NO. _____

IN THE
Supreme Court of the United States

JOHN YANG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment, U.S. Const. Amend. IV, permits a police officer to seize a vehicle and its occupants when the officer only knows that an occupant walked in the early morning to a vehicle from the direction of a house with only suspected crime activity, the vehicle was parked but running with its lights off, and another officer reported the occupants of a similar vehicle as "being shady" earlier in the evening.

2. Whether the Fourth Amendment, U.S. Const. Amend. IV, permits a police officer to seize a vehicle and its occupants when the officer equivocally stated that he only "perceived" that the vehicle failed to stop at a stop sign, even though the officer was in a moving squad car over 600 feet away from the vehicle, at night, the vehicle's brake lights were illuminated for multiple seconds, two vehicles crossed the intersection in front of the automobile after it had stopped and before it began moving again, and the arresting officers did not ask a single question to investigate the "perceived" traffic violation after seizing the vehicle and its occupants.

PARTIES TO THE PROCEEDINGS

1. John Yang, petitioner on review, was a defendant-appellant below.

2. United States of America, respondent on review, was plaintiff-appellee below.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner John Yang is an individual who is not subject to the corporate disclosure requirements of S. Ct. Rule 29.6.

RELATED PROCEEDINGS

United States District Court (E.D. Wis.):

United States v. Yang, 20-CR-234. (April 26, 2021)

United States Court of Appeals (7th Cir.):

United States v. Yang, 21-2745 (July 12, 2022)

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PETITION FOR A WRIT OF CERTIORARI

John Yang respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's decision is reported at 39 F.4th 893. The District Court's decision denying the defendant's motion to suppress evidence is not published in the *Federal Supplement*, but is available at 2021 U.S. Dist. LEXIS 79294, 2021 WL 1610098.

JURISDICTION

The Seventh Circuit issued its decision and final judgment on July 12, 2022. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

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

STATEMENT OF THE CASE

I. STOP AND ARREST OF JOHN YANG.

This case involves an unconstitutional traffic stop that led to the collection of evidence in violation of Petitioner and Defendant John Yang ("Yang" or "Petitioner").

After 1:00 a.m. on November 23, 2020, Green Bay Police Officers Benjamin Harvath ("Harvath") and Garth Russell ("Russell") were on patrol in separate vehicles

in Green Bay. Russell was driving an unmarked car, and he acknowledged that someone looking at his vehicle "couldn't know for certain" whether the vehicle was a police car. Tr. 82-83, App. 141.[1] While on patrol, Russell drove past the Express Convenience Center gas station near the intersection of Dousman Street and Maple Avenue. Tr. 62, 81; App. 120, 140. There, he saw a Dodge Ram (the "Ram") parked at one of the gas station pumps with three men standing nearby, one of whom was holding a chainsaw. Tr. 62, 81; App. 120, 140. Russell testified that one of the other individuals (later identified as Yang) "look[ed] at" Russell and stared at his vehicle. Tr. 62-63; App. 120-21.

Russell did not intervene with the men standing by the Ram, nor did he radio to dispatch or anyone else what he had observed. Tr. 83; App. 141. Russell did, however, drive up the street, turn around, and drive past the gas station a second time. Tr. 64; App. 122. By the time Russell returned, the Ram and the three men had left, and Russell did not see them again until after the vehicle had been stopped by Harvath later that night. Tr. 64; App. 122.

Unlike Russell, Harvath was on patrol in a marked police SUV that night. Ex. 3 at 00:20 (showing Harvath's marked police vehicle). At approximately 1:30 a.m., Harvath was driving eastbound on Kellogg Street, a few blocks away from the Express Convenience Center gas station. Harvath observed the Ram—only later identified as the same Ram Russell had seen earlier—parked on the side of the street

[1] The transcript of Yang's suppression hearing is cited as "Tr.," followed by the page number. The transcript of Yang's plea hearing is cited as "Plea Hr'g Tr.," followed by the page number. The Appendix is cited as "App."

with the vehicle running and the lights off. Tr. 14; App. 72. Harvath had not previously seen the Ram, and it had been approximately 30 minutes since Russell had observed the Ram at the gas station. Harvath had not spoken with Russell about Russell's observations at the gas station, and Harvath did not know that Russell thought that the Ram or its occupants "were being shady." Ex. 2 at 00:38; *see* Tr. 26; App. 84. As Harvath drove past the Ram, he "thought [he] observed" two people in the vehicle. Tr. 14, 53; App. 72, 111. The outside temperature that night was at or below freezing, and Harvath acknowledged that to keep the temperature in the cabin of the Ram warm, the vehicle needed to be running. Tr. 15, 53-54; App. 73, 111-112.

Harvath drove past the Ram, made a U-turn at the next intersection, drove past the Ram a second time, and noted the vehicle's license plate. Tr. 16-17; App. 74-75. As Harvath continued driving westbound past the Ram, he observed a pedestrian about two or three houses west of the Ram walking eastbound on Kellogg Street. Tr. 17-18; App. 75-76. Harvath did not know if that individual was headed to the Ram. Tr. 20; App. 78. Even though Harvath "monitor[ed] both the pedestrian on foot and the truck through [his vehicle's] mirrors" after driving past them, Harvath never saw the pedestrian get into the Ram or even "ma[k]e it to the truck." Tr. 19-20; App. 77-78. Harvath acknowledged that "it could be a coincidence that his truck is parked running near the intersection of Ashland Avenue and Kellogg Street" and that the pedestrian was walking in that direction. Tr. 18-19; App. 76-77.

Likewise, Harvath did not observe the location from where the pedestrian began walking. About five days earlier, Harvath had been told by another officer that the officer previously had "responded to reports of in and out traffic at suspicious times and multiple times at [a home located at] 826 Kellogg Street." Tr. 12-13; App. 70-71. The other officer "also took at least one complaint from a neighbor of 826 Kellogg Street regarding the in and out activity there." Tr. 14; App. 72. That home was in a residential neighborhood and more than a block away from where Harvath observed the pedestrian and the Ram, and Harvath did not observe the pedestrian or the Ram anywhere near the 826 Kellogg Street home. Tr. 52-53; App. 110-11. The officers also "generally [had] an awareness" of drug activity in the neighborhood, Tr. 15; App. 73, but Harvath did not observe the pedestrian walk out of, in front of, or anywhere near the homes suspected to have been involved in drug trafficking in the past. Tr. 52; App. 110. Harvath acknowledged that the pedestrian could have come from any other house on the block, could have come from somewhere on the other side of the street, could have turned onto Kellogg Street at the intersection with Oakland Avenue (a half block to the east of the 826 Kellogg Street home), or could have walked from any other house on any other cross-street. Tr. 52-53; App. 110-11.

Harvath testified that the pedestrian "appeared to be a shorter male with a huskier build," but that "was pretty much the best [Harvath was able to] do with regards to any sort of physical description." Tr. 20, 54; App. 78, 112. Unlike Russell, who said he observed some of the men at the gas station "stare" at his vehicle, Tr. 62-63; App. 120-21, Harvath did not observe this pedestrian stare at Harvath's

marked squad car as he drove by, break into a run upon seeing Harvath's vehicle, take any sort of erratic turn at that moment, or reach his hands toward his waistband in any sort of suspicious manner.

Harvath continued to drive westbound on Kellogg Street, and he kept watching the Ram in his rearview mirror. Tr. 21-23; App. 79-80. The Ram turned on its lights, drove away from the curb, and turned southbound onto Oakland Avenue. Tr. 23; App. 81. After the Ram left Harvath's sight, Harvath made another U-turn on Kellogg and followed the Ram onto Oakton Avenue. Tr. 24; App. 82. Because Harvath was trying to avoid being seen by the occupants of the Ram, Tr. 23-24; App. 81-82, Harvath needed to turn around and head back to Oakton. Tr. 24; App. 82. By the time Harvath approached the intersection of Kellogg Street and Oakton Avenue, the Ram was already about a block away—approaching the intersection of Oakton Avenue and Dousman Street—when Harvath again observed it. Tr. 24, 44-45; App. 82, 102-03; Ex. 2 at 00:13.

The video from Harvath's dashcam shows that from the time after Harvath made his second U-turn on Kellogg Street to follow the Ram until the time that Harvath began to turn onto Oakton Avenue, about 13 seconds elapsed. At the suppression hearing, the government introduced as Exhibit 1, App. 36-37, a copy of a map of the area from Google Maps. According to Google Maps, the distance from the intersection of Kellogg Street and Oakton Avenue (where Harvath was located) to

the intersection of Dousman Street and Oakton Avenue (where the Ram was located) is approximately 190 meters—over 600 feet. App. 37.[2]

There was a stop sign on Oakland Avenue that regulated traffic at the intersection with Dousman Street. Tr. 25; App. 83. As Harvath rounded onto Oakland Avenue, he saw the Dodge Ram approaching the intersection and saw that the lights were turned on, and the dashcam video from Harvath's vehicle showed the Ram's brake lights were illuminated by the time that Harvath had turned onto Oakland. Tr. 25; Ex. 2 at 00:16. Harvath testified that the brake lights indicated to him "that the brakes [were] being applied to the vehicle." Tr. 47-49; App. 105-07. Moreover, the Ram had its brake lights illuminated when it was at the Dousman intersection, and a separate vehicle on Dousman Street drove across Oakton traveling westbound. Ex. 2 at 00:17. The Ram's brake lights then turned off, but before it moved, a second vehicle on Dousman crossed Oakton heading westbound. Ex. 2 at 00:20. The Ram then turned on its left turn signal and turned left (eastbound) onto Dousman. Ex. 2 at 00:22. Harvath testified that from his vantage point of over 600 feet away in his moving squad car turning onto Oakton, he believed that the Ram did not come to a complete stop at the stop sign. Tr. 25; App. 83. Harvath, acknowledged, however, that he had "just turned south onto Oakland" when he observed what he characterized as a perceived traffic infraction." Tr. 44; App. 102.

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[2] A copy of the government's map with the distance between Kellogg Street and Dousman Street calculated by Google Maps and marked on the map is included in the appendix. As the Seventh Circuit did, this Court may take judicial notice of distance estimates from Google Maps.

At around the time that the Ram pulled on to Dousman Street, Harvath spoke via radio with Russell. According to Harvath, during that conversation, Russell told Harvath that Russell had seen a dark-colored Ram at the gas station "earlier that night" and had "observed suspicious activity surrounding it." Tr. 26; App. 84. Russell did not tell Harvath at that time any facts or details about what Russell found "suspicious" about the Ram or its passengers. Tr. 26, 64; App. 84, 122. Moreover, according to the dashcam video from Harvath's vehicle, all Russell told Harvath over the radio was that the passengers of the Ram "were being shady." Ex. 2 at 00:38.

After speaking with Russell, Harvath decided to stop the Ram. Tr. 27; App. 85; Ex. 2 at 00:40. Harvath stopped the vehicle in the Blackstone Family Restaurant parking lot, and a few moments later, Russell arrived on scene. Tr. 27, 67-68; App. 85, 125-26. The officers spoke with the passengers for a few minutes, and during that time, Harvath determined that the pedestrian whom he had seen walking on Kellogg Street was one of the passengers in the Ram. Tr. 20-21; App. 78-79. Before the stop, Harvath did not know that the pedestrian was in the Ram. Tr. 20-21, 52, 54; App. 78-79, 110, 112. The officers identified the pedestrian as the petitioner and defendant, John Yang. Tr. 20-21, 34; App. 78-79, 92.

Harvath asked the driver questions about what the three passengers had been doing that evening, why they had been parked at the intersection of Kellogg Street and Ashland Avenue, where they had been before arriving at the Blackstone restaurant, why they were out at 1:30 a.m., who owned the vehicle, and whether any

weapons were in the vehicle. Ex. 2 at 01:54 to 02:38, 02:58 to 03:40. Harvath told the passengers the reason for the stop, saying, "The official reason for the stop, looked like you rolled the stop there when you pulled off of Oakland onto Ashland, er sorry, Dousman, and then you pulled back, and I'm pretty sure your registration plate lamp is not functioning." Ex. 2 at 02:38. Harvath added, "trust me, I'm not going to jam you up for registration plate lamps. It's just more just an informational thing." Ex. 2 at 02:52.

Russell then approached the passenger side of the Ram and spoke with Yang and the third passenger. Russell began his interaction with the passengers by asking, "Didn't I just see you guys at the Dousman Express with this chainsaw?" Ex. 3 at 00:59. Russell then told the passengers that he had seen them and the Ram at the Dousman Express gas station with a chainsaw. Ex. 3 at 01:04. Russell asked the passengers for IDs and said he was asking for IDs because they were not wearing their seatbelts. Ex. 3 at 01:25. Russel said, "[Y]ou don't have your seatbelts on. According to you, you just took it off, but I don't know that so you're going to give me your name, or I'm going to have to take you out of the vehicle." Ex. 3 at 01:51. Russell then asked questions about what the passengers had been doing and about dropping off one of the passengers. Ex. 3 at 03:25.

The government did not introduce any evidence that either Harvath or Russell asked any questions to elicit any admissions from the driver about rolling through the stop sign or to obtain any evidence about the alleged stop-sign violation. To the contrary, during the stop, Yang asked the officers, "Why are we being stopped?"

Harvath answered, "I just explained to you, he rolled through the stop sign and the registration plate lamp isn't working. Plus, I saw you walking towards . . . him at Kellogg and Ashland." Ex. 2 at 3:41.

After speaking with the Ram's passengers for several minutes, Ex. 2 at 02:15 to 07:14, Russell ordered Yang out of the vehicle. Tr. 74; App. 132. At that time, according to Russell, Yang resisted Russell's attempts to place Yang in handcuffs. Tr. 40-41, 75-76; App. 98-99, 133-34. Yang then attempted to flee the scene, but the officers (using a taser) stopped Yang and placed him under arrest. Tr. 76-77; App. 134-35; Ex. 3 at 6:19. The officer arrested the other two occupants in the vehicle.

During the struggle, the officers observed that Yang was in possession of a gun. Tr. 41-42, 77-78; App. 99-100, 135-36. Officers also seized from the three individuals and the Dodge Ram marijuana, methamphetamine, and drug paraphernalia. Tr. 42-43; App. 100-01.

II. INDICTMENT AND MOTION TO SUPPRESS EVIDENCE.

On December 8, 2020, the Grand Jury returned an indictment charging Yang with possession and intent to distribute 5 grams or more of methamphetamine, in violation of 21 U.S.C. § 841 (Count One); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) (Count Two); possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Count Three); and possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. § 922(k) (Count Four).

On January 13, 2021, Yang moved to suppress all evidence found on him and in the Ram, arguing that Harvath's initial traffic stop of the Ram violated the Fourth Amendment. The district judge held an evidentiary hearing on the motion. Harvath and Russell testified at the hearing, and the government introduced a map of the neighborhood where the events took place as well as the dashcam videos from Harvath's and Russell's vehicles. Following the hearing, Yang filed a post-hearing brief in which he raised two arguments.

First, Yang argued that Harvath did not have reasonable suspicion that the Ram had committed a traffic infraction, specifically, allegedly rolling through the stop sign at the intersection of Dousman Street and Oakton Avenue or having a defective license-plate light. Second, Yang argued that the knowledge of the officers did not create a reasonable suspicion that Yang or anyone else in the Ram was engaged in illegal activity.

In response to Yang's motion, the government argued that Harvath had reasonable suspicion to stop the Ram because the vehicle did not come to a complete stop at the stop sign and because of the officer's suspicions of illegal activity. The government did not argue that Harvath's stop was justified because of a license plate light that was allegedly out.

The district judge denied Yang's motion to suppress. The judge "[found] the testimony of both police officers credible" and that Harvath "had at least a reasonable suspicion to believe a traffic violation had occurred." App. 32. The judge further con-

cluded that the officers had reasonable suspicion to believe that the passengers of the vehicle had committed a crime. App. 32.

III. GUILTY PLEA AND SENTENCING.

On June 15, 2021, Yang entered a conditional plea of guilty to Counts One and Two (possession of methamphetamine with intent to distribute, and possession of a firearm in furtherance of the narcotics trafficking crime) per a written plea agreement. The plea agreement preserved Yang's right to appeal the judge's denial of his motion to suppress, and the government acknowledged that right during the plea colloquy.

On September 13, 2021, the district judge sentenced Yang to 111 months' imprisonment. This was the statutory mandatory sentence, less time served in state custody while awaiting trial in this case. The appeal to the Seventh Circuit followed.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari for two reasons.

First, The Seventh Circuit's decision that the officers had reasonable suspicion to believe that the vehicle's occupants were engaged in unlawful drug activity conflicts with other federal circuit court decisions. In particular, the Seventh Circuit's decision adopted a reasonable suspicion standard based on a generalized profile without individualized suspicion.

Second, The Seventh Circuit misunderstood the record in deciding that Officer Harvath was reasonable in his suspicion that a traffic violation occurred, in a flagrant violation of Petitioner's Fourth Amendment rights.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH FEDERAL CIRCUITS ON TWO IMPORTANT FOURTH AMENDMENT QUESTIONS.

A. The Circumstances Prior to the Traffic Stop did Not Create a Reasonable Suspicion that Criminal Activity was Afoot.

United States courts of appeals have held that the presence of an individual in a high crime area at night without other specific and articulable facts that a particular citizen was engaged in a particular crime is not individualized suspicion to justify detention under the reasonable suspicion standard. *See, e.g.*, *United States v. Black*, 707 F.3d 531, 542 (4th Cir. 2013) ("Here, the totality of the factors outlined by the district court—an individual's presence at a gas station; prior arrest history of another individual; lawful possession and display of a firearm by another; Black's submission of his ID showing an out-of-district address to Officer Zastrow, all of which occurred in a high crime area at night—fails to support the conclusion that Officer Zastrow had reasonable suspicion to detain Black."); *United States v. Hill*, 752 F.3d 1029 (5th Cir. 2014) ("The government cannot, in other words, justify a warrantless search or seizure with nothing more than incantations about the proverbial high crime area."); *United States v. Green*, 111 F.3d 515, 520 (7th Cir. 1997) ("That on one occasion a car is parked on the street in front of a house where a fugitive resides is insufficient to create reasonable suspicion that the car's occupants had been or are about to engage in criminal activity.").

United States courts of appeals have also held that a generic claim of behavior such as nervousness, without other specific and articulable facts that a citizen was engaged in a particular crime, is similarly insufficient under the reasonable suspicion standard. *See, e.g.*, *United States v. Jones*, 269 F.3d 919, 929 (8th Cir. 2001) ("When an officer can cite only one or two facts, including a generic claim of nervousness, as supporting his determination of reasonable suspicion, then we may conclude that his suspicion was not reasonable.").

It is not reasonable for officers to suspect that a vehicle's occupants were, are, or will be engaged in criminal activity based only on a profile of presence in an area of expected criminal activity and a generic claim of behavior. Even though they recognized that factors susceptible of innocent explanation, when taken together, may form a particularized and objective basis for reasonable suspicion for a *Terry* stop, *see United States v. Arvizu*, 534 U.S. 266, 277–78 (2002), "it is impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation." *United States v. Beck*, 140 F.3d 1129, 1137 (8th Cir. 1998). Instead, to be reasonable under the Fourth Amendment, a search must be based on individualized suspicion of wrongdoing." *Black*, 707 F.3d at 540. "In other words, the suspicious facts must be specific and particular to the individual seized." *Id.*

Therefore, the Seventh Circuit directly conflicted with other federal circuit decisions when it concluded that it was reasonable for Harvath to decide that the occupants of the Ram were engaged in illegal drug activity on based on (1) the Ram's

presence in a residential neighborhood at 1:30 a.m. in a neighborhood with heightened drug trafficking and (2) another officer had seen the Ram earlier, had seen one of the Ram's occupants holding a chainsaw (hardly an indication that drug-trafficking activity as afoot), and generically thought the occupants had acted "shady." Ex. 2 at 00:38.

The need for this Court's review is particularly compelling because, in disagreeing with other federal circuit decisions, the Seventh Circuit created precedent for using characteristics thought typical of persons engaging in drug traffic *without* individualized suspicion to support a stop. Thus, allowing the Seventh Circuit's decision to go unreviewed would allow decisions by state and federal prosecutors to alter the Fourth Amendment's protections. *See*, *e.g.*, *Manuel v. City of Juliet*, 137 S. Ct. 911, 917 (2017) (explaining that the Court granted review to address the Seventh Circuit's "outlier" decision).

B. There was No Basis for the Traffic Stop because there was no Reasonable Suspicion that a Traffic Violation Occurred.

There are instances when this Court has elected to grants petitions that request review based upon erroneous factual findings or the misapplication of a properly stated rule of law. *See Tolan v. Cotton*, 572 U.S. 650, 651 (2014). This petition is not employing a "bait-and-switch" tactic of the ilk that the Court frowns upon. *See City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 620 (2015).

Here, the facts weigh so far in favor of Petitioner that it is inconceivable how the Court of Appeals affirmed the District Court's refusal to suppress the improperly

gathered evidence. Petitioner respectfully asks the Court to uphold the Fourth Amendment by granting this Petition.

The Fourth Amendment permits police to conduct "brief investigative stops," like the stop in this case, when the police have "a particularized and objective basis" for suspecting that a traffic violation occurred. *Navarette v. California*, 572 U.S. 393, 396-97 (2014). Although a passenger, Petitioner was seized when the police officers pulled over the driver for allegedly failing to come to a complete stop at a stop sign, *Brendlin v. California*, 551 U.S. 249, 255 (2007), and thus, Petitioner may question the constitutionality of the traffic stop. *Id*. at 256-259.

"[T]he ultimate touchstone of the Fourth Amendment is reasonableness." *Riley v. California*, 573 U.S. 373, 381 (2014). "Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). As traffic stops are seizures, they must be reasonable under the circumstances. *Id*.

The Seventh Circuit was no doubt aware of the above precedent for it cited the same. Yet, its interpretation of the law is so detached from the facts that it resulted in an untenable result.

The standard for initiating a traffic stop is low—"the level of suspicion the standard requires is 'considerably less than proof of wrongdoing by a preponderance of the evidence,' and 'obviously less' than is necessary for probable cause." *Navarette*, 572 U.S. at 397 (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). Probable cause is an objective standard, based on the totality of the circumstances.

United States v. Lewis, 920 F.3d 483, 489 (7th Cir. 2019). The police officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." *Terry*, 392 U.S. at 21.

The government has an interest in regulating the use of its roads and highways, and, of equal or greater importance, protecting its citizens. But, "[a]n individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." *Delaware v. Prouse*, 440 U.S. 648, 662 (1979).

Here, there was no articulable or reasonable suspicion of a traffic violation. *Id.* at 663. As discussed above, the "failure to come to a complete stop" observation (or rather illusion) by the officer was a pretext to the unlawful seizure. Officer Harvath did not actually observe a traffic violation, and neither officer observed that criminal activity was afoot.

The officer's state of mind is not relevant to the analysis. *Scott v. United States*, 436 U.S. 128, 138 (1978) ("[T]hat the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."). Here, putting aside the officer's state of mind, the circumstances do not justify the action of pulling over the Ram.

Simply put, the Ram came to a complete stop. The video from Harvath's dashcam shows that from the moment Harvath's squad car turned onto Oakton Avenue,

the Ram was stopped at the stop sign with its brake lights illuminated. Ex. 2 at 00:16. Had the vehicle rolled through the stop sign, the relative distance shown in the video between the lights on the Ram and the streetlights would have constantly changed, just as they appear to do once the Ram departs from the intersection. Moreover, while the Ram had its brake lights illuminated at the intersection, a vehicle on Dousman drove across Oakton traveling westbound. Ex. 2 at 00:17. The Ram's brake lights then turned off, but before it moved, a second vehicle on Dousman crossed Oakton heading westbound. Ex. 2 at 00:20.

The Seventh Circuit commented that the subject "video is grainy and out of focus," thus concluding it "unclear as to whether the truck came to a full and complete stop." App. 4. This statement belies the footage. The video shows that the Ram ceased moving at the intersection—the Ram stopped long enough for two cars to pass it by.

The Seventh Circuit further stated, "[T]he low-quality video footage does not confirm the truck's distance from the intersection, nor does it establish whether the vehicle was stopped or slowly moving forward when the other cars crossed." App. 10. This statement fails to acknowledge that the Ram stopped moving for five seconds.[3] On this record, the Seventh Circuit's conclusion cannot stand. Instead, five seconds reveals that the driver followed the rules of the road.

[3] There is no prescribed time limit needed for a complete stop in Wisconsin. *See* Wis. Stat. § 346.46.

Beyond the length of time that the Ram stopped, there is also the fact that Harvath was not in a position to observe the Ram as it approached the intersection. Harvath's view of the Ram was first blocked by the home on the southwest corner of Kellogg Street and Oakton Avenue as Harvath turned the corner. Harvath's view then was distorted by the fact that he was in his own moving squad car that was rounding onto Oakton and then driving along Oakton—moving the entire time. Harvath made his observations in the middle of the night with hardly any light to illuminate the Ram while more than 600 feet—more than two football fields—away from the Ram. Further, when the Dodge Ram was stopped at the stop sign, Harvath was directly behind it, meaning that Harvath could not see the Ram's tires at all and thus had to base his conclusion that the Ram was rolling through the stop sign on his perception of the vehicle's movement (even though Harvath and his own vehicle were moving the entire time). Finally, Harvath did not have a better view since he was in his vehicle when the video was recorded.[4]

The inquiry here is whether Harvath reasonably believed he saw a traffic violation. The video establishes that such a belief was not reasonable. Meanwhile, Harvath's testimony about whether the vehicle rolled through the stop sign was equivocal. In particular, Harvath testified that he only "perceived" a traffic violation. When counsel for Yang asked Harvath to "start with the perceived failing to

[4] The District Court recognized the limitations of Harvath's personal observations: "It is not foreign to human experience for personal observation in matters involving motion, distance, and perspective to be more clear when viewed live than from a video recording."

stop at the intersection of it was Dousman and Oakland," Harvath testified that what Yang's counsel said was correct. Tr. 44. Additionally, when Harvath was asked whether he "essentially just turned south onto Oakland when [he] observed this traffic—or perceived traffic infraction," Harvath testified, "Correct, yes." Tr. 44. Thus, Harvath twice called his observations of the Ram's stop at the Dousman Street intersection merely a "perceived traffic infraction."

A traffic stop must be "justified at its inception, and reasonably related in scope to the circumstances which justified the interference in the first place." *Hiibel v. Sixth Jud. Dist. Ct. of Nevada, Humboldt Cnty.*, 542 U.S. 177, 185 (2004). The stop here was never justified, and this case is a prime example of why pretextual stops cannot stand. As Justice Sotomayor noted, the Court "assumed in *Whren* that when an officer acts on pretext, at least that pretext would be the violation of an actual law." *Heien v. North Carolina*, 574 U.S. 54, 73 (2014) (internal citation omitted). Pretext essentially hands law enforcement officers carte blanche to conduct traffic stops. *Id*. (citing *Barlow v. United States*, 32 U.S. 404, 411 (1833) (Story, J.) ("There is scarcely any law which does not admit of some ingenious doubt"). So, too, here. Harvath and Russell wanted to stop the occupants of the Ram but did not really have a constutitonal basis on which to do so. So, Harvath ginned up a "perceived traffic infraction": that the Ram supposedly ran through the stop sign. This Court should not countenance Harvath's unconstitutional behavior.

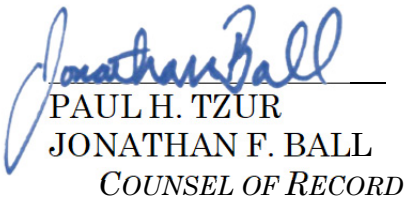
Again, the Court has held that seizures be justified at inception and viewed through the totality of the circumstances. *Hiibel*, 542 U.S. at 185; *Navarette*, 572

U.S. at 397. The Seventh Circuit misunderstood the circumstances to create reasonable suspicion in the absence of an actual traffic violation. Evaluating a seizure under the Fourth Amendment is inherently fraught because "[e]ach case is to be decided on its own facts and circumstances." *Ker v. California*, 374 U.S. 23, 33 (1963). The facts and circumstances of this matter warrant further review.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,



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