysis of whether the officer had reasonable suspicion in the first place") (footnote omitted).

Also absent from the analysis in *Navarette* is any discussion of *J.L.*'s dicta regarding the possibility of dispensing with or relaxing the established reliability analysis. In its brief in *Navarette*, the respondent asked this Court to do for drunk driving cases what it would not do for firearm cases:

> Although *J.L.* rejected the sufficiency of the tip in the context of routine crime prevention, it recognized that a heightened governmental interest, arising from an imminent threat to public safety, is an important factor in evaluating the totality of circumstances, which, in turn, affects the overall balancing of reasonableness. Thus, the stronger the governmental interest, the less demanding a

> showing of reliability is required for an anonymous tip to provide reasonable suspicion.

Brief of Respondent, *Navarette v. California*, 572 U.S. 393 (2014) (No. 12-9490), 2013 WL 667370, at *18-19.

At oral argument, the respondent began by putting the risk of harm and the minimal intrusion of the stop front and center:

> An officer can reasonably rely on such a tip because the importance of the governmental interest in protecting the public from the ongoing and immediate threat of drunk driving outweighs the minimal intrusion of a traffic stop.

Transcript of Oral Argument at 28, *Navarette v. California,* 572 U.S. 393 (2014) (No. 12-9490). Questioning followed, testing this argument against *J.L.* For example, Justice Ginsburg asked: "So what's the difference? The – the argument on the drunk driving is very, very dangerous, but so is having a gun in one's pocket?"; and Justice Scalia asked, "You don't think that a teenager standing on a street corner with a couple of other teenagers with a gun in his belt represents a threat to public safety?" *Id*. at 41, 48-49. Answers to this line of questioning are not part of *Navarette*'s analysis.

In a "close case," one might have expected this Court to rely on the risk of harm posed by drunk driving and the minimal intrusion of the stop as support for the conclusion that there was reasonable suspicion. It did not. The explicit manner in which these factors were argued and the conspicuous manner

in which this Court declined to address them was a mixed signal that did not go unnoticed. As one commentator put it, "Shockingly, the Court in *Navarette* avoided this discussion altogether." Andrew B. Kartchner, J.L.*'s Time Bomb Still Ticking: How* Navarette*'s Narrow Holding Failed to Address Important Issues Regarding Anonymous Tips*, 44 U. Balt. L. Rev. 1, 7 (2014).

Another commentator, a trial judge, noted that this Court did not "expressly adopt the reasoning of the respondent in its briefing and at argument." Burns & Conte, *supra*, 45 Loy. U. Chi. L.J. at 1176. Foreseeing a case like Mr. Trott's, the same commentator added:

> However, the Court did not expressly reject or repudiate the respondent's proffered reasoning based on the danger to public safety, and it remains unclear whether, in a different case in which the tip did not have all the indicia of reliability or specificity that the tip in *Navarette* had, it might comport with the Fourth Amendment to reason that a *Terry* stop was nevertheless justified based in part on the suspected drunk driver's potential danger to public safety.

Id. Mr. Trott's case is that "different case in which the tip did not have all the indicia of reliability or specificity that the tip in *Navarette* had," and the question left open in *Navarette* is now squarely before this Court.

B. The Conflict

In dissenting from the denial of certiorari in *Harris*, Chief Justice Roberts observed that the "conflict is clear and the stakes are high" with respect to the split among courts over the question of whether police must "confirm an anonymous tip of drunk or erratic driving" through independent observation of suspicious behavior. 130 S.Ct. at 12 (Roberts, C.J., dissenting). While *Navarette* settled the question as to the need for police observation of suspicious activity, it did so without addressing the underlying conflict over the role in the reasonable suspicion analysis of balancing the risk of harm posed by drunk driving against the intrusiveness of the stop. The underlying and perduring conflict is about the propriety of this balancing approach. This conflict was clear when this Court denied certiorari in *Harris*, and it is even clearer now.

Courts of last resort in at least eleven states, California, Delaware, Hawaii, Iowa, Kansas, Maryland, New Jersey, New Mexico, Tennessee, Vermont, and Wisconsin, and the Eighth Circuit Court of Appeals have upheld stops in possible drunk driving cases based in part on the risk of harm posed by drunk driving and the lessened or minimal intrusion of a vehicle stop:

- *United States v. Wheat*, 278 F.3d 722, 736, 737 (8th Cir. 2001), *cert. denied*, 537 U.S. 852 (2002) (distinguishing *J.L.* based on the "imminent threat to public safety" posed by a possible drunk driver and the assessment that vehicle "stops are considerably less invasive, both

physically and psychologically, than the frisk on a public corner that was at issue in *J.L.*");

- *People v. Wells*, 136 P.3d 810, 815 (Cal. 2006), *cert. denied*, 550 U.S. 937 (2007) (approving *Wheat* and recognizing "the relatively greater urgency presented by drunken or erratic highway drivers, and the minimal intrusion involved in a simple vehicle stop");

- *Bloomingdale v. State*, 842 A.2d 1212, 1221 (Del. 2004) ("[W]hen deciding whether an anonymous tip of erratic driving provided reasonable suspicion to stop a vehicle, courts should balance the government's interest in responding immediately to reports of unsafe driving against the comparatively modest intrusion on individual liberty that a traffic stop entails.");

- *State v. Prendergast*, 83 P.3d 714, 722-23 (Haw. 2004) (distinguishing *J.L.* based on the "imminence of harm" and the less intrusive nature of a vehicle stop);

- *State v. Walshire*, 634 N.W.2d 625, 630 (Iowa 2001) (distinguishing *J.L.* because a "serious public hazard allegedly existed that, in the view of the Supreme Court, might call for a relaxed threshold of reliability" and "the intrusion on privacy interests is slight, less than in a pat-down situation");

- *State v. Crawford*, 67 P.3d 115, 118 (Kan. 2003) (reiterating that under Kansas precedent "'[t]his minimal intrusion is balanced against the

substantial harm caused by intoxicated drivers'") (citation omitted);

- *State v. Golotta*, 837 A.2d 359, 366, 372 (N.J. 2003) (allowing for a reduction in the "degree of corroboration necessary to uphold a stop of a motorist suspected of erratic driving" because of the lesser intrusion of a vehicle stop and because "an intoxicated or erratic driver poses a significant risk of death or injury to himself and to the public");

- *State v. Contreras*, 79 P.3d 1111, 1118 (N.M. 2003) (reasoning that "New Mexico's grave concern about the dangers of drunk drivers, and the minimal intrusion of a brief investigatory stop tip the balance in favor of the stop");

- *State v. Hanning*, 296 S.W.3d 44, 52 (Tenn. 2009) (distinguishing *J.L.* based on the "imminent danger of harm to the public" and the lesser "level of intrusion");

- *State v. Boyea*, 765 A.2d 862, 868 (Vt. 2000), *cert. denied*, 533 U.S. 917 (2001) ("Balancing the public's interest in safety against the relatively minimal intrusion posed by a brief investigative detention, the scale of justice in this case must favor the stop[.]") (internal citation omitted);

- *State v. Rutzinski*, 623 N.W.2d 516, 527 (Wis. 2001) (distinguishing *J.L.* based on the "potential imminent danger to public safety" and the "minimal intrusion" of the stop).

Courts of last resort in at least eight states, Iowa, Kentucky, Michigan, Nebraska, North Dakota, South Dakota, Virginia, and Wyoming, have held that stops based on tips related to possible drunk driving violated the Fourth Amendment and, in so holding, did not incorporate a balancing approach. *See State v. Kooima*, 833 N.W.2d 202 (Iowa 2013), *cert. denied*, 572 U.S. 1087 (2014)[3]; *Collins v. Com.*, 142 S.W.3d 113 (Ky. 2004); *People v. Pagano*, ___ N.W.2d ___, 2021 WL 1570350 (Mich. Apr. 22, 2021); *State v. Rodriguez*, 852 N.W.2d 705 (Neb. 2014); *Anderson v. Dir., N. Dakota Dep't of Transp.*, 696 N.W.2d 918 (N.D. 2005); *State v. Stanage*, 893 N.W.2d 522 (S.D. 2017); *Harris v. Commonwealth,* 668 S.E.2d 141 (Va. 2008), *cert. denied*, 558 U.S. 978 (2009); and *McChesney v. State*, 988 P.2d 1071 (Wyo. 1999).

Dissenting and concurring opinions from both sides of the conflict illustrate the fixed nature of the dispute: it almost always returns to *J.L.* and, now, whether the Court in *Navarette* allowed for treating drunk driving as the exception to *J.L.* Among the cases endorsing a balancing approach, the dissent in *Wells* argued:

> The majority misreads *J.L.* That the high court in *J.L.* left open the possibility that a catastrophic threat might justify a somewhat relaxed standard of reasonable cause to detain does not suggest we are now to rank all crimes along a sliding scale, permitting investigatory

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[3] The fact that Iowa shows up on both sides of the conflict reflects the need for clarification from this Court.

> detentions on lesser showings when the detainees are suspected of more serious crimes.

136 P.3d at 818 (Werdegar, J., dissenting). Likewise, in *Boyea*, the dissent argued: "The majority's rule is that if an automobile-operation crime is alleged, then the crime is so dangerous that police need not have reliable information. This 'automobile' exception has no basis in Supreme Court precedent." 765 A.2d at 880 (Johnson, J., dissenting). The concurring opinion in *Hanning* made a similar point: "Because the U.S. Supreme Court rejected a generalized 'firearm exception,' I am hesitant to join the majority to the extent that its opinion could be read as adopting a generalized 'reckless driving' exception." 296 S.W.3d at 57 (Wade, J., concurring).

Among the cases in which the majority did not incorporate a balancing approach, the dissent, predictably, argued that it should have. *See*, *e.g.*, *Kooima*, 833 N.W.2d at 212 (Mansfield, J., dissenting) (arguing that *J.L.* is distinguishable because "'in the present case, a serious public hazard [drunk driving] allegedly existed that, in the view of the Supreme Court, might call for a relaxed threshold of reliability; and…the intrusion on privacy interests [with a traffic stop] is slight, less than in a pat-down situation'" (alterations in original) (quoting *Walshire*, 634 N.W.2d at 630)); *Collins*, 142 S.W.3d at 118 (Graves, J., dissenting) (emphasizing the "state's interest in preventing drunk driving, but also the minimal invasiveness of an automobile stop"); *Rodriguez*, 852 N.W.2d at 718 (Heavican, C.J., dissenting) (arguing that there was reasonable suspicion, in part, because "the failure to follow up on that report…defies reason

and 'could have disastrous consequences'" (quoting *Navarette*, 572 U.S. at 404))); *Harris*, 668 S.E.2d at 703 (Kinser, J., dissenting) (criticizing the majority for ignoring the Commonwealth's argument "that anonymous tips about incidents of drunk driving require less corroboration than tips concerning matters presenting less imminent danger to the public"); *McChesney*, 988 P.2d at 1079 (Thomas, J., dissenting) ("'We must apply that balancing test in the instant case. A motor vehicle in the hands of a drunken driver is an instrument of death … An investigatory or safety stop of a suspected drunken driver is a minimal intrusion upon that driver's freedom of movement and privacy.'" (quoting *State v. Tucker,* 878 P.2d 855, 861 (Kan. App. 1994))).

Along similar lines, one of the concurring opinions in *Pagano*, in explaining why the case was at least a "close case," pointed to the same risk-of-harm and intrusiveness factors and quoted Chief Justice Roberts's dissent in *Harris*. 2021 WL 1570350 at *12-13 (Zahra, J., concurring). Notably, the Michigan Court of Appeals upheld the stop based in part on these same factors. *People v. Pagano*, 2019 WL 2273357, at *3 (Mich. Ct. App. May 28, 2019), *rev'd,* 2021 WL 1570350 (Mich. Apr. 22, 2021) ("Less information is required to justify a traffic stop when the informant's tip relates to potentially dangerous driving because the interest in ensuring public safety on a roadway is high compared with the minimally invasive nature of a traffic stop.").

Lastly, in *Stanage*, the Supreme Court of South Dakota held that the stop in question was unconstitutional because "[u]nder *Navarette*, a

conclusory allegation of drunk or reckless driving is insufficient to support a reasonable suspicion of criminal activity." 893 N.W.2d at 531.[4] Reading *Navarette* as did the Maryland Court of Appeals, the dissent argued:

> When balancing the risk of harm to the public in the present case with the minimal intrusion necessitated by Deputy Kriese's investigatory stop, the "scale of justice ... must favor the stop; a reasonable officer could not have pursued any other prudent course." *State v. Boyea*, 171 Vt. 401, 765 A.2d 862, 868 (2000). And *Navarette*—although postdating these cases—does not stand for a contrary principle.

Id. at 536 (Kern, J., dissenting). The majority responded by rejecting the notion that *Navarette* allows for such balancing: "[T]he Supreme Court did not rely on any sort of public-safety exception to the Fourth Amendment in its totality-of-the-circumstances analysis in *Navarette*. The dissent does not cite to any

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[4] The identities of the tipsters in *Stanage* were discoverable, prompting the court to treat them as non-anonymous. 893 N.W.2d at 526. Nonetheless, the court held that the tipsters' conclusory allegation did not give rise to reasonable suspicion. The balancing approach is typically injected into cases where reliability is weakest, i.e., in anonymous tip cases. *Stanage* illustrates how, even in some cases involving non-anonymous tips, the balancing approach comes into play. *See also Anderson*, 696 N.W.2d at 923 (tipster was not "purely anonymous").

Supreme Court decisions on this point, let alone one decided after *Navarette*." *Id*. at 530 n.7.[5]

II. THIS CONFLICT OVER THE SCOPE OF THE REASONABLE SUSPICION ANALYSIS IN POSSIBLE DRUNK DRIVING CASES SHOULD BE RESOLVED NOW.

This case is important for the same two reasons that *Navarette* was important. As Justice Scalia framed the matter: "Drunken driving is a serious matter, but so is the loss of our freedom to come and go as we please without police interference." *Navarette*, 572 U.S. at 414 (Scalia, J., dissenting). Yet there is much more at stake in Mr. Trott's case with respect to the loss of freedom.

While *Navarette* was a "close case" under this Court's established reliability analysis, Mr. Trott's case is not. To uphold the stop in this case, it is necessary to abandon this Court's established reliability analysis by adoption of a balancing approach. There is no

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[5] Further demonstrating the need for clarification following *Navarette*, the Supreme Court of Washington, in a gun case, offered a contrary reading of *Navarette*:

> [W]hen a tip involves a serious crime or potential danger, less reliability may be required for a stop than is required in other circumstances. We read the United States Supreme Court's decision in *Navarette*–that a single anonymous 911 call may justify pulling over a reported drunk driver–as largely turning on this factor.

State v. Z.U.E., 352 P.3d 796, 803 (Wash. 2015) (en banc) (internal citations omitted)

precedent for doing so. *See* Kit Kinports, *Probable Cause and Reasonable Suspicion: Totality Tests or Rigid Rules?*, 163 U. PA. L. Rev. Online 75, 83 (2014) ("Thus, there is no precedent in the Court's Fourth Amendment jurisprudence for applying a balancing approach or considering the severity of the crime when assessing reasonable suspicion or probable cause.").

Nonetheless, with profound implications beyond possible drunk driving cases, Maryland has taken this step. In the words of Chief Justice Roberts, the Fourth Amendment analysis is now structurally "different" in Maryland (joining several states) than it is in other states, with the potential for it to be different in "other situations" besides drunk driving. 130 S.Ct. at 11 (Roberts, C.J., dissenting). In *J.L.*, this Court refused to allow the danger associated with firearms to compensate for a deficient showing of reliability, convinced that one could not "securely confine such an exception to allegations involving firearms," 529 U.S. at 272, and cognizant of the fact that "'the reasons for creating an exception in one category [of Fourth Amendment cases] can, relatively easily, be applied to others,' thus allowing the exception to swallow the rule." *Id*. at 273 (alteration in original) (quoting *Richards v. Wisconsin,* 520 U.S. 385, 393-394 (1997)). The rule of *Terry*'s particularity requirement, as embodied in this Court's established reliability analysis, is more at risk than ever of being swallowed by an indeterminate balancing exception.

The fruit of *J.L.*'s dicta and *Navarette*'s silence is a legal landscape in which the protections of the Fourth Amendment vary based on state lines. More delay in

resolving the conflict will only lead to more inconsistent results, without any gain in this Court's ability to answer the question about the propriety of incorporating a balancing approach like the one used in Mr. Trott's case into the reasonable suspicion analysis.

Finally, with Mr. Trott's case, this Court has what it needs to answer the question that has been left open for too long. Indeed, Maryland's appellate courts as well as the State treated Mr. Trott's case as a proper vehicle for exploring the parameters of the Fourth Amendment in drunk driving cases: the Court of Appeals "granted *certiorari* to consider the parameters of the Fourth Amendment in the context of a 911 call reporting drunk driving," Pet. App. 3a.4a; "the intermediate appellate court observed that this case presents 'an important question of public policy' balancing the interests of individual privacy protected by the Fourth Amendment...against the inherent danger to the public arising from driving while intoxicated, in the context of an anonymous 911 call reporting such alleged behavior," Pet. App. 6a; and the State treated Mr. Trott's case as one that justified an approach that "combined" "the Supreme Court's reasoning in *Navarette*" with the balancing approach at issue. Pet. App. 12a-13a. The propriety of such a combination is precisely what is at stake in this case.

III. BALANCING THE RISK OF HARM POSED BY DRUNK DRIVING AGAINST THE INTRUSIVENESS OF THE STOP IS NOT A PROPER PART OF THE REASONABLE SUSPICION ANALYSIS.

The reasonable suspicion analysis turns on "specific and articulable facts," *Terry*, 392 U.S. at 21, not on a second balancing of generic factors like the risk of harm posed by the crime and the intrusiveness of a vehicle stop. As the Supreme Court of South Dakota explained, "*Terry*'s reasonable-suspicion standard already limits the individual protection of the Fourth Amendment by striking a balance between the need to protect the public and the need to protect the individual." *Stanage*, 893 N.W.2d at 530 n.7. *See also Dunaway v. New York*, 442 U.S. 200, 208 (1979) (noting that the standard of probable cause "applied to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations").[6]

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[6] The Court of Appeals, quoting *United States v. Sharpe*, 470 U.S. 675, 685 (1985), stated that "'the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion.'" Pet. App. 26a. But the Court of Appeals took *Sharpe*'s language out of context: the Court in *Sharpe* was simply trying to resolve the "difficult line-drawing problems in distinguishing an investigative stop from a *de facto* arrest" and to decide whether the stop there had been "unnecessarily prolonged." 470 U.S. at 685 (emphasis omitted). In other words, the "brevity of the invasion" is what justified the Court's application of the reasonable suspicion standard in *Sharpe* as opposed to the probable cause standard; that "brevity" did not get counted again to justify application of a less demanding reasonable suspicion standard.

While *Terry* incorporated a balancing analysis to justify the stop and frisk exception to the warrant requirement, a second round of balancing in individual cases would erode *Terry*'s particularity requirement. If the risk of harm posed by drunk driving is so great and the intrusion of a vehicle stop so minimal as to justify dispensing with the need for the tipster to provide more than a conclusory allegation or for the police to do more to corroborate that conclusory allegation, then there is every reason in the next case for dispensing with any of the other facts relied upon by the Court of Appeals. The next case, for instance, might involve a gas station instead of a liquor store, and there is no principled basis for "conclud[ing] that the scales of justice tilt in favor of the stop" in the former case but not in the latter. Pet. App. 28a. In the words of this Court, "'No consideration relevant to the Fourth Amendment suggests any point of rational limitation' of … a doctrine" that allows courts to use a balancing approach in assessing reasonable suspicion. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (quoting *Chimel v. California*, 395 U.S. 752, 766 (1969)).

Nor is there a basis for limiting the balancing approach to possible drunk driving cases. Concepts like "imminence" and "danger" admit of varying degrees. There is no reason why a crime with purportedly more or less "imminence" or "danger" associated with it should not also allow for a balancing approach tailored to that crime, raising the specter of a confusing multitude of varying reasonable suspicion standards. If "the seriousness of the offense under investigation" does not create "exigent circumstances of the kind that under the Fourth Amendment justify a warrantless

search," under the exigent circumstances exception to the warrant requirement, *id*. at 394, then the seriousness of the offense does not justify the creation of a sliding scale of reasonable suspicion standards that is "more slide than scale." Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 394 (1974).

The Court of Appeals's balancing is as flawed in its application as it is in theory. In seeking to justify its reliance on the risk of harm posed by drunk driving, the Court of Appeals turned to Chief Justice Roberts's dissent in *Harris*: "While the police can observe the subject of other types of tips 'and step in before actual harm occurs[,]' a 'wait-and-see approach' with drunk driving 'may prove fatal.'" Pet. App. 28a (alteration in original) (quoting *Harris*, 130 S.Ct. at 11 (Roberts, C.J., dissenting)). The sole piece of empirical evidence cited by the Court of Appeals in support of this claim is the fact that "167 people in Maryland died in alcohol-impaired driving incidents in 2019, accounting for about one-third of the total traffic deaths in the State." Pet. App. 2a.

This fact is no basis for distinguishing *J.L.* In 2019, in Baltimore City alone, there were 348 homicides, 303 of which were by handgun.[7] If the Court of Appeals's evidence is what counts, then the argument that would seem to follow is not that *J.L.* is distinguishable, but

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[7] Tim Prudente, *2019 closes with 348 homicides in Baltimore, second-deadliest year on record*, Baltimore Sun (January 1, 2020), *available at* https://www.baltimoresun.com/news/crime/bs-md-ci-cr-2019-homicide-final-count-20200101-jnauuumukbdh3edsyypspsm3he-story.html.

that *J.L.* is wrong. Neither the State nor the Court of Appeals provided evidence that a "wait-and-see approach" has, in fact, proven fatal in drunk driving cases but not in other types of cases, or more so in drunk driving cases than in others. In the absence of such objective evidence, in the words of *J.L.*, the Court of Appeals has failed to "securely confine such an exception to allegations" of drunk driving. 529 U.S. at 272.

Regarding the degree of intrusiveness, the Court of Appeals emphasized that people have a diminished expectation of privacy in a vehicle because "[i]t travels public thoroughfares where both its occupants and its contents are in plain view." Pet. App. 27a (quoting *United States v. Knotts*, 460 U.S. 276, 281 (1983)). Of course, because the allegation in Mr. Trott's case was devoid of any specific allegation of suspicious behavior, it is pure speculation that something Mr. Trott did in his car, in plain view, led to his being seized.

The Court of Appeals contrasted the "search and seizure of one's person in *J.L.*" with the "intrusion in this case involv[ing] an officer approaching a stopped motor vehicle and knocking on a window." Pet. App. 27a. There is no glossing over the fact, however, that Corporal Cooper pulled in behind Mr. Trott with his emergency lights activated, thereby effectuating a seizure of Mr. Trott's person. *See Arizona v. Johnson*, 555 U.S. 323, 332 (2009) (reiterating that "a passenger is seized, just as the driver is, 'from the moment [a car stopped by the police comes] to a halt on the side of the road'" (quoting *Brendlin v. California*, 551 U.S. 249, 263 (2007))). *See also Delaware v. Prouse*, 440 U.S. 648,

657 (1979) (stating that a vehicle stop "by means of a possibly unsettling show of authority" interferes "with freedom of movement" and "may create substantial anxiety").

The Court of Appeals, moreover, ignored evidence that a generic "minimally intrusive" stop is a fiction. Mr. Trott argued that if balancing the risk of harm against the level of intrusiveness is to play a role in the reasonable suspicion analysis, then the Court of Appeals must take into account the disproportionate impact of policing practices on people of color.[8] Doing so would be consistent with *Terry*'s acknowledgment that "the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices." 392 U.S. at 17 n.14. *See* Amanda Graham, et al., *Race and Worry About Police Brutality: The Hidden Injuries of Minority Status in America*, 15 Victims & Offenders 549 (2020) (finding that Black and Hispanic people experience far great fear of police brutality than do white people). Simply ignoring such evidence is, in fact, "unreasonable." Pet. App. 25a.

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[8] As evidence of this impact, Mr. Trott cited several sources in the Court of Appeals, including, e.g., Giulia Heyward & João Costa, *Black children are 6 times more likely to be shot to death by police, study finds*, CNN (Dec. 17, 2020), *available at* https://www.cnn.com/2020/12/17/us/black-children-police-brutality-trnd/index.html; Jordan E. DeVylder et al., *Association of Exposure to Police Violence With Prevalence of Mental Health Symptoms Among Urban Residents in the United States*, JAMA Network Open (Nov. 21, 2018), *available at* https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2715611

IV. THERE WAS NOT REASONABLE SUSPICION TO SEIZE PETITIONER.

The Court of Appeals would not have resorted to a balancing approach, if the totality of circumstances as analyzed in accordance with *Navarette* had given rise to reasonable suspicion. *Navarette* and Mr. Trott's case are not both "close" cases, and, for the reasons stated, the Court of Appeals's balancing approach cannot make up the difference.

Whereas *Navarette* involved "more than a conclusory allegation of drunk or reckless driving," with the anonymous caller alleging specific "conduct [that is] a significant indicator of drunk driving," 572 U.S. at 403, the anonymous tip in Mr. Trott's case was nothing more than a conclusory allegation, the dispatch reporting an allegation of an "intoxicated driver." Despite *Navarette*'s emphasis on the specific substance of the tip, in contrast to a "conclusory allegation," the Court of Appeals was satisfied with the conclusory allegation in Mr. Trott's case. This satisfaction is not surprising in light of the conflict over the balancing approach. Courts that have adopted a balancing approach have condoned conclusory allegations. *See Crawford*, 67 P.3d at 116. Courts that have not adopted a balancing approach have not condoned them. *See Harris*, 668 S.E.2d at 144; *Kooima*, 833 N.W.2d at 212; *Stanage*, 893 N.W.2d at 531. Following *Navarette*, the need for clarification thus extends from the propriety of the balancing approach to the propriety of upholding stops based on conclusory allegations of drunk or reckless driving.

The Court of Appeals conceded that "on its own, such a 'bare bones,' conclusory allegation would not suffice to support a stop." Pet. App. 22a. But the Court of Appeals then attempted to recast a conclusory allegation as "shorthand" for something specifically observed. Quoting a pre-*Navarette* decision by the Supreme Court of Kansas, the Court of Appeals reasoned that "although conclusory, an allegation that a person is intoxicated is 'the kind of shorthand statement of fact that lay witnesses have always been permitted to testify to in court.'" Pet. App. 22a (quoting *Crawford*, 67 P.3d at 119).

This begs the question as to what "fact," if any, was conveyed through the "shorthand" of the conclusory allegation, "intoxicated driver." Did the caller (or someone reporting to the caller) see Mr. Trott, before getting into his car, discard a bottle that looked like a bottle containing alcohol and conclude that he was intoxicated? *See United States v. Hauk*, 412 F.3d 1179, 1188 (10th Cir. 2005) ("Even if the informant is well-meaning, reliance on anonymous uncorroborated tips could result in searches based on far less than an objective reasonable basis."). That the "fact" observed was something actually suggesting that criminal activity was afoot is just speculation. "Shorthand," in short, does not satisfy *Terry*'s "demand for specificity." 392 U.S. at 21 n.18.

That demand was not met in petitioner's case. There was nothing specific in the call or the observations of Corporal Cooper suggesting criminal activity. *J.L.*, 529 U.S. at 272 ("The reasonable suspicion here at issue requires that a tip be reliable in

its assertion of illegality, not just in its tendency to identify a determinate person."). Nor was there any predictive information in the call by which "to test the informant's knowledge or credibility." *Id*. at 271. Nor is there any suggestion that Corporal Cooper ever attempted to learn more about the tipster or the tip before stopping Mr. Trott. *Contreras*, 79 P.3d at 1118 ("[W]e encourage dispatch operators and police officers to record the names of concerned callers and to obtain as many facts as possible to determine the credibility and reliability of each caller.").

While the Court of Appeals found that that "the tip was contemporaneous to the reported behavior," Pet. App. 22a, there is no basis for inferring that whatever was witnessed (by whomever) was witnessed contemporaneously with the call or that any observed behavior was "startling" or even mildly suspicious. While Corporal Cooper testified that he likely arrived on the scene somewhere between two and eight minutes after being dispatched, there is no evidence as to when the call by the tipster, as opposed to the dispatch to Corporal Cooper, was actually placed and when the tipster witnessed the activity (if any) that led to the 911 call. In short, there is no basis for inferring from the tip an ongoing crime.

The 911 call itself was not introduced into evidence and no evidence was presented with respect to any "features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity." *Navarette*, 572 U.S., at 400. Neither was there any indication as to whether the caller was aware that he or she could be identified and

traced. In sum, the Court of Appeals's conclusion that "the anonymous call was reliable" is incompatible with *Terry*, *J.L.*, and *Navarette*.

The Court of Appeals concluded further that "'the observed conduct, when viewed in the context of all the other circumstances known to the officer, was indicative of criminal activity.'" Pet. App. 24a (citation omitted). Here, the Court of Appeals focused on the fact that Mr. Trott was found in a car parked in front of a liquor store and the "lateness of the hour[.]" Pet. App. 25a. Yet it is unclear whether the caller (or person reporting to the caller) was aware of the existence of the liquor store, and nothing in the call linked the liquor store to the conclusory allegation. Moreover, there is no evidence that the liquor store was open or, if closed, when it had closed, no evidence that the call came from anyone associated with the liquor store, no evidence regarding the proximity of any other businesses, and no evidence regarding Corporal Cooper's prior experience, if any, with activities at that liquor store. Whatever minimal weight, if any, is given to these facts, they are not enough to turn the conclusory allegation in petitioner's case into reasonable suspicion. The demand of *Terry* was not met.

CONCLUSION

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

Respectfully submitted,

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