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

BRIEF *AMICUS CURIAE* ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

JEFFREY T. GREEN
Co-Chair, NACDL
AMICUS COMMITTEE
1501 K Street N.W.
Washington, D.C. 20005
(202) 736-8291

ADEEL M. BASHIR *
PRESIDENT, AMERICAN
MUSLIM BAR ASSOCIATION
ASSISTANT FEDERAL
DEFENDER MIDDLE
DISTRICT OF FLORIDA
400 N. Tampa St.,
Suite 2700
Tampa, FL 33602
(703) 835-3929
adeel_bashir@fd.org

Counsel for Amicus Curiae

* Counsel of Record

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958 and boasts a nationwide membership of many thousands of direct members and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. It is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL files many amicus briefs each year, including in the U.S. Supreme Court, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants. NACDL and its members have an important interest in ensuring that among other objective factors, lower courts may consider race under a flexible totality-of-circumstances test to determine whether a reasonable person would feel free to ignore a police officer's show of authority in determining whether a Fourth Amendment seizure has occurred.

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[1]Pursuant to Supreme Court Rule 37.2(a), counsel of record for both parties received notice of *amici curiae*'s intention to file this brief at least 10 days prior to the due date. Petitioner and respondent have consented to the filing of this brief. No party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

It is hardly a secret America's criminal justice system disproportionately affects people-of-color.[2] As a result, *amici* have represented countless numbers of clients from communities of color. And we have often found it necessary to discuss our clients' race to help courts better understand the reality of their life experiences, which often differ from their white counterparts.[3]

Given our perspective, *amici* urge this Court to grant review in Petitioner Knights's case to resolve the acknowledged circuit conflict on whether, under the totality of the circumstances, a court is barred from considering a person's race in determining whether a Fourth Amendment seizure has occurred. See Pet. i. Review is warranted for three reasons.

First, the Eleventh Circuit's anomalous rule—excising race alone from the seizure analysis—conflicts with this Court's precedent allowing courts to consider *all* objective factors in totality-of-circumstances inquiries about the voluntariness of police-civilian encounters. See *United States* v. *Mendenhall*, 446 U.S. 544, 558 (1980). Second, the Eleventh Circuit's assertion that race has no objective relationship to the coerciveness of a police-civilian interaction is not only wrong, but also contravenes defense attorneys' regular practice of relying on empirical evidence showing that racial dynamics intensify the risk of harm to persons-of-color during

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[2] *See generally* Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010).

[3] *See, e.g.*, Jonathan A. Rapping, Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions, 16 NYU Journal of Legislation and Public Policy 999, 1000 (2013).

police encounters. Third, the Eleventh Circuit's belief that courts cannot apply a race-conscious reasonable person test belies lower courts' competency to assess race objectively in many other contexts, including other Fourth Amendment analyses.

Petitioner's case is also an excellent vehicle to address whether race plays a role in the seizure analysis. As for the facts, officers, in a marked police car, approached and outnumbered a young Black male, past midnight, in a predominately minority neighborhood, and parked against the flow of traffic limiting the young man's egress, to conduct an investigatory stop upon less than reasonable suspicion. Furthermore, Tampa, Florida, where the stop occurred, has a documented history of targeting civilians along racial lines, correlating with different community views towards the police based on race. Thus, the setting includes both a clear police show of authority and an obvious racial component that objectively informs whether a reasonable person in Petitioner's situation would have felt free to leave.

Finally, at a minimum, the Court should grant review and give guidance on what other factors, if any, are inappropriate to consider in the totality-of-circumstances analysis. The ordinary rule is courts can consider personal characteristics from which they can draw "commonsense conclusions about behavior and perception." *J.D.B.* v. *North Carolina*, 564 U.S. 261, 272 (2011) (cleaned up). But the Eleventh Circuit's reasoning casts doubt on whether other personal characteristics, such as age or gender, are also off limits in the seizure analysis. And its all-circumstances-except-race test challenges the objectivity of the reasonable person standard for persons-of-color in a seizure analysis.

Petitioner and *amici* agree, a true totality-of-circumstances test means courts can, but need not, consider *all* objective circumstances contributing to how a reasonable person would perceive the voluntariness of a police interaction. See Pet. 21-27. This sometimes includes considering objective realities about the racial dynamics of police-civilian encounters. Thus, *amici* ask the Court to grant the petition and adhere to its longstanding precedent, allowing for a flexible totality-of-circumstances analysis permitting courts, in appropriate cases, to consider race among other objective factors when determining whether a reasonable person in the defendant's shoes would have felt free to disregard a police officer's show of authority.

The Eleventh Circuit's bright line all-circumstances-except-race rule ignores the reality of race in America, rendering the Fourth Amendment's protection for persons-of-color illusory. It does so by marginalizing the life experiences of large swaths of communities-of-color and penalizing them for failing to act unreasonably by walking away from a police officer's show of authority when doing so would objectively put their lives in danger. The Court should grant the petition and right this obvious wrong.

I. RACE IS ONE OF MANY FACTORS FROM WHICH COMMONSENSE INFERENCES CAN BE DRAWN ABOUT HOW A REASONABLE PERSON WOULD REACT TO A POLICE-CIVILIAN ENCOUNTER.

A. A police officer's show of authority triggers a Fourth Amendment seizure based on the totality of the circumstances surrounding the police-civilian encounter.

The Fourth Amendment guarantees: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "The Framers made that right explicit in the Bill of Rights following their experience with the indignities and invasions of privacy wrought by general warrants and warrantless searches." *Byrd* v. *United States*, 138 S. Ct. 1518, 1526 (2018) (cleaned up). Because "[f]ew protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures," *id.*, the Fourth Amendment encapsulates "the very essence of constitutional liberty." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454 n.4 (1971).

This Court recognizes two types of police actions sufficient to restrain a civilian's liberty, triggering the Fourth Amendment's protection against unreasonable seizures: (1) through physical force; or (2) by a show of authority. See *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1967).

As for the latter, "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 466 U.S. at 554.

"*Mendenhall* establishes that the test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *California* v. *Hodari D.*, 499 U.S. 621, 628 (1991). This "test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." *Michigan* v. *Chesternut*, 486 U.S. 567, 573 (1988).

"Examples of circumstances that might indicate a seizure" include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching . . . , or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554. The setting where the police-civilian encounter took place can also inform "whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Florida* v. *Bostick*, 501 U.S. 429, 435-39 (1991).

At bottom, the *Mendenhall* totality-of-circumstances test asks courts to measure how a person in the defendant's shoes would have reasonably perceived and reacted to a police encounter: either (1) ignore an officer's show of authority without fear of compulsion; or (2) submit to a show of authority understanding noncompliance could risk further police action such as physical restraint, arrest, or violence.

B. Race objectively informs the risk of violence in a police-civilian encounter.

As *Mendenhall* recognizes, a defendant's individual characteristics—there, Mendenhall's race (Black), age

(22), gender (female), and education (non-high school degree)—while not "decisive," are "not irrelevant" to the totality-of-circumstances measuring the coerciveness of a police-civilian encounter. *Mendenhall*, 446 U.S. at 558 (citing *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973) (the totality-of-circumstances includes "characteristics of the accused")).[4]

Consistent with *Mendenhall*'s approach, *amici* have long understood courts in the seizure context are tasked with determining how a reasonable person, who possesses the same individual characteristics as the suspect, would assess the voluntariness of a police encounter. This sometimes involves pointing out our client's race to "determine what it would have been like for a reasonable man to be in the suspect's shoes." *Thompson* v. *Keohane*, 516 U.S. 99, 119 (1995) (Thomas, J., dissenting).

The sad reality is racial disparities persist both in the frequency of police-civilian encounters and instances of police killings.[5] Thus, objective inferences can be drawn from race about evaluating the risk of harm to oneself in a police-civilian encounter.

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[4]While *Mendenhall* involved consent, this Court has explained seizure and consent "turn on very similar facts," and the "question of voluntariness pervades" both analyses. *United States v. Drayton*, 536 U.S. 194, 206 (2002).

[5]Frank Baumgartner, Derek A. Epp & Kelsey Shoub, *Suspect Citizens: What 20 Million Traffic Stops Tell Us About Policing and Race*, Cambridge University Press (2018); Number of People Shot to Death by the Police in the United States from 2017 to 2021, by Race (2021), https://www.statista.com/statistics/585152/people-shot-to-death-by-us-police-by-race/.

Consider "the talk"—the conversation parents of color have with their children about the potential for violence in police interactions.

> For generations, black and brown parents have given their children 'the talk'– instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger – all out of fear of how an officer with a gun will react to them.

Utah v. *Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J. dissenting).

Many factors, such as policing policy, stereotypes about minorities, and racial segregation, contribute to make "the talk" a necessary feature of persons-of-colors' objective reality.[6] "Even if this blight were eradicated today, a long history of race-based policing likely will remain imprinted on the group and individual consciousness of African-Americans for the foreseeable future." *Commonwealth* v. *Evelyn*, 485 Mass. 691, 708 (2020) (discussing the history of racial profiling).

Names like George Floyd, Philando Castile, Laquan McDonald, Freddie Gray, Eric Garner, Tamir Rice, Breonna Taylor, and Sandra Bland, serve as an everyday reminder that police encounters for people-of-color too often result in death.[7] According to a

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[6]*See generally*, Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 Geo. L.J. 1479, 1485 (2016).

[7]For a more complete list of unarmed Black people killed by the police over the past decade, *see The Unarmed Black People Killed by Police from 2009-Present*, https://www.gonzaga.edu/about/offices-services/diversity-

Washington Post analysis, while Black Americans account for less than 13% of the U.S. population, they are shot and killed by police at more than twice the rate as white Americans.[8] Another recent study found the lifetime risk of being killed by police use of force was greatest among Black men, who are about 2.5 times more likely to be killed by police than white men.[9] The study also found about 1 in 1,000 Black men and boys will be killed by police.[10] Black women are about 1.4 times more likely to be killed by police than white women.[11]

Racial disparities persist not only in the risk of violence involved in a police-civilian encounter, but also in how civilians perceive this reality. Black adults are about five times as likely as whites to say they have been unfairly stopped by police because of their race or ethnicity.[12] According to a 2020 Kaiser Family

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inclusion-community-equity/say-their-name#inmemoriam (last visited Sept. 9, 2021).

[8]Jennifer Jenkins, Steven Rich & Julie Tate, *934 People Have Been Shot and Killed by Police in the Past Year*, The Washington Post (Sept. 6, 2021), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/; *see also* https://mappingpoliceviolence.org/.

[9]Frank Edwards, Edward Esposito & Hedwig Lee, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, Proceedings of the National Academy of Sciences of the United States of America, (August 20, 2019), https://www.pnas.org/content/116/34/16793.

[10]*Id.*

[11]*Id.*

[12]Drew DeSilver, Dalia Fahmy & Michael Lipka, *10 Things We Know About Race and Policing in the U.S.*, Pew Research Center (June 3, 2020), https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/.

Foundation poll, 7 in 10 Black Americans say they have experienced incidents of discrimination or police mistreatment, including nearly half who have felt their lives were in danger.[13] Meanwhile, only 3 percent of white people report negative police interactions in their lifetimes.[14]

All these figures contribute to markedly different views towards the police along racial lines. Just a month before George Floyd's death, a Pew Research Center survey found 78% of Americans overall—but a far smaller share of Black Americans (56%)—said they had at least a fair amount of confidence in police officers to act in the best interests of the public.[15] The survey found wide differences within and across age and race, with younger Black Americans saying they were less likely than both older Black Americans and younger Americans in other racial and ethnic groups to express confidence in police.[16] Only half of Black people under age 55 expressed at least a fair amount of confidence in the police to act in the best interest of

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[13]*Poll: 7 in 10 Black Americans Say They Have Experienced Incidents of Discrimination or Police Mistreatment in Their Lifetime, Including Nearly Half Who Felt Their Lives Were in Danger*, Kaiser Family Foundation (June 18, 2020), https://www.kff.org/racial-equity-and-health-policy/press-release/poll-7-in-10-black-americans-say-they-have-experienced-incidents-of-discrimination-or-police-mistreatment-in-lifetime-including-nearly-half-who-felt-lives-were-in-danger/.

[14]*Id.*

[15]Hannah Gilberstadt, *A Month Before George Floyd's Death, Black and White Americans Differed Sharply in Confidence in the* Police, Pew Research Center (June 5, 2020), https://www.pewresearch.org/fact-tank/2020/06/05/a-month-before-george-floyds-death-black-and-white-americans-differed-sharply-in-confidence-in-the-police/.

[16]*Id.*

the public.[17] The survey also asked the public to rate the ethical standards of police officers. While nearly three-quarters said they would rate the ethical standards of police officers highly, just 52% of Black adults said the same.[18]

C. Defense attorneys routinely cite to race as an objective factor informing the risk of violence in the Fourth Amendment seizure analysis.

Contrary to the Eleventh Circuit's view that race does not lend itself to objective conclusions, see Pet. App. 8a, the data shows race objectively informs the reality of police-civilian encounters. And that reality for persons-of-color is, because of their race, they may, given other objective circumstances, reasonably understand they have no choice but to submit to a police officer's show of authority for the sake of their lives.

So it is no more than an acceptance of reality to acknowledge race can be one of many objective factors that might complete the picture of how a reasonable person, who happens also to be a person-of-color, would assess the coercive effect and voluntary nature of a police encounter under the totality of the circumstances.

Indeed, this is the argument Petitioner's counsel made in the lower court when she argued finding "an innocent person in Mr. Knights's position would feel free to terminate the law enforcement encounter" ignores the "reality—young African-American men feel that they cannot walk away from police without risking arrest or bodily harm." Reply Br. of Appellant,

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[17] *Id.*

[18] *Id.*

United States v. *Knights*, 2019 WL 3285541, at *11-12 (11th Cir. 2019).

This is also the same argument made by defense counsel in *United States* v. *Smith*, 794 F.3d 681 (7th Cir. 2015). Relying on empirical data, social science, and historical evidence, counsel argued:

> A young person minding his own business while strolling home from the nearby gas station in a neighborhood bearing an overwhelmingly poor, minority demographic is never going to feel free to walk away when two officers swing their bicycles around in a dark alley, quickly approach him while closing in on him in a 45-degree angle, and rather than asking him his name or introducing themselves, ask whether he has any guns, knives, or weapons. A belief to the contrary is not rooted in reality.

Brief of Appellant, *United States* v. *Smith*, 2014 WL 7250538, at *15 (7th Cir. 2014).

In fact, *amici* identified over two hundred instances when defense attorneys have made similar arguments about the objective role race plays in evaluating the voluntariness of a civilian's submission to a police officer's show of authority. Below are just a handful examples of those arguments:

- *United States* v. *Radford* involved a 33-year-old Black woman from Arizona, confronted by two white male Galesburg police officers at the Galesburg Train Station, a town of 32,000 in a remote corner of rural Illinois. Arguing Radford was seized because a reasonable person in her position would not have felt free to terminate her encounter with law enforcement, the appellant argued,

> "[t]he power dynamic created by this environment is a factor the Court should consider when assessing the totality of circumstances."

Brief of Appellant, *United States* v. *Radford*, 2017 WL 75655, at *14-15 (7th Cir. 2017).

- *United States v. Hester* concerned whether a seizure occurred when four Newark police officers flanked Hester, a Black male sitting in the passenger seat of a vehicle outside a corner store. Hester asked the district court to consider the Department of Justice's finding from 2011-2014, the Newark Police Department made thousands of stops with no indication of reasonable suspicion of criminal activity, and provided the lower court with empirical evidence showing these unconstitutional stops were directed at black residents of Newark.

  On appeal from the denial of his motion to suppress, Hester argued "[e]verything before the court confirmed that if Mr. Hester had tried to walk away from a 'high risk traffic stop,' at least one of the officers would surely have stopped him. There was no basis for the court to conclude that any reasonable person in his position would have felt free to leave."

Brief of Appellant, *United States* v. *Hester*, 2017 WL 1546936, at *28 (3d Cir. 2017).

- In *State* v. *Jones*, the trial court held it was impermissible for it to consider the race of the defendant in determining whether a reasonable person in the situation would have felt free to leave the encounter. On appeal, Jones, a Black male, argued "the

> legacy of violence by police against African Americans - from the Rodney King incident to beatings in post-Katrina New Orleans - is likely to be in the forefront of an African American's mind when he or she is stopped by the police."
>
> Jones also explained his argument was not "that there is one standard for defendants who are African American and another standard for those who are not. The issue is whether a reasonable person would feel free to leave the police contact and considering race will only make this consideration a more informed decision. Ignoring issues related to race in police encounters will only lead to mistaken conclusions and unjust results."

Brief of Petitioner, *State* v. *Jones*, 2019 WL 9054080, at *6-7, *28. (N.H. 2019).

- In *State* v. *Johnson*, Johnson argued he was seized when two armed officers stood on either side of his car preventing him from leaving, shined their flashlights into the car, twice questioned him about the car's ownership, and requested his identification. As part of his argument, Johnson stressed "it is 'not irrelevant' that Mr. Johnson is black, just as it is 'not irrelevant' that there were two officers instead of one. An African American man flanked by two armed white officers in the middle of the night in a confined space would not feel free to ignore their questions and leave."

Brief of Respondent, *State* v. *Johnson, Jr.*, 2018 WL 3825446, at *20 (Wash. App. Div. 2018).

- *State* v. *Reed* involved a Black man who was told by a police officer to stop and show his hands. Arguing the police's conduct amounted to a seizure, Reed argued "[i]t does not require a study of sociology or of African-American studies, or emersion into the Black Lives Matter movement, or being particularly woke in today's parlance to understand that the relationship of a reasonable African-American man to a show of government authority can differ from that of a reasonable man of the historically dominant white culture in America."

Brief of Defendant, *State* v. *Reed*, 2018 WL 2085330, at *21 (Wis. 2018).

- In *Crews* v. *United States*, three uniformed and armed white police officers demanded the attention of Crew, a Black man, and followed up by cornering him on the landing to his own residence. Highlighting the racial dynamics of the encounter, appellant explained, "Mr. Crews is [a] black 31-year old man living in a high crime area, he was alone after midnight returning home and it was especially dark, pitch black out, there were multiple armed white officers coming at him and a flashlight was being shined on him . . . ."

Reply Brief of Appellant, *Crews* v. *United States*, 2021 WL 531911, at *10 (D.C. 2021).

- Under the totality of the circumstances, the appellant in *United States* v. *Cowan* argued "a reasonable person would not have felt free to leave," given, in part, "Mr. Cowan was the

> only black man in a house with two white homeowners and two white police officers."

Brief of Appellant, *United States* v. *Cowan*, 2016 WL 4376585, at *15-16 (6th Cir. 2016).

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These examples show defense attorneys are not asking courts to consider race as an independent or subjective basis to find a seizure occurred. Nor are they asking for special Fourth Amendment rules to apply to people-of-color. They are not even saying courts must consider their clients' race.

Rather, they are merely asking courts to consider an objective reality that validates the lives and experiences of their clients-of-color—that a person-of-color can reasonably be expected to act more apprehensive around the police than whites fearing his/her life, and that apprehension could objectively affect whether a reasonable person-of-color would feel free to walk away from a police officer without risking his/her life.

II. LOWER COURTS ARE COMPETENT TO CONSIDER RACE OBJECTIVELY IN THE TOTALITY-OF-CIRCUMSTANCES.

The Eleventh Circuit's all-circumstances-except-race rule denies the racial significance of the police-civilian encounter, positing administrability and Equal Protection concerns prevent courts from considering race in the seizure analysis. See Pet. App. 14a. But nothing about judicial administration or the constitution compels courts to turn a blind eye to the objective reality about what a person experiences because of the color of their skin.

To the contrary, "whenever the government treats any person unequally because of his or her race, that

person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 229-30 (1995).

The practical effect of the Eleventh Circuit's rule refusing to allow courts to recognize the role of race in a police-civilian encounter is racially discriminatory. Indeed, when race is taken out of the seizure equation, persons-of-color face a reasonable person standard divorced from their objective reality, which punishes them for failing to unreasonably walk away from a police encounter and risk their lives.

There is no principled reason to deny courts the ability to consider race in the seizure analysis when the result of doing so is itself discriminatory. That is all the truer because courts already competently consider race in other totality-of-circumstances analyses without crossing the line of race-based discrimination.

Take reasonable suspicion under the Fourth Amendment, which, like the seizure analysis, depends on "the totality of the circumstances—the whole picture . . . ." *United States* v. *Cortez*, 449 U.S. 411, 417 (1981). In *United States* v. *Brignoni-Ponce* 422 U.S. 873, 844 (1975), for example, the Court noted "[a]ny number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area." There, "officers relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants." *Id.* at 885-86. The Court did not say race or ethnic appearance could not be considered altogether. Rather, the Court held race "standing alone" cannot support reasonable suspicion. *Id.* at 887. So while racial profiling is strictly prohibited, *Brignoni-Ponce* reasons that an individual's race, along with other

objective circumstances, can inform the totality-of-circumstances for determining reasonable suspicion.

As another example, the Ninth Circuit in *United States* v. *Brown*, 925 F.3d 1150, 1156 (9th Cir. 2019) explained in "evaluating flight as a basis for reasonable suspicion, we cannot totally discount the issue of race." The court observed "[t]here is little doubt that uneven policing may reasonably affect the reaction of certain individuals—including those who are innocent—to law enforcement." *Id.* Given increased "coverage of racial disparities in policing" and "amplif[ied] awareness of these issues," the court found the "racial dynamics in our society" "can inform the inferences to be drawn from an individual who decides to step away, run, or flee from police without a clear reason to do otherwise." *Id.* at 1556-57. And while data on police practices "cannot replace the commonsense judgments and inferences about human behavior underlying the reasonable suspicion analysis," *id.* at 1556 (cleaned up), the court explained it could not ignore the realities of race.

The "totality of circumstances" inquiry for reasonable suspicion also "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *United States* v. *Arvizu*, 534 U.S. 266, 273 (2002) (Citation omitted). But the Eleventh Circuit's all-circumstances-except-race rule does not allow for persons-of-color to draw on their collective life experiences facing systemic racism and police as a community.

Outside the Fourth Amendment context, in *Batson* v. *Kentucky*, 476 U.S. 79, 80 (1986), this Court held "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their

race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." In the years since, this Court has "made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Foster* v. *Chatman*, 578 U.S. 1023, 1748 (2016) (citation and quotation marks omitted); see also *Flowers* v. *Mississippi*, 139 S. Ct. 2228, 2243 (2019) (providing examples of the broad evidence a criminal defendant can present to support a claim that a prosecutor's peremptory strikes turned on race).

Finally, in the criminal sentencing arena, imposing different sentences based on race would violate Equal Protection. See U.S.S.G. § 5H1.10. But that does not mean courts are forbidden from considering race altogether, for example, by accounting for the disparity between the guideline ranges for crack and powder cocaine "as reflecting unjustified race-based differences." *Dorsey* v. *United States*, 567 U.S. 260, 268 (2012). Indeed, courts regularly rely on their disagreement with that racially disparate sentencing scheme as a basis to vary from the recommended guideline sentence. See, *e.g.*, *Kimbrough* v. *United States*, 552 U.S. 85, 97 (2007).

Lower courts' experience in considering race objectively in a totality-of-circumstances inquiry, without considering race to be the sole or dispositive factor in the analysis, should give this Court confidence if it adopts Petitioner's rule, lower courts also will be able to consider race as one of many factors in the totality-of-circumstances seizure analysis with no trouble and consistent with Equal Protection.

III. PETITIONER'S ENCOUNTER WITH THE POLICE INCLUDES AN OBJECTIVE RACIAL COMPONENT INFORMING THE VOLUNTARINESS OF THE INTERACTION.

Petitioner's case is also an excellent vehicle to address the question about the role of race in the seizure analysis. To begin, the facts show a quintessential show of authority. After parking their marked police vehicle so it effectively blocked Petitioner Knights's ability to drive away, two armed officers approached Petitioner Knights, a young Black man, past midnight, to conduct an investigatory stop upon less than reasonable suspicion. See Pet. App. 3a-4a; see also *id.* 20a-21a, 52a, 62a.

Furthermore, the setting – Tampa, Florida – is emblematic of the national trend showing racial disparity in the relationship between civilians and the police. First, the events here took place in the Live Oaks Square neighborhood in Tampa, which is over 90% non-white.[19] Meanwhile, Tampa Police Department (TPD) officers are whiter, about 69%.[20] Only about 14% of officers are Black.[21]

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[19]*Race and Ethnicity in Tampa, Florida*, Statistical Atlas, https://statisticalatlas.com/place/Florida/Tampa/Race-and-Ethnicity (last visited Sept. 9, 2021); *see also* Tampa, FL, Data USA, https://datausa.io/profile/geo/tampa-fl/#demographics (last visited Sept. 9, 2021).

[20]Monivette Cordeiro, et al., *Central Florida Police Forces Whiter Than Communities They Serve*, Orlando Sentinel, June 25, 2020, https://www.orlandosentinel.com/news/crime/os-ne-orlando-police-agencies-racial-diversity-20200625-5lmo2awyazderesw7kuyypaovu-story.html.

[21]Jennifer Titus, *10 Investigations asked Tampa Bay Law Enforcement for the Race Breakdown in their Departments; Here's What They Said*, Tampa Bay 10 News (June 10, 2020, 4:37 PM), https://www.wtsp.com/article/news/investigations/10-

Second, data from the last few years shows a Black person is more than twice as likely as a white person to be killed by the TPD.[22] The TPD also used more force per arrest than 44% of police departments in Florida, and exhibited more racial disparities in deadly force than 54% of departments.[23]

Third, Tampa has a documented history of disparate treatment of Black people by the police. For instance, a 2015 Tampa Bay Times investigation revealed the TPD encouraged officers to disproportionately target poor, Black neighborhoods, like Live Oaks Square, for bike stops.[24] The Pulitzer-Prize winning expose promoted a Department of Justice report, which found "stark racial disparities" in how TPD enforces laws and a long pattern of racist practices.[25] The expose also helped create the Tampa Citizen's Review Board "to foster transparency, enhance communication and ensure a relationship of trust and respect . . ." between the TPD and the community.[26]

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investigates/tampa-bay-area-law-enforcement-employee-race-breakdown/67-a5aad771-b7bb-419b-a7e7-53bd1159dee6.

[22]Campaign Zero, *Police Scorecard*, https://policescorecard.org/fl/police-department/tampa (last visited Sept. 9, 2021).

[23]*Id.*

[24]Kameel Stanley, *How riding your bike can land you in trouble with the cops – if you are black*, Tampa Bay Times (Apr. 18, 2015), https://www.tampabay.com/news/publicsafety/how-riding-your-bike-can-land-you-in-trouble-with-the-cops---if-youre-black/2225966/.

[25]*See* Greg Ridgeway, et al., U.S. Dep't of Just., *An Examination of Racial Disparities in Bicycle Stops and Citations Made by the Tampa Police Department* (2016), https://www.tampa.gov/document/report-23341.

[26]Code of Ordinance City of Tampa, Florida § 18-8(b); *see also id.* § 18-8(c); *Citizens Review Board*, Tampa.gov,

The Policing Project partnered with the then-newly formed Tampa Citizens Review Board to solicit public input in developing its strategy for engagement between the TPD and the public. The findings showed approval consistently lower among younger respondents, non-white respondents, and respondents at the lowest income levels.[27] The group that rated TPD lowest were Black males, who only 30% approved and 43% disapproved.[28]

Though the Citizen's Review Board has now existed several years, it has fallen short of its mission to foster trust. A 2020 poll released by the Tampa Bay Partnership, in collaboration with the Community Foundation of Tampa Bay, shows there are still significant divides between the views and experiences of Black and white residents with specific issues of race, racism, and racial equity.[29] While over 70% of Tampa Bay residents agree Black people are treated less fairly than white people when dealing with the police, Black residents are more likely to view issues of race and racial discrimination as pervasive, systemic issues present in society.[30] White residents,

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https://www.tampa.gov/police/citizens-review-board (last visited Sept. 9, 2021).

[27]Policing Project NYU School of Law, *Report to the Tampa Citizens Review Board Summarizing Public Feedback on Tampa Police Department Policies and Practices* (March 2018), https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/5ae0e19788251b6ca60b20a1/1524687257328/Tampa+CRB+Survey+Report_APRIL+UPDATE_vf.pdf.

[28]*Id.*

[29]*See Tampa Bay Partnership, State of the Region: Racial Sentiment Survey* 61 (2020).

[30]*Id.*

however, are more likely to view these issues as situationally dependent.[31]

These findings, along with the racial justice issues at the heart of the George Floyd protests, have prompted a renewed push by civil rights groups and community members to revamp the Citizen Review Board and increase diversity within the police department.[32] On Juneteenth, 2020, under increasing pressure from the community, Tampa Mayor Jane Castor announced plans to form a Task Force on Policing to enhance TPD's interactions with the public.[33] Only time will tell if the mayor's latest efforts can change the reality Black and white people in Tampa live in different worlds with their relationship with the police.

Petitioner's facts, including the racial climate where the events took place, thus give the Court an excellent

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[31]*Id.*

[32]Tony Marrero, *Civil rights groups call for reform of law enforcement review boards*, Tampa Bay Times (June 10, 2020), https://www.tampabay.com/news/2020/06/10/civil-rights-groups-call-for-reform-of-law-enforcement-review-boards/; Mckenna King, *Tampa leaders looking increase power of citizen's review board, diversity of police department*, ABC Action News (Sept. 24, 2020), https://www.abcactionnews.com/news/region-hillsborough/tampa-leaders-looking-to-increase-power-of-citizens-review-board-diversity-of-police-department.

[33]Colin Wolf, *Tampa Mayor Jane Castor announces new policies for police, including excessive force changes, and a new task force*, Creative Loafing (June 19, 2020 12:00, PM), https://www.cltampa.com/news-views/local-news/article/21137845/tampa-mayor-jane-castor-announces-new-policies-for-police-including-excessive-force-changes-and-a-new-taskforce.

backdrop upon which to address the role of race in the objective seizure analysis.

IV. EXCISING RACE FROM THE TOTALITY-OF-CIRCUMSTANCES SEIZURE ANALYSIS RAISES MANY QUESTIONS WARRANTING GUIDANCE FROM THIS COURT.

Finally, Petitioner and *amici* agree the Eleventh Circuit's decision to excise race from the totality-of-circumstances gives an incomplete picture about the objective nature of a police-civilian encounter. The Court should not let that decision stand.

The Eleventh Circuit's ruling also raises many other questions about how to apply the reasonable person standard in the Fourth Amendment seizure context. For instance, in the closely-analogous custody context, courts are required to "examine all of the circumstances surrounding the interrogation, includi ng any circumstance that would have affected how a *reasonable person in the suspect's position* would perceive his or her freedom to leave." *J.D.B.*, 564 U.S. at 270-271 (cleaned up) (emphasis added). Thus, when determining custody involving a child, courts conduct the analysis from the perspective of a reasonable child because age "is a fact that 'generates commonsense conclusions about behavior and perception.'" *Id.* at 272 (quoting *Yarborough* v. *Alvarado*, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting)).

In contrast, the Eleventh Circuit's all-circumstances-except-race rule eliminates one of the crucial factors allowing courts to assess the voluntariness of a police-citizen encounter from the prospective of someone in the defendant's shoes. The Eleventh Circuit's reasoning brings up whether other individual characteristics are off limits in the seizure analysis. Can courts consider facts about other suspect

classes, alienage, and national origin, in the totality-of-circumstances? See *Graham* v. *Richardson,* 403 U.S. 365 (1971). And what about gender, age, religious beliefs, or socio-economic status. Are those now improper factors in the seizure analysis?

In the end, the Eleventh Circuit's decision casts doubt on the objectivity of the reasonable person in the feel "free to leave" seizure analysis. Is the reasonable person: (1) an androgynous, nonracial person, who cannot be reasonably expected to have a perception different from any other person; or (2) a person possessing the same objective characteristics of the defendant, such as age, gender, race, intelligence, education, and disability, from which courts and the police can draw reasonable inferences about how that person would react to a police-civilian encounter.

The stakes are simply too high for this Court to leave this and so many other questions about the what factors are inappropriate in the totality-of-circumstances seizure analysis.

CONCLUSION

For these reasons and those stated in Petitioner Knights' submission, the Court should grant his petition.

Respectfully submitted,

JEFFREY T. GREEN
Co-Chair, NACDL
AMICUS COMMITTEE
1501 K Street N.W.
Washington, D.C. 20005
(202) 736-8291

ADEEL M. BASHIR *
PRESIDENT, AMERICAN
MUSLIM BAR ASSOCIATION
ASSISTANT FEDERAL
DEFENDER MIDDLE
DISTRICT OF FLORIDA
400 N. Tampa St.,
Suite 2700
Tampa, FL 33602
(703) 835-3929
adeel_bashir@fd.org

Counsel for Amicus Curiae

* Counsel of Record

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