No. 21-6223

IN THE SUPREME COURT OF THE UNITED STATES

AARON MARTIN MERCADO-GRACIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

NATASHA K. HARNWELL-DAVIS
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the lower courts correctly determined, on the particular facts of this case, that petitioner was not seized for Fourth Amendment purposes when a police officer -- after concluding a traffic stop for speeding, returning petitioner's license and registration, and informing petitioner that he was free to go -- engaged petitioner in additional conversation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 989 F.3d 829. The opinion of the district court (Pet. App. 22a-42a) is not published in the Federal Supplement but is available at 2018 WL 2303104.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2021. A petition for rehearing was denied on June 7, 2021. The petition for a writ of certiorari was filed on November 3, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted of conspiring to possess one kilogram or more of heroin with intent to distribute, in violation of 21 U.S.C. 846; possessing one kilogram or more of heroin with intent to distribute, in violation of 21 U.S.C. 841(b)(1)(A) (2012); and using or carrying a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c) (2012). Judgment 1-2; see Pet. App. 7a-8a. The district court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-21a.

1. On March 25, 2016, a state police officer "clocked" petitioner driving "ninety-two miles an hour in a seventy-five-mile-an-hour zone" on a highway in New Mexico. Pet. App. 2a. The officer, who was in uniform and driving a marked patrol car, drove after petitioner and pulled him over. Id. at 24a; see 11/7/17 Hr'g Tr. 35. The officer approached the passenger side of petitioner's car, told him that he had been pulled over for speeding, and asked for his license and registration. Pet. App. 24a. Petitioner handed the officer his driver's license, car registration, and proof of insurance; at the officer's direction, petitioner also got out of the driver's seat and stood near the patrol car while the officer used a computer in the patrol car.

Id. at 2a. A camera on the patrol car recorded their ensuing conversation. See id. at 24a.

The car was registered to Hector Ramirez Reyes and insured under a different name, Fabian Reyes. Gov't C.A. Br. 2-3. When the officer asked petitioner who owned the car, petitioner said "his cousin Fabian." Id. at 3. When the officer asked petitioner what Fabian's last name was, petitioner described Fabian as his "lady's husband's cousin[]" and said that he did not know Fabian's last name, but claimed that Fabian had loaned him the car to drive from Phoenix to Albuquerque for the weekend. Ibid. When the officer asked petitioner why he was going to Albuquerque, petitioner gave an evolving series of answers, saying first that he owned a remodeling business; then that he was in the area not for work but "just so [he] can drive around"; and then that he had "a lady" to meet. Pet. App. 3a-4a (citation omitted). After a total of about seven minutes, the officer finished writing a citation, gave petitioner back his license and registration documents, and told petitioner, "You're free to go." Id. at 5a (citation omitted).

As petitioner walked away, the officer remained by the patrol car and asked him, "Is it okay if I ask you some questions?" Pet. App. 5a (citation omitted). Petitioner turned around and replied, "Regarding?" Ibid. (citation omitted). In a "cordial and friendly" tone, the officer then spent "three more minutes" asking petitioner some questions about his travel. Id. at 6a (citation

omitted). In response to those questions, petitioner said that he owned a different car that he shared with his partner; that he had borrowed the car he was currently driving, with the owner's permission, because he was meeting a lady in Albuquerque; that he knew the woman's first name and telephone number, but did not know where he was meeting her; and that he did not bring any credit cards with him on the trip and instead planned to pay cash. Ibid. During the course of the conversation, petitioner became visibly nervous. Ibid.

The officer found petitioner's answers odd and his demeanor suspicious. Pet. App. 28a-29a. After petitioner refused to consent to a search of the car -- which the officer told petitioner that he "'definitely'" had the right to do -- the officer said that he had "'some concerns'" and was going to "deploy [a drug-sniffing] dog on the exterior of the vehicle." Id. at 30a (citations omitted). After radioing for assistance and patting petitioner down for weapons, the officer walked a drug-sniffing dog around petitioner's car. Id. at 30a-31a. The dog alerted to the presence of drugs, at which point the officer handcuffed petitioner and told him that he would be detained while the officer applied for a search warrant. Id. at 31a-32a. A second officer then arrived on scene. Id. at 33a. The second officer told petitioner that the warrant process "would take a long time," and petitioner changed his mind and consented. Ibid. After petitioner signed a written consent form, the officers searched the car and

found two bundles of heroin and a gun with ammunition. Ibid.; Gov't C.A. Br. 10.

A later search of petitioner's phone revealed that he and his cousin Fabian had been working together to deliver drugs, both on that occasion and prior trips. See Trial Tr. 124-130.

2. A grand jury in the District of New Mexico charged petitioner with conspiring to possess one kilogram or more of heroin with intent to distribute, in violation of 21 U.S.C. 846; possessing one kilogram or more of heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(A) (2012); and using or carrying a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c) (2012). Superseding Indictment 1-10. Before trial, petitioner moved to suppress the heroin and gun found in the car. D. Ct. Doc. 47, at 1 (July 10, 2017). After an evidentiary hearing, the district court denied petitioner's motion. Pet. App. 22a-42a.

The district court explained that the encounter included an initial traffic stop that was valid and reasonable in scope, Pet. App. 34a-35a, followed by a consensual conversation that did not constitute a seizure because a reasonable person in petitioner's circumstances "would [have] believe[d] he was free to leave," id. at 36a (citation omitted). The court observed that the officer had by then told petitioner that "he was free to go," had returned his license and registration, "spoke in a friendly manner," "let [petitioner] walk back towards his own car," "did not display a

weapon, did not touch or restrain [petitioner], and did not stand in his way." Ibid. The court also noted that, after the officer asked petitioner if he would answer more questions, it was petitioner who turned around and walked back toward the officer. Ibid. The court additionally determined that, by the end of the consensual conversation, the officer had reasonable suspicion to walk his drug-sniffing dog around the outside of petitioner's car and that the dog's alert in turn provided probable cause for a search. Id. at 37a-42a.

The case proceeded to trial, and the jury found petitioner guilty on all counts. Pet. App. 8a. The district court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4.

3. The court of appeals unanimously affirmed. Pet. App. 1a-21a. Like the district court, the court of appeals recognized that "[t]he traffic stop began as a Fourth Amendment seizure but evolved into a consensual citizen-police encounter that did not implicate the Fourth Amendment." Id. at 9a (emphasis omitted). The court of appeals explained that, in "deciding whether an encounter between a police officer and a citizen is consensual or is instead a Fourth Amendment seizure, * * * a court must determine whether a reasonable person under the circumstances would believe he was free to leave or disregard the officer's request for information." Id. at 10a (brackets, citation, and internal quotation marks omitted). And the court determined that,

on the particular facts of this case, "an objectively reasonable person in [petitioner's] position would have felt free to decline to answer [the officer's] additional questions and go on his way" after the officer issued the speeding citation, id. at 12a -- noting, among other things, that the officer had returned petitioner's license and registration, had told him he was "free to go," and had not interfered with petitioner as he walked away from the patrol car toward his own car, id. at 11a (citation omitted).

On appeal, petitioner contended for the first time that "his race should factor into" the reasonable-person analysis. Pet. C.A. Reply Br. 8-9; see Pet. C.A. Br. 23. Petitioner had not mentioned his race or ethnicity in his pretrial motion to suppress and had not attempted to introduce any evidence on that issue at the suppression hearing. At petitioner's request, however, potential jurors had been told that petitioner "is of Mexican ancestry" as part of an inquiry into their potential bias. Trial Tr. 92-93. The court of appeals rejected petitioner's newly asserted contention, noting that it had previously declined to "interject[] race into the objective reasonable person test * * * for determining whether a citizen-police encounter was consensual or instead a Fourth Amendment seizure." Pet. App. 13a.

The court of appeals acknowledged that race may in some circumstances be relevant to assessing the separate issue of voluntariness for consent. Pet. App. 13a. The court explained,

however, that "the test for voluntariness of consent accounts for some subjective characteristics of the accused," whereas "the Fourth Amendment's seizure analysis has always been an objective one." Ibid. (citation omitted). And the court observed that, on appeal, petitioner had abandoned any challenge to the voluntariness of his consent to the search of his car; petitioner instead argued only that "no objectively reasonable person in his position would have felt free to disregard" the officer's questions after the officer had issued the citation. Id. at 14a. The court found that argument "unavailing * * * under the totality of the circumstances presented here." Ibid.

ARGUMENT

Petitioner contends (Pet. 13-20) that his race must be taken into account when evaluating whether a reasonable person would have felt free to terminate the encounter with the police officer under the circumstances of this case. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court. This case would also be an unsuitable vehicle in which to address the question presented because it would make no practical difference to the outcome. This Court has recently denied petitions for writs of certiorari presenting similar questions. See Knights v. United States, 142 S. Ct. 709 (2021) (No. 21-198); Easley v. United States, 139 S. Ct. 1644 (2019) (No. 18-8650); cf. Pet. 26 (describing this case as a "companion case" to Knights). The same course is warranted here.

1. The court of appeals correctly determined that petitioner was not seized for Fourth Amendment purposes when the police officer engaged him in additional conversation after returning his license and registration, telling him he was free to go, and allowing him to walk away. Pet. App. 5a.

a. The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. The "seizure" of a person "can take the form of 'physical force' or a 'show of authority'" by the police "that 'in some way restrains the liberty' of the person." Torres v. Madrid, 141 S. Ct. 989, 995 (2021) (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)) (brackets omitted). In particular, this Court has made clear that an individual is seized within the meaning of the Fourth Amendment only if a law enforcement officer applies physical force to restrain the individual -- whether or not the restraint is "ultimately unsuccessful," ibid. (quoting California v. Hodari D., 499 U.S. 621, 626 (1991)) -- or invokes the officer's authority to stop the individual and the individual submits to that show of authority, see Hodari D., 499 U.S. at 626-627; Brower v. County of Inyo, 489 U.S. 593, 595-597 (1989). Thus, a "police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission." Brendlin v. California, 551 U.S. 249, 254 (2007).

The Court has recognized that "when an individual's submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test" for distinguishing between a voluntary consensual encounter with the police, which does not implicate the Fourth Amendment, and a Fourth Amendment seizure. Brendlin, 551 U.S. at 255. And the test that this Court has long employed is whether, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Ibid. (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)).

That inquiry is "objective" and is undertaken from the perspective of a "reasonable person," without regard to the individual's subjective mental state. United States v. Drayton, 536 U.S. 194, 202 (2002) (discussing Florida v. Bostick, 501 U.S. 429, 438 (1991)); see Michigan v. Chesternut, 486 U.S. 567, 574 (1988) (explaining that the reasonable-person test "calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police," thus ensuring that "the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached"). Relevant circumstances include the location of the encounter, the number of officers, the officers' proximity to the individual, and the officers' conduct, including whether they displayed their weapons or made any threats or

commands. See, e.g., Bostick, 501 U.S. at 437; Chesternut, 486 U.S. at 574-576.

The court of appeals correctly applied those principles to the specific facts of this case in determining that petitioner was not seized for Fourth Amendment purposes when a police officer engaged him in additional conversation on the roadside after issuing him a traffic citation. Pet. App. 9a-14a. The officer had by then returned petitioner's license and registration and had expressly told petitioner that he was "free to go." Id. at 11a. As the court observed, petitioner plainly understood that he was free to go because he walked away from the patrol car to his own car, ibid. -- only turning around and walking back when the officer said, "Excuse me, Aaron," and asked, "Is it okay if I ask you some questions?" Id. at 5a (citation omitted); see id. at 11a. Among the other facts demonstrating that a reasonable person would have felt free to terminate the encounter under "the totality of these circumstances," the court emphasized that the officer "'spoke in a friendly manner,'" was the "'only officer present,'" "'did not display a weapon, did not touch or restrain [petitioner,] and did not stand in his way.'" Id. at 12a; see id. at 27a-28a (district court's similar findings, based in part on a video of the stop).

The decision below is therefore correct and consistent with this Court's precedent. And, in any event, the court of appeals' determination that petitioner was not seized at the relevant time in this particular encounter is highly fact-bound and does not

warrant further review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

b. Petitioner errs in contending (Pet. 10-20) that the court of appeals was required to consider race in determining whether a reasonable person would have felt free to terminate the encounter. This Court has never relied on race to determine whether a Fourth Amendment seizure has occurred.

The threshold inquiry into the existence of a seizure has always been an "objective" question. Hodari D., 499 U.S. at 628. Some personal characteristics, such as age, may be considered if they have an "objectively discernible relationship to a reasonable person's understanding of his freedom of action." J.D.B. v. North Carolina, 564 U.S. 261, 275 (2011); see id. at 271-277 (holding that courts may take into consideration a suspect's youth in the objective inquiry into whether the suspect is in custody for Miranda purposes). But petitioner does not identify any comparable "objectively discernible relationship," id. at 275, between race and whether a reasonable person would feel free to terminate an encounter with the police. As the Tenth Circuit explained in a prior decision invoked by the panel here, "[t]here is no uniform life experience for persons of color, and there are surely divergent attitudes toward law enforcement officers among members of the population." United States v. Easley, 911 F.3d 1074, 1082 (2018), cert. denied, 139 S. Ct. 1644 (2019); see Pet. App. 13a.

Courts would thus lack any "uniform way" to account for a suspect's race, unlike age, while still maintaining an "objective standard for Fourth Amendment seizures." Easley, 911 F.3d at 1082. Indeed, under petitioner's approach, the exact same conduct by the police might constitute a seizure for a suspect of one race but not another. That result would be contrary to the objective inquiry this Court has prescribed -- particularly in contexts where the police approach large and possibly diverse groups of individuals, such as drug-interdiction efforts on a bus. See Drayton, 536 U.S. at 197-198; Bostick, 501 U.S. at 431-432.

Petitioner contends (Pet. 14) that this Court "recognized race as relevant to seizure questions" in United States v. Mendendhall, supra. As the court of appeals correctly explained, however, "Mendenhall's discussion of race . . . was in the context of assessing voluntariness, not seizure," and the "test for voluntariness of consent accounts for some subjective characteristics of the accused." Pet. App. 13a (quoting Easley, 911 F.3d at 1081). Specifically, in the portion of Mendenhall on which petitioner relies, this Court concluded that the defendant had voluntarily agreed to accompany several federal agents to an office within an airport to answer questions. See 446 U.S. at 557-558. The defendant contended that she had been coerced to go with the officers -- in part on the theory that, as a young black woman with only a high-school education, she "may have felt unusually threatened by the officers, who were white." Id. at

558. The Court stated that those factors were "not irrelevant," ibid. (citing Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)), but nonetheless found the defendant's conduct voluntary.

Mendenhall indicates that race may sometimes be a relevant consideration in contexts, such as voluntariness, that require an evaluation of a person's subjective mindset. Mendenhall, 446 U.S. at 558; see Schneckloth, 412 U.S. at 226 (explaining that the personal "characteristics of the accused," such as "lack of education," may be considered in evaluating voluntariness). But "the Fourth Amendment's seizure analysis has always been an objective one." Pet. App. 13a (citation omitted); see, e.g., Brendlin, 551 U.S. at 255; Drayton, 536 U.S. at 202; Bostick, 501 U.S. at 438. And an objective inquiry, by its nature, "does not vary with the state of mind of the particular individual being approached." Chesternut, 486 U.S. at 574. Mendenhall therefore does not support petitioner's request to require or permit courts to undertake the objective reasonable-person inquiry through a different lens depending on the race of the defendant.

The other decisions of this Court invoked by petitioner (Pet. 14) likewise concerned an inquiry with a subjective component: the voluntariness of a confession in police custody. See Payne v. Arkansas, 356 U.S. 560, 566-567 (1958); Fikes v. Alabama, 352 U.S. 191, 196-197 (1957); Haley v. Ohio, 332 U.S. 596, 600-601 (1948) (plurality opinion); cf. Schneckloth, 412 U.S. at 226.

c. Petitioner states (Pet. 24) that an "officer can mitigate the enhanced vulnerability and fear people of color feel by conveying" to them that they are free to leave or to otherwise terminate an encounter. See Pet. 23-25. The objective inquiry prescribed by this Court's case law already takes into account whether officers have given such a warning -- as the officer did in this case, when he expressly advised petitioner that petitioner was "free to go." Pet. App. 5a (citation omitted); see Bostick, 501 U.S. at 437. To the extent that petitioner contends that officers should be required to give such a warning in all cases, or all cases involving persons of certain races, or that a seizure has necessarily occurred in the absence of such a warning, this Court already rejected any such per se rule in United States v. Drayton. See 536 U.S. at 203 (concluding that the court of appeals erred insofar as it adopted a per se rule requiring suppression in the absence of "a warning that [suspects] may refuse to cooperate"); see also id. at 201 (stating that "for the most part per se rules are inappropriate in the Fourth Amendment context"). And a per se rule that would turn on whether a particular individual's "race is known or knowable" (Pet. 24) to the police would be even more unwarranted.

2. Petitioner contends (Pet. 15-17, 20-22) that federal and state courts are divided on whether a suspect's race may be considered as part of the objective inquiry into whether a reasonable person would feel free to terminate an encounter with

the police. Petitioner does not, however, identify any federal court of appeals or state court of last resort that has in fact incorporated race into that inquiry, and any disagreement in dicta would not warrant this Court's review. See Sup. Ct. R. 10(a) and (b).

Like the court of appeals here, other federal courts have rejected the consideration of race in the reasonable-person inquiry for determining whether a seizure has occurred. See United States v. Knights, 989 F.3d 1281, 1288 (11th Cir.) ("[T]he race of a suspect is never a factor in seizure analysis."), cert. denied, 142 S. Ct. 709 (2021); Monroe v. City of Charlottesville, 579 F.3d 380, 386-387 (4th Cir. 2009) ("To agree that [the suspect's] subjective belief that he was not free to terminate the encounter was objectively reasonable because relations between police and minorities are poor would result in a rule that all encounters between police and minorities are seizures. Such a rule should be rejected."), cert. denied, 559 U.S. 992 (2010).

Petitioner errs in arguing (Pet. 15) that the Seventh Circuit adopted a contrary approach in United States v. Smith, 794 F.3d 681 (2015). In Smith, the Seventh Circuit determined that a seizure had occurred when two officers used their bikes to "obstruct[]" a pedestrian's "path forward" in a "dark alley," one of the officers dismounted and approached with "his hand on his gun," and that officer "aggressive[ly]" questioned the pedestrian about possessing weapons. Id. at 685. The court found that,

"[g]iven these factors," the pedestrian "was seized for purposes of the Fourth Amendment." Ibid. Having made that finding, the court nonetheless addressed the defendant's "argument that the reasonable person test should take into account [his] race." Id. at 687. The court stated that race "is 'not irrelevant' to the question of whether a seizure occurred" but is "not dispositive either." Id. at 688. That language was not part of the court's holding; indeed, the Seventh Circuit emphasized that it had found a seizure on the facts of that case "without taking into account [the defendant's] race." Ibid.; see Knights, 989 F.3d at 1288 (describing the discussion of race in Smith as "dicta").

Petitioner's reliance (Pet. 16) on the Ninth Circuit's decision in United States v. Washington, 490 F.3d 765 (2007), is likewise misplaced. There, the court concluded -- without any consideration or even mention of race -- that the defendant had not been seized when an officer parked his car nearby and approached the defendant's car on foot with a flashlight. See id. at 769-770. After the officer approached, the defendant consented to a search of his person, which the Ninth Circuit found to be voluntary. Id. at 771. But the court then concluded that the officer had "exceeded the scope of [the defendant's] consent," id. at 774, thereby transforming the encounter into an investigatory stop for which the officer needed (and lacked) reasonable suspicion, see id. at 771-774. In so doing, the court stated that it had taken into account testimony from the suppression hearing

about two then-recent "publicized shootings by white Portland police officers of African-Americans." Id. at 768, 773. The court did not suggest that it was determining whether a seizure had occurred based on the defendant's race; instead, the court was primarily addressing the scope of voluntary consent -- which, as explained above (see pp. 13-14, supra), has a subjective component.

Similarly, in Dozier v. United States, 220 A.3d 933 (D.C. 2019) (cited at Pet. 4, 12, 14), the D.C. court was addressing whether a defendant had voluntarily consented to a pat-down search during an encounter that "began in a consensual manner," id. at 941; see id. at 941-946. And given the totality of the circumstances there, the court's discussion of race in deeming the defendant's "fear of harm" to be "particularly justified," id. at 944, was "unnecessary" to the outcome, id. at 949 (McLeese, J., concurring in the judgment) (stating that the issue of race had not been "raised in the trial court" or "brief[ed]" on appeal, and questioning the majority's treatment of it).

Petitioner also invokes (Pet. 21 n.20) several other decisions by federal district courts and state courts. In one, Massachusetts's highest court expressly declined to resolve the question presented. See Commonwealth v. Evelyn, 152 N.E.3d 108, 121 (Mass. 2020) ("[W]e do not decide here whether the race of a defendant properly informs the seizure inquiry."). The remaining decisions identified by petitioner are not from courts of last resort and therefore would not suffice to establish any conflict

warranting this Court's review. Many also did not squarely address the question presented or rejected petitioner's proposed answer to it. See, e.g., State v. Johnson, 440 P.3d 1032, 1042 n.5 (Wash. Ct. App. 2019) (declining to consider defendant's race); United States v. Hill, No. 18-cr-458, 2019 WL 1236058, at *3 (E.D. Pa. Mar. 11, 2019) (stating that the Third Circuit has rejected race as a factor in determining whether a person is seized) (citing United States v. De Castro, 905 F.3d 676, 682 (3d Cir. 2018), cert. denied, 139 S. Ct. 1219 (2019)).

3. In any event, this case would be an unsuitable vehicle in which to address the question presented because resolving that question in petitioner's favor would not affect the correct disposition of the case. The court of appeals determined that, under the totality of the circumstances, a reasonable person would have felt free to terminate the encounter after the police officer issued the citation. Pet. App. 11a-12a. The court emphasized that the officer had returned petitioner's documents to him, had told him that he was free to go, and had allowed him to walk away -- before asking, in a friendly tone, whether petitioner would answer additional questions. See ibid. Petitioner has not shown that attempting to consider the same objective circumstances from the perspective of a person of his race would alter the bottom-line conclusion. Notably, when petitioner declined to allow the officer to search his car before the officer deployed a drug-

sniffing dog, petitioner indicated that he knew he "ha[d] the right" to decline a consensual search. Id. at 30a.

Moreover, whether the officer seized petitioner for Fourth Amendment purposes by reengaging him in conversation is academic here because the officer had reasonable suspicion for an investigative stop at that point anyway, in light of the discrepancies in petitioner's documents and his evasive answers to the officer's earlier questions. The court of appeals had no occasion to reach that alternative basis for denying petitioner's motion to suppress the drugs and gun found in his car because the court determined that petitioner was not seized at that time. Pet. App. 14a n.5; see Gov't C.A. Br. 26-30 (making the alternative argument). But the presence of reasonable suspicion further diminishes any practical need or rationale for addressing the question presented on the particular facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

NATASHA K. HARNWELL-DAVIS
Attorney

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