No. 20-1784

In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DANIEL DEUBLE,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals to the State of Ohio, Eighth Appellate District

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REPLY BRIEF OF PETITIONER

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INTRODUCTION

An undercover officer, who was impersonating a 15-year-old girl online, contacted someone using the handle "EY" through a social media application and arranged to meet at a park for a sexual encounter. During the communications, "EY" gave a vague description of himself and said he drove a green Honda. "EY" changed the initial meeting time because he was suspicious of police presence and set a new meeting time. At the new meeting time, Respondent was one of two people present at the park. Still, he was the only one using his phone as messages were sent to him through social media. Police detained Respondent and sent a test message through the social media application, causing a notification to ping on Respondent's phone, which he left on the ground. The court of appeals held that police detained Respondent without probable cause. In so holding, the court ignored objective facts that demonstrated a probability that Respondent was "EY."

The opinion below also extended *Riley v. California,* 573 U.S. 373 (2014) by finding that Respondent had an expectation of privacy in his phone. In so holding, the court of appeals found that the phone was searched when police observed the notification on the phone.

The questions presented raise important issues under the Fourth Amendment of the United States Constitution in a case involving an investigation emblematic of similar investigations. Respondent's opposition does not undermine the reasons for granting the Petition. Review should be granted.

ARGUMENT

I. A Settled Framework Does Not Prevent Review

The Court has "long held the 'touchstone of the Fourth Amendment is reasonableness.'" *Florida v. Jimeno,* 500 U.S. 248, 250 (1991). And in turn, reasonableness is measured objectively under the totality of the circumstances. *Illinois v. Gates,* 462 U.S. 213 (1982). "[O]nly the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." *Gates,* at 233 citing *Spinelli v. United States,* 393 U.S. 410 (1968). Probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018). Probable cause is not a high bar. *Kaley v. United States,* 571 U.S. 320, 338-39 (2014).

Respondent argues that there is no compelling reason to grant the Petition because the case invokes an issue of "well-settled law concerning probable cause." Opp. 10. The argument is soundly refuted by looking at recent cases in which this Court granted certiorari. In these cases, this Court decided questions involving the Fourth Amendment by applying an established framework.

In *Florida v. Jardines,* 569 U.S. 1 (2013) certiorari was granted to review the Florida Supreme Court's decision to determine whether the use of a narcotics dog constituted a search under the Fourth Amendment. *Jardines,* at 3. In answering the question, this Court looked to the *Katz v. United States,*

389 U.S. 347 (1967) to resolve a straightforward case. *Jardines,* at 5.

In *Navarette v. California*, 572 U.S. 393 (2014) certiorari was granted to review an unpublished decision of the California Court of Appeals to clarify when police officers may detain a motorist based on an anonymous tip about an unsafe driver. *Navarette,* at 396. Review was granted despite prior decisions in *Terry v. Ohio,* 392 U.S. 1 (1968), *Alabama v. White*, 496 U.S. 325 (1990) and *Florida v. J.L.*, 529 U.S. 266 (2000).

In *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) certiorari was granted to review the United States Court of Appeals for the District of Columbia's opinion in a qualified immunity case. Despite an established probable cause framework found in *Illinois v. Gates,* 462 U.S. 213 (1983) and others, this Court issued an opinion reversing the lower court's determination that probable cause did not exist to arrest partygoers.

Recently, in *Kansas v. Glover,* 140 S. Ct. 1183 (2020) certiorari was granted to whether a deputy's reasonable inference allowed the deputy to begin an investigative traffic stop. *Glover,* at 1187. In answering the question, this Court looked to an established framework found in *United States v. Cortez,* 449 U.S. 411 (1981), *Terry v. Ohio,* 392 U.S. 1 (1968), and other cases. *Id.*

Respondent has not identified a single case in which the same or similar circumstances was held to have violated the Fourth Amendment. Therefore, it cannot be said that this case is a matter of settled law. Because probable cause is a fluid concept, this Court

should continue to review questions invoking the Fourth Amendment in compelling cases. This case is one of those compelling cases. There should be no doubt that investigations such as the one conducted here are being undertaken across the country with similar investigative techniques. The facts here are straightforward and representative of investigative methods used in such investigations. Applying these facts to the probable cause framework will produce an opinion with precedential value to be relied on by police, prosecutors, and criminal defense attorneys for decades to come.

II. Respondent's Opposition Confirms the Need for Review

1. As a preliminary matter, Respondent argues that he was arrested, not merely detained. Both the trial court and court of appeals rejected Petitioner's argument that Respondent's initial detention was proper under *Terry v. Ohio*, 392 U.S. 1 (1968) and found the detention to be a de facto arrest. Pet. App. 11, 19. The Court need not address whether there was reasonable suspicion for police to conduct an investigative stop of Respondent, since Petitioner argues the more demanding standard of probable cause is satisfied. *United States v. Sokolow,* 490 U.S. 1, 7 (1989). Still, Petitioner will accept any invitation to address whether Respondent was effectively arrested.

2. Respondent argues that child enticement statutes and "catfishing" do not implicate any new question of when an arrest satisfies probable cause. Opp. 13. Contrary to Respondent's view, these points invoke a debate about what objective facts meet

probable cause in these types of investigations that are being conducted across the country.

Respondent argues that Petitioner's reference to "catfishing" is designed to suspend probable cause, Opp. 14. Yet he makes that very concept a focal point of his probable cause analysis. Respondent argues that police did not know whether "EY" was truthful or reliable in his online communications and could have been a lie. Opp. 3, 5. In fact, Respondent concedes the information he provided was unreliable and outright false. Opp. 11, 14-15. Respondent argues the lower court applied the doctrine that "the prosecution cannot rely solely on minimal, vague information from an anonymous, unreliable source to establish probable cause," Opp. 13 and thus likens the facts here to an anonymous tip.

The reliability or trustworthiness of EY's online communication should be irrelevant to the probable cause determination. This case is unlike a case involving an anonymous tip in a meaningful way. With an anonymous tip, someone other than the suspect is providing the pertinent information. As a result, the reliability and trustworthiness are essential when police seek to identify the suspect based on a tip. In a case such as the one here, the suspect is the one providing the information. In Respondent's view, probable cause to detain the suspect exists only if the suspect matches the information provided. Such a proposition lacks common sense as a principle given the concept of "catfishing." Since information given by a suspect over the internet can be false or vague, the more critical information the suspect provides will

be when and where the suspect agrees to meet the undercover officer.

The court of appeals agreed with Respondent's position. The opinion below in analyzing probable cause noted that there was only a vague description of the suspect and no sign of the green Honda the suspect was purportedly driving. Pet. App. 30. The opinion below focused more on whether Respondent matched the information that "EY" gave and excluded objective facts from its consideration. What was more critical was Respondent's arrival at the park at the agreed meeting time and his cell phone use at the same time as police sending messages through the Whisper application.

Respondent's arguments and the opinion below invite this Court to consider whether the reasoning in *Navarette v. California*, 572 U.S. 393 (2014), *Florida v. J.L.*, 529 U.S. 266 (2000), and *Alabama v. White*, 496 U.S. 325 (1990) applies to information given by a suspect. In response to Respondent's arguments, Petitioner would argue that vague information given by a suspect does not negate other objective facts supporting probable cause.

3. Respondent argues that future investigations are not implicated by the opinion below. He suggests that police should have delayed detention and taken additional investigative steps. Just because more could have been done does not mean it is needed to satisfy probable cause. Respondent suggests that police could have asked, "Are you the young guy on the basketball court wearing the white gym shorts?" Police should not have to ask such questions as they must maintain the persona of a minor. Questions that

make them sound like a "cop" would hinder the apprehension of the suspect. It should be kept in mind that Respondent was already suspicious of police presence, Pet. App. 5, and he might have responded, "Are you a cop?" if he did not see a teenage girl in plain sight. The erroneous probable cause analysis, broadly applicable to these investigations, critically affects the ability of police to identify and apprehend suspects.

III. A Commonsense Approach Based On Reasonable Inferences Establishes Probable Cause

Respondent argues that probable cause existed only after the test message was sent. He supports his argument by taking the investigator's cross-examination testimony out-of-context. Opp. 17-18. Yet, as the opinion below reveals, the same investigator testified:

> I had noticed one of the – the defendant would stop playing basketball, walk over to his phone, and I would get a response immediately after. And I picked that up and so I sent a couple of more text messages. And every time the suspect would put his phone down[,] I received a text message from him. That's when I knew [he] was going to be our person.

Pet. App. 21 citing Tr. 138.

In any event, the subjective intentions of police play no role in ordinary, probable-cause Fourth Amendment analysis. *Whren v. United States,* 517 U.S. 806 (1996). Instead, probable cause inquiry is an objective measure that can include reasonable inferences. *Maryland v. Pringle,* 540 U.S. 366, 371-372 (2003). And again, probable cause "requires only

a probability or substantial chance of criminal activity, not an actual showing of such activity." *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018)

The court of appeals oversimplified the facts in its analysis. It found the "totality of the circumstances" before Respondent's arrest consisted of him showing up at the meeting place and using his phone. Pet. App. 30-31. The opinion below dismissed the fact that Respondent was the only person at the park who was using his phone because police had only a vague description of the suspect and the green Honda was nowhere in sight. Contrary to this, police made an "entirely reasonable inference" that Respondent was "EY" based on the historical circumstances, Respondent's presence at the park at the agreed meeting time, and Respondent's actions of checking his phone three times, as police were sending messages through the Whisper application. These facts objectively support a finding of probable cause.

Nor does probable cause here rely on the trustworthiness of any information Respondent gave as "EY." Respondent again argues unconvincingly that his own lies diminish probable cause. Opp. 19-20.

IV. The Court Below Held Respondent Had a Privacy Interest in His Cell Phone Notification Screen

Respondent argues that this Court should deny the Petition because the opinion below did not address *Riley v. California,* 573 U.S. 373 (2014) or *United States v. Brixen*, 908 F.3d 276 (7th Cir. 2018). Opp. 22. Contrary to this claim, the court found that Respondent was challenging the "search of his cell phone." Pet.

App. 29. The opinion below refers to the investigator picking up Respondent's phone off the ground and searching it. Pet. App. 21, 28. The opinion then mentions the test message several times, but never mentions the phone extraction. Pet. 12, 25-26, 30. A fair reading of the opinion below reflects the court of appeals considered the test message on the notification screen to be a search under the Fourth Amendment. This conclusion is evidenced by the court's reliance on *Riley* and the Ohio Supreme Court's decision in *State v. Smith,* 920 N.E.2d 949 (Ohio 2009). Applying *Riley* the court held that the police did not have, "the authority to arrest a person and then *search that person's phone for probable cause* to support the arrest." Pet. App. 31. Thus, the opinion below was in fact excluding the "search" of Respondent's entire phone, notification screen included.

The brevity of the opinion below is not a basis to deny the Petition. The Court in *Riley* itself granted certiorari after the California Court of Appeals in an unpublished decision summarily decided the cell phone issued based on a decision of the California Supreme Court. *People v. Riley*, No. D059840, 2013 Cal. App. Unpub. LEXIS 1033, 2013 WL 475242 (Cal. Ct. App. Feb. 8, 2013). Likewise, this Court in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) reviewed the unpublished decision of the Massachusetts Court of Appeals where the confrontation clause was mentioned in a footnote. See *Commonwealth v. Melendez-Diaz*, No. 05-P-1213, 2007 Mass. App. Unpub. LEXIS 566 (Mass. Ct. App. July 31, 2007) at footnote 3. History shows that landmark cases can come from state appellate court opinions, unpublished opinions included, so long as the question arose. Here the opinion

below equated the test message and notification screen to a search under the Fourth Amendment. Pet. App. 31. And even though *Brixen* was not discussed in the opinion below, it was raised to the court of appeals and the Ohio Supreme Court.

There should be no concerns that this case does not present an excellent vehicle to determine whether a phone is searched for purposes of the Fourth Amendment where the phone's content was not affirmatively accessed. As much as Respondent argues the test message was a fruit of the unlawful arrest, such a determination was not clearly articulated in the opinion below, as the cell phone was recovered from the ground. Pet. App. 9, 21. Even though *Riley* concerns a cell phone search incident to arrest, it is understood that a search incident to arrest typically involves a search of an arrestee and the arrestee's immediate control. *Chimel v. California,* 395 U.S. 752, 762-763 (1969). Again, a distinction is that Respondent's cell phone was on the ground and not on his person. More importantly, what the court concisely decided was that Respondent had an expectation of privacy in his phone's notification screen and that the phone was "searched" after Respondent was handcuffed.

If the objective facts do not establish probable cause to detain Respondent when he was handcuffed and if the notification screen is not a search, then a remand for "further proceedings not inconsistent with this opinion" might be warranted, See, e.g., *Skinner v. Switzer*, 562 U.S. 521, 537 (2011) as it is understood that not, "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Wong Sun v. United*

States, 371 U.S. 471, 487-488 (1962). See also, *Utah v. Strieff*, 136 S. Ct. 2056 (2016). Furthermore, if the first question involving probable cause is resolved in Petitioner's favor then this Court could exercise discretion to address the second question involving whether the phone was searched as a matter of public policy. See, e.g., *District of Columbia v. Wesby,* 138 S. Ct. 577 (2018) (exercising discretion to correct court of appeals error at each step in case involving probable cause and qualified immunity).

V. The Brief in Opposition Does Not Raise Any Vehicle Concerns

Even after considering Respondent's opposition, there should be no concern that this case presents an excellent vehicle to address substantial constitutional questions with undisputed national significance. Consider that Respondent does not dispute: (1) this Court's jurisdiction; (2) the operative facts of this case; (3) the finality of the opinion below; (4) that the issues presented are federal constitutional question; (5) that a decision here would have national significance; (6) that there is a conflict in principle between the opinion below and the Seventh Circuit's decision in *Brixen*. Nor does, Respondent argue that *Brixen* was wrongly decided. These uncontested points reinforce granting the Petition.

As to what Respondent disputes, the opposition does not undermine the reasons in favor of granting the Petition. First, an established probable cause framework does not preclude review of this case or future cases, especially when this Court has yet to decide a case with similar facts. Second, Respondent's argument that analogize the facts here to an anonymous

tip and the appellate court's agreement with such contention should serve as an invitation to consider this argument since he cites to no case from this Court that concludes the same. Third, it seems contrary to Respondent's arguments an objective and commonsense analysis that permits reasonable inferences support probable cause in this case. Finally, the opinion below relied on *Riley* to find a privacy interest in the entire phone including the notification screen.

The Court should grant the Petition to review the questions presented as the facts here are emblematic of similar types of police investigations.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully Submitted,

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