No. _____

In the

Supreme Court of the United States

AARON MARTIN MERCADO-GRACIA, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Tenth Circuit

Petition for Writ of Certiorari

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Questions Presented

Once an officer issues a traffic citation and tells the person he may leave, the Fourth Amendment requires consent to then delay departure to ask more questions. Whether the person stays voluntarily or reasonably believes he is not free to go is determined by the totality of all the circumstances. *United States v. Mendenhall,* 446 U.S. 544, 557 (1980).

The questions presented are:

1. When deciding if a person objectively believed he could refuse an officer's request to answer more questions, is the person's race a factor in the totality of the circumstances.
2. If so, would a reasonable person have understood from the officer's conduct that he could walk away, get in his car, and drive off without consequence, given all the circumstances here.

Related Proceedings

United States Court of Appeals for the Tenth Circuit

United States v. Aaron Martin Mercado-Gracia, Case No. 19-2153

Opinion Entered: March 2, 2021

Petition for Rehearing Denied: June 7, 2021

Mandate Entered: June 15, 2021

United States District Court for the District of New Mexico

United States v. Aaron Martin Mercado-Gracia, Case No. 16-CR-1701-JCH

Judgment Entered: April 3, 2019

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In the

Supreme Court of the United States

AARON MARTIN MERCADO-GRACIA, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Petition for Writ of Certiorari

Aaron Martin Mercado-Gracia petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in his case.

Opinions Below

The decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Mercado-Gracia*, Case No. 19-2153, is published at 989 F.3d 829.[1] The district court's memorandum opinion and order is available at 2018 WL 2303104.[2]

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[1] App. 1a-21a. "App." refers to the attached appendix. The record on appeal contained four volumes. Mercado refers to the documents and pleadings in those volumes as Vol. __ followed by the bates number on the bottom right of the page (e.g. Vol. I, 89).

[2] App. 22a - 42a.

Jurisdiction

On March 2, 2021, the Tenth Circuit entered its judgment.[3] Mercado filed a petition for rehearing which the court denied on July 26, 2021. On March 19, 2020, this Court entered a standing order that extends the time to file a petition for a writ of certiorari in this case to November 4, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Pertinent Constitutional Provision

The Fourth Amendment to the Constitution of the United States

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.

Introduction

An ideal world is colorblind. But an ideal world does not exist and has never existed. Race matters. Colorblindness conveniently skips over this country's historically traumatic, often court-sanctioned, treatment of people of color. As we regularly witness in the news, this history is particularly significant in the context of law enforcement's relationship with black and brown communities. Against this backdrop, Mercado petitions this Court, asking that it rule that race is an objective fact that affects both how a law enforcement encounter is perceived and the reasonableness of the response to it.

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[3] App. 1a-21a.

When examining the totality of the circumstances, a court should be allowed to consider a person's race as a factor in understanding how a reasonable person in his position would not decline an official request to be questioned or turn away from interrogation, especially when he has not been informed he may refuse to interact. The Tenth Circuit does not think so. Here, it reiterated its holding in *United States v. Easley*, 911 F.3d 1074, 1081 (10th Cir. 2018), that race has "no place in the objective, reasonable-person analysis." App. 13a. Its decisions are not only divorced from reality but also ignore that race and other factors that influence our understanding of the world are relevant considerations in many areas of the law, including Fourth Amendment jurisprudence. *See e.g. Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (recognizing race as an exception to the no-impeachment rule); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884-86 (1975) (race by itself cannot support reasonable suspicion but can be considered in the aggregate); *United States v. Brown*, 925 F.3d 1150, 1156 (9th Cir. 2019) (an individual's race "can inform the inferences to be drawn" from his decision how to interact with police); *see also* Orin S. Kerr, *The Questionable Objectivity of Fourth Amendment Law,* 99 Tex. L. Rev. 447, 468-69 (2021) (arguing that "harms of racially discriminatory enforcement are so severe" that they "should be considered as part of the reasonableness of the government's action."). The Tenth Circuit's current position ignores the objective reality for millions of minorities whose everyday life experience undoubtedly leads to a different objective reality when confronted by law enforcement than their white counterparts.

There are several reasons this Court should scrutinize the Tenth Circuit's holdings. First, the prevalence of traffic stops and police-citizen encounters necessitates reexamination of the consensual-encounter test as the current test fails to reflect real world experiences. Second, while the circuit endeavored to distinguish considerations as age, the basis for the distinctions drawn misconstrue this Court's precedent. Third, a circuit split has emerged regarding the role race plays in assessing how the reasonable person would view the interaction. On one side there is *Easley* and *Knights*,[4] and on the other, *Smith*,[5] *Brown*,[6] and *Dozier*.[7] Finally, the public is interested and watching. We live in an era of racial unrest in which police confront citizens daily. Many people are newly witnessing, in real time, the consequences of a criminal justice system that fails to meaningfully account for the tense relationship between communities of color and law enforcement. To comprehend how reasonable people view these encounters, race must be part of a court's "totality of the circumstances" analysis.

For these reasons, critically examining *Easley* and *Mercado-Gracia* is a matter of exceptional importance. The Tenth Circuit's current legal analysis to determine if a person voluntarily consented to additional questioning prolonging a traffic stop is at odds with current societal understanding of

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[4] *United States v. Knights*, 989 F.3d 1281 (11th Cir. 2021), *petition for cert. filed*, Aug. 6, 2021 (No. 21-198).

[5] *United States v. Smith*, 794 F.3d 681 (7th Cir. 2015).

[6] *United States v. Brown*, 925 F.3d 1150 (9th Cir. 2019); *United States v. Washington*, 490 F.3d 765 (9th Cir. 2007).

[7] *Dozier v. United States*, 220 A.3d 933 (D.C. 2019).

what voluntary consent means.[8] For a right as significant as the one provided by the Fourth Amendment to be so incongruent with the objective understanding of what that right protects suggests it is time to reevaluate. To that end, consideration of race as a relevant contextual factor among many in the aggregate circumstances analysis makes sense because it reflects the reality that race impacts whether a rational person will feel free to end his interaction with the police.

Statement of the Case

A. Factual background

New Mexico State Police Officer Wood, was driving west on I-40 with a drug-detection dog. Outside of Albuquerque, New Mexico he stopped Mercado, who was traveling eastbound on I-40, for speeding. App. 2a. Mercado, who was driving a Dodge Charger, pulled over on the shoulder of the highway and Wood walked up to the passenger side.

At the side of Mercado's car, Wood asked Mercado for his driver's license, insurance, and registration. App. 2a. Mercado handed those documents to Wood, who then ordered him out of the Charger and instructed him to stand by his patrol SUV. There, Wood stood by the passenger-side front seat of his SUV and Mercado stood by the passenger-side front tire on the opposite side of the passenger door from Wood. Wood said Mercado was fidgeting, moving around, but was engaged in the conversation and made eye contact as Wood began questioning him. App. 25a. Wood admitted there was nothing unusual about this behavior, as most people tend to act this way when pulled over. *Id.*

[8] For instance, the recent emergence of the "Me Too" movement recognizes that consent cannot be presumed from a show of authority.

Mercado confirmed for Wood that the address listed on his Arizona driver's license was current. App. 25a. The car's registration also was from Arizona and was registered to Hector Ramirez Reyes. *Id.* The insurance card was issued to Fabian Reyes. App. 3a. Wood asked follow-up questions about the different names, because he allegedly was concerned about the ownership of the car. In response to Wood's question about who owned the vehicle, Mercado initially answered, "My cousin," and said his cousin's name was "Fabian." App. 3a, 25a. Wood asked for Fabian's last name. *Id.* Mercado explained "Well, he's my lady's, uh, husband's cousin."[9] *Id.* He also said that Fabian allowed him to borrow his car for the weekend. When Wood asked where he was heading, Mercado responded "Albuquerque." *Id.*

Wood continued with more questions unrelated to resolving the traffic infraction. He asked Mercado why he was headed to Albuquerque. *Id.* After initially hesitating, Mercado revealed he was going to Albuquerque to have an affair. App. 3a-4a, 26a-27a.

Despite Mercado's eventual confession that he was about to cheat on his partner, Wood testified that he found Mercado's responses and demeanor "odd." App. 27a. He said it was curious that Mercado started by mentioning his business, then shifted to plans for "just driving around" and finally confessed to the real reason he was in town – to see a lady. *Id.* At this point, according to Wood, Mercado became increasingly fidgety, antsy, moving his hands and feet around, but still made eye contact with Wood when answering questions. App. 4a, 27a. Wood explained that based on his training,

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[9] The district court had two transcripts of the interaction between Wood and Mercado. Both reflect that Mercado told Wood that it was his "lady's cousin." App. 3a n.2.

answering simple questions with questions appeared to be an attempt for "the brain to buy time to fabricate a response." App. 4a, 27a.

To further quell his suspicions about the car's ownership, Wood returned to the Charger to ensure that the VIN matched the documents Mercado had given him. App. 5a, 27a. He also ran an NCIC check and confirmed the car had not been reported stolen. *Id.* Wood then gave Mercado his documents back, handed him a traffic citation, explained the process to settle the citation and told him that he was "free to go." *Id.* Wood had held Mercado on the side of the road for approximately seven minutes. *Id.*

Before Mercado reached the Charger's rear bumper, Wood called out to him:

Wood: Excuse me, Aaron.

Mercado: Yeah?

Wood: Is it okay if I ask you some questions?

Mercado: What?

App. 5a, 28a. Mercado, submitting to Wood's authority, then walked toward Wood who was standing near the passenger door of his patrol vehicle. *Id.*

Wood: Is it okay if I ask you some questions?

Mercado: Regarding?

Wood: Huh? Well, I'm just a little confused, is all, on your travel here, your trip. It's a little confusing to me, you know what I mean?

Wood then asked Mercado a series of questions about the car he had already determined was not stolen and was properly registered and insured. Next, he asked questions about Mercado's mistress. He demanded specifics about the planned rendezvous, including how Mercado intended to pay for the weekend. App. 28a-29a. The unrelenting questioning made Mercado

uncomfortable because he believed the officer intended to tell his wife. Vol. I, 134. Mercado's evident discomfort in turn made Wood concerned for his own safety. App. 29a. So he asked Mercado if he had weapons in the car. Mercado said he did not. Id. Wood asked if he had any drugs or marijuana in the car. *Id.* As Mercado was borrowing the car, he replied, "not that I'm aware of." *Id.*

Wood asked Mercado if he could search the car. Mercado replied, "No." App. 30a. Wood wanted to know why and Mercado said he thought this was just about a ticket. *Id.* Undeterred, Wood said he would have his drug dog sniff the exterior of the Charger because of "concerns" he had about Mercado's travel plans. *Id.* He added that he did not need Mercado's permission. *Id.* At this point, approximately fifteen minutes had passed since Wood stopped Mercado. App. 31a.

Wood's drug dog alerted to portions of the car. Wood arrested Mercado, putting him in handcuffs and then in the back of his patrol SUV. App. 31a-32a. He again asked Mercado to let him search the car. Mercado again refused. *Id.* Later, the officer's supervisor arrived and convinced Mercado to allow them to search. App. 33a. When they did, inside the cabin they found two bundles of heroin and a firearm. *Id.*

B. Procedural history

A grand jury indicted Mercado on one count of conspiracy to possess with intent to distribute heroin, in violation of 21 U.S.C. § 846; one count of possession with intent to distribute heroin, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A); and one count of carrying a firearm during a drug trafficking crime, in violation of 18 U.S.C. § 924(c). App. 7a-8a.

Mercado moved to suppress the evidence the officers obtained during the search, arguing that it was the fruit of an unlawful seizure. App. 1a-2a, 7a-8a. Mercado explained that he was seized throughout the interaction with the officer. App. 34a. Although the officer said he was free to go, Mercado argued he was never free to do so. Given the officer's show of authority, a reasonable person in his position would not have believed he could ignore the officer and continue with his travels.

The district court disagreed. It said after Wood gave Mercado a traffic citation and returned his documents, their subsequent interaction became consensual. App. 10a, 36a-37a. The officer then developed reasonable suspicion during this encounter which allowed him to detain Mercado while he had his drug dog sniff the car for drug odors. App. 39a.

The case proceeded to trial and the jury found Mercado guilty of all three counts. App. 8a. The district court sentenced Mercado to a prison term of 180 months. *Id.*

Mercado appealed the denial of his suppression motion. App. 8a. He argued that the aggregate circumstances demonstrated that a reasonable person in his position would not have felt free to disregard the officer and drive away. Appellant's Open Brief (AOB) at 23. Mercado had barely reached the end of the officer's SUV before the officer called out to him. The officer then immediately began a series of accusatory questions. Given the authority the officer displayed and his complete control of the interaction, Mercado said no reasonable person of color would have felt he could ignore the officer's requests, let alone get into his car and drive away. AOB at 23-24.

The Tenth Circuit affirmed the district court's ruling. App. 12a. The court concluded an objectively reasonable person in Mercado's position would

have felt free to not answer the officer's questions and go on his way. *Id.* Relying on *United States v. Easley*, 911 F.3d 1074, 1081 (10th Cir. 2018), the court said it would not "interject[] race into the objective reasonable person test . . . for determining whether a citizen-police encounter was consensual or instead a Fourth Amendment seizure." App. 13a.

Mercado petitioned for a rehearing. He explained that dismissing race as a factor to conclude his interaction with the officer was consensual was incompatible with this Court's decisions, and those of other circuits, finding race and age are relevant to the seizure analysis. Although the panel ordered the government to respond, it denied Mercado's petition.

Reasons for Granting the Writ

I. Mercado's is the ideal case to ask whether race is a factor that informs a reasonable person's view of police interactions.

Race is an objective fact that affects both how a law enforcement encounter is perceived and the reasonableness of the response to it. This case asks whether the race of a motorist who is asked by an officer to answer more questions immediately after he is told he can leave is relevant to the seizure analysis described in *Florida v. Bostick*, 501 U.S. 429, 432, 436 (1991).

A person is seized when "an officer, by means of physical force *or show of authority*, has in some way restrained the liberty of a citizen." *Id.* at 434 (emphasis added). The "crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Id.* at 435. By itself, race does not determine whether a person has been seized. But it can affect what a person thinks is happening and thus the response to it. The police methods used to

to prolong a traffic stop to interrogate, and the response produced, must be judged from the view of a reasonable person in the selected motorist's position, including his race.

"[I]t is no secret that people of color are disproportionate victims" of suspicionless stops. *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (citing M. Alexander, *The New Jim Crow*, 95-136 (2010)).[10] Here, Mercado, a Mexican immigrant, was traveling alone. After Wood, a white officer, issued a traffic citation, he told Mercado he could leave. Wood no longer had a reason to keep him there. Yet, before Mercado even stepped past the front of the officer's SUV, the officer called out to Mercado, asking if he would answer more questions. App. 5a. Mercado's response was halting: he asked, "what?" followed by, "regarding?" The officer then launched into a line of persistent and accusatory questioning. It was apparent that his objective was not to gain further insight into the traffic infraction, but to force inconsistent or evasive comments from Mercado that he could claim were suspicious. Standing on the side of a highway, braced by desert and with no one else around, Mercado was singled out and isolated. A reasonable person in his position now would think he was the officer's "target." A reasonable person also might think it was because of race.

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[10] *See also* Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 Miss. L.J. 1133, 1152 & n. 87 (2012); *Floyd v. City of New York*, 959 F.Supp.2d 540, 557 (S.D.N.Y.) ("Those who are routinely subjected to stops are overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract the unwanted attention."); & *id*. (those stopped testified they "feel unwelcome" in parts of the city, and "distrustful of the police"; such "alienation cannot be good for the police, the community, or its leaders. Fostering trust and confidence between the police and the community would be an improvement for everyone.").

Police stops are inherently intimidating. Officers press their position and omit mentioning a person's right to decline to answer or refuse a search. The more focused and intense the officer's inquiry, the more coercive the encounter risks becoming and the less likely a reasonable person would believe they could stop it. Add the abysmal race record noted in *Strieff* and a person of color is even more likely to feel helpless or afraid to change what is happening. *See Dozier*, 220 A.3d at 944 (given the well-publicized and documented examples of abuse at the hands of "hyper-vigilant" officers, persons of color "would reasonably be especially apprehensive" to walk away or refuse to answer questions). Race, and the history of race, cannot be underestimated or excised from how police encounters unfold. *See id.* ("The fear of harm and resulting protective conditioning to submit to avoid harm at the hands of police is relevant to whether there was a seizure because feeling 'free' to leave or terminate an encounter with police officers is rooted in an assessment of the consequences of doing so.").

Race, like age, is an objective fact. A court should consider whether such facts can affect people's responses. Would a reasonable person of Mercado's race in his position have felt free to ignore the officer or stop the encounter? Race inevitably informs one's perceptions and so, in turn, behavior. A court cannot reliably assess whether a reasonable person felt free to act contrary to police authority without considering the uncomfortable implications of race. *See*, *e.g.*, *United States v. Curry*, 965 F.3d 313, 332 (4th Cir. 2020) (Gregory, CJ., concurring) ("There's a long history of black and brown communities feeling unsafe in police presence."); *Brown*, 925 F.3d at 1156 n. 2 (noting Department of Justice investigated the Seattle Police Department and discovered "a pattern or practice of using unnecessary or excessive force" and

reported "serious concerns" about "racially discriminatory policing."); *Floyd*, 959 F.Supp.2d at 562 (finding the "disproportionate and discriminatory stopping of blacks and Hispanics" by New York City police violated the Equal Protection Clause); & *id.* (statistical and anecdotal evidence showed minorities are "treated differently than whites.").

Moreover, this Court has held other objective facts, such as failing to inform a person he may end the encounter or that she can refuse consent, loom large in a seizure analysis. *Bostick*, 501 U.S. at 432. In other words, law enforcement officials must somehow convey to the reasonable person in the individual's position that cooperation with the officer is voluntary. This Court has never excluded any objective circumstance in a seizure analysis. *J.D.B. v. North Carolina*, 564 U.S. 262, 280 (2011). All objective circumstances surrounding an encounter, including race, must be examined to ensure a citizen, exercising his constitutional right to interstate travel, has not been illegally seized.

II. The Tenth Circuit's decision is incorrect.

According to this Court's precedent, a district court must take into account all the circumstances surrounding an officer's confrontation of a motorist from the perspective of a reasonable person in the motorist's position. *Brendlin v. California*, 551 U.S. 249, 255 (2007). The Tenth Circuit has categorically dismissed race as an objective factor for a court to consider in its seizure analysis. Race is irrelevant, it said, because "there is no uniform life experience for persons of color . . . ." *Easley*, 911 F.3d at 1082; *accord*, *Mercado*, App. 13a. It went further and wrote "there is no uniform way to apply a reasonable person test that adequately accounts for racial differences consistent with the objective standard for Fourth Amendment seizures."

Easley, 911 F.3d at 1082. The circuit's hubris is astounding. How is it then that other courts have found that people of color, based on everyday experience, are "conditioned to presume that asserting their constitutional rights in a police encounter will increase their likelihood of physical harm or arrest." *United States v. Easley*, 293 F.Supp.3d 1288, 1306 (D.N.M. 2018); *see also Dozier*, 220 A.3d at 944-45 (relying on statistical reports to conclude that "not all encounters with the police proceed from the same footing, but are based on experiences and expectations, including stereotypical impressions, on both sides."); *Knights*, 989 F.3d at 1290 (Rosenbaum, J. concurring) (explaining that "free to leave" test makes citizen responsible for judging whether officer is detaining him, "an especially tricky dilemma for Black citizens, who studies indicate historically have disproportionately suffered violence in law-enforcement encounters.").

Any "commonsense conclusions about behavior and perception" that make a reasonable person in the motorist's position highly vulnerable to pressure, or less equipped to resist coercive tactics, must be part of any 'free to ignore' analysis. *J.D.B.*, 564 U.S. at 272. This Court already has ruled on characteristics appropriate to consider. *See e.g., Haley v. Ohio*, 332 U.S. 596, 600-01 (1948) (age); *Payne v. Arkansas*, 356 U.S. 560, 562-63 (1958) (education level); *Fikes v. Alabama*, 352 U.S. 191, 193-94 (1957) (general intelligence level). More importantly, the Court also has recognized race as relevant to seizure questions. In *United States v. Mendenhall*, 446 U.S. 544, 558 (1980), Mendenhall disputed her encounter was consensual and asserted that as a black woman, she found the officers even more threatening. The Court agreed those "factors were not irrelevant," although in her case, they were not dispositive. *Id.* Likewise, the Court's discussion of tension between

police and minorities in *Terry v. Ohio*, 392 U.S. 1, 14 n. 11 (1968) not only confirms the relevance of race in seizure issues, it establishes just how long race has been deemed significant in police encounters.

Other district and circuit courts agree. In *United States v. Smith*, 794 F.3d 681, 688 (7th Cir. 2015), the court, citing *Mendenhall,* held it is permissible to consider race. Race, the court said, is relevant "in everyday police encounters with citizens in Milwaukee and around the country" and "empirical data demonstrat[es] the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system." 794 F.3d at 688; *see also Betts v. City of Chicago, Illinois*, 784 F.Supp.2d 1020, 1025-27 & n. 1 (N.D. Ill. 2011) (addressing admissibility of black plaintiff's prior arrests when they could be false arrests and detailing evidence of racial profiling and its impact on people of color, including the response to police and advice to children); *United States v. Easley*, 2018 WL 1882853, at * 6 (S.D. Oh. Apr. 19, 2018) (unpublished) (finding no reasonable suspicion to detain or search black defendants and quoting Justice Sotomayor's *Strieff* dissent to point out that people of color are disproportionately subjected to police scrutiny); *State v. Spears*, 839 S.E.2d 450, 463 (S.C. 2020) (Beatty, J., dissenting) (totality of the circumstances viewed through a "truly objective eye would acknowledge the fact that African-Americans are being reasonable when they respond in accordance with their collective experiences gained over two hundred years."); *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016) (citing hugely disproportionate targeting of black men in Boston to explain why the defendant fled from police); *In re J.M.*, 619 A.2d 497, 512-13 (D.C. App. 1992) (Mack, J., dissenting, but concurring in remand) (noting "race is a factor that has for many years engendered distrust between black males and law

enforcement" and suggesting no reasonable black male, however innocent, would feel free to ignore a drug interdiction team).

The Ninth Circuit too has held race is a pertinent objective factor to consider when analyzing whether a person was seized. In *United States v. Washington*, 490 F.3d 765 (9th Cir.2007), it found that an African-American's consent to search, after being stopped late at night on a dark street and led away from his car, was not voluntary. Its conclusion acknowledged the "tension between the African-American community and police officers" and referenced two well known incidents in which white officers had shot African-Americans on those streets, killing one. *Id.* at 776. Indeed, police pamphlets were distributed afterward, advising people to "follow the officer's directions" and "if ordered, comply with the procedures for a search." *Id.* at 769, 776. Thus, the court stated it had "no confidence" that Washington's consent to search was voluntary. *Id.* at 776.

A 'reasonable person' evaluation is based on someone in the individual's position. *Brendlin*, 551 U.S. at 256-57. When, like here, the personal characteristic of race is an objective fact, it is appropriate for a court to consider if race had a material effect. The issue in *Brendlin* was "whether a reasonable passenger would have perceived that the [officer's] show of authority was at least partly directed at him, and that he was thus not free to ignore the police presence and go about his business." *Id.* at 261. Race is pertinent when it has been shown to exacerbate interactions with police that already are fraught and tense. As it is, many people naturally comply with shows of police authority. Imagine the effect when one is also a member of a targeted population. Like Mendenhall, Mercado is a person of color. Like Washington, he was stopped and led away from his car. Nothing or no one

indicated he was free to ignore the officer and get back in his car, or even to decline to answer the officer's questions. Ultimately, the point of any inquiry is to decide whether all the "'objective circumstances add up'" to a seizure. *J.D.B.*, 564 U.S. at 278 (quoting *Thompson v. Keohane*, 516 U.S. 99, 113 (1995)). When an individual's race is known or reasonably knowable to the confronting officer, it is an objective circumstance upon which a court is expected to deliberate. Even more so when the person of color is alone with a white officer.

A. The Tenth Circuit's decision is inconsistent with this Court's precedents in similar contexts and ignores the commonsense conclusions communities of color draw from their shared experience.

Without question, personal characteristics inform whether a reasonable person in the individual's position feels free to stop talking to police or knows he can assert her constitutional rights without retribution. For example, in *J.D.B*, this Court held "a child's age properly informs the *Miranda* custody analysis" because "children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave." 564 U.S. at 264-65. The Court reasoned that age "is a fact that 'generates commonsense conclusions about behavior and perception.'" *Id.* at 272 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting)). Being a person of color in the United States also forces commonsense conclusions that do not compromise the objective inquiry of seizure analyses, the Tenth Circuit's glib opinion notwithstanding.

For example, in *Easley*, the district court applied this Court's reasoning in *J.D.B.* to include race as an objective fact relevant under the totality of the circumstances. 293 F.Supp.3d at 1306-08. Race, like age, is a personal

characteristic that people cannot control. Yet, their effect on interactions with the police are measurable and well known.[11] Race is arguably the more compelling fact. For while a child's behavior may be based on an officer's perceived authority, a person of color's response is rooted in a centuries-long history of abuse that continues today. Abuses of power, injury, and death at the hands of law enforcement affect persons of color disproportionately. *See* Brief of Amici Curiae Center on Race, Inequality, and the Law, et al, *Knights v. United States*, No. 21-198 (factually detailing dangerousness of police interactions with persons of color and explaining how race reasonably influences their perceptions of police).

African-Americans are arrested at a much higher rate than whites. Police -related injury is almost five times more likely with African-Americans than with whites.[12] Although drug use is similar to other groups, the majority of people arrested for drug crimes are African-Americans. At about 13% of the American population, African-Americans comprise almost 60% of those incarcerated for drug crimes.[13] These statistics led an FBI director to confess

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[11] The district court relied, in part, on the work of Professor Devon Carbado, who noted substituting race for age in the analysis was not to "suggest that blacks are to whites what children are to adults." Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Calif. L. Rev. 125, 141-42 (2017). Rather, "mindful of the racial infantilization of black people under both slavery and Jim Crow," Carbado made the substitution "simply to suggest that even if one thinks that age is more relevant than race in determining whether a person is seized, the claim that race is irrelevant is difficult to sustain." *Id.*

[12] Sirry Alang, et al., *Police Brutality and Black Health: Setting the Agenda for Public Health Scholars*, Am. J. Public Health 107(5): 662-665 & n. 12 (May, 2017).

[13] Paul Butler, *The White Fourth Amendment*, 43 Tex. Tech. L. Rev. 245, 253-54 & n. 79 (Fall, 2010).

that police officers of all races view African-Americans and Caucasians differently.[14]

Such distressing facts of life in the United States are not lost on the communities of color, whether or not they have been directly involved in police-civilian encounters. The reality of the criminal justice system's racial disparity spawns feelings of anger, grief, stress, anxiety, hopelessness, and powerlessness.[15] What this means in a police-civilian situation is persons of color ordinarily feel more vulnerable, expecting to be treated as second-class citizens.[16] As a consequence, most communities of color, develop a strategy to deal with the police. The strategy typically involves deference - doing whatever the officer says and not talking back.[17] And every responsible parent of a child of color will pass on that advice. *See Strieff*, 136 S.Ct. at 2070 (Sotomayor, J., dissenting) ("for generations, black and brown parents have given their children 'the talk' – instructing them never to run down the street;

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[14] Michael Schmidt, *FBI Director Speaks Out on Race and Police Bias*, New York Times (Feb. 12, 2015), available at, https://www.nytimes.com /2015/02/13/us/politics/fbi-director-comey-speaks-frankly-about-police-view-of-blacks .html.

[15] Alang, Am. J. Public Health 107(5): 662-665 & nn. 3, 14, 15 & 17; Jacob Bor, et al., *Police Killings and their Spillover Effects on the Mental Health of Black Americans: a Population-Based, Quasi-Experimental Study*, thelancet.com (June 21, 2018), available at, http://dx.doi.org/10.1016/S01406737(18)31130-9.

[16] Tracey Maclin, *"Voluntary" Interviews and Airport Searches of Middleeastern Men: The Fourth Amendment in a Time of Terror*, 73 Miss. L.J. 471, 523 (2003); Lenese Herbert, *Bete Noire: How Race-Based Policing Threatens National Security*, 9 Mich. L. Rev. 149, 176-77 (Fall, 2003).

[17] Paul Butler, *Stop and Frisk and Torture-Lite: Police, Terror of Minority Communities*, 12 Ohio St. J. Crim. L. 57, 63 (Fall, 2014); Lee, 81 Miss. L.J. at 1152; Lenese Herbert, *Can't You See What I'm Saying? Making Expressive Conduct a Crime in High-Crime Areas*, 9 Geo. J. on Poverty L. & Pol'y 135, 137-38 (Winter, 2002).

always keep your hands where they can be seen; do not even think of talking back to a stranger – all out of fear of how an officer with a gun will react to them.").[18]

Race, like age, is not necessarily "a determinative, or even significant factor in every case . . . . It is, however, a reality that courts cannot simply ignore." *J.D.B.*, 564 U.S. at 277. Thus, "just as youth or age may impact a court's understanding of the circumstances, this Court must consider race to fully apprehend the encounter between" Mercado, a Mexican immigrant, and Wood, a white officer. *Easley*, 293 F.Supp.3d at 1307; *see also Mendenhall*, 446 U.S. at 558 (black woman's race and gender relevant to whether she "felt unusually threatened by officers" and to whether consent voluntary). Ignoring race makes "the inquiry more artificial." *J.D.B.*, 564 U.S. at 279. Taking it into account, as one factor among others, allows the 'totality of the circumstances' inquiry of a 'free to ignore' analysis to accurately reflect the reality facing people of color in the United States.[19]

III. Court are divided over whether race can be considered in the Fourth Amendment seizure analysis.

The firm divide amongst the circuits on the issue of race in the consent analysis is a persuasive reason for this Court to address it. As discussed in Section II and noted and cited in footnotes 4-7, a circuit split exists regarding

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[18] *See also* Fleda Jackson, *Anticipated Negative Police-Youth Encounters and Depressive Symptoms among Pregnant African American Women: A Brief Report*, J. Urban Health 94(2): 259-65 & nn.10, 11 (Apr., 2017); Russell K. Robinson, *Perceptual Segregation*, 108 Colum. L. Rev. 1093, 1125 (June, 2008).

[19] Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror,"* 26 Pace L. Rev. 1 (2005) (reviewing campaign by federal, state and local governments in 1930s to remove hundreds of thousands of persons of Mexican ancestry from United States, many of whom were U.S. citizens).

the consensual-encounter test. The majority of circuits to have considered the issue permit consideration of race in the totality of circumstances calculus.[20] A person driving cross-country would now have his/her race deemed relevant depending on where a seizure occurs.

While the current split is now 3-2 against the Tenth Circuit's position, the decision in the Eleventh Circuit, which adopted *Easley*'s rationale, was not unanimous. In her comprehensive concurrence, Judge Rosenbaum highlights the absurdity of the current consensual-encounter test and urges this Court to reconsider its practicality. *Knights*, 989 F.3d at 1289-1305. Judge Rosenbaum discusses the cultural history that makes people of color particularly vulnerable to police presence and suggests an affirmative advisement of a right to decline – i.e. a bright-line test – is a race-neutral,

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[20] In deciding Fourth Amendment issues impacted by race, federal and state district courts have used reasoning similar to the Seventh and Ninth Circuits, as well as the D.C. Court of Appeals. *See Easley*, 2018 WL 1882853, at *6 (officers may not detain and search individuals based on "their own views of what 'types' of individuals appear, to them, to be 'suspicious'" because that "inevitably" exacerbates the "overpolicing of the underprivileged and of communities of color."); *United States v. Hill*, 2019 WL 1236058, at *3 (E.D. Pa. Mar. 11, 2019) (commenting that courts need to recognize tension between law enforcement and communities of color "as both real and as a meaningful consideration on the part of any person of color stopped as a suspect."); *Doe v. City of Naperville*, 2019 WL 2371666, at *4 (N.D. Ill. June 5, 2019) (analyzing unlawful seizure claim from perspective of "reasonable twelve-year-old, African American child"); *Commonwealth v. Evelyn*, 152 N.E.3d 108, 120 (Mass. 2020) (describing split in federal circuits and acknowledging that "troubling past and present of policing and race are likely to inform how African-Americans and members of other racial minorities interpret police encounters."); *State v Johnson*, 440 P.3d 1032, 1042 n. 5 (Wash. Ct. App. 2019) (noting that race could be a factor in assessing reasonable person's "perceptions" but there officers did not know defendant's race when they decided to confront him); *In re D.S.*, 2021 WL 212363, at *6 (Md. Ct. Spec. App. Jan. 21, 2021) (in free-to-leave analysis, court may consider "perceptions about race-related risks in interacting with [] officers.").

narrowly-tailored solution to the compelling interest of safeguarding a minority population's Fourth Amendment rights. *Id.* at 1299.

If this circuit split is not resolved the Fourth Amendment rights of persons of color in parts of this country will continue to be diminished. Substantial evidence establishes the "commonsense reality" that the country's historical treatment and overpolicing of people of color renders them unlikely to assert their constitutional rights and feel free to leave. Thus, in the same way that the courts may consider that a minor is less likely to feel free to leave an interaction with police, courts can consider the "commonsense reality" that race is a relevant contextual factor for the reasonable person analysis. *J.D.B.*, 564 U.S. at 572.

Moreover, if the circuit split remains, the reasonable person test will continue to create discord because it is biased. It assumes that a person's interactions with the police is a generic experience when it is not. To hold, as the Tenth and Eleventh Circuits do, that an individual's race can never be considered among "all the circumstances surrounding the encounter," *Bostick*, 501 U.S. 429, would elevate potential problems at the cost of ignoring a very large current problem. When race is ignored in a consensual-encounter analysis, communities that are especially vulnerable to police encounters because of their race are systematically disadvantaged in comparison to people who are not. Thus, although an individual's race will not be a factor in every case, it is "a reality that courts cannot simply ignore." *J.D.B.*, 564 U.S. at 277. Common sense and the shared experience of communities of color demonstrate race can be a consequential objective fact that heightens the reasonable person's perception that he has been seized.

IV. Even if the Court does not directly address whether race may be part of a court's Fourth Amendment seizure analysis, the Court still can recognize race's influence on how one responds to police by revisiting the analysis and emphasizing another objective factor - 'freedom to ignore.'

After purportedly releasing Mercado, the officer continued to display his authority by calling him back to answer more questions. He offered no explanations. As a Mexican immigrant, alone on the side of a remote section of highway, this treatment, in turn, multiplied Mercado's feeling of being vulnerable and resurrected a fear of being mistreated. *Cf. Bostick*, 501 U.S. at 437, 439 (cramped confines of bus and omitting right to refuse consent are factors affecting whether consent was voluntary). Without knowing his rights, Mercado knew only that deference was safest. Mercado did nothing but submit to what a reasonable person of color in his position would understand was an unmistakable imbalance of power.

After dismissing race's relevance to seizure analyses, the Tenth Circuit claims to not know how a "reasonable person test that adequately accounts for racial differences" might still let law enforcement "know ex ante what conduct implicates the Fourth Amendment." *Easley*, 911 F.3d at 1082. Its stupefaction stems from its firm belief an officer is "under no obligation to inform [the individual] that she was free not to cooperate with him or to answer his questions." *Id.* at 1082. A blanket license to withhold a constitutional right will never rectify the deleterious burden of race.

Fortunately, this Court has a suggestion aimed toward the panel's dilemma. If "police officers are competent to account for other objective circumstances . . . such as the length of questioning," they are competent to evaluate the objective fact of race on circumstances they control. *J.D.B.*, 564 U.S. at 279. They need only "common sense" to know that race affects the

reasonable person's understanding of a "freedom of action." *Id.* at 275, 280. An objective seizure inquiry can coexist with Fourth Amendment rights. When race is known or knowable, an officer can mitigate the enhanced vulnerability and fear people of color feel by conveying the 'freedom to act.' *See Knights*, 989 F.3d at 1299 (Rosenbaum, J., concurring) (a "narrowly tailored solution that is race-neutral . . . would require officers to advise citizens whether they are free to leave before questioning begins.") *see also* 3 Wayne R. LaFave, Search and Seizure § 8.2(i) at 214 (2d ed. 1987) (warnings of Fourth Amendment rights "show the individual that the police 'are prepared to recognize' [the] choice to assert [] constitutional rights.") (quoting *Miranda*, 384 U.S. at 468); *J.D.B.*, 564 U.S. at 278, 280 (officers need only "common sense" to know a juvenile is not an adult and so "internalize and perceive" attendant circumstances differently). In other words, when race matters, rights can tip the balance of power toward neutral.

The Tenth Circuit's protest is already noted but obliging officers to directly inform an individual of her rights is not the only way it can be done. Like the FBI director earlier, acknowledging that race affects how one is treated is the first step. The second might be to modulate approach and tone accordingly. Such measures may remain fluid, responsive to events and behavior taking place in real-time. But the effect of trying them may mirror what *Drayton* found: "passengers know that their participation enhances their own safety and the safety of those around them." 536 U.S. at 205. Ironically, compliance rates not only may remain the same, they may rise.

In contrast to the Tenth Circuit, *Easley*'s district judge, Judge Vázquez, and Circuit Judge Rosenbaum, grasped a way to reconcile the competing interests of the Fourth Amendment and crime interdiction. Both wrote that

when an investigation targets a person of color, somehow letting that person know cooperation is voluntary gives her "the opportunity to meaningfully comprehend both the officer's purpose and [the] right to refuse consent." *Easley*, 293 F.Supp.3d at 1309; *Knights*, 989 F.3d at 1299-1300 (same). Conveying one is 'free to act' can be as simple as using a pleasant tone in a respectful manner. Not only can these measures compensate for the disparate treatment of people of color, but as *Drayton* suggests, they will not impede law enforcement operations since passengers want to participate in their own safety. 536 U.S. at 205. In this way, the unfortunate effects of race are addressed, Fourth Amendment rights are preserved, and the task of drug interdiction yet proceeds.

Finally, allowing the 'freedom to ignore' makes it more difficult for an officer to exploit race, directly or indirectly. Again, there is a natural presumption that an officer's authority demands compliance. *See Bostick*, 501 U.S. at 432, 437 (emphasizing police did not convey compliance was required when they advised of right to refuse consent); *see also id.* at 446-47 (Marshall, J., dissent) (the majority opinion 'repeatedly stresses' police told Bostick he could refuse search). The presumption is especially pronounced among people of color. What lawyers and judges know cannot reasonably be expected of the public, let alone a community with a shared experience of discrimination. *See Bostick*, 501 U.S. at 447 (J. Marshall, dissenting) (a reasonable person unaware of rights would not know police cannot use a refusal to cooperate against them). When the officer conveys that a person has rights – whether directly or otherwise, it reduces the taint of implicit coercion. Conversely, deliberately withholding information or taking advantage of a lack of knowledge allows intimidation and fear to replace truly voluntary consent.

Conclusion

In conclusion, the decisions of the Tenth Circuit are tragically flawed. To deny persons of color the reality of their experiences could only be done by someone who has not had them. The circuit's refusal to recognize the legitimate burden borne by people of color is then compounded by its zero-sum approach to drug interdiction and constitutional rights. Its limited analysis is unable to conceive of anything but the status quo, which is known to be broken. It is up to another court then to recognize the role race plays in police interactions and to offer guidance on how best to support law enforcement while respecting people's rights.

Mercado asks this Court to grant this Petition and review and reverse the Tenth Circuit's decision.

A. At a minimum, the Court should hold this petition pending disposition of *Knights v. United States*, No. 21-198, or make Mercado's a companion case, as both petitioners ask this Court to consider whether a court is categorically barred from considering a person's race when deciding if that person has been seized under the Fourth Amendment.

If the Court grants Knights' certiorari petition, it should also grant Mercado's. For the reasons discussed in this petition, Mercado's case would be a valuable companion case to *Knights* given the similarity of the issues. If the Court is not inclined to do so, then Mercado requests it hold his petition until *Knights* is resolved, and then grant his petition, vacate the judgment, and remand for reconsideration in light of that decision (GVR).

A GVR is appropriate when intervening developments" – like a new opinion from this Court – "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a

redetermination may determine the ultimate outcome of the matter." *Wellons v. Hall*, 558 U.S. 220, 225 (2010) (per curiam) (citing *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam)) (quotation marks omitted). "This practice has some virtues. In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before [it] rules on the merits, and alleviates the potential for unequal treatment that is inherent in [its] inability to grant plenary review of all pending cases raising similar issues[.]" *Lawrence*, 516 U.S. at 167 (quotation marks omitted). This flexible approach "can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit [the Court's] plenary review." *Id.* at 168.

Here, "the equities of the case" would support a GVR order if the Court does not grant plenary review to Mercado. *Lawrence*, 516 U.S. at 167-68. Regardless of the outcome in *Knights*, the Court's decision will necessarily delve into Fourth Amendment seizure analysis in general and the application of race in that analysis in particular. A GVR will therefore "assist[]" the Tenth Circuit "by flagging a particular issue that it does not appear to have fully considered[.]" *Lawrence*, 516 U.S. at 167. If the Court holds that race can be considered in the seizure analysis, that will upend the Tenth Circuit's decisions that it cannot be. But even if the Court reaches the opposite conclusion, there is still a "reasonable probability" that its decision would cause the Tenth Circuit to change its ruling in context "if given the

opportunity for further consideration[.]" *Wellons*, 558 U.S. at 225 (quotation marks omitted). Given that both Knights and Mercado have asked the Court to revisit how the free-to-leave test is applied, the Court's decision can affect the Tenth Circuit's view that certain objective circumstances are inconsequential to the aggregate analysis. Accordingly, at a minimum, if the Court grants Knights' certiorari petition it should hold Mercado's, and thereafter GVR his case.

Respectfully submitted,

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