No. 21-6223

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

Reply Brief for Petitioner

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Reply Brief for Petitioner

Mercado asked this Court to consider whether an individual's race can ever be part of a court's Fourth Amendment seizure analysis. The government posed a different question in opposition, asking whether further questioning after the initial stop constitutes seizure. However, fundamental to each question is that a person's race influences the decisions and behavior of both parties and so becomes an integral part of a 'totality of the circumstances' inquiry.

Simply excluding race from the aggregate as the Tenth and Eleventh Circuits have done widens the divide between federal and state courts on a question that affects countless police interactions across the country. Nevertheless, the government downplays the conflict and reiterates the Tenth Circuit's decisions are correct under this Court's precedent; neither tack is persuasive. For it fails to explain why race and the common experiences of communities of color should be excluded when other objective characteristics, like age, can be considered.

The government and the two circuits forget how comprehensive a 'reasonable person' assessment must be. Instead, all three focus the reasonable person only on what an officer did at a particular moment during the interaction, e.g. "after . . . informing petitioner that he was free to go - [he] engaged petitioner in additional conversation." But every moment takes

place in a context typically initiated and controlled by the police. Thus, in the above example where an officer's words create ambiguity, am I free to go? do I have to talk? are reasonable questions. Answering them wrong carries tremendous risk, especially for persons of color.

The Court should grant certiorari, not only to resolve conflict between courts, but to give more guidance on the objective personal characteristics that fairly contribute to the sum of the circumstances in which a seizure occurs.

A. The Tenth Circuit's decision aggravates the conflict among the lower courts.

The government insists there is no conflict among the lower courts. BIO 15-19. Thus, in its view, the Ninth Circuit, the D.C. Court of Appeals, and the Seventh Circuit have not found that race can be a factor considered in a court's Fourth Amendment seizure analysis. *Id.*

1. The government writes that in *United States v. Washington*, 490 F.3d 765 (9th Cir. 2007) and *Dozier v. United States*, 220 A.3d 993 (D.C. Cir. 2019), the courts considered race only to decide whether the individual voluntarily consented to a search. BIO 17-18. The courts would disagree.

In W*ashington*, the court examined whether a voluntary search had become a seizure. 490 F.3d at 772. The actual question answered was whether "in the total circumstances a reasonable person in Washington's shoes would not have felt at liberty to terminate the encounter with the police

and leave." *Id.* Incidentally, the same question also comprises the seizure analysis this Court prescribed in *Florida v. Royer*, 460 U.S. 491, 502 (1983). In *Royer*, the Court held that whether an officer has seized a person turns on whether his conduct would lead a reasonable person to believe that he was not free to leave. *Id.* Guided by these analyses, the Ninth Circuit concluded that under the "totality of the circumstances . . .[including] the publicized shootings by white Portland police officers of African-Americans, [and] the widely distributed pamphlet [referencing the shootings] with which Washington was familiar . . . a reasonable person would not have felt free . . . to leave the scene. 490 F.3d at 773-74. The court considered race to determine whether Washington had been seized, not whether he voluntarily consented. Clearly, if the former occurred, the latter is moot.

In fact, the Ninth Circuit again stressed the objective relevance of race to the seizure analysis in *United States v. Brown*, 925 F.3d 1150 (9th Cir. 2019). There, the court examined whether police, who had an anonymous tip about a black man with a gun, had reasonable suspicion to seize a black man solely on the grounds that he ran when he saw them. *Id.* at 1151-52. Again, the court looked to this Court for direction. It noted that in *Wardlaw*, Justice Stevens explained there is a general awareness of racial disparities in policing because of the availability of information and data on police practices. *Id.* at 1156 (citing *Illinois v. Wardlaw*, 528 U.S. 119, 125 (2000)

(Stevens, J., concurring in part and dissenting in part)). As part of the "commonsense judgments and inferences" attributed to the reasonable person, this awareness "can inform the inferences to be drawn from an individual who decides to step away, run or flee from police without clear reason . . . ." *Id.* Out of concern for their safety, Justice Stevens wrote, some citizens are justifiably wary of police interactions. *Id.* (citing *Wardlaw*, 528 U.S. at 126-140 (Stevens, J., concurring in part and dissenting in part)). The Ninth Circuit concluded that "the racial dynamics in our society," not wrongdoing, explain why a person might run from the police. *Id.* at 1157. A court "cannot totally discount the issue of race . . . . [U]neven policing may reasonably affect the reaction of certain individuals – including those who are innocent – to law enforcement." *Id.* Contrary to the government's suggestion, race is a relevant objective circumstance in Fourth Amendment seizure analysis for the Ninth Circuit. *Cf.*, *Washington v. Lambert*, 98 F.3d 1181, 1187-88 (9th Cir. 1996) (observing that "burden of aggressive and intrusive police action falls disproportionately on African-American, and sometimes Latino, males.").

The government mistakenly believes that in *Dozier*, the D.C. Court of Appeals too addressed race only in the context of consent. BIO 18. As in *Washington*, the police engagement in *Dozier* was initially consensual. The court examined whether it later became a seizure. It did so by looking at the

aggregate circumstances through an objective lens. 220 A.3d at 940. An individual's race, the court ruled, was expressly relevant to whether a reasonable person in Dozier's position would feel he was free to leave. It explained that, "an African-American man facing armed policemen," such as Dozier, "would reasonably be especially apprehensive" because it is "known from well-publicized and documented examples" that persons of color are "perceived with particular suspicion by hyper-vigilant police officers . . . ." *Id.* at 944. The "fear of harm and resulting protective conditioning to submit to avoid harm at the hands of police," that comes from this general knowledge, "is relevant to whether there was a seizure." *Id.* at 944. In other words, a reasonable person, aware of multiple tragic outcomes, would understandably consider them when weighing the consequences of not submitting to the police. *Id.* Given all the circumstances, the court determined Dozier was "not truly free" to walk away or refuse to answer questions and, thus, was "seized within the meaning of the Fourth Amendment." *Id.* at 944, 947.

In both *Washington* and *Dozier*, then, courts in two circuits evaluated whether there was a seizure and ruled that ample documentation of the disparate treatment of persons of color by police can inform the reasonable person's calculation whether he is truly free to leave or refuse. The decisions of the Ninth Circuit and D.C. Court of Appeals are diametrically opposed to those of the Tenth and Eleventh Circuits.

2. Mercado maintains the Seventh Circuit is aligned with the Ninth Circuit and D.C. Court of Appeals. The government disagrees and says the decision in *United States v. Smith*, 794 F.3d 681 (7th Cir. 2015), is consistent with Tenth and Eleventh Circuit decisions. BIO 16-17. Again, the government is incorrect.

In *Smith*, the court held that "race is 'not irrelevant' to the question of whether a seizure occurred." 794 F.3d at 688 (quoting *United States v. Mendenhall*, 446 U.S. 544, 558 (1980)). It said, "race" is highlighted "in everyday police encounters with citizens in Milwaukee and around the country" by "empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system." *Id.* A district court in the Seventh Circuit understood *Smith* to say that race can be a factor in the Fourth Amendment seizure analysis. *See Doe v. City of Naperville*, 2019 WL 2371666 at *4 (N.D. Ill. June 5, 2019) (relying on *Smith* for its conclusion that "plaintiff was seized if a reasonable twelve-year-old African American child in his situation would not have felt free to leave.").

Whether race can be a factor in the Fourth Amendment seizure analysis should not depend on where the litigation takes place. The common experiences of communities of color are so widespread and well-known that race is relevant to how a reasonable person responds to a police encounter wherever it occurs. The Court has intimated as much in previous decisions.

Mercado presents an ideal opportunity for the Court to definitively acknowledge race as integral to the aggregate that informs a seizure analysis. It is time.

B. The government's argument on the merits is unpersuasive because it misapprehends the breadth of the reasonable person's characteristics and perspective.

1. The government's defense of the Tenth Circuit's decision offers no reason why this Court should leave conflict among the lower courts unresolved. At its core, its argument proposes confining seizure analysis to a finite list of factors, all of which focus solely on the police. BIO 11 (citing tone, number of officers, display of weapons, touching or blocking a person's way as primary factors affecting a reasonable person's perception).[1] But this Court and lower courts have repeatedly held that all relevant objective factors must be considered. *See e.g.*, *J.D.B. v. North Carolina*, 564 U.S. 261, 280 (2011) (the Court has "not once" excluded a "circumstance that it determined was relevant and objective, simply to make the fault line between custodial and noncustodial brighter."). Whether a reasonable person truly would feel free to leave is necessarily "rooted in an assessment of the consequences of doing so." *Dozier*, 220 A.3d at 944. This, then, is the critical factor, and that

[1] Notably, these factors all exist when an officer pulls a car over and orders the driver out, as the officer did here. Neither the Tenth Circuit nor the government explain how these factors alone tell a reasonable person he is free to leave, especially when the stop continues to be controlled by the police.

assessment is immediately informed by what an officer says or does not say - "you're free to leave" or "you don't have to answer," respectively. It also includes common understandings "among ordinary people at the present time." Black's Law Dictionary (11th ed. 2019) (defining "reasonable person"). Today, the impact of race on police encounters is well known and widely reported and people understand this. *See* Pet. 18-20; *see also Wardlaw*, 528 U.S. at 125, 133 (Stevens, J., concurring in part, dissenting in part) (discussing increased awareness of racial disparities in policing). Thus, race affects how a reasonable person perceives what is happening or may happen.

A categorical exclusion of race removes the seizure analysis from a real setting and places it in a sterile legal construct. In the government's view, race is correctly excluded because there is no "comparable objectively discernible relationship between race and whether a reasonable person would feel free to terminate the interaction with the officer." BIO 12. Echoing the Tenth Circuit, the government claims this is because "'there is no uniform life experience for persons of color, and there are surely divergent attitudes toward law enforcement officers among members of the population.'"[2] *Id.*

[2] Others disagree that communities of color do not share a common understanding of their disparate treatment by authority over generations. Dr. Wendy Ashley, a Trauma Psychotherapist and professor at California State University Northridge, explains that people of color have experienced "racial trauma [] through generations and it lives inside of us." That trauma is defined as the "mental, emotional, psychological injury that comes from racial bias, discrimination, and anything like

(quoting *United States v. Easley*, 811 F.3d 1074, 1082 (10th Cir. 2018). But both statements may be wrong rather than true.

First, it is an elementary pitfall to think race influences only the decisions and actions of people of color. It may affect others too but in the converse. In other words, noncolored persons may feel free to leave. Furthermore, there is no uniform life experience for a group of any color, which is not the criterion for evaluating race's effect anyway. Rather it is those "racial disparities" that we all know exist. These shape people's perspectives and responses to police even if attitudes diverge toward law enforcement. No person of color would contrive to say otherwise.

Now, consider the assessment of the reasonable person who is aware "racial disparities" exist in contrast to the assessment of the Tenth Circuit here. The reasonable person so informed sees the objective fact that Mercado is a person of color, alone on the side of the road with an armed police officer. They know that police encounters frequently end poorly for people of color. They recognize from the moment Mercado is stopped, the officer is in control.

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that. It shows up individually - in denial of opportunities, or lack of access to resources. It shows up interpersonally through micro-aggressions. It shows up structurally or systemically, as in police brutality. It shows up vicariously through watching videos of people getting killed over and over again." Commentary on the Nia DaCosta film, *Candyman*.

Possessing "knowledge . . . generally obtained among ordinary people," the reasonable person understands the dilemma of Mercado being told he can leave and then seconds later, before he even passes the front of the officer's car, being asked to stay for additional questioning. Black's Law Dictionary (11th ed. 2019) (defining "reasonable person"). They intuit that being a person of color in those circumstances only increases any apprehension about leaving. Race is the secret everyone knows. Here, it limited Mercado's freedom of action. In contrast to the court's finding, a reasonable person would not have felt free to leave.

C. Mercado's case is ripe for this Court to weigh whether simply being told one can leave or not answer questions might offset the imbalance of "racial disparities."

1. By minimizing the importance of disclosing a person's rights during an interaction, the Tenth Circuit only elevates race as an objective factor in the seizure analysis. As Mercado illustrates, a person of color would reasonably hesitate to leave given the officer's conflicting consecutive statements. If the circuit court refuses to acknowledge the historical experiences and common understandings of communities of color regarding law enforcement, then this Court can consider measures that counteract their pernicious effect. That is not done by adopting the officer-centric list of factors proposed by the government.

The court was tasked with analyzing "all of the circumstances surrounding the encounter" that are relevant to whether a reasonable person truly felt free to leave. *Florida v. Bostick*, 501 U.S. 429, 437 (1991). Instead, it failed to address many factors that create the context in which the officer told Mercado he could leave. Then when he moved to leave, the officer asked to talk further. This crucial timing also completely escaped the court.[3] Likewise, the fact that the officer's request came while Mercado was still within reach. Given "all of the circumstances surrounding the encounter," no reasonable person would believe that ignoring the officer was an option, let alone driving off. The ambiguous situation would make a reasonable person "act[] sensibly," especially a reasonable person of color. Black's Law Dictionary (11th ed. 2019) (defining "reasonable person"). At no point did the officer relinquish his authority or control of the scene, such that a reasonable person upon hearing his request to answer more questions would view participation as entirely voluntary.

2. The Fourth Amendment rights of all people are better protected by eliminating ambiguity when possible, or at least by not creating it. Despite the government's protest, Mercado is not asking for a "per se rule" that officers "warn" a person of their right to end an encounter. BIO 15. Rather,

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[3] It also escaped the government. Thus, it argues that by moving toward his car, Mercado indicated he "plainly understood he was free to go . . . ." BIO 11.

he is asking this Court to restrain the carte blanche officers have when the Tenth Circuit finds withholding that information is inconsequential in the seizure analysis. *See United States v. Thompson*, 546 F.3d 1223, 1228 (10th Cir. 2006) (officer's failure to advise an individual he was free to leave or disregard questions "should carry little weight in [the seizure] analysis."); *Easley*, 911 F.3d at 1082 (officers "under no obligation to inform [individual] she was free not to cooperate . . . or answer . . . question[s]."). Instead of condoning and perpetuating "uneven policing," Mercado asks the Court to help level the field.[4] *Brown*, 925 F.3d at 1156.

[4] There are three points that assuage the government's concern that if race is sometimes a relevant factor, "the exact same conduct by the police might constitute a seizure for a suspect of one race but not another." BIO 11. First, as the government emphasizes, seizure analysis is "highly fact-bound" and given the fluidity of police interactions, rarely will police behave in the "exact same" way. Second, "encounters with the police . . . are based on experiences and expectations . . . on both sides." *Dozier*, 220 A.3d at 945. As empirical data on policing disparities shows, police conduct varies by race. Police behavior is not exactly the same across the races. Third, being informed of one's rights is a way to soften the known impact of race so the "exact same conduct" will not constitute a seizure for one race but not another. The refusal of lower courts, like the Tenth Circuit, to endorse the importance of knowing one's constitutional rights is one reason outcomes differ.

Conclusion

For the reasons given in his petition and this reply brief, Mercado respectfully requests this Court grant his petition for writ of certiorari.

Respectfully submitted,
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DATED: February 23, 2022

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Certificate of Service

I, Irma Rivas, hereby certify that on February 23, 2022, a copy of the petitioner's reply brief were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614,

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