No. 21-198

IN THE
Supreme Court of the United States

ANTHONY W. KNIGHTS,
Petitioner,
v.
UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government sometimes attempts to frame the question presented as whether a court is *required* to account for race when assessing whether a seizure occurred under the Fourth Amendment. But the real question is whether race can *ever* inform that analysis. And the decision below—categorically excluding race from the otherwise flexible, totality-of-the-circumstances inquiry—implicates an entrenched conflict on a question that affects countless police-citizen encounters across the country. The government minimizes the conflict and manufactures vehicle objections, but neither effort is persuasive. The government's defense of the decision below likewise fails. The government declines to endorse the equal-protection rationale on which the Eleventh Circuit chiefly relied, and it offers no valid basis on which to exclude race while accounting for other objective personal characteristics. Certiorari is warranted to resolve the conflict here—and to offer much-needed guidance on a "free-to-leave" test that, as applied by the lower courts, has increasingly little basis in reality.

A. The Decision Below Deepens A Square Conflict Among The Lower Courts.

The government agrees that three federal courts of appeals, including the Eleventh Circuit here, have "rejected the consideration of race in the reasonable-person inquiry for determining whether a seizure has occurred." BIO 12-13. But it insists that no other court has adopted a contrary approach. BIO 8, 12. That assertion is incorrect: both the Ninth Circuit and the

D.C. Court of Appeals have expressly held that a defendant's race can inform the seizure analysis, and the Seventh Circuit has endorsed that approach.

1. The government argues that *United States v. Washington*, 490 F.3d 765 (9th Cir. 2007), and *Dozier v. United States*, 220 A.3d 933 (D.C. 2019), considered race only in determining whether each defendant had consented to a search, not whether a seizure had occurred. BIO 14. Not so.

In the salient portion of *Washington*, the Ninth Circuit considered whether an at-first voluntary search had "escalated into a seizure." 490 F.3d at 772. The court articulated the question as 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.* The Ninth Circuit relied on its governing test for "determining if a person was seized." *Id.* at 771. And after evaluating the totality of the circumstances, the Ninth Circuit held:

> In sum, under the totality of the circumstances— . . . [including] the publicized shootings by white Portland police officers of African–Americans, [and] the widely distributed pamphlet [published in response to these shootings] with which Washington was familiar . . . —we conclude that a reasonable person would not have felt free to . . . leave the scene.

Id. at 773-74. That is a holding about the existence of a seizure, not the voluntariness of consent.

The government also attempts to dismiss the D.C. Court of Appeals' decision in *Dozier* as addressing only consent. BIO 14. That is inaccurate. Like *Washington*—and like many other cases raising seizure questions—*Dozier* involved an initially consensual encounter that escalated into a seizure. The D.C. Court of Appeals' determination of when that seizure occurred, again, was governed by the objective, totality-of-the-circumstances test. *See* 220 A.3d at 940. And the court explicitly considered the defendant's race as a circumstance bearing on whether a "reasonable person" in his position would believe that he was free to leave: "As is known from well-publicized and documented examples, an African-American man facing armed policemen would reasonably be especially apprehensive" in defendant's situation, having been "perceived with particular suspicion by hyper-vigilant police officers expecting to find criminal activity in a particular area." *Id.* at 944. That "fear of harm and resulting protective conditioning to submit to avoid harm at the hands of police," the court continued, "is relevant to whether there was a *seizure*." *Id.* (emphasis added). After considering the totality of the encounter, the court concluded that the defendant "was seized within the meaning of the Fourth Amendment."[1] *Id.*

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[1] The government notes the concurrence's suggestion that consideration of race was "'unnecessary' to the outcome" of the court's seizure inquiry. BIO 14-15 (quoting *Dozier*, 220 A.3d at 949 (McLeese, J., concurring in the judgment)). A concurrence, of course, does not

Again, that is a ruling on whether a seizure occurred—and in accounting for the defendant's race in that inquiry, the D.C. Court of Appeals, like the Ninth Circuit, staked out a position directly contrary to the decision below.

2. As for *United States v. Smith*, 794 F.3d 681 (7th Cir. 2015), the Seventh Circuit expressly acknowledged "the relevance of race in everyday police encounters with citizens in Milwaukee and around the country" and "empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system." *Id.* at 688. The Seventh Circuit accordingly concluded that "race is 'not irrelevant' to the question of whether a seizure occurred." *Id.* (quoting *United States v. Mendenhall*, 446 U.S. 544, 558 (1980)). At least one district court in the Seventh Circuit has interpreted this language as authorizing the consideration of race, where relevant, as part of the seizure inquiry. *See Doe v. City of Naperville*, 2019 WL 2371666, at *4 (N.D. Ill. June 5, 2019) (citing *Smith* for proposition that "plaintiff was seized if a reasonable twelve-year-old, African American child in his situation would not have felt free to leave").

Smith thus means that still more citizens across the country are subject to divergent seizure analyses based on the happenstance of geography. Multiple state high courts have recognized and emphasized this

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authoritatively explain (let alone vary) the majority's analysis, or alter the court's holding that race can properly inform the seizure inquiry.

deepening split. *See* Pet. 15 (collecting cases). At a minimum, there is a square 3-to-2 conflict about whether race can ever be considered in the Fourth Amendment seizure analysis—with several additional courts having weighed in and recognized the conflict. Certiorari is warranted.

B. This Case Is An Excellent Vehicle.

1. The government argues that a favorable ruling on the question presented would make no difference to the outcome of Mr. Knights's case. According to the government, nothing in the Eleventh Circuit's amended opinion "signals a retreat" from its original determination that "a reasonable person—of any race—would have felt free to terminate this encounter with the police." BIO 15.

The opposite is true. Mr. Knights petitioned for rehearing on the ground that the panel's original conclusion that the encounter was "consensual" could not be reconciled with its recognition that race is relevant to the seizure inquiry. After receiving supplemental briefing on that question, the Eleventh Circuit *withdrew* its original opinion. Pet. 8-9, 18-19. In its place, the Eleventh Circuit issued an amended opinion categorically excluding race from the seizure inquiry—and only after announcing that rule, concluded that Mr. Knights had not been seized. Pet. App. 9a. Conspicuously absent from this amended opinion is any holding in the alternative that even if race were accounted for, Mr. Knights would not have been seized. It is thus apparent that the panel determined that the question presented was outcome-determinative.

2. The government's alternative suggestion—that the officers had the requisite reasonable suspicion to justify any seizure—is, at most, an issue for remand. But it is also unsubstantiated. The magistrate judge expressly rejected that argument. Pet. App. 86a-91a. And although the government made the same argument to the court of appeals, *see* U.S. Br., No. 19-10083, at 22-23, that court declined to adopt the government's position, Pet. App. 8a-9a. For good reason: as the magistrate judge put it, "Mr. Knights leaning into a car at 1:00 a.m. in a high-crime area, giving a 'blank stare' to officers when they drove past in a patrol car, and unsuccessfully trying to start the car did not provide Officers Seligman and Samuel with reasonable suspicion of criminal activity." Pet. App. 91a. The government's once-rejected, once-ignored reasonable-suspicion hypothesis is no reason to deny review.

C. The Government's Merits Defense Fails.

1. The government's merits defense is likewise no reason to leave the conflict among the lower courts unresolved. At any rate, the government distorts the Eleventh Circuit's true holding and fails to bolster the decision below—which unjustifiably singled out and categorically excluded race from a totality-of-the-circumstances inquiry.

To start, the government repeatedly frames the Eleventh Circuit's decision as holding merely that it was not "required to take [Mr. Knights's] race into account." BIO 8; *accord, e.g.*, BIO 10 ("Petitioner errs in contending … that the court of appeals was required to account for race in evaluating the totality of the

circumstances."). But the Eleventh Circuit did not hold merely that it was not *required* to consider race in the seizure inquiry; the court of appeals held that it was *foreclosed* from considering race in the totality-of-the-circumstances analysis. Pet. 8-9.

The government's contention (echoing the decision below) that considering race is categorically off-limits in this context because there is no "uniform life experience for persons of color" (BIO 11) is a second strawman. Mr. Knights, of course, is not challenging that obvious truth. His position is quite different: In a world in which Black Americans have long experienced disproportionate and well-publicized violence in law-enforcement encounters, a Black man in a situation like Mr. Knights found himself in Tampa in 2018 is more likely to pause before attempting to leave the scene. That is so regardless of his own personal views and regardless of his own experiences with the police.

That is precisely why race is an objective demographic fact, properly considered (where relevant) in the seizure inquiry. It has nothing to do with the subjective "psychology of [an] individual suspect." *J.D.B. v. North Carolina*, 564 U.S. 261, 275 (2011). Rather, a reasonable person in Mr. Knights's shoes, in deciding whether he is "free to leave" a police encounter, may reasonably account for the distinct experiences of Black men with police, especially within a particular community—and the high stakes of a misstep. Pet. 23-27.

Indeed, the government concedes (as it must) that "[s]ome personal characteristics, such as age," can be

relevant to the seizure inquiry. BIO 11. But there is also no uniform life experience among people of a certain age, so by the government's logic, age should also be irrelevant. Of course, this Court held the opposite in *J.D.B.*—because age can nonetheless yield objective conclusions relating to a reasonable person's understanding of his freedom of action. 564 U.S. at 275. The same is true here.

The government says that Mr. Knights has failed to identify any "comparable 'objectively discernible relationship'" between race and the free-to-leave inquiry. BIO 11 (quoting *J.D.B.*, 564 U.S. at 275). But the petition compiles detailed statistics reflecting the disproportionate violence Black Americans experience in law-enforcement encounters. Pet. 24-25. The petition establishes that this impact of race on police encounters is no secret; it is well known and widely reported. Pet. 25-26. And the petition shows, empirically, that this disparity amplifies the coercive nature of a police-citizen encounter. Pet. 26-27. That is precisely the sort of evidence the Court found relevant in *J.D.B.* 564 U.S. at 272-73 & n.5.[2]

Moreover, the government has no real answer to this Court's acknowledgement in *Mendenhall* that a Black woman's race and gender were relevant to whether her consent to a prolonged police encounter

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[2] The comprehensive amicus briefs filed by the Center on Race, Inequality, and the Law, et al. and the National Association of Criminal Defense Lawyers supply additional evidence of this disparity and its effect on behavior and perception.

was voluntary. 446 U.S. at 558. The government says the consent inquiry has a subjective component. BIO 12. But as already explained (Pet. 29-30), race is not relevant to the consent inquiry because of a particular defendant's *subjective* experience, but rather because of its *objective* significance—because of the conclusions it may yield regarding a reasonable person's purported consent. So too here.

The government asserts that this Court has never considered race in the threshold seizure inquiry, suggesting Mr. Knights's position is novel. BIO 10. But this Court and lower courts have long employed free-to-leave tests flexibly, stressing that no list of factors is exhaustive. Indeed, in the *Miranda* custody context, "[n]ot once" has the Court excluded "a circumstance that [it] determined was relevant and objective, simply to make the fault line between custodial and noncustodial 'brighter.'" *J.D.B.*, 564 U.S. at 280. It is the decision below that breaks from this longstanding approach, by selectively excluding one demographic characteristic from a totality-of-the-circumstances inquiry.

The government's group-on-a-bus hypothetical (BIO 11) is likewise unpersuasive. Any doctrine that accounts for individual demographic characteristics may, in certain circumstances, lead to different results for different members of a group. The same would be true if the individuals on the bus were asked for their consent to searches under *Mendenhall*. And the same is true if the members of the group span different ages under *J.D.B.* That is not because of some illicit subjective inquiry, but because individual

characteristics may affect a reasonable person's objective understanding of the same police encounter.

Finally, the government mentions, but conspicuously does not endorse, the equal-protection rationale on which the Eleventh Circuit heavily relied. BIO 12. That is because it is meritless: there is no principled basis for concluding that courts run afoul of equal-protection doctrine by considering race in the totality-of-the-circumstances seizure test but not in several other longstanding criminal procedure doctrines. Pet. 32-34.

2. The magistrate judge in this case—the judge who heard the testimony and evidence—concluded that Mr. Knights was seized even without considering his race. For good reason. Contrary to the government's contentions, the police interaction at issue here was no light-touch consensual encounter. No reasonable person would feel free to walk away after two uniformed officers in a marked police car spot him in the middle of the night, swing around to approach him, box his car in with their patrol car, and emerge shining flashlights—and then, after the person has gotten into his parked car and closed the door, rap on the car window.

The government emphasizes that Mr. Keaton retreated into his relative's home, but he did so before the officers had finished parking the patrol car. Pet. App. 72a. And Mr. Keaton's departure made the encounter *more* coercive toward Mr. Knights, not less—it was Mr. Knights's wife's car, so he couldn't just walk away, and now he was alone, outnumbered by two uniformed police officers. Pet. App. 3a.

The decision below thus illustrates the serious mismatch between the free-to-leave legal standard, as applied by the lower courts, and the real world. And that tension is in no sense limited to the decision below. Though the government posits that no further guidance is needed (BIO 16-17), courts and jurists around the country have long recognized this distortion. *See, e.g.*, *United States v. Harger*, 313 F. Supp. 3d 1082, 1088 n.4 (N.D. Cal. 2018) ("It is pure fiction, even if indeed a legal one, that an individual could feel free to leave and ignore the presence of police officers after a patrol car parks directly behind their vehicle."); *United States v. Singh*, 51 F. App'x 730, 731 (9th Cir. 2002) (B. Fletcher, J., concurring) ("At a common-sense level, I note that the precedents force us to indulge in fictions as we determine the answers to such questions as, 'Did the defendant feel free to leave or to refuse consent?' Were we to present the facts to one hundred psychologists, I venture that one hundred would answer 'no' to both questions."); *United States v. Tavolacci*, 895 F.2d 1423, 1425 (D.C. Cir. 1990) (The free-to-leave "test has been criticized as 'artificial' and as based on a false assumption that ordinary citizens believe they are normally free to cut police inquiries short.").[3]

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[3] *Accord, e.g.*, Ronald Jay Allen et al., Criminal Procedure: Investigation and Right to Counsel 404 (2005) ("[D]oes the average person when approached by a police officer feel free to terminate the encounter...? Isn't the seizure test in fact a legal fiction...?"); Patricia M. Wald, *Guilty Beyond a Reasonable Doubt: A Norm Gives Way to*

Review is thus warranted to ensure the seizure inquiry accurately reflects how reasonable people perceive police encounters—and thus, ultimately to remain faithful to the Fourth Amendment's dictates. Like "the legal rules for probable cause and reasonable suspicion[, which] acquire content only through application," *Ornelas v. United States*, 517 U.S. 690, 697 (1996), the free-to-leave test requires periodic clarification from the Court, *see*, *e.g.*, *Florida v. Harris*, 568 U.S. 237, 244 (2013) (rejecting lower court's overly rigid application of probable-cause test "in favor of a more flexible, all-things-considered approach"); *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (same, for reasonable suspicion). Far from factbound error correction (BIO 16-17), this is precisely the sort of critical doctrinal question—affecting thousands of encounters across the country every day—on which only this Court can provide authoritative guidance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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the Numbers, 1993 U. Chi. Legal F. 101, 106 (1993) ("Although judges daily proclaim piously that a reasonable person in those circumstances should have known she had the right to keep going, I doubt that any judge is completely convinced of that.").

Respectfully submitted,

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