No. 14-209

In the
Supreme Court of the United States

ILLINOIS,
PETITIONER,

v.

DERRICK A. CUMMINGS,
RESPONDENT.

On Petition for a Writ of Certiorari
to the Illinois Supreme Court

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

LISA MADIGAN
Attorney General of Illinois
CAROLYN E. SHAPIRO*
Solicitor General
BRETT E. LEGNER
Deputy Solicitor General
MICHAEL M. GLICK
ELDAD Z. MALAMUTH
Assistant Attorneys General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5376
cshapiro@atg.state.il.us

*Counsel of Record

Attorneys for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent's brief in opposition fails to undermine the petition's compelling reasons for a grant of certiorari. First, respondent makes much of factual differences between this case and others in the entrenched split that petitioner set forth in its petition and that this Court appears to be prepared to resolve in *Rodriguez v. United States*, No. 13-9972, but those differences are constitutionally irrelevant. Respondent also ignores the Illinois Supreme Court's abandonment of the longstanding principle that a stop's reasonableness is assessed as a whole, and respondent fails to address adequately that the state court's newly announced bright-line rule requires unprincipled differential treatment of stops that are initiated for similar purposes and that take the same amount of time. Additionally, respondent proffers a state-law argument neither made in the decision below nor accepted by any Illinois court. Finally, respondent fails to rehabilitate the Illinois Supreme Court's erroneous statement of Fourth Amendment law.

I. This Case Directly Implicates A Split Over Whether The Fourth Amendment Requires A Traffic Stop To Cease The Moment Suspicion Dissipates Or The Stop's Purpose Is Otherwise Satisfied.

A. The factual differences between this case and *Rodriguez*, as well as other cases involving dog sniffs, are constitutionally irrelevant.

Respondent concedes the entrenched split of authority over whether police can briefly prolong a traffic stop to perform a dog sniff after the purpose of a traffic stop is satisfied by the officer issuing a ticket. Opp. at 5, 7-8 n.3. Indeed, this Court recently granted certiorari on that issue in *Rodriguez v. United States*, No. 13-9972. And although respondent asserts that this case presents a "different question," Opp. at 5, the three factual differences he notes are constitutionally irrelevant. The same legal principles dictate the outcome of both cases, and any factual differences make this case an ideal companion to *Rodriguez*.

1. This case, respondent notes, involves mistaken identity in the execution of a warrant, not a dog sniff, as in *Rodriguez*. Opp. at 4-5. But this comparison incorrectly focuses on different aspects of the stops: the dog sniff is the police conduct that occurred during the stop, while the arrest warrant, like the traffic violation in *Rodriguez*, relates to the

stop's original purpose. Thus, the proper comparison to the dog sniff in *Rodriguez* is the license request here. Yet neither respondent nor the Illinois Supreme Court asserts that a license request is a separate Fourth Amendment search requiring independent justification during a lawful stop, nor does respondent take issue with petitioner's claim that the challenged request here has the same constitutional significance (or lack thereof) as a dog sniff. See Pet. at 19-21; see also *Illinois v. Caballes*, 543 U.S. 405, 407-08 (2005). Thus, the different actions by the police in the cases have no bearing on the appropriate constitutional analysis.

2. Respondent similarly points to the different initial justifications for the stops in the two cases: enforcement of traffic laws in *Rodriguez* and execution of an arrest warrant here. Opp. at 7. But this purported distinction cannot justify the use of a totality of the circumstances test for traffic enforcement and a bright-line rule for arrest warrants. Instead, the question in both cases is whether, under the totality of the circumstances, the legal stop became unreasonable due to brief activity *after* the purpose of the stop was satisfied. The stop's initial purpose, whatever it was, is relevant to the reasonableness analysis, but the purpose alone does not and cannot resolve that analysis. See Pet. at 17-19.

3. Respondent also notes that the challenged police conduct in *Rodriguez* occurred after the officer issued a warning ticket, while here no ticket was issued before reasonable suspicion dissipated. Opp. at 7. Yet this is a distinction without a difference. Indeed, respondent implicitly recognizes that both cases involve the same question of whether there is some point during a stop (such as the issuance of a ticket or dissipation of reasonable suspicion) after which government action is automatically no longer justified by the initial reasons for the stop. Compare Opp. at 6 (describing *Rodriguez* and other cases as identifying "the point during a traffic stop *beyond which government action is further limited by the Fourth Amendment*") (emphasis added), with Opp. at 12-13 (describing the petitioner's position here as seeking "to retain the virtually unfettered access it has to a suspect during a lawful seizure for some poorly defined period *after it can no longer justify the intrusion*") (emphasis added).

4. Any factual differences between this case and *Rodriguez* actually highlight the inappropriateness of a bright-line rule here. It is more difficult to isolate the moment at which reasonable suspicion dissipates than to determine when a ticket issues. Thus, it is even more important that no bright-line rule requires that traffic stops end when reasonable suspicion dissipates. Such a rule would not only be contrary to the dictate that reasonableness be measured by the totality of the circumstances and

the stop as a whole, but it would open the floodgates to litigation regarding the exact moment that each traffic stop *should* have ended. See Opp. at 18 ("Had there been any ambiguity as to whether the warrant applied to respondent, it clearly would have been reasonable for Officer Bland to prolong the seizure in order to investigate respondent's identity.").

At the same time, the reasonableness of the officer's request is much clearer here than in *Rodriguez*. Here, the officer asked for respondent's license immediately and as a matter of routine. See Pet. at 18. In *Rodriguez*, however, the defendant was required to wait seven or eight minutes for a drug dog to arrive and complete its inspection. *United States v. Rodriguez*, 741 F.3d 905, 907 (8th Cir. 2014). These differences make this case a perfect companion to *Rodriguez* because they allow this Court to flesh out its guidance to the lower courts in similar but not identical factual circumstances. At a minimum, however, this Court should hold this case in abeyance while it decides *Rodriguez*, remanding for further analysis once that case is decided.

B. Respondent likewise cannot minimize the split over extended stops by ignoring cases in which the initial purpose of the stops was community caretaking or motorist assists.

Respondent attempts to minimize the existing split identified by petitioner by simply describing

some of petitioner's cases as being about "community caretaking," while this case involved an arrest warrant. Opp. at 4. But respondent again relies on a distinction without a difference. The community-caretaking and motorist-assist cases are relevant not because of the reasons the police initiated contact with the drivers but because the police requested drivers' licenses and identification in those cases even though those initial reasons did not require those requests. In those cases, however, unlike here, the courts correctly evaluated the reasonableness of the stop as a whole and upheld the requests. See Pet. at 9 (citing *State v. Godwin*, 826 P.2d 452, 456 (Id. 1992); *State v. Ellenbecker*, 464 N.W.2d 427, 428-30 (Wis. Ct. App. 1990); *State v. Reynolds*, 890 P.2d 1315, 1320 (N.M. 1995)).

C. A bright-line rule prohibiting all questions after a stop's purpose is satisfied is logically inconsistent with cases requiring evaluation of a stop's reasonableness as a whole when activity takes place before the purpose of the stop is satisfied.

The reasonableness of the stop should be determined by examining the stop as a whole regardless of whether a question unrelated to the stop's original purpose occurs before or after that purpose is satisfied. See Pet. at 10-12. Respondent asserts that Supreme Court "precedent necessarily

treats government action occurring before the expiration of the time reasonably necessary to effectuate the purpose of the stop differently than government action occurring after the expiration of the stop." Opp. at 12.

But this argument simply begs the question. Most courts agree that the time reasonably necessary to effectuate the purpose of the stop allows for some unrelated questioning that prolongs it. See Pet. at 11. The issue is whether the rule should be different for unrelated questions that occur after a ticket is issued or, as here, after reasonable suspicion dissipates. In other words, if two stops with the same original purpose take the same amount of time, should one be considered reasonable when an unrelated question occurs before the ticket issues or reasonable suspicion dissipates but the other considered unreasonable when the question comes afterward. It is logically inconsistent to reach different results in those cases. Yet the Illinois Supreme Court's bright-line rule does just that.

And the bright-line rule punishes diligence and creates perverse incentives. Respondent argues that we should not assume that officers will act in bad faith and "artificially prolong a stop." Opp. at 13. But an officer asking an unrelated question before issuing a ticket or refuting reasonable suspicion would not be acting in bad faith, because this Court and others would have found such conduct

reasonable. Case law will have instructed officers to proceed in that manner. Yet such a rule would encourage officers to first ask unrelated questions, possibly leading to longer traffic stops, and potentially leaving the original purpose unresolved if, for example, the officer is called away for a separate emergency.

II. Illinois Law Did Not, And Could Not, Resolve This Case.

Respondent argues that the question presented "has essentially been decided in Illinois as a matter of state law." Opp. at 8. This argument is both wrong and a red herring. The Illinois Supreme Court decided this case as a matter of federal law, and no Illinois court has interpreted the Illinois Constitution as respondent suggests.

The Illinois Supreme Court did not rely on the Illinois Constitution, instead clearly holding that the officer's "request for [respondent's] license impermissibly prolonged the stop and violated the fourth amendment [sic]." App. 15a-16a. Indeed, the decision below mentions the Illinois Constitution only once, in a "see also" cite while laying out "familiar and well-established" Fourth Amendment principles, indicating that Illinois's search-and-seizure clause is identical to the Fourth Amendment's for present purposes. App. 6a. Throughout this litigation, the courts relied on the Fourth Amendment to determine whether the

officer's request for respondent's license was reasonable and, if anything, indicated the Illinois Constitution would be interpreted identically. See App. 31a, 35a, 38a. The notion that this Court should decline to review a case because defendant could have raised a state-law argument that the state court might (or might not) have accepted is untenable. See *Michigan v. Long*, 463 U.S. 1032, 1042 (1983) (holding that "when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law," the Court assumes that there are no such state law grounds).

Further, respondent's state-law argument is frivolous. Illinois's search-and-seizure clause, in article I, section 6 of the State constitution, has "the same scope as the fourth amendment" unless there is contrary "'state tradition and values as reflected by long-standing case precedent.'" *People v. Fitzpatrick*, 986 N.E.2d 1163, 1167 (Ill. 2013) (quoting *People v. Caballes*, 851 N.E.2d 26, 45 (Ill. 2006) (*Caballes II*)). *Caballes II* refused to interpret Illinois's search-and-seizure clause differently from the Fourth Amendment in a case involving a dog sniff during a traffic stop. 851 N.E.2d at 45-46. And no Illinois court has ever held that the search-and-seizure clause of the Illinois Constitution departs from the Fourth Amendment in the way respondent describes. Respondent asserts that "it is apparent" that a

proposition regarding the end of traffic stops in *People v. Cosby*, 898 N.E.2d 603, 610-19 (Ill. 2008), is based on state constitutional law because it did not cite the Fourth Amendment after a particular sentence and "cannot be traced to any federal constitutional authority." Opp. at 9. But *Cosby* unambiguously addressed whether drivers were seized "for Fourth Amendment purposes." *Id.* at 612.[1] Respondent's suggestion that the Illinois Supreme Court would find "long-standing case law" demonstrating state-law tradition based entirely on one sentence, unsupported by citation, in a case focused on the Fourth Amendment, is implausible. See also *Fitzpatrick*, 986 N.E.2d at 1167 ("the lockstep question is generally settled for search and seizure purposes"). This case presents a question of pure federal law.

III. Reversal—Either Summary Or Plenary—Is Appropriate.

Respondent asserts that Section II of the petition requests no more than "error correction" and that this Court generally declines to review "'the misapplication of a properly stated rule of law.'" Opp. at 14 (quoting Sup. Ct. R. 10). This latter proposition

[1] Respondent also relies on *People v. Brownlee*, 713 N.E.2d 556 (Ill. 1999), Opp. at 9 n.4, which the Illinois Supreme Court did not cite in this case. But *Brownlee*, too, was decided as a matter of federal law. See *id.* at 564-66. See also *id.* at 566-67 (Heiple, J., specially concurring) (criticizing majority for not relying on state law).

is of course, true, but is entirely irrelevant, while the former proposition is simply false. Nor can respondent rehabilitate the Illinois Supreme Court's opinion.

1. As the petition and Section I, *supra*, set forth, this case presents a split on an important federal question, making petitioner's request for far more than error correction. The petition also demonstrated that the Illinois Supreme Court's legal reasoning was fallacious—indeed, on the far end of the wrong side of the split—but that does not diminish the reality that the split is entrenched and ready for resolution, as this Court appears to have recognized in granting certiorari in *Rodriguez*.

2. The error here is not a misapplication of a properly stated rule of law, but a misstatement of law at odds with other courts and in tension with longstanding precedent from this Court. It simply is not true that there is a bright-line Fourth Amendment rule requiring police officers to end traffic stops the moment that reasonable suspicion dissipates or that courts should not evaluate the stop as a whole when brief conduct occurs after the purpose is satisfied. Thus, there is no properly stated rule of law to be misapplied.

3. Section II of the petition demonstrated that because the case below misapprehended this Court's recent teachings on the proper conduct during traffic stops, reversal, either summary or plenary, was

appropriate. Pet. at 16-22. Respondent's attempts to buttress the decision below only validate those arguments.

Respondent admits that the Illinois Supreme Court's bright-line rule and statement that a "request for identification must be tethered to, and justified by, the reason for the stop," App. 10a, were "inartfully worded," and he attempts to rewrite the opinion, Opp. at 16. But the Illinois Supreme Court left no ambiguity as to its legal reasoning: "That suspicion [that the driver was subject to an arrest warrant] disappeared when [the officer] saw that [respondent] was not a woman and, therefore, could not be [the subject of the warrant]. Requesting [respondent's] license impermissibly prolonged the stop because it was unrelated to the reason for the stop." App. 11a. The Illinois Supreme Court concisely summarized its bright-line rule—one that is incorrect.

For support, respondent and the Illinois Supreme Court rely heavily on dicta in the plurality opinion of *Florida v. Royer,* 460 U.S. 491, 500 (1983), that an investigatory stop must "last no longer than is necessary to effectuate the purpose of the stop." See App. 7a, 10a; Opp. 15-16. But as petitioner explained, Pet. at 17-18 n.5, subsequent cases reject *Royer*'s rigid rule, and *Royer*'s facts—police removing an individual from an airport concourse and taking him to a small, closet-sized room—are so unlike the

circumstances here that *Royer*'s dicta offer no support for respondent's position. Likewise, respondent and the Illinois Supreme Court rely on *Caballes* to support their purported "tethering" principle. See App. 10a, Opp. 11-12, 15. But to the contrary, *Caballes* upheld a canine sniff entirely unrelated to the traffic offense that precipitated the stop. 543 U.S. at 407-09. This Court should reject this inappropriate reliance on *Royer*'s dicta and misreading of *Caballes*.

Another of respondent's already-rejected arguments is that Officer Bland had to "end the seizure," presumably by informing respondent he was free to go, before requesting respondent's license in a "consensual encounter." Opp. 1-3, 18-20. But petitioner does not claim that the license request was consensual. Rather, petitioner explained that this Court has previously rejected the notion that the moment the purpose of a traffic stop is complete has substantial constitutional significance, as evidenced by the fact that after fulfilling that purpose, an officer need not inform the driver that he is free to go before asking for consent to search his car. Pet. at 17 (discussing *Ohio v. Robinette*, 519 U.S. 33, 36, 39-40 (1996)).

In the end, respondent is left arguing that the Illinois Supreme Court's holding was "limited to the facts of this case." Pet. at 3, 7, 13. But the bright-line rule that court announced cannot be so limited. See,

e.g., *People v. Ferris*, 9 N.E.3d 1126, 1136-37 (Ill. App. Ct. 2014) (relying in part on *Cummings* to strike down seizure of car). "Narrow facts" do not justify a broadly applicable—and incorrect—rule.

* * *

This Court should clarify that no artificial line at the "end" of a traffic stop replaces reasonableness as the relevant touchstone and should reverse the Illinois Supreme Court, either summarily or after full briefing and argument. Alternatively, this Court should hold this case in abeyance pending its decision in *Rodriguez*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois
CAROLYN E. SHAPIRO*
Solicitor General
BRETT E. LEGNER
Deputy Solicitor General
MICHAEL M. GLICK
ELDAD Z. MALAMUTH
Assistant Attorneys General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5376
cshapiro@atg.state.il.us

*Counsel of Record

NOVEMBER 2014