No. 25-885

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DONTE J. CARTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR THE PETITIONER

D. JOHN SAUER
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 25-885

UNITED STATES OF AMERICA, PETITIONER

v.

DONTE J. CARTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR THE PETITIONER

The brief in opposition confirms the need for this Court's review. Far from disputing a lower-court conflict on the question presented, respondent asserts one even broader than the petition documents. Br. in Opp. 25-32. And he does not meaningfully deny that the conflict warrants this Court's resolution. He simply proposes that rather than granting the government's petition in this case, the Court should summarily reverse in some other, future case in which a lower court *declines* to introduce race into the Fourth Amendment seizure inquiry. He supports that unorthodox proposal by positing both that this Court itself already adopted a race-infused framework in *United States* v. *Mendenhall*, 446 U.S. 544 (1980) (Br. in Opp. 10-15), and that the District of Columbia Court of Appeals (DCCA) did not in fact rely on race here (*id.* at 23-24). Neither proposition withstands scrutiny.

The portion of *Mendenhall* on which respondent focuses addressed the question of a defendant's consent to a police request—not the distinct question, addressed elsewhere in the opinion, of whether a seizure occurred. See 446 U.S. at 558-559. And the many pages of the decision below that consider respondent's race in the context of the seizure analysis, see Pet. App. 18a-26a, cannot tenably be dismissed as dicta. The DCCA made clear that, in its view, it was "require[d] * * * to take into account the defendant's race," *id.* at 18a, and that its "hold[ing]" therefore "factor[ed] in" respondent's status as a "Black man," *id.* at 26a. Thus, as Judge McLeese observed below, the court "appear[ed] to give dispositive weight" to perceptions of law enforcement that the court attributed to respondent based on his race. *Id.* at 27a (opinion concurring in the judgment). Doing so was a profound departure from the objective nature of the seizure inquiry. This Court should grant certiorari and reverse.

A. The Decision Below Conflicts With Fundamental Fourth Amendment And Equal Protection Principles

1. As the petition explains (Pet. 12-13), this Court's longstanding test for whether law enforcement has effected a show-of-authority seizure 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." *Brendlin* v. *California*, 551 U.S. 249, 255 (2007) (quoting *Mendenhall*, 446 U.S. at 554 (opinion of Stewart, J.)). "[T]he issue" is "the intent of the police as objectively manifested," *id.* at 260, not the subjective intent or impressions of either the officers, see *ibid.*, or the person whom they encounter, see *Michigan* v. *Chesternut*, 486 U.S. 567, 574 (1988).

Respondent contends (Br. in Opp. 18-19) that because the hypothetical "reasonable person" would be aware of "the circumstances" he lives in, "the role race can play" in law enforcement, and "how the police interact with people in [his] neighborhood," such perceptions are objective factors that may be considered—indeed, *must* be considered—under the Fourth Amendment. But that argument could equally be applied to any number of personal traits, such as occupation, religious affiliation, or personal experience with law enforcement, any of which might be stereotyped as carrying heightened (or reduced) sensitivity to perceptions of police authority, making the inquiry personal rather than general.

As the Court has recognized in the analogous context of determining when a suspect is in custody for purposes of *Miranda* warnings, incorporation of such "contingent psychological factors" invites an inquiry that "turns too much on the [individual's] state of mind and not enough on the 'objective circumstances.'" *Yarborough* v. *Alvarado*, 541 U.S. 652, 668-669 (2004) (citation omitted). Contrary to respondent's assertion (Br. in Opp. 18-19), his approach does not avoid subjectivity merely because it employs assumptions and stereotypes about how a person with such traits *might* think, rather than testimony about the *actual* thinking of the individual at issue. A hypothesis as to how someone with an individual's specific combination of personal qualities might have reacted is simply a backhanded—and less accurate—way of trying to probe "the state of mind of the particular individual being approached," *Chesternut*, 486 U.S. at 574.

Indeed, the Court has made clear that the "speculative" nature of a personal trait is itself a reason for eliminating it as an "objective" factor. *Alvarado*, 541 U.S. at 668. The problem is greatly exacerbated when the

personal trait is someone's race. The Constitution's equal-protection guarantee cannot readily be reconciled with official reliance on racial assumptions and stereotypes. See Pet. 15 (citing *Shaw* v. *Reno*, 509 U.S. 630, 647 (1993)). Respondent's claim (Br. in Opp. 19) that his approach could have benefited other racial groups at different times in the Nation's history does not render that approach "colorblind." It simply suggests that the stereotypical thinking attributed to a person's "color[]" might change over time. *Ibid.*

The injection of race into the seizure inquiry is also profoundly unworkable. It would require officers on the street, whenever their interactions with members of the public might approach the level of a seizure, to determine each person's race and anticipate the subjective perceptions of law enforcement that a court might later attribute to that racial group. See Pet. 15-16. When police encounter a racially diverse group of people—for instance, when conducting a drug interdiction on a bus, see *United States* v. *Drayton*, 536 U.S. 194 (2002)—the exact same police conduct might constitute a seizure as to some members of the group and not others. See Pet. 17. And the police would be forced to sort out who is who by making educated guesses as to their races from the color of their skin. See Pet. 15.

Respondent's acknowledgment (see Br. in Opp. 33) that a "person's apparent race or ethnicity may sometimes bear on whether officers have reasonable suspicion to conduct an investigatory stop," Pet. 17, does not support his proposal to incorporate race ubiquitously into the "reasonable person" test. Among other things, the relevance of race in the former context is based on objective, observable facts (*e.g.*, that the person shares the same apparent race and other physical characteristics as the suspected perpetrator of a crime), not specu-

lation about particular racial groups' attitudes toward the police.

2. In defending a race-infused approach, respondent relies principally—indeed, almost exclusively—on this Court's decision in *Mendenhall*. See Br. in Opp. 11-15. That reliance is misplaced. There, agents with the Drug Enforcement Administration (DEA) approached Mendenhall in an airport, "asked to see her identification and airline ticket," and then later (after she behaved suspiciously in the initial encounter) asked "if she would accompany [them] to the airport DEA office for further questions." *Mendenhall*, 446 U.S. at 548. This Court upheld the admission of the heroin that the agents ultimately found on her person. See *id.* at 559-560. Respondent errs in suggesting that the Court incorporated race into the seizure inquiry along the way.

In the district court, the parties had "*assumed* that [she] was seized when she was approached on the airport concourse." *Mendenhall*, 446 U.S. at 551 n.5 (opinion of Stewart, J.) (emphasis added). And in denying Mendenhall's suppression motion, the court had separately analyzed the two parts of the concourse interaction. *Id.* at 549. It had found that the initial portion, when the first agents approached Mendenhall, was justified by reasonable suspicion of criminal activity; and it had found that in the later portion, Mendenhall "had not been placed under arrest or otherwise detained when she was asked to accompany the agents to the DEA office, but had accompanied the agents voluntarily in a spirit of apparent cooperation." *Ibid.* (internal quotation marks omitted).

When the case reached this Court, Justice Stewart's opinion likewise took a bifurcated approach to the encounter. In Part II-A, joined by Justice Rehnquist, Justice Stewart determined that the initial encounter with

Mendenhall was not a seizure at all under the "free to leave" test that the Court would later formally adopt. *Mendenhall*, 446 U.S. at 546 n.†, 551-557; see, *e.g.*, *Brendlin*, 551 U.S. at 255 (applying *Mendenhall* test). Then, in Part II-B, Justice Stewart—now speaking for the Court—upheld the district court's "finding" that Mendenhall "accompanied the agents to the office 'voluntarily in a spirit of apparent cooperation.'" *Mendenhall*, 446 U.S. at 557 (citation omitted); see *ibid.* (explaining that the intervening court of appeals decision had been "mistaken in substituting for that finding [a] view of the evidence" under which "the agents' request that the respondent accompany them converted the situation into an arrest requiring probable cause in order to be found lawful").

Unlike Part II-A, Part II-B did not apply the test for whether a seizure had occurred; it applied the test for voluntary consent to a law-enforcement request. See *Mendenhall*, 446 U.S. at 557-558. Specifically, it assessed "whether [Mendenhall's] consent to accompany the agents was in fact voluntary" under the voluntary-consent test from *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). *Mendenhall*, 446 U.S. at 557. That voluntary-consent test differs from the seizure test in multiple ways. For one, as the *Mendenhall* opinion made clear, voluntary consent "is a matter which the Government has the burden of proving." *Ibid.* (citing *Bustamonte*, 412 U.S. at 222). That is not a burden that the Court has imposed when considering the existence or scope of a seizure, see, *e.g.*, *Brendlin*, 551 U.S. at 255 (existence); *United States* v. *Sharpe*, 470 U.S. 675, 682-687 (1985) (scope); see also *United States* v. *Carhee*, 27 F.3d 1493, 1496 (10th Cir. 1994); *Mendenhall*, 446 U.S. at 551-557 (opinion of Stewart, J.) (seizure analysis).

For another, the voluntariness test—unlike the seizure test—*can* take account of "the possibly vulnerable subjective state of the person who consents." *Bustamonte*, 412 U.S. at 229. It may therefore consider not only the "details" of the police conduct, but also "the characteristics of the accused." *Id.* at 226. Accordingly, citing the exact page of *Bustamonte* on which those latter words appear, the opinion in *Mendenhall* acknowledged that Mendenhall's status as a black female, who "may have felt unusually threatened" by the white officers, was "not irrelevant" (but also not "decisive") to the inquiry that it was conducting. 446 U.S. at 558 (citing *Bustamonte*, 412 U.S. at 226). But that was an inquiry into voluntary consent, not into the existence or scope of a seizure. See *id.* at 557-558.

Respondent's conflation of the two separate inquiries (Br. in Opp. 11-15) is a misreading of the opinion. In Part II-A, where Justice Stewart determined—under the "reasonable person" test—that the agents' initial encounter with Mendenhall was not a seizure, he relied only on the agents' objective conduct and never referred to Mendenhall's race. See *Mendenhall*, 446 U.S. at 551-557. That omission is inexplicable on respondent's reading of the opinion. Nor is it plausible that Part II-B of *Mendenhall* in fact replaced the objective reasonable-person test with the more subjective voluntary-consent test—a reading that would place the opinion at war with itself.

Instead, Part II-B of the opinion did no more than what it said it was doing: determining that "the trial court's finding" that Mendenhall "accompanied the agents to the office 'voluntarily'" was "sustained by the record." *Mendenhall*, 446 U.S. at 557 (citation omitted); see *United States* v. *Easley*, 911 F.3d 1074, 1081 (10th Cir. 2018) ("*Mendenhall*'s discussion of race * * * was

in the context of assessing voluntariness, not seizure."), cert. denied, 587 U.S. 980 (2019). In an actual seizure analysis, however—which even respondent emphasizes is "*not* based on the subjective viewpoint of the alleged seized individual," Br. in Opp. 18 (citation omitted)—race has no role. The DCCA was wrong to incorporate it.

B. The Court Should Resolve The Question Presented In This Case

As the petition explains (at 18-22), the question presented is important, is squarely presented by the decision below, and warrants this Court's review. Respondent's efforts to show otherwise are misconceived, and ultimately reinforce the reasons for certiorari.

1. Despite his defense of defining a Fourth Amendment seizure by reference to race, respondent maintains (Br. in Opp. 23) that, in fact, "the DCCA's ruling didn't turn on its consideration of race." That reading—under which the DCCA's extended discussion of race was in fact irrelevant to the result—cannot be squared with the decision below. While the DCCA initially focused on objective factors of the kind that courts traditionally weigh in determining whether a seizure has occurred, see *id.* at 23-24, it deemed those factors insufficient to resolve the case, see Pet. App. 18a. It explicitly announced that it "must look beyond the mere conduct of the officers" and "examine the impact of [respondent's] race." *Ibid.* And it devoted pages of its opinion to a survey of largely academic nonrecord material purporting to show that black Americans are less likely than other groups to feel free to leave a police encounter. See *id.* at 18a-26a.

Respondent's blinkered focus (Br. in Opp. 2-4, 6, 8, 20, 24) on a single clause in that part of the court's opinion—in which the court stated that "any reasonable per-

son would be fearful of failing to cooperate under these circumstances," Pet. App. 25a—is unsound. The full sentence reads: "Indeed, whereas any reasonable person would be fearful of failing to cooperate under these circumstances, a Black man would be especially cautious here so as to avoid potential physical retaliation." *Ibid.* And the court's race-based assessment was essential to its holding: namely, that "taking into account the coercive nature of the officers' conduct *and* factoring in the elevated effect that this would have had on an objective and reasonable Black man in [respondent's] shoes, we hold that [respondent] was seized within the meaning of the Fourth Amendment" without reasonable suspicion. *Id.* at 26a (emphasis added).

As Judge McLeese's concurrence in the judgment observed, "the opinion for the court appears to give dispositive weight to [the] consideration[] that [respondent] as a Black man would reasonably be 'especially apprehensive around police' and 'especially distrustful of law enforcement.'" Pet. App. 27a (quoting *id.* at 19a, 21a). The majority did not dispute Judge McLeese's observation, nor could it reasonably have done so. Accordingly, like Judge McLeese, a subsequent decision of the DCCA has understood the decision below to have considered race as a relevant factor. See *Ervin* v. *United States*, 349 A.3d 702, 706 n.2 (D.C. 2026) ("Our precedents weigh [a black defendant's] race in favor of finding that he was seized") (citing this case). And given the majority's inability to otherwise decide whether a seizure occurred, see Pet. App. 18a, that factor was apparently "dispositive," *id.* at 27a (McLeese, J., concurring in the result).

2. As the petition further explains (at 18-19), the decision below implicates a conflict in the lower courts. Respondent not only acknowledges as much, but posits an

even broader conflict, in which "many" (four, by his count) appellate courts would take the same approach as the DCCA. Br. in Opp. 26; see *id.* at 25-31. If that is so, however, then the case for certiorari is even more compelling than the petition suggested.

To the extent, for example, that the Ninth Circuit's decision in *United States* v. *Moreno*, 742 F.2d 532 (1984)—which does not involve race per se, see *id.* at 536—misreads *Mendenhall* in the same way that respondent does, that misreading warrants correction. The fact that "*Mendenhall* has been on the books since 1980," Br. in Opp. 32, does not preclude misunderstandings of it, or disagreements about it. See, *e.g.*, *Easley*, 911 F.3d at 1081 (interpreting *Mendenhall* differently from respondent).

That is not to say that respondent is correct in characterizing other lower courts as having adopted his and the DCCA's race-based approach to the Fourth Amendment seizure analysis. Both *State* v. *Jones*, 235 A.3d 119 (N.H. 2020), and *State* v. *Sum*, 511 P.3d 92 (Wash. 2022) (en banc), were decided under state constitutional provisions, not the federal Fourth Amendment. *Jones*, 235 A.3d at 123; *Sum*, 511 P.3d at 101; see *State* v. *Beauchesne*, 868 A.2d 972, 980 (N.H. 2005) (noting that the state constitution differs from the federal Fourth Amendment); *State* v. *Rankin*, 92 P.3d 202, 204-205 (Wash. 2004) (en banc) (same). And *Jones* actually "reach[ed its] conclusion" that the defendant was seized "irrespective of the defendant's race." 235 A.3d at 126.

Furthermore, as the government has explained in a prior brief (a copy of which is being served on respondent), neither *United States* v. *Washington*, 490 F.3d 765 (9th Cir. 2007), nor *United States* v. *Smith*, 794 F.3d 681 (7th Cir. 2015), definitively decided the question presented here. See Br. in Opp. at 13-14, *Knights* v. *United*

States, 142 S. Ct. 709 (2021) (No. 21-198) (*Knights* Opp.). To be sure, the same appeared to be true of a prior DCCA decision, *Dozier* v. *United States*, 220 A.3d 933 (2019). See *Knights* Opp. at 14-15. And the DCCA has now interpreted *Dozier* to "require[]" that it "take into account the defendant's race" in the seizure analysis. Pet. App. 18a. But the Seventh and Ninth Circuits have yet to do the same.

The problems that the DCCA's approach creates for federal law enforcement in the District of Columbia in themselves warrant this Court's intervention. See Pet. 20-21. Such intervention is all the more warranted if other courts have adopted or are on the verge of adopting the same approach. This Court should grant certiorari and ensure that the Fourth Amendment is interpreted uniformly and correctly.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

MAY 2026