No. 13-9972

In the Supreme Court of the United States

DENNYS RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
GINGER D. ANDERS
Assistant to the Solicitor General
CHRISTOPHER J. SMITH
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether, in the context of a traffic stop, a police officer may conduct a dog sniff of a vehicle after issuing a written traffic warning, where the traffic stop was not unreasonably prolonged.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 127-131) is reported at 741 F.3d 905. The opinion of the district court (J.A. 110-115) is not published in the *Federal Supplement* but is available at 2012 WL 5458427.

JURISDICTION

The judgment of the court of appeals (J.A. 132-133) was entered on January 31, 2014. The petition for a writ of certiorari was filed on May 1, 2014, and granted on October 2, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the District of Nebraska, petitioner was convicted on one count of possessing with intent to distribute 50 grams or more of a mix-

ture or substance containing methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1). J.A. 116. He was sentenced to 60 months of imprisonment, to be followed by four years of supervised release. J.A. 117, 199. The court of appeals affirmed. J.A. 127-131.

1. Just after midnight on March 27, 2012, Morgan Struble, a canine officer with the Valley Police Department in Nebraska, was in his patrol car with his drug-sniffing dog, Floyd, when he observed the vehicle petitioner was driving veer slowly onto the shoulder of the highway and then jerk back onto the road. J.A. 16-19. Officer Struble observed the vehicle cross the fog line and drive for several seconds on the shoulder of the road before it reentered the traffic lane. J.A. 19-20. Nebraska law prohibits driving on highway shoulders, Neb. Rev. Stat. Ann. § 60-6,142 (LexisNexis 2010), as well as failing to maintain a lane, *id.* § 60-6,139(1). At 12:06 a.m., Officer Struble initiated a traffic stop of the vehicle. J.A. 26. The vehicle was occupied by petitioner and a front-seat passenger, Scott Pollman. J.A. 24.

As Officer Struble approached the vehicle, he noticed an "overwhelming" odor of air freshener. J.A. 20-21, 54. According to Struble, the use of "overwhelming" air freshener is a "common tactic" for covering up the scent of contraband such as illegal drugs. J.A. 54. Struble also observed that Pollman had his hat pulled down over his eyes, was looking straight ahead, and would not make eye contact, as if he did not want to be seen. *Ibid.* In Struble's view, Pollman appeared unusually nervous for a mere passenger in a stopped vehicle. J.A. 34.

Officer Struble advised petitioner of the reason for the stop, and petitioner stated that he had driven on

the shoulder to avoid a large pothole in the roadway. J.A. 22, 46. In the officer's view, that explanation was inconsistent with his observation of petitioner's vehicle "slow[ly]" veering onto the shoulder, remaining there, and then "jerk[ing] back to the roadway." J.A. 46-47. After Struble collected petitioner's license, registration, and proof of insurance, he asked petitioner to sit in the patrol vehicle while a records check was completed. J.A. 23. Petitioner asked if he was required to do so, and Struble responded that he was not. *Ibid.* Petitioner declined to accompany the officer and instead waited in his own vehicle. *Ibid.* Struble later testified that, in his time as a police officer, he had never encountered anyone else who was "so adamant against" sitting in the patrol vehicle. J.A. 53. Struble believed that petitioner's behavior indicated that he did not want to be far from his vehicle or its contents. *Ibid.* Struble explained that, in his experience, "people concealing contraband" tend not to "want to distance themselves too much from their contraband." J.A. 53-54.

After Officer Struble ran a records check on petitioner, he returned to petitioner's vehicle. J.A. 24. He asked Pollman for identification and asked where the two men were coming from and where they were going. *Ibid.* Pollman stated that they had traveled to Omaha, Nebraska, to look at a car that was for sale and that they were returning to Norfolk, Nebraska. *Ibid.* Pollman also stated that he had not seen any pictures of the vehicle before making the trip. J.A. 25. Officer Struble found it "suspicious" and "abnormal" that the men would drive four hours to Omaha and back "that late at night to see a vehicle sight unseen to possibly buy it." J.A. 26, 60-61. Pollman also stated

that he had not bought the vehicle because the seller did not have its title. J.A. 26, 61. Struble found it similarly unlikely that the two men would have driven that distance to look at a car without obtaining any title information in advance. J.A. 26, 60-61.

Officer Struble returned to his patrol car to run a records check on Pollman. At that point, at 12:19 a.m., he also called for a second officer because he wanted another officer present, for safety reasons, if he performed a dog sniff. J.A. 27, 71-72. While waiting on the second officer, Struble issued a written warning to petitioner, noting the time on the warning as 12:25 a.m. J.A. 29. Struble finished handing the warning to petitioner and explaining it to him at 12:27 or 12:28 a.m. *Ibid.* Struble also returned all the documents to both petitioner and Pollman. J.A. 27. After petitioner signed the written warning, Struble gave petitioner a copy of the document. *Ibid.*

Officer Struble then asked permission to walk his dog around petitioner's vehicle. J.A. 29. When petitioner refused consent, Struble directed petitioner to step out of the vehicle. *Ibid.* Petitioner rolled up the windows of his car and then stood in front of the patrol car with Struble while Struble waited for the second officer. J.A. 29-30. After the second officer arrived at 12:33 a.m., Struble retrieved his dog and led him around petitioner's car, and, within 20 to 30 seconds, the dog alerted to the presence of drugs. J.A. 31-33. All told, seven or eight minutes had passed from the time Struble had issued the written warning until the dog indicated the presence of drugs, which means that Floyd alerted around 12:35 a.m. J.A. 33. Based on the dog's alert, Struble then searched peti-

tioner's vehicle and uncovered a large bag of methamphetamine. J.A. 34.

2. Petitioner was indicted in the United States District Court for the District of Nebraska on one count of possessing with intent to distribute 50 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1). Petitioner moved to suppress the drugs seized from his car, arguing that the dog sniff had occurred during an unlawful detention that was not supported by reasonable suspicion of criminal activity.

After an evidentiary hearing, a magistrate judge issued oral findings and a recommendation to deny the motion to suppress. J.A. 95-103. At the outset, the judge found Officer Struble, the only witness who had testified at the suppression hearing, to be credible. J.A. 95. The judge declined to find that reasonable suspicion had supported the detention after Struble issued the written warning, J.A. 103-104, but, citing Eighth Circuit precedent, concluded that the extension of the stop by "seven to eight minutes" for the dog sniff was only a de minimis intrusion on petitioner's Fourth Amendment rights. J.A. 100-101 (citing *United States* v. *$404,905.00 in U.S. Currency*, 182 F.3d 643 (1999), cert. denied, 528 U.S. 1161 (2000)).

The district court agreed with the magistrate judge. J.A. 110-115. Emphasizing that Officer Struble had "requested backup for officer safety," that the backup officer had "responded in a short period of time" and that the drug dog was already in Struble's car and was deployed "immediately" after the backup officer arrived, the court concluded that the traffic stop had not been "prolonged beyond the time reasonably required to complete the mission of the stop."

J.A. 114. The court explained that dog sniffs that occur "within a short time following the completion of a traffic stop" are permissible if "de minimis" and that the delay caused by Struble's dog sniff was de minimis. *Ibid.* (citation omitted). The district court did not address whether reasonable suspicion supported extending petitioner's detention, beyond generally stating that it was adopting the magistrate judge's findings. *Ibid.*

In light of the denial of his motion to suppress, petitioner entered a conditional guilty plea, reserving his right to appeal the district court's Fourth Amendment ruling. He was sentenced to 60 months of imprisonment, to be followed by four years of supervised release. J.A. 116-117, 119.

3. The court of appeals affirmed the denial of the motion to suppress. J.A. 127-131. In accordance with *Illinois* v. *Caballes*, 543 U.S. 405 (2005), the court explained that "[a] dog sniff conducted during a traffic stop that is 'lawful at its inception and otherwise executed in a reasonable manner' does not infringe upon a constitutionally protected interest in privacy." J.A. 130 (quoting *United States* v. *Martin*, 411 F.3d 998, 1002 (8th Cir. 2005) (quoting *Caballes*, 543 U.S. at 408)). The court rejected petitioner's argument that the stop was "unreasonably prolong[ed]" by the "brief delay" in deploying the dog. *Ibid.* The court explained that the dog sniff had been delayed only because Officer Struble had waited for a second officer to arrive out of concern "for his safety because there were two persons in [petitioner's] vehicle." J.A. 130-131. Noting that it had "repeatedly upheld dog sniffs that were conducted minutes after the traffic stop concluded," the court concluded that the "seven- or

eight-minute delay" in this case was—like the brief delays in those cases—only a "de minimis intrusion on [petitioner's] personal liberty." *Ibid.* (citing *United States* v. *Morgan*, 270 F.3d 625, 632 (8th Cir. 2001), cert. denied, 537 U.S. 849 (2002); *$404,905.00 in U.S. Currency*, 182 F.3d at 649). The court thus held that no Fourth Amendment violation had occurred. J.A. 131.

The court of appeals did not address the government's argument that the police had a reasonable suspicion that petitioner was engaged in criminal activity, independently justifying further detention.

SUMMARY OF ARGUMENT

I. This Court has held that a dog sniff may be a reasonable incident of a traffic stop. See *Illinois* v. *Caballes*, 543 U.S. 405 (2005). That is true even if the sniff incrementally prolongs the stop. The sequence of events during the stop, including whether a ticket is issued before or after conducting the sniff, does not affect the reasonableness of the sniff: the test remains whether the stop's overall duration remains objectively reasonable. Under that analysis, the dog sniff here was reasonable.

A. When an officer conducts a traffic stop based on probable cause to believe the driver has committed a traffic violation, the Fourth Amendment permits the officer to conduct a number of investigative inquiries before resolving the traffic violation, so long as the stop does not last an unreasonably long time.

First, the officer may conduct inquiries designed to resolve the traffic violation, such as verifying the validity of the driver's license and registration. For his and the community's safety, the officer may also conduct warrant and criminal-history checks. Traffic

stops that include those inquiries are reasonable if the officer has performed his tasks in an amount of time "reasonably needed to effectuate" the law-enforcement purpose of the stop. *United States* v. *Sharpe*, 470 U.S. 675, 685 (1985).

Second, an officer may conduct inquiries into unrelated criminal activities during a traffic stop, even without reasonable suspicion. This Court has approved two such investigatory inquiries: performing a dog sniff, and questioning the vehicle's occupants about matters unrelated to the traffic violation. See *Caballes*, 543 U.S. at 407; *Arizona* v. *Johnson*, 555 U.S. 323, 333 (2009).

B. *Caballes* permits a dog sniff to prolong a traffic stop, so long as the total duration of the stop remains reasonable. In *Caballes*, the Court explained that the dog sniff must not "unreasonably prolong[]" the stop "beyond the time reasonably required" by the traffic-compliance purpose of the stop. 543 U.S. at 407. Although petitioner contends that *Caballes* established a rule that a dog sniff may not prolong the stop at all, *Caballes* did not so hold. And such a bright-line prohibition would conflict with basic Fourth Amendment principles. Under *Sharpe,* an officer's performance of investigatory tasks that routinely occur in any stop does not violate the Fourth Amendment, even if it extends the stop's duration, so long as the overall duration of the stop remains reasonable. 470 U.S. at 685. But petitioner's bright-line rule would unjustifiably treat dog sniffs differently.

Courts considering dog sniffs and unrelated questioning conducted during a traffic stop have generally applied a reasonableness analysis. Recognizing that such investigatory acts may add seconds or minutes to

the duration of a stop, courts have generally held that such delays are permissible, so long as the officer acted reasonably diligently and the stop did not last longer than reasonably required to resolve the traffic violation.

C. An officer's issuing a traffic ticket before performing a dog sniff does not render the reasonableness inquiry inapplicable. The order in which the officer performs permissible traffic-stop tasks—running a driver's license check, issuing a ticket, questioning the driver, performing a dog sniff—is purely a matter of sequencing. Petitioner's proposed bright-line prohibition on performing a dog sniff after issuing a ticket would arbitrarily distinguish between traffic stops that affect the individual interest at stake—*i.e.*, the interest in avoiding an unreasonably long detention—in essentially identical ways. The bright-line rule would also unduly constrain officers' discretion to conduct investigatory inquiries in the order warranted by the particular circumstances of a traffic stop.

D. A dog sniff performed after issuance of a ticket is permissible so long as it does not "unreasonably prolong[]" the stop beyond the time "reasonably required" to resolve the traffic violation. *Caballes*, 543 U.S. at 407. In undertaking that inquiry, a court should consider the total duration of the stop in relation to the duration of traffic stops involving similar circumstances; the proportion of the stop attributable to the dog sniff; and the officer's diligence throughout.

E. Petitioner's arguments for a bright-line prohibition on post-ticket dog sniffs are without merit. Petitioner contends that after the ticket is issued, the motorist is in the same position as someone who is first encountering the police—but that ignores the

fact that the motorist has lawfully been detained on probable cause to believe he has committed a traffic violation. The relevant question is whether the continuing detention is constitutionally reasonable. Petitioner also argues that a reasonableness inquiry would be unworkable. Numerous lower courts, however, readily evaluated the reasonableness of stops involveing pre- and post-ticket dog sniffs and unrelated investigatory questioning based on the factors suggested above.

F. The dog sniff at issue in this case was valid because it did not unreasonably prolong the traffic stop. The approximately 29-minute duration of the stop was within the range of other similar traffic stops. The seven-to-eight-minute delay attributable to the dog sniff did not represent an unduly large portion of the stop, and it was occasioned by the officer's reasonable need to have backup present for safety reasons. Officer Struble acted with reasonable diligence throughout the stop, including by calling for backup well before he had completed the tasks necessary to issue the ticket.

II. The extension of petitioner's traffic stop to conduct a dog sniff was independently justified by Officer Struble's reasonable suspicion—unrelated to petitioner's traffic offense—that unlawful activity was taking place. Although the court of appeals did not rule on that issue, this Court may affirm on that alternative ground.

ARGUMENT

I. A POLICE OFFICER MAY CONDUCT A DOG SNIFF DURING A TRAFFIC STOP, AFTER ISSUING A TRAFFIC TICKET, SO LONG AS THE DETENTION IS NOT UNREASONABLY PROLONGED

The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. Amend. IV. When a police officer stops a vehicle based on probable cause to believe the driver has committed a traffic violation, the driver and passengers are lawfully seized. *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979); see, *e.g.*, *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977) (per curiam) (when officer observes violation of traffic law, "there is no question about the propriety of the initial restrictions" imposed by a traffic stop). Here, Officer Struble stopped petitioner's vehicle based on probable cause after observing it cross the fog line and drive on the shoulder of the road. See *State* v. *Magallanes*, 824 N.W.2d 696, 701 (Neb. 2012), cert. denied, 133 S. Ct. 2359 (2013); see Neb. Rev. Stat. Ann. § 60-6,142 (LexisNexis 2010) ("No person shall drive on the shoulders of highways."). The stop was therefore lawful at its inception.

A traffic stop that is lawful at its inception remains subject to reasonableness constraints in its execution. A stop normally entails a variety of procedures to safely execute the stop, address the concerns that prompted it, and permit reasonable investigatory activities. In evaluating the conduct of a traffic stop, the Court has observed that "[t]he touchstone of our analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal secu-

rity." *Mimms*, 434 U.S. at 108-109 (internal quotation marks and citation omitted).

A dog sniff may be a reasonable incident of a traffic stop. See *Illinois* v. *Caballes*, 543 U.S. 405 (2005). That is true even if the sniff may incrementally prolong the stop. And the sequence of events during the stop, including whether a ticket is issued before or after conducting the sniff, does not affect the reasonableness of the sniff: the test remains whether the stop's overall duration remains objectively reasonable. Under that analysis, the dog sniff here was reasonable.

A. An Officer May Conduct A Range Of Investigatory Inquiries In A Traffic Stop, So Long As The Stop Is Not Unreasonably Prolonged

Decisions of this Court and lower courts establish that an officer conducting a traffic stop may generally conduct a range of investigatory inquiries, subject to the overarching rule that the stop does not "unreasonably infringe[] interests protected by the Constitution." *Caballes*, 543 U.S. at 407. Those well-accepted inquiries fall into two general categories. First, an officer may perform actions that are reasonably necessary to investigate and resolve the traffic violation, such as verifying the validity of a driver's license and vehicle registration. Second, an officer may undertake investigatory actions that are not related to the traffic violation itself, but instead are designed to detect other criminal activity. Those activities include sniffs by drug-detection dogs, see *ibid.*, and questioning about unrelated matters, *Arizona* v. *Johnson*, 555 U.S. 323, 333 (2009). Those inquiries are permissible, even though they are not directed to resolving the traffic violation, because they do not constitute inde-

pendent searches or seizures for Fourth Amendment purposes. In the context of traffic stops in which the officer performed such inquiries before resolving the traffic violation, the Court has held that such inquiries are permissible if they do not unreasonably prolong the traffic stop. See *Caballes*, 543 U.S. at 407.

1. Officers may conduct inquiries designed to resolve the traffic violation and safely conduct the stop

a. Courts have uniformly recognized that a routine traffic stop permits the officer to "ask[] for the driver's license [and] the vehicle's registration, as well as inquir[e] about the occupants' destination, route, and purpose." *United States* v. *Sanchez*, 417 F.3d 971, 975 (8th Cir. 2005).[1] Often the officer will request insurance documentation to ensure that the driver is complying with state law requiring liability insurance.[2] Once the officer obtains the license and insurance documentation from the driver, he must check the license to verify the driver's identity and confirm that the driver is licensed to operate the vehicle. The officer ordinarily performs that task either by running a search on an in-car computer or by radioing the police dispatcher for assistance.[3] The officer will also perform a records check on the vehicle's registration and vehicle identification number in order to verify

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[1] See also, *e.g.*, *United States* v. *Digiovanni*, 650 F.3d 498, 507 (4th Cir. 2011) (routine actions include "requesting a driver's license and vehicle registration, running a computer check, and issuing a ticket"); *United States* v. *Hernandez*, 418 F.3d 1206, 1209 n.3 (11th Cir. 2005), cert. denied, 549 U.S. 889 (2006).

[2] *United States* v. *Zavala*, 541 F.3d 562, 577 (5th Cir. 2008).

[3] See, *e.g.*, *People* v. *Turriago*, 681 N.E.2d 350, 352 (N.Y. 1997) (computer check); *State* v. *England*, 19 S.W.3d 762, 765 (Tenn. 2000) (dispatcher check).

that the vehicle is registered in compliance with state law and is not stolen.[4] Finally, the officer may ask questions about the occupant's destination and plans, as the answers may provide relevant context or an explanation for the driver's traffic violation.[5]

Similarly, officers also regularly perform records checks to determine whether the vehicle's occupants have outstanding warrants or criminal history.[6] Although these checks may not be directly related to resolving the underlying traffic violation,[7] they serve important officer-safety concerns that arise in any traffic stop by allowing an officer to know who he is dealing with.[8] Cf. *Hiibel* v. *Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 186 (2004) ("Knowledge of identity [gained in a reasonable-suspicion stop] may inform an officer that a suspect is wanted for another offense, or has a record of violence."). Courts accord-

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[4] *Zavala*, 541 F.3d at 576.

[5] *United States* v. *Brigham*, 382 F.3d 500, 508 n.6 (5th Cir. 2004) (en banc).

[6] See, *e.g.*, *United States* v. *Garcia*, 205 F.3d 1182, 1187 (9th Cir.) (warrant checks are "standard" procedure in all stops), cert. denied, 531 U.S. 856 (2000); *United States* v. *Purcell*, 236 F.3d 1274, 1278 (11th Cir.) (criminal-history checks are "routine"), cert. denied, 534 U.S. 830 (2001).

[7] See *United States* v. *Holt*, 264 F.3d 1215, 1221 (10th Cir. 2001) (en banc) (per curiam) ("[A] motorist may be detained for a short period while the officer runs a background check to see if there are any outstanding warrants or criminal history pertaining to the motorist even though the purpose of the stop had nothing to do with such prior criminal history."), overruling on other grounds recognized in *United States* v. *Stewart*, 473 F.3d 1265, 1269 (10th Cir. 2007).

[8] See *United States* v. *Burleson*, 657 F.3d 1040, 1046 (10th Cir. 2011).

ingly have uniformly held that an officer may "routine[ly]" perform warrants and criminal history checks, even when the officer has no basis to believe that the motorists have warrants or a criminal record. See generally 4 Wayne R. LaFave, *Search and Seizure* § 9.3(c), at 512-519 (5th ed. 2012) (LaFave).

b. The longer the officer takes to complete these routine traffic-stop steps, the longer the detention of the vehicle's occupants will last. Yet the stop remains reasonable so long as the officer has performed his tasks with reasonable diligence and in an amount of time "reasonably needed to effectuate" the law-enforcement purpose of the stop. *United States* v. *Sharpe*, 470 U.S. 675, 685-686 (1985).

In *Sharpe*, the Court rejected the lower court's "*per se* rule that a 20-minute detention is too long to be justified" in the context of a vehicle stop based on reasonable suspicion, explaining that a stopwatch approach is "clearly and fundamentally at odds with our approach in this area." 470 U.S. at 686. The Court explained that the duration of a temporary seizure must be reasonable under the circumstances and that it is "appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." *Ibid.* The Court cautioned, however, that courts should not "second-guess[]" police officers' decisions by "imagin[ing] some alternative means by which" the police could have accomplished their objectives more quickly. *Id.* at 686-687.

Following *Sharpe*, courts evaluating whether the length of a routine traffic stop is reasonable have considered the totality of the circumstances, recognizing that the time it takes a reasonably diligent officer

to perform routine traffic-stop tasks may vary widely based on the situation. See *United States* v. *Branch*, 537 F.3d 328, 336 (4th Cir. 2008) ("The maximum acceptable length of a routine traffic stop cannot be stated with mathematical precision."), cert. denied, 555 U.S. 1118 (2009).

c. The duration of a traffic stop may often depend on how the officer engages in police work—whether he runs a warrant check, for instance, or how thoroughly he investigates a driver's authority to operate a rental car. Consistent with *Sharpe*, courts have held that officers may reasonably choose their investigative methods in response to things that happen during the stop, even if their decisions lengthen the stop. See *Sharpe*, 470 U.S. at 688; see also, *e.g.*, *United States* v. *Brigham*, 382 F.3d 500, 511 (5th Cir. 2004) (en banc) (no "per se rule" governs the order of tasks or length of stop); *United States* v. *Hernandez*, 418 F.3d 1206, 1212 n.7 (11th Cir. 2005) ("We underline that the police are not constitutionally required to move at top speed or as fast as possible."), cert. denied, 549 U.S. 889 (2006).

The length of the stop may also vary for reasons not within the officer's control. For instance, a records check of a license, registration, or criminal history might reasonably take anywhere between several seconds and 40 minutes, depending on circumstances such as the officer's need to rely on the dispatcher to perform the search or a driver's provision of false information. See generally LaFave § 9.3(c), at 508-509 & n.155, 512 n.170 (citing cases). Courts have eschewed any per se rules governing whether a stop is unreasonably prolonged. Instead, they have consid-

ered the total duration of the stop, as well as the reason for any delay.[9]

2. Officers may perform certain investigatory actions unrelated to the traffic violation

An officer conducting a traffic stop may also perform investigatory tasks that are not related to the traffic justification for the stop, including executing a dog sniff and asking questions about unrelated criminal activity. The leeway for an officer to do so reflects the recognition that, so long as the officer does not branch out into unjustified searches or otherwise render the manner of the stop unreasonable, it is socially beneficial for the officer to remain alert to the possibility of criminal activity by the motorist or his passengers worthy of police intervention. See *Hernandez*, 418 F.3d at 1212 n.7 ("For the police to be vigilant about crimes is, at least broadly speaking, a good thing."). As with investigatory tasks directly related to the traffic violation, the constitutionality of the seizure ultimately turns on whether it was unreasonably prolonged under the circumstances.

This Court has made that principle clear in the context of both dog sniffs and investigatory questioning. In *Caballes,* this Court held that the Fourth Amendment permits an officer to perform a dog sniff during

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[9] See, *e.g.*, *Digiovanni*, 650 F.3d at 511 ("[A] multitude of factors can affect the length of a traffic stop, some working in favor of the government, others in favor of the defendant. For example, some computer checks will take longer than others, depending on the speed of the computers involved and whether the car's occupants possess in-state or out-of-state identifications."); *United States* v. *Douglas*, 195 Fed. Appx. 780, 784 (10th Cir. 2006) (noting that circumstances such as computer problems and difficulty verifying license can reasonably result in stops lasting over 30 minutes).

an otherwise lawful traffic stop, even though the drug-detection sniff is unrelated to the traffic violation. 543 U.S. at 407-408. The Court thus rejected the Illinois Supreme Court's conclusion that the dog sniff "unjustifiably broadened the scope of an otherwise routine traffic stop into a drug investigation." See *People* v. *Caballes*, 802 N.E.2d 202, 204 (2003), vacated and remanded, *Illinois* v. *Caballes*, 543 U.S. 405 (2005); *Caballes*, 543 U.S. at 408. The Court explained that even if "the use of the dog converted the citizen-police encounter * * * into a drug investigation," that "shift in purpose" did not render the traffic stop unreasonable because the dog sniff itself was not a "search subject to the Fourth Amendment." *Caballes*, 543 U.S. at 408. Because the sniff did not infringe any "constitutionally protected interest in privacy," the Court held that performing a dog sniff does "not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner." *Ibid.*

Similarly, in *Johnson*, 555 U.S. at 333, the Court held that an officer may ask a detained motorist investigatory questions that are unrelated to the underlying traffic violation. The Court explained that, like a dog sniff, questioning is not a search or seizure for Fourth Amendment purposes. See *Muehler* v. *Mena*, 544 U.S. 93, 101 (2005). The Court accordingly held that "inquiries into matters unrelated to the justification for the traffic stop" "do not convert the encounter into something other than a lawful seizure, so long as [they] do not measurably extend the duration of the stop." *Johnson*, 555 U.S. at 333.

B. An Officer May Perform A Dog Sniff During A Traffic Stop So Long As It Does Not Unreasonably Extend The Stop

This Court held in *Caballes* that a dog sniff is a permissible incident of a traffic stop if the stop is not "unreasonably prolonged" as a result. 543 U.S. at 407. Thus, a dog sniff may incrementally prolong a stop, as long as the total duration of the stop does not exceed that reasonably required to resolve the traffic violation. Lower courts have therefore generally applied a reasonableness analysis to unrelated questioning and dog sniffs that extend a traffic stop.

1. Caballes *permits a dog sniff to extend a stop, so long as the stop does not exceed the time reasonably required to resolve the traffic violation*

Petitioner argues (Br. 21, 25) that the Court indicated in *Caballes* that a dog sniff may not prolong a stop *at all*—in other words, that *Caballes* established a bright-line rule that a dog sniff that adds even a minimal amount of time to the stop is per se unreasonable. In petitioner's view (Br. 25), an officer may conduct a dog sniff during a traffic stop only if the sniff occurs simultaneously with some other action related to resolving the traffic stop. That reading of *Caballes* is unsound.

In *Caballes*, this Court explained that the primary limitation on an officer's authority to perform a dog sniff is the reasonableness of the stop's duration: the dog sniff must not "unreasonably prolong[]" the stop. 543 U.S. at 407. The Court elaborated that a "seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time *reasonably required to*

complete that mission." *Ibid.* (emphasis added).[10] But the Court did not hold that whenever a dog sniff lengthens the stop by any amount of time, the delay automatically causes the stop as a whole to exceed the time "reasonably required" to resolve an ordinary traffic stop under similar circumstances.[11] *Ibid.* And a bright-line prohibition on dog sniffs that extend the traffic stop by any amount of time, no matter how minimal, would conflict with basic Fourth Amendment principles.

a. Under *Sharpe,* the basic test for the validity of a stop is its overall objective reasonableness in light of all of the circumstances. Under that principle, basic investigation that routinely occurs in any stop does

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[10] *Caballes* cited *People* v. *Cox*, 782 N.E.2d 275 (Ill. 2002), cert. denied, 539 U.S. 937 (2003), overruled, *People* v. *Bew*, 886 N.E.2d 1002 (Ill. 2008), as an example of an "unreasonably prolonged" stop, 543 U.S. at 407-408, but that decision does not shed light on whether a dog sniff may permissibly prolong a traffic stop for some amount of time. In *Cox*, an officer stopped a motorist for a routine, minor traffic violation and detained her for 15 minutes while awaiting a canine unit, which arrived while the first officer was writing the ticket. *Cox* held that 15 minutes far exceeded the "time reasonably needed to effectuate" the purpose of the traffic stop and that the officer had "stall[ed]" in order to facilitate the dog sniff. 782 N.E.2d at 280 (quoting *Sharpe*, 470 U.S. at 685). It is thus unclear whether the court found the stop's duration unreasonable because it concluded that the dog sniff must have added some delay to the stop, and any delay was per se impermissible; or because the court concluded that the amount of delay was unreasonable under the circumstances.

[11] The Court observed that the lower courts had found that the "duration of the stop in this case was entirely justified by the traffic offense." *Caballes*, 543 U.S. at 408. The Court therefore had no occasion to consider a situation in which the dog sniff added some time to the traffic stop.

not violate the Fourth Amendment, even if it extends the stop's duration, so long as the overall duration of the stop remains reasonable. But petitioner's bright-line rule would unjustifiably treat dog sniffs differently.

Imagine two similar traffic stops involving dog sniffs: (1) a traffic stop conducted by a single officer who decides to perform a warrant check on a passenger in the vehicle, just to be thorough, such that the entire stop takes 15 minutes (instead of the 14 minutes it would have taken without the extra warrant check); and (2) a traffic stop conducted by a single officer who decides to perform a dog sniff, such that the entire stop takes 15 minutes (instead of the 14 minutes it would have taken had the officer not performed the sniff). Under petitioner's view, the incremental delay imposed by the warrant check in the first stop would be permissible if it were deemed reasonable under *Sharpe*—but the exact same incremental delay caused by the dog sniff in the second stop would be per se unreasonable.

Nothing in the Fourth Amendment justifies that disparity. *Caballes* and *Johnson* establish that dog sniffs and unrelated questioning do not run afoul of any scope limitation on traffic stops, and they do not constitute independent searches or seizures. See pp. 17-18, *supra*. Consequently, the individual interest implicated by stops involving unrelated inquiries is the same as the interest at stake in traffic stops solely focused on the traffic violation: the interest in not being detained for an unreasonably long period of time. See *Caballes*, 543 U.S. at 407. Given the identity of the individual Fourth Amendment interests involved, the constitutionality of stops involving some

unrelated tasks should be evaluated under the same reasonableness framework that applies to routine traffic stops, *i.e.*, by assessing the reasonableness of the total duration of the stop in light of the officer's diligence. See *Sharpe*, 407 U.S. at 686; pp. 15-17, *supra*.

b. Petitioner's reading of *Caballes* would also lead to arbitrary results within the universe of traffic stops involving pre-ticket dog sniffs or unrelated questioning. Under petitioner's view, *Caballes* permits an officer to perform a dog sniff or ask unrelated questions only if he happens to be able to shoehorn those activities into "dead time" that otherwise would be spent waiting for a records check or the like. Pet. Br. 25 (citation omitted). But an officer's ability to do that will vary based on factors that have little to do with the officer's diligence or the severity of the intrusion.

i. An officer's ability to multitask—to perform a dog sniff simultaneously with other activities during the traffic stop—will vary widely. If a traffic stop is conducted by two officers, one might be able to conduct the dog sniff while the other performs tasks related to the traffic violation, such as communicating with the dispatcher about the vehicle's registration. If the stop is conducted by a single officer, however, multitasking will often be impossible. The officer will have to perform tasks seriatim, and that will often prolong the stop. See, *e.g.*, *United States* v. *Patterson*, 472 F.3d 767, 777 n.3 (10th Cir. 2006) (quoting officer testimony that it takes "more time for me to get my dog out, stop writing the warning, run my canine around the vehicle, the two trips or whatever it took, put him back up and finish the warning and get my returns," than it does to have a second officer

perform the sniff), vacated on other grounds, 555 U.S. 1131 (2009).

Even assuming a single officer has "dead time" spent awaiting the dispatcher's report of a records check, police safety procedures and individual canine-handler characteristics may determine whether he is actually able to perform a dog sniff during that time. Conducting a dog sniff requires the officer to pay close attention to the dog to watch for changes in behavior that signal interest in a particular area or detection of narcotics. Sandy Bryson, *Police Dog Tactics* 260 (2000) (Bryson). Because focusing intently on the dog may leave a single officer vulnerable to attack, police procedures often require the canine officer to have backup present for the sniff, so that the backup officer can observe the vehicle's occupants and the surrounding area while the canine officer focuses on the dog.[12] A single officer performing a traffic stop may therefore have to call for backup before performing the sniff, which may lengthen the stop.

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[12] See, *e.g.*, U.S. Police Canine Ass'n, *Patrol & The Police K9, A Manual for Back-up Officers & Supervisors*, http://www.uspcak9.com/training/k9manual.html (last visited Dec. 15, 2014) (back-up "[o]fficers should be focused on their surroundings * * * [t]he Officer should be alert and prepared to deal with a threat * * * [a]s the [dog] handler may be out flanked or out numbered by multiple suspects"); Bryson 260 ("When a drug dog is searching a vehicle on a car stop * * * the team needs a cover officer in charge of the occupants. The K-9 officer has to concentrate his full attention on his dog without worrying about getting shot in the back or people running away. The handler is fully occupied working his dog."); *State* v. *Griffin*, 949 So. 2d 309, 311 (Fla. Dist. Ct. App. 2007) (Florida police procedures require another officer to be present for a dog sniff.).

In addition, even apart from the need for backup, a single officer's ability to perform a sniff while awaiting the results of a records check may vary based on the dog itself. Different dogs alert differently, and a particular dog's alert to the scent of narcotics may consist solely of subtle behavioral changes that the officer might overlook if he is listening on the radio for the dispatcher's report or is otherwise distracted.[13]

For both single- and multiple-officer stops, moreover, the existence of "dead time" may turn on the happenstance. For instance, patrol-car equipment may have a determinative impact: some patrol cars are equipped with a computer that enables an officer to perform records checks in a matter of seconds, and those officers will not expect to have any minutes-long time lag while waiting to hear from a dispatcher.[14]

ii. Similarly fortuitous circumstances would be determinative of the constitutional permissibility of unrelated questioning. Multiple officers might be able to conduct questioning and traffic-related tasks simultaneously, but single officers might have more trouble doing so. An officer might pause in writing a ticket, or

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[13] See, *e.g.*, Bryson 260 ("the handler whose attention is diverted will miss a higher percentage of behavioral changes by the dog"); Utah POST K-9 Program, *Narcotics Detector Dog Performance Objectives* 59 (Mar. 13, 2012), http://www.publicsafety.utah.gov/post/inservice/documents/NarcoDogGradeSheets20120313.pdf (an alert may consist of subtle changes in behavior, such as a sudden head movement, changes in breathing, and "fixated" behavior).

[14] See LaFave § 9.3(c), at 512-513 (contrasting "almost instantaneous" availability of records data when police officer has computer, with the minutes-long delay when police rely on older technology); Police Bureau, City of Portland, *Anatomy of a Traffic Stop*, https://www.portlandoregon.gov/police/article/258015 (last visited Dec. 15, 2014) (discussing use of in-car computers).

linger at the person's car, in order to ask questions, and if the initial answers provoke follow-up questions, that conversation might delay the progress of the traffic stop by a few minutes. See, *e.g.*, *United States* v. *Turvin*, 517 F.3d 1097, 1102 (9th Cir. 2008) (officer stopped writing citation to confer with another officer and then asked driver additional questions, a process that added four minutes to the traffic stop). And again, the existence of "dead time" that might provide leeway to question the vehicle's occupants may turn on fortuity or police-department resources.

iii. In sum, conditioning the reasonableness of a traffic stop involving a dog sniff or questioning on the officer's ability to multitask would grant fortuitous circumstances dispositive constitutional weight. Again, two hypothetical stops illustrate the anomaly. In the first stop, conducted by two officers, one officer is able to perform the sniff while the other checks the license and registration, such that the entire stop takes 14 minutes. In the second stop, conducted by a single officer who cannot perform the sniff at the same time as other tasks, the entire stop takes 15 minutes, instead of the 14 minutes it would have taken had the officer not performed the sniff. In petitioner's view, the first stop would be constitutionally permissible but the second impermissible, thereby giving dispositive weight to the extra minute—without considering whether the incremental additional intrusion in the second stop truly impinged on the individual's Fourth Amendment interest against unreasonable detention.

That result would also be in considerable tension with this Court's refusal to permit the scope of the Fourth Amendment's protection in connection with a traffic stop to depend on local law enforcement prac-

tices. *Whren* v. *United States*, 517 U.S. 806, 815 (1996). In *Whren*, the Court held that the reasonableness of a traffic stop did not turn on whether the officer had violated local police policies in conducting the stop. *Ibid.* The Court explained that under such a regime, the reasonableness of the stop at issue would have depended on "trivialities" such as whether the officer had violated a department prohibition on plain-clothes stops, or was instead "wearing a uniform or patrolling in a marked police cruiser." *Ibid.* Petitioner's reading of *Caballes* and *Johnson* as imposing bright-line rules would permit just such trivialities, such as whether officers work in pairs or have access to high-tech computer systems, to control the Fourth Amendment analysis.

2. Courts considering dog sniffs and unrelated inquiries made before the issuance of a ticket have generally assessed the overall reasonableness of the stop

The common-sense conclusion that stops that were briefly lengthened by unrelated inquiries are not per se unconstitutional is reflected in the approaches taken by most of the lower federal courts that have addressed the issue. Although they have employed varying analyses, those courts have generally measured the validity of the encounter by considering its overall objective reasonableness.

The courts of appeals have most clearly addressed the framework for analyzing a stop lengthened by unrelated inquiries in the context of police questioning. Under *Johnson*, an officer may engage in unrelated investigatory questioning that does not "measurably" extend the traffic stop. 555 U.S. at 333. Recognizing the practical reality that questioning often lengthens the duration of the stop by seconds or

minutes, courts have generally permitted such delays under a reasonableness analysis. See *United States* v. *Everett*, 601 F.3d 484, 491 (6th Cir. 2010) (explaining that a "measurable" delay is one that is "significant," *i.e.*, that unreasonably prolongs the stop); cf. *United States* v. *Valenzuela*, 494 F.3d 886 (10th Cir.) (rejecting argument that officer "was only permitted to ask questions unrelated to the traffic stop while he was writing out a ticket, waiting for dispatch, or conducting some other investigative procedure related to the initial purpose of the stop," as too "narrow" and formalistic), cert. denied, 552 U.S. 1032 (2007). In *Everett*, for instance, the Sixth Circuit held that the "vast weight of authority" supported the conclusion that unrelated questioning may prolong a stop, so long as the "duration of the *stop as a whole* * * * was reasonable" and the officer's "overall course of action during a traffic stop, viewed objectively and in its totality, is reasonably directed toward the proper ends of the stop." 601 F.3d at 492, 494-495. Of the other courts of appeals to consider the issue, the vast majority have employed a similar reasonableness analysis; only the Fifth Circuit has adopted a bright-line rule.[15]

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[15] See *United States* v. *Griffin*, 696 F.3d 1354, 1362 (11th Cir. 2012) (rejecting "bright-line no prolongation rule" and assessing "the length of the stop as a whole, including any extension of the encounter," under the totality of the circumstances) (citation omitted), cert. denied, 134 S. Ct. 956 (2014); *United States* v. *Mason*, 628 F.3d 123, 131-132 (4th Cir. 2010) (one and a half minutes of unrelated questioning was reasonable because it was "slight" in relation to the total duration of the stop), cert. denied, 132 S. Ct. 329 (2011); *United States* v. *Harrison*, 606 F.3d 42, 45 (2d Cir. 2010) (per curiam) ("entire process" must be reasonable) (citation omitted); *United States* v. *Rivera*, 570 F.3d 1009, 1013 (8th Cir. 2009) (questions did not "unreasonably prolong" stop);

In the context of dog sniffs performed before issuance of a citation, those courts of appeals that have considered situations in which the sniff was found to have lengthened the stop have applied a reasonableness analysis. See *United States* v. *Carpenter*, 406 F.3d 915, 916-917 (7th Cir. 2005) ("modest incremental delay" of up to five minutes waiting for dog to arrive was not unreasonable in the context of the stop); see also *United States* v. *Rivera*, 570 F.3d 1009, 1013-1015 (8th Cir. 2009) (based on totality of circumstances, delay of less than two minutes for dog sniff did not unreasonably prolong stop); see also *United States* v. *Green*, 740 F.3d 275, 280 (4th Cir.) (stating in dicta that any "de minimis" delay in conducting traffic-related tasks that resulted from dog sniff was not unreasonable), cert. denied, 135 S. Ct. 207 (2014); *United States* v. *Stepp*, 680 F.3d 651, 662-663 (6th Cir. 2012) (analyzing dog sniff "much the same way we analyze extraneous questioning" and noting that "slight" "extension" of stop for a dog sniff is not "unreasonable," but concluding that delay of three and a half minutes for dog sniff, added to six minutes of extraneous questioning, rendered stop unreasonable under the circumstances).[16] Other courts have stated

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Turvin, 517 F.3d at 1101-1102 (considering total duration of stop and relative length of delay; four-minute delay for questioning during a 14-minute stop was reasonable); *Valenzuela*, 494 F.3d at 888; *United States* v. *Childs*, 277 F.3d 947, 954 (7th Cir.) (en banc) (asking whether the "entire process remain[ed] reasonable"), cert. denied, 537 U.S. 829 (2002). But see *United States* v. *Pack*, 612 F.3d 341, 350 (5th Cir.) (unrelated questioning may not extend stop), cert. denied, 131 S. Ct. 620 (2010).

[16] Some state courts have undertaken similar analyses. See *People* v. *Thomas*, No. 3-12-0676, 2014 WL 5426813, at *4 (Ill. App. Ct. Oct. 27, 2014) (single officer "deviat[ed] from writing a warning

that the proper inquiry is whether the dog sniff unreasonably prolonged the stop under the circumstances, but in cases in which the sniff apparently did not add any additional time to the stop. It is therefore unclear whether those courts view that analysis as permitting some incremental additional delay attributable to the dog sniff. See, *e.g.*, *United States* v. *Bell*, 555 F.3d 535, 542 (6th Cir.) (question is whether police "unreasonably delayed the stop"; officers may "deviate" from purpose of stop by taking dog around vehicle), cert. denied, 557 U.S. 945 (2009); *United States* v. *Figueroa*, 425 Fed. Appx. 15, 17 (2d Cir.

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ticket" to conduct dog sniff, but "avoided any undue delay"); *Johnson* v. *Commonwealth*, 179 S.W.3d 882, 884, 886 (Ky. Ct. App. 2005) (upholding sniff that caused "brief delay" but did not "prolong the stop to any unreasonable extent"); *Wilson* v. *State*, 666 S.E.2d 573, 575-576 (Ga. Ct. App. 2008) (considering officer's diligence, total duration, and "minimal" time attributable to dog sniff); *State* v. *Arias*, 752 N.W.2d 748, 761-762 (Wis. 2008) (stop prolonged by 78 seconds for dog sniff was reasonable under the totality of the circumstances); *People* v. *Chan*, No. G040871, 2013 WL 6843598, at *3 (Cal. Ct. App. Dec. 30, 2013) (five-minute delay for dog sniff, patdown, and warrant check in context of seven-minute stop was reasonable because stop was not extended beyond time reasonably required to resolve traffic violation); *State* v. *Fowler*, No. 105,752, 2011 WL 6311112, at *4 (Kan. Ct. App. Dec. 2, 2011) (per curiam) (declining to apply a bright-line rule, but finding that delay for sniff was unreasonable where officers did not proceed expeditiously); *Griffin*, 949 So. 2d at 314-315 (finding 90-second delay for sniff reasonable); cf. *People* v. *Wofford*, 969 N.E.2d 383, 392 (Ill. App. Ct. 2012) (concluding that 17-minute stop was not unreasonably prolonged where officer performed each step diligently, without separately analyzing dog sniff that added one minute to stop). Other courts, however, appear to have disapproved any delay beyond that necessary to resolve the traffic violation. See, *e.g.*, *State* v. *Gray*, 997 N.E.2d 1147, 1152 (Ind. Ct. App. 2013).

2011) (considering length of stop as a whole and whether there was "unreasonable delay"); *United States* v. *Montes*, 280 Fed. Appx. 784, 791 (10th Cir. 2008) (considering overall reasonableness of stop). To our knowledge, no court of appeals has definitively adopted and applied the bright-line rule in a published opinion. Cf. *United States* v. *Bonilla*, 357 Fed. Appx. 693, 697 (6th Cir. 2009) (disapproving sniff where officer stopped writing ticket to perform sniff when backup arrived).

C. When An Officer Conducts A Dog Sniff After, Rather Than Before, Issuing A Ticket, That Sequencing Decision Should Not Render The Reasonableness Inquiry Inapplicable

The same reasonableness analysis should apply regardless of the order in which the officer performs his investigatory tasks. Issuance of a ticket in the midst of a stop does not make the performance of other investigatory actions inherently unreasonable. Rather, the order in which the officer performs permissible traffic-stop tasks—running a driver's license check, issuing a ticket, questioning the driver, performing a dog sniff—is purely a matter of sequencing that does not alter the intrusiveness of the stop. To institute, as petitioner proposes, a bright-line prohibition on an officer's performing a dog sniff after issuing a ticket would arbitrarily distinguish between functionally identical traffic stops that have the same impact on individual interests.

1. When during a traffic stop the officer issues a ticket is not an event of constitutional significance

Because an officer's authority in a traffic stop is not strictly cabined by the traffic justification for the stop,

and the duration of the stop can be prolonged by investigatory actions, see pp. 19-26, *supra*, the officer's issuance of a ticket before performing a dog sniff does not render the sniff per se unreasonable. The issuance of the ticket does not transform the ensuing detention into something constitutionally different from a detention that occurs before the ticket is issued. As petitioner notes (Br. 12), the issuance of the ticket ordinarily signifies that the officer has completed tasks related to the traffic violation. But that simply means that a subsequent dog sniff will be directed to a matter other than the traffic violation—which is also the case when an officer performs the sniff before issuing the ticket. Issuing the ticket before the sniff makes clear that the subsequent detention incrementally extends the stop beyond the time minimally required to address the traffic violation. But the same incremental delay can occur when the officer conducts the sniff before issuing the ticket.

Viewed in light of the constitutionally protected interest at stake—the interest against an unreasonably prolonged detention—an officer who conducts a sniff after issuing a ticket does not commit any greater intrusion than an officer who conducts a sniff before issuing the ticket. Both events place the motorist in the same position: he is subject to a probable-cause traffic stop that is briefly extended by a dog sniff. The delay must not unreasonably prolong the stop. But whether the sniff occurs before or after the ticket is issued is purely a matter of sequencing that should not be accorded independent constitutional significance. See *Valenzuela*, 494 F.3d at 890 ("Our cases do not focus on the order of events.").

A pair of hypothetical dog sniffs, both conducted by a single officer, illustrates the point:

- In the first, beginning at 12:00, the dispatcher takes seven minutes to check the driver's license and registration. At 12:07, the dispatcher reports to the officer that the driver's license and registration are valid. The officer begins to write up a ticket but does not give it to the driver. At 12:09, the officer begins to perform the dog sniff. The dog alerts at 12:10.
- In the second, also beginning at 12:00, the dispatcher again takes seven minutes, reporting back at 12:07. The officer writes up the ticket and decides to give it to the driver before getting his dog out of the patrol car. The officer begins the dog sniff at 12:09, and the dog alerts at 12:10.

From the individual's perspective, each stop involves exactly the same intrusion, in character and degree. Each stop lasted the same amount of time, each involved equally expeditious officer conduct, and each was prolonged by the same amount of time to permit the dog sniff to occur. When the ticket was issued during the course of the stop plays no role in determining the severity of the intrusion or whether the officer's conduct was reasonable under the circumstances.

A bright-line rule forbidding any sniff conducted after the issuance of a ticket, even if it prolongs the stop by mere seconds, would therefore give talismanic significance to a characteristic of the stop that has nothing to do with, and no effect on, the constitutionally protected interest at stake. To apply a reason-

ableness analysis to the first dog sniff described above, while categorically barring the second, would arbitrarily treat individuals who have been subjected to materially similar intrusions differently. See *State* v. *DeLaRosa*, 657 N.W.2d 683 (S.D. 2003) (rejecting bright-line prohibition on post-ticket dog sniffs because the nature and degree of the intrusion is the same whether the sniff is performed before or after the ticket's issuance); cf. *Whren*, 517 U.S. at 815 ("We cannot accept that the search and seizure protections of the Fourth Amendment are so variable.").

2. Petitioner's proposed bright-line rule would have adverse consequences

Imposing a per se bar on post-ticket dog sniffs would intrude on the officers' legitimate conduct of traffic stops. Legitimate law-enforcement considerations may prompt an officer to finish issuing a ticket before turning to a dog sniff or other inquiry. But under the bright-line approach, officers will lack the flexibility to issue a citation first under any circumstances.

Some officers, for instance, prefer to use the issuance of the citation as a reason to ask the driver to step out of the vehicle so that the officer can hand him the citation and explain it. During that conversation, the second officer then conducts the dog sniff—which thus may take place after the time noted on the citation, and after the driver has signed the citation.[17] Petitioner's rule would discourage that practice, which promotes officer safety by providing a nonconfrontational means of asking the vehicle's occupants to step

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[17] See *State* v. *Cargile*, No. 38855, 2013 WL 5979328, at *4 (Idaho Ct. App. Jan. 14, 2013).

out of the car and keeping them engaged during the dog sniff. [18] Alternatively, an officer might use the issuance of the citation or warning as an opportunity to further observe the driver's behavior to help decide whether a dog sniff is warranted.[19]

In other situations, it may minimize the intrusion on the individual to issue the citation shortly before performing a dog sniff. When a single officer calls for a canine team or a backup officer to facilitate the sniff, for instance, the officer might save time by completing the ticket while awaiting the other officer. Petitioner's rule would prevent that. And an officer who is in the midst of writing a ticket when the canine team arrives would not be able to take the natural action of completing the ticket and handing it to the driver as the canine officer is preparing to perform the sniff.[20] An officer also would be unable to issue a citation while awaiting the results of a records check—even if doing so would reduce the total length of the stop.[21]

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[18] Cf. *Bell*, 555 F.3d at 537-538 (officers used explanation of traffic warning as a reason to ask the driver to step out of the car before the dog sniff was performed).

[19] See *United States* v. *Simms*, 385 F.3d 1347, 1354 (11th Cir. 2004) (driver's continued nervousness after being informed he would receive only a verbal warning influenced decision to conduct search), cert. denied, 544 U.S. 988 (2005).

[20] See, *e.g.*, *State* v. *Brimmer*, 653 S.E.2d 196, 199 (N.C. Ct. App. 2007) (canine team arrived as officer was giving ticket to driver; officer completed and issued the ticket and then explained the dog sniff, which occurred immediately thereafter); *Griffin*, 949 So. 2d at 315 (backup officer arrived while patrol officer was writing ticket; the officer stopped what he was doing and did not finish the ticket until after the dog sniff).

[21] Cf. *United States* v. *Purcell*, 236 F.3d 1274, 1277-1279 (11th Cir.) (stop not rendered unreasonable because criminal-history

Rigidly constraining officers in this manner would run counter to the principle that law-enforcement officers should be given broad discretion, within the bounds of reasonableness, "to graduate their responses to the demands of any particular situation." *United States* v. *Place*, 462 U.S. 696, 709 n.10 (1983); *Sharpe*, 470 U.S. at 686-687 (courts should not "second-guess[]" officers' reasonable choices, even if those choices do not result in the least restrictive possible detention). It would make the constitutionality of traffic stops turn not on the ultimate reasonableness of the intrusion, but instead on the outcome of "a mad dash by one officer and dog to the stopped vehicle while the other officer checks out the driver's papers." *DeLaRosa*, 657 N.W.2d at 689. And if the rule encouraged an officer to draw out the ticket-writing process while her partner completed a dog sniff or a canine unit arrived on the scene, it would have little constitutional benefit.[22]

In sum, to give the order in which the officer chooses to perform permissible actions during a traffic stop talismanic significance—as petitioner's bright-line prohibition would do—would give rise to arbitrary results without meaningfully furthering the individual interests protected by the Fourth Amendment. "Constitutional rights should be based upon reasonable-

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check was not completed until after officer gave citation), cert. denied, 534 U.S. 830 (2001).

[22] A defendant could, of course, later argue that the officer dragged his feet while writing the ticket and therefore displayed an objective lack of diligence that made the stop unreasonable under *Sharpe*. But courts would likely find it difficult to say that an officer who took seven minutes rather than three to write a ticket violated constitutional standards of diligence.

ness of the totality of the government intrusion, rather than a mere bright-line rule based solely upon a timing sequence." *DeLaRosa*, 657 N.W.2d at 688.

D. A Post-Ticket Dog Sniff Is Permissible If The Officer Does Not Unreasonably Prolong The Stop

Rather than any per se rule, the same basic reasonableness inquiry that applies when a dog sniff is conducted before a ticket is issued should apply when the order of proceedings is reversed. The overarching question is whether the performance of the dog sniff "unreasonably prolonged" the traffic stop—*i.e.*, extended it beyond the time "reasonably required to complete [the] mission" of resolving the traffic violation, in light of all the circumstances. *Caballes*, 543 U.S. at 407.

1. A traffic stop as a whole, "viewed objectively and in its totality," must be "reasonably directed toward the proper ends of the stop," such that the stop's duration does not exceed that reasonably required to conduct similar traffic stops. *Everett*, 601 F.3d at 495. Courts "do not simply look at the 'interval of prolongation in isolation,' but rather assess the length of the stop as a whole, including any extension of the encounter." *Griffin*, 696 F.3d at 1362 (quoting *Everett*, 601 F.3d at 494).

Consistent with that analysis, the courts that have employed a reasonableness analysis to determine the permissibility of post-ticket dog sniffs have considered the length of the stop, the time spent on the sniff, and the totality of the circumstances. See, *e.g.*, *United States* v. *$404,905.00 in U.S. Currency*, 182 F.3d 643, 649 (8th Cir. 1999) (considering total length of stop and relative delay caused by dog sniff in order to determine "reasonableness measured by the totality

of the circumstances"), cert. denied, 528 U.S. 1161 (2000); *United States* v. *Johnson*, 331 Fed. Appx. 408, 410 (7th Cir. 2009) (two-minute post-ticket delay preceding dog sniff was not unreasonable in context of 12-minute stop); *DeLaRosa*, 657 N.W.2d at 687 (post-ticket sniff added minimal time to stop; *State* v. *Box*, 73 P.3d 623, 629-630 (Ariz. Ct. App. 2003) (upholding brief post-ticket delay); *Brimmer*, 653 S.E.2d at 199-200 (90-second delay was reasonable); *People* v. *McQuown*, 943 N.E.2d 1242, 1248 (Ill. App. Ct. 2011) (38-minute post-ticket delay for dog sniff unreasonably prolonged stop, where officer wrote ticket after ten minutes and did not call for a canine unit until 13 minutes after that).[23]

2. Applying an approach that considers the duration of the stop, the length of the dog sniff, and the officer's diligence provides a practicable test for assessing the reasonableness of post-ticket issuance sniffs.

If the total duration of the stop does not exceed the bounds of the range of permissible traffic stops—and in particular, stops involving similar underlying circumstances—the stop is more likely to be reasonable. See *Turvin*, 517 F.3d at 1101-1102 (14-minute stop that included unrelated questioning was within the

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[23] Courts have employed a similar analysis in cases not involving dog sniffs. See, *e.g.*, *United States* v. *Garrido-Santana*, 360 F.3d 565, 573 (6th Cir.) (stop was not rendered unreasonable by fact that officer ran a computer check on defendant's authority to drive rental car and the results did not arrive until after the citation was issued; continued detention was not "intrusive"), cert. denied, 542 U.S. 945 (2004); *United States* v. *Hill*, 195 F.3d 258, 269 (6th Cir. 1999) (fact that license check results did not come back until after citation issued did not render stop unreasonable), cert. denied, 528 U.S. 1176 (2000); *Purcell*, 236 F.3d at 1277-1279.

bounds of an ordinary traffic stop). When an individual is stopped for committing a traffic violation, he can reasonably expect to be detained for a period of time that varies from several minutes to 40 minutes or more, depending on the circumstances. See pp. 16-17, *supra*. Evaluating the total length of the stop in question against the range of ordinary traffic stops will help determine whether the stop exceeded the length of detention to which the traffic violation itself may expose a driver. Looking in particular at how long traffic stops involving similar circumstances might take—for instance, stops involving multiple vehicle occupants—will provide a more refined sense as to how much time might be "reasonably required" to resolve similar traffic stops. *Caballes*, 543 U.S. at 407.

Also relevant is the proportion of the total stop that represents the delay attributable to the dog sniff (or other unrelated inquiry). If an officer spends the bulk of an 11-minute stop on matters directly related to the traffic violation, and then prolongs the stop for two minutes to perform a dog sniff, the incremental intrusion on the individual's interests is small in relation to the overall detention justified by the traffic violation. See *Mason*, 628 F.3d at 132 ("The one to two of the 11 minutes devoted to questioning on matters not directly related to the traffic stop constituted only a slight delay that raises no Fourth Amendment concern."); see also *$404,905.00 in U.S. Currency*, 182 F.3d at 649 (two-minute post-ticket sniff was reasonable when stop lasted five to eight minutes). But if the delay arising from a dog sniff constitutes a substantial portion of the stop as a whole, the stop is more likely to have been primarily focused on drug detection, and to have exceeded the amount of time "reasonably re-

quired" to resolve traffic violations involving similar circumstances. *Caballes*, 543 U.S. at 407; see, *e.g.*, *Wells* v. *State*, 922 N.E.2d 697, 700 (Ind. Ct. App. 2010) (delay of 20 minutes due to dog sniff, which doubled the length of the stop, was unreasonable); *McQuown*, 943 N.E.2d at 1248-1249.

The officer also must have been reasonably diligent in pursuing the traffic-related purpose of the stop. See p. 15, *supra*. Since an officer may pursue unrelated inquiries during a traffic stop, it follows that the officer need not spend every second pursuing the traffic violation itself in order to be reasonably diligent. See *Everett*, 601 F.3d at 495; *Turvin*, 517 F.3d at 1102-1103. Rather, the relevant consideration is the officer's "overall course of action" and whether it is "reasonably directed" toward resolving the traffic stop. *Everett*, 601 F.3d at 495. Here again, the proportion of time spent on the unrelated inquiry is relevant. See *United States* v. *Digiovanni*, 650 F.3d 498, 511 (4th Cir. 2011) (stop was unreasonably prolonged where officer spent ten minutes of 15-minute stop questioning the driver about drug possession). Courts should also consider whether the officer performed each task expeditiously in light of the circumstances, as well as the reasonableness of any justification for a delay.

E. Petitioner's Arguments For A Bright-Line Prohibition On Post-Ticket Dog Sniffs Are Unpersuasive

1. Petitioner's primary argument is that once an officer issues a ticket, the "motorist is in the same legal position as a citizen walking on a public sidewalk," and such a citizen may not be detained initially without individualized reasonable suspicion of criminal wrongdoing. Pet. Br. 13 (citing *City of Indianapolis*

v. *Edmond*, 531 U.S. 32, 37 (2000)). But a motorist who has just been issued a ticket is *not* in the same position as someone approached on the street who has had no previous interaction with the police. The motorist has lawfully been detained on probable cause to believe he has committed a traffic violation, and the issuance of the ticket does not end that detention unless a reasonable person would feel free to leave. See *Brendlin* v. *California*, 551 U.S. 249, 256-257 (2007). The relevant question for Fourth Amendment purposes is therefore whether that continued detention is reasonable, not whether the police would be permitted to initiate the same seizure, absent the underlying probable cause of a traffic offense, against a hypothetical person who has not committed any violation.

2. Petitioner also argues (Br. 21-23) that without a bright-line rule forbidding all post-ticket dog sniffs, it would be too difficult for courts to determine whether a given dog sniff is reasonable. But the lower courts have already been doing just that. Several courts have employed the reasonableness standard to evaluate a post-ticket dog sniff, and they have readily been able to assess the length of the delay, the total duration of the stop, and the officer's diligence. See pp. 36-37, *supra*. In addition, the numerous decisions considering dog sniffs and other unrelated inquiries performed before the ticket is issued confirm that courts have been able to evaluate the reasonableness of a stop prolonged by such inquiries. See pp. 27-29, *supra*.

Petitioner's assertion (Br. 22) (citation omitted) that any judicial assessment of a post-ticket dog sniff would be "virtually standardless" wrongly assumes

that the inquiry would focus on the length of the sniff-related delay in isolation and whether that amount of time could be characterized in the abstract as "de minimis." But that is not the test; rather, the question is whether the stop was unreasonably prolonged in light of its traffic-related purpose.[24] See *Caballes*, 543 U.S. at 407; *Griffin*, 696 F.3d at 1362 (rejecting focus on the "interval of prolongation in isolation") (citation omitted). That standard adequately guides courts' analysis, as the decisions applying the unreasonable-prolongation analysis demonstrate. And although the standard requires consideration of the specific circumstances of each case, that is already true of judicial consideration of routine stops not involving dog sniffs. See pp. 15-17, *supra*. Courts, moreover, will be able to draw guidance from decisions involving similar scenarios. See *Ornelas* v. *United States*, 517 U.S. 690, 698 (1996).

3. Finally, petitioner emphasizes the "embarrassing" and "intrusive" nature of dog sniffs and argues that permitting post-ticket dog sniffs will subject innocent drivers to "false alerts" and needless searches of their vehicles. Pet. Br. 27-28. As this Court has repeatedly held, however, a dog sniff is not a search requiring independent Fourth Amendment justification. See *Caballes*, 543 U.S. at 408-409; *Place*, 462 U.S. at 707. Accordingly, after *Caballes*, it is settled

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[24] The Eighth Circuit used the term "*de minimis*" in *$404,905.00 in U.S. Currency*, 182 F.3d at 649, as shorthand to describe the minimal nature of the delay in relation to the circumstances of the stop as a whole. The court considered whether the post-ticket delay was "reasonable[] measured by the totality of the circumstances," rather than focusing on the length of the delay in isolation. *Ibid.*

law that police officers may conduct dog sniffs without reasonable suspicion during otherwise lawful traffic stops. A bright-line rule prohibiting post-ticket dog sniffs, while permitting sniffs that are performed during the course of the stop, cannot reasonably be based on views about the intrusiveness of dog sniffs.

Petitioner also asserts (Br. 28), citing a Chicago Tribune study, that dog sniffs conducted without suspicion subject motorists to needless searches because often no drugs are found following a canine alert. But in *Florida* v. *Harris*, 133 S. Ct. 1050 (2013), which concerned the reliability of dog sniffs in establishing probable cause, the defendant unsuccessfully relied on that same study. See Resp. Br. at 29-30 (No. 11-817). This Court rejected the argument that canine alerts that do not result in discovery of narcotics indicate unreliability. 133 S. Ct. at 1056 & n.2. (defendant's arguments "reflect[ed] a misunderstanding" because dogs often properly alert to residual odors). In any event, petitioner disclaimed any challenge to the dog's reliability in this case. J.A. 30.

F. The Dog Sniff Did Not Unreasonably Prolong The Traffic Stop In This Case

Officer Struble's conduct of the dog sniff in this case did not unreasonably prolong the stop of petitioner's vehicle. The stop lasted approximately 29 minutes in total, which is within the standard range of traffic stops involving similar circumstances. Officer Struble made the traffic stop alone and encountered two persons in the car, increasing the amount of time it took to assess the situation and run serial warrant

checks on petitioner and his passenger, Pollman.[25] The total duration of the stop, therefore, did not exceed what petitioner might reasonably have expected based on his traffic violation and the circumstances.

Officer Struble spent the first 21-22 minutes of the stop conducting permissible inquiries designed to investigate the traffic violation: he verified petitioner's license and registration, ran warrant checks on petitioner and Pollman, questioned petitioner about the traffic violation and his reasons for being on the road, prepared a written warning, and explained the warning to petitioner. J.A. 22-23, 58, 100. As the magistrate judge found, the amount of time Struble took to investigate the violation and issue the ticket was not "an inordinately large amount of time." J.A. 100. Indeed, some of that time was attributable to petitioner's actions: he apparently lied about the reason he had driven onto the shoulder, J.A. 46, and he got out of his car but refused to accompany Officer Struble to the patrol car, J.A. 23. Both of those actions necessitated further conversation. Officer Struble was thus reasonably diligent in performing the tasks related to the traffic stop: he proceeded directly from one to the next, and petitioner has never sug-

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[25] See *United States* v. *Kitchell*, 653 F.3d 1206, 1218 (10th Cir.) (22-minute stop justified by need to question three occupants), cert. denied, 132 S. Ct. 435 (2011); *United States* v. *Parker*, 512 Fed. Appx. 991, 993 (11th Cir. 2013) (per curiam) (stop lasting 30-40 minutes was reasonable where officer needed to locate relevant statute); *Branch*, 537 F.3d at 338 (bulk of 30-minute stop was justified by normal incidents of traffic stop, and "relatively small" portion was justified by reasonable suspicion); *United States* v. *Mincey*, 321 Fed. Appx. 233, 241-242 (4th Cir. 2008) (35-minute stop was reasonable because rental-car verification took extra time), cert. denied, 558 U.S. 945 (2009).

gested that Officer Struble failed to perform any of his tasks expeditiously under the circumstances.

Officer Struble was also reasonably diligent with respect to the dog sniff. He testified that for officer-safety reasons, he had to call for backup before performing the dog sniff. J.A. 72. The practice of conducting a sniff only with a backup officer present is well-accepted, see p. 23, *supra*, and it was particularly appropriate in this case, as the officer was outnumbered by petitioner and Pollman. See *Mimms*, 434 U.S. at 111 (recognizing important interest in officer safety during traffic stops). Struble did not wait until he issued the written warning to call for backup, instead placing the call some eight minutes before that, while he was conducting a criminal-record check on Pollman. J.A. 27. Within two minutes after Struble made the call, the backup officer was en route. *Ibid.* Struble finished explaining the citation at 12:27 or 12:28 a.m., and the backup officer arrived at 12:33 a.m. Struble immediately retrieved his dog, and it alerted around 12:35 a.m. J.A. 68-69. The delay attributable to the dog sniff is thus seven to eight minutes. J.A. 33, 100 (magistrate judge's finding). Throughout, Struble appears to have attempted to minimize the delay.[26]

The delay of seven to eight minutes in the context of a 29- or 30-minute stop did not unreasonably prolong the stop. Once petitioner had been detained for 22 minutes in connection with the traffic violation, the additional delay was incremental: it did not represent

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[26] Cf. *State* v. *Beckman*, 305 P.3d 912, 917-918 (Nev. 2013) (en banc) (nine-minute delay that doubled stop's duration was unreasonable where officer did not seek dog sniff until well after stop concluded, which the court viewed "seiz[ing]" the defendant "again").

the bulk of the total time, or even one-half or one-third of it. That indicates that Officer Struble's overall course of conduct was primarily focused on resolving the traffic stop. See *Everett*, 601 F.3d at 495. The seven- or eight-minute interval, moreover, did not extend the traffic stop beyond what might reasonably be required for similar traffic stops not involving dog sniffs.

II. THE DOG SNIFF OF PETITIONER'S CAR WAS INDEPENDENTLY JUSTIFIED BY THE OFFICER'S REASONABLE SUSPICION OF CRIMINAL ACTIVITY

The extension of petitioner's traffic stop to conduct a dog sniff was independently justified by Officer Struble's reasonable suspicion—unrelated to petitioner's traffic offense—that unlawful activity was taking place. An officer may prolong a traffic stop if "the circumstances give rise to a reasonable suspicion that criminal activity unrelated to the stop is afoot." *United States* v. *Chavez Loya*, 528 F.3d 546, 553 (8th Cir. 2008). Although the court of appeals did not rule on that ground, a prevailing party is "free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); see Gov't C.A. Br. 15-19.[27]

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[27] The magistrate judge made an oral finding that reasonable suspicion did not justify extending the detention after the written warning was issued. J.A. 102. The judge did not engage in an extended analysis, however. Neither the district court nor the court of appeals addressed the issue.

Reasonable suspicion requires "a particularized and objective basis for suspecting legal wrongdoing," but "the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *United States* v. *Arvizu*, 534 U.S. 266, 273-274 (2002) (citation and internal quotation marks omitted). The existence of reasonable suspicion is subject to de novo appellate review, giving "due weight to inferences drawn from [the historical] facts by resident judges and local law enforcement officers."[28] *Ornelas*, 517 U.S. at 699.

Officer Struble reasonably suspected that petitioner's car contained illicit drugs. Numerous factors, taken together, established reasonable suspicion: the overwhelming odor of air freshener emanating from petitioner's car, petitioner's evident agitation, petitioner's implausible explanation for his traffic violation; Pollman's nervous behavior and attempts to avoid being looked at closely, and Officer Struble's belief that Pollman's story about the reason for making the long trip to Omaha in the middle of the night

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[28] Petitioner is incorrect (Br. 34) that the magistrate judge declined to credit Officer Struble's testimony that he found particular circumstances to be suspicious. The judge stated in his oral ruling that "[o]ne can take difference with some of these conclusions as to what [Struble's] suspicious of * * * and I do, as well as [defense counsel], have some doubts about the fact that he has these suspicions but whether they're of any value." J.A. 95. Given that petitioner's counsel did not argue that Struble's testimony should not be credited, but only that the circumstances were not legally sufficient to create reasonable suspicion, the judge's statement should be understood to express the legal conclusion that reasonable suspicion was absent.

was not credible.[29] Moreover, immediately after petitioner declined to consent to a dog sniff of his car and Officer Struble asked him to step out of his vehicle to await the arrival of the backup officer, petitioner rolled up the windows of his car, further contributing to Struble's reasonable suspicion that the air fresheners were being used to mask the odors detectable to a drug dog. Together, these circumstances are more than sufficient to create reasonable suspicion.

Petitioner's argument to the contrary (Br. 34-39) is premised on the assertion that each factor, in isolation, might be perfectly innocent. But this Court has held that it is not appropriate to "evaluat[e] and reject[] * * * [the] factors in isolation from each other" on the ground that each is "susceptible to an innocent explanation." *Arvizu*, 534 U.S. at 274. Rather, courts must "take into account the 'totality of the circumstances.'" *Ibid.* Here the totality of the circumstances strongly suggested that petitioner was engaged in criminal activity.

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[29] See, *e.g.*, *Illinois* v. *Wardlow*, 528 U.S. 119, 124 (2000) ("[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion."); *Branch*, 537 F.3d at 338 (explaining that nervousness of driver, passenger's refusal to make eye contact, and "presence of several air fresheners" in car contributed to reasonable suspicion of illicit drug activity); *United States* v. *Fuse*, 391 F.3d 924, 929-930 (8th Cir. 2004) (holding that "a strong odor of air freshener" helped "demonstrate reasonable suspicion justifying continued detention of [defendant] to conduct a dog sniff"), cert. denied, 544 U.S. 990 (2005); see also *United States* v. *Riley*, 684 F.3d 758, 764 (8th Cir.) ("[R]easonable suspicion could derive from 'unusual or suspicious travel plans.'" (quoting *United States* v. *Beck*, 140 F.3d 1129, 1139 (8th Cir. 1998))), cert. denied, 133 S. Ct. 800 (2012).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
GINGER D. ANDERS
Assistant to the Solicitor General
CHRISTOPHER J. SMITH
Attorney

DECEMBER 2014