No. 01-631

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTOPHER DRAYTON AND CLIFTON BROWN, JR.

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an officer who informs a passenger on a bus that the officer is conducting drug and illegal weapons interdiction and asks the passenger for consent to search, while another plainclothes officer stays at the front of the bus without blocking the exit, has effected a "seizure" of that passenger within the meaning of the Fourth Amendment and *Florida* v. *Bostick*, 501 U.S. 429 (1991).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 231 F.3d 787. The oral decision of the district court (Pet. App. 10a-14a; J.A. 129-134) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2000. Pet. App. 1a. A petition for rehearing was denied on May 16, 2001. Pet. App. 15a-16a. On August 1 and 31, 2001, Justice Kennedy extended the time within which to file the petition for a writ of certiorari to and including October 12, 2001. The petition was filed on October 12, 2001, and was granted on January 4, 2002. 122 S. Ct. 803. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * .

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, respondent Christopher Drayton was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 846, and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Following the entry of a conditional guilty plea in the same court, respondent Clifton Brown, Jr., was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 846. Drayton was sentenced to 120 months of imprisonment, to be followed by eight years of supervised release; Brown was sentenced to 88 months of imprisonment, to be followed by five years of supervised release. The court of appeals reversed and remanded with instructions to grant respondents' motions to suppress. Pet. App. 1a-9a.

1. On February 4, 1999, a Greyhound bus made a scheduled stop in Tallahassee, Florida, en route from Ft. Lauderdale, Florida, to Detroit, Michigan. Pet. App. 3a-4a. At the bus station in Tallahassee, all 25 to 30 passengers on board were required to get off the bus for reasons unrelated to law enforcement (so that the bus could be refueled and cleaned). Pet. App. 3a; J.A. 104 (Tr. 75-76). The driver checked the passengers' tickets as they re-boarded and then left to handle

paperwork inside the terminal. Pet. App. 3a; J.A. 77-79, 104 (Tr. 47-48, 75-76). Before the bus driver left for the terminal office, three members of the Tallahassee Police Department asked for and received the driver's permission to board the bus. The police officers were dressed casually, and each had his badge around his neck or in his hand. Although the officers were armed, their weapons were covered by their clothing, and there is no evidence that any passenger was aware that the officers were armed. Pet. App. 3a; J.A. 43-44, 76-77 (Tr. 11-12, 45-46).

The three officers boarded the bus. Officer Hoover remained at the front, kneeling in the bus driver's seat, facing toward the rear of the bus. From that position, he could see the passengers and ensure the safety of the other officers without blocking the aisle or otherwise obstructing the exit. Pet. App. 3a; J.A. 45-47, 89-90 (Tr. 12-15, 59-61). Officers Lang and Blackburn walked to the back of the bus, where Officer Lang began speaking with individual passengers.[1] Officer Lang politely asked passengers about their travel plans and attempted to match each passenger with luggage in the overhead racks. So that he would not block the aisle, Officer Lang stood next to or just behind the passenger with whom he was conversing. Pet. App. 3a; J.A. 47-50, 56 (Tr. 14-18, 24). According to Lang, any passenger

[1] Officer Blackburn spoke with the passengers seated in the very last row; Officer Lang spoke with the other passengers. Officer Lang explained that the "primary purpose" of having Officers Hoover and Blackburn with him was safety. From the front of the bus, Lang explained, Officer Hoover would "observ[e] passengers' reactions to what [Lang] was doing for [Lang's] safety," and Blackburn was "doing the same" from "the back of the bus," *i.e.*, "observing the passengers while" Lang "ma[d]e contacts." J.A. 47 (Tr. 14-15).

who declined to have his luggage searched or who wished to leave the bus would have been permitted to do so without interference or argument. Pet. App. 3a-4a; J.A. 70-71, 98 (Tr. 39-40, 69). In Lang's experience, most people willingly cooperate, Pet. App. 4a, and some remark that they are glad the police are checking for drugs and weapons to ensure passenger safety during their travel, J.A. 73, 100 (Tr. 42, 71). Officer Lang could recall five to seven instances in the last year in which passengers had declined to have their luggage searched. In addition, it was very common for passengers to get up and leave the bus while the officers were on it. Pet. App. 4a; J.A. 81 (Tr. 50-51). See J.A. 95-96 (Tr. 66) (individuals declined to grant consent about once a week). Sometimes Officer Lang specifically told passengers that they had the right to refuse to cooperate, but on this particular day, he did not. J.A. 81 (Tr. 51).

Respondents were seated on the driver's side of the bus, near the back. Drayton was in the aisle seat and Brown was next to him, by the window. Officer Lang approached from the rear and leaned over Drayton's right shoulder. Speaking in a normal conversational tone, Officer Lang showed respondents his badge and explained his purpose. With his voice "just loud enough for [respondents] to hear," Lang said:

> I'm Investigator Lang with the Tallahassee Police Department. We're conducting bus interdiction, attempting to deter drugs and illegal weapons being transported on the bus. Do you have any bags on the bus?

Pet. App. 4a; J.A. 55 (Tr. 23-24). Respondents answered by pointing to a green bag in the overhead luggage rack. Lang asked, "Do you mind if I check it?"

and Brown replied, "Go ahead." Lang handed the bag to Officer Blackburn, who looked inside and found no contraband. Pet. App. 4a; J.A. 56, 59-61 (Tr. 24, 27-29).

Lang had noticed that respondents were wearing heavy jackets and baggy pants even though it was a warm day. Pet. App. 4a-5a; J.A. 61, 105 (Tr. 29-30, 77). Because Lang was aware that drug traffickers and others often use baggy clothing "to conceal weapons or narcotics on their person," J.A. 61 (Tr. 29-30), he asked Brown for permission to pat him down for weapons. Brown said "Sure," pulled a cell phone out of his pocket, and opened his coat. J.A. 61-62 (Tr. 30); see Pet. App. 5a. As Lang performed the pat-down, he felt hard objects on the fronts of Brown's thighs; the objects resembled drug packages that Lang had detected on other occasions. Pet. App. 5a; J.A. 63 (Tr. 31-32). When Lang felt the objects, Brown "just dropped his head," without saying anything. J.A. 64-65 (Tr. 33). Lang arrested Brown and handcuffed him; Officer Hoover then escorted Brown off the bus. Pet. App. 5a; J.A. 63-64 (Tr. 32-33).

Lang then turned to Drayton and asked, "Mind if I check you?" Drayton responded by lifting his hands approximately eight inches from his legs. Pet. App. 5a; J.A. 65 (Tr. 33-34). Lang conducted a similar patdown and found the same kind of hard objects on Drayton's thighs. Pet. App. 5a; J.A. 65 (Tr. 34). Lang then arrested Drayton and escorted him off the bus. Pet. App. 5a; J.A. 65 (Tr. 34). A search of respondents revealed that Brown had three packages taped to the several pairs of boxer shorts he was wearing; the packages contained a total of 483 grams of cocaine powder. Drayton was also wearing multiple pairs of boxer shorts. Those shorts had two packages, containing 295

grams of cocaine, taped to them. Pet. App. 5a; J.A. 66-67 (Tr. 35).

2. A federal grand jury returned a two-count indictment charging respondents with conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846, and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Gov't C.A. E.R. 12 (indictment). Respondents moved to suppress the cocaine. Relying on two Eleventh Circuit decisions that involved searches of bus passenger luggage, *United States* v. *Guapi*, 144 F.3d 1393 (1998), and *United States* v. *Washington*, 151 F.3d 1354 (1998), respondents argued that their consent to the pat-down was invalid because they "were not told they did not have to consent." See, *e.g.*, Drayton Motion to Suppress, C.A. E.R., Tab 2, at 2.

Following an evidentiary hearing and the arguments of counsel, the district court denied the motion. "[T]he police conduct," the district court found, "was not coercive and * * * the search was therefore voluntary." Pet. App. 10a; J.A. 129 (Tr. 104). The officers, the court found, did not brandish their badges or weapons when they boarded the bus. To the contrary, the court explained, the officers were dressed in street clothes and boarded around the same time as the passengers. As a result, the court found that the officers "could have been mistaken for other passengers." J.A. 126, 130 (Tr. 100, 105); Pet. App. 11a. Officer Lang, the court further noted, spoke to respondents from just behind their seats so that "no one [was] standing in their way." Pet. App. 13a; J.A. 131 (Tr. 106). It was "obvious," the court found, that respondents could "get up and leave, as [could] the people ahead of them." Pet. App. 13a; J.A. 132 (Tr. 106).

The district court also found that there was "nothing in [Officer Lang's] tone of voice" to suggest bullying or abuse. Pet. App. 13a; J.A. 132 (Tr. 106-107). To the contrary, after hearing the testimony and observing Officer Lang's temperament and demeanor, the court found:

> [E]verything that[] [was] said, everything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests it was cooperative. There was nothing coercive, there was nothing confrontational about it.

Pet. App. 13a; J.A. 132 (Tr. 107). See also J.A. 51, 58 (Tr. 19, 26) (officer's testimony that he speaks to passengers in a "friendly and courteous" manner, using "a nice tone of * * * voice").

The cases cited by respondents, the court further observed, were distinguishable. In those cases, the officers made a general announcement from the front of the bus. Such an announcement, the court noted, might have suggested to the passengers that they were not permitted to refuse cooperation. Here, in contrast, "[t]here was no general announcement when the[] officers got on the bus." Pet. App. 13a; J.A. 132 (Tr. 107). The court continued: "There was nothing coercive and nothing in what Officer Lang said or did or the other officers did on that bus that would suggest to a reasonable person that they were not free to leave." Pet. App. 13a; J.A. 132 (Tr. 107-108). Although the officers did not "tell [respondents] that they don't have to consent," the court noted, "there's nothing in the law that says they have to do that." Pet. App. 12a, 13a; J.A. 131 (Tr. 106).

3. The court of appeals reversed. Pet. App. 1a-9a. "This case," the court stated, "is controlled by our

decision in *United States* v. *Washington*, 151 F.3d 1354 (11th Cir. 1998), which extended *United States* v. *Guapi*, 144 F.3d 1393 (11th Cir. 1998)." Pet. App. 5a-6a. In *Guapi*, the bus driver advised the passengers that they were required to get off the bus. Before the passengers exited, however, two officers boarded the bus and announced to the passengers that they wanted the passengers' "consent and cooperation" in performing a quick inspection of luggage for contraband. After waiting for the passengers to open their bags, one officer proceeded down the aisle, checking the passengers' bags as he went. Because the officer started at the front, the passengers had to get by him to get off the bus. The court of appeals concluded that the show of authority at the front of the bus, combined with the other circumstances, would have communicated to passengers that they were not free to decline cooperation absent "notification to the passengers that they were in fact free to decline the search request." 144 F.3d at 1394-1396. In *Washington*, the officer again made a general announcement at the front of the bus, holding his badge over his head and declaring that his purpose was to conduct "a routine bus check." He then asked individual passengers for tickets and identification, and requested consent to search some passengers' bags. Following *Guapi*, the court declared that a bus passenger under those circumstances would not feel free to disregard the officers' requests absent "some positive indication that consent could have been refused." 151 F.3d at 1355-1357.

In this case, the court of appeals agreed that the police officers neither blocked the aisle nor made a general announcement suggesting that cooperation was required. Nonetheless, the court held that *Guapi* and *Washington* compelled the conclusion that respondents

had been seized and that their consent to search was involuntary. Like the officers in *Guapi* and *Washington*, the court stated, in this case Officer Lang began the encounter with a "show of authority" by displaying his badge in his hand and telling respondents that he was a police officer. Pet. App. 6a. The fact that Lang spoke to each passenger individually and used a quiet, friendly tone, the court stated, made no difference: "We do not believe that a passenger-specific show of authority is any less coercive than a general, bus-wide one." *Id.* at 7a. The court noted that the opinion in *Guapi* had distinguished between general announcements and individual officer-citizen interactions. *Id.* at 7a n.5. The panel in this case, however, deemed that distinction unpersuasive and dismissed it as dictum. *Ibid.*

The court also refused to distinguish this case from *Washington* and *Guapi* based on the fact that, in this case, the officer did not ask respondents for tickets or identification. Pet. App. 7a. Whether or not an officer asks for such documents, the court stated, does not affect whether other requests or commands are coercive. *Ibid.* Nor did it matter that passengers in other instances "had declined to have their luggage searched, and that passengers had often exited the bus while the officers were on it," the court stated. *Id.* at 8a. There was no evidence of what the officers said or did in those other cases, the court noted, and the number of times in which passengers had refused to consent to the search were few in comparison to the number encounters. *Ibid.* Finally, the court concluded that the presence of an officer in the bus driver's seat, at the front of the bus, could contribute to a finding that the passengers had been seized. The court did not dispute that Officer Hoover (like the other officers) was dressed in casual,

civilian clothes. It cited no evidence that any passenger knew that Hoover was a police officer. Nonetheless, the court declared that seeing Hoover near the bus exit "might make a reasonable person feel less free to leave the bus." *Id.* at 9a.

The court of appeals acknowledged that *Washington* had "been criticized by the Tenth Circuit" because it establishes a de facto requirement that officers warn bus passengers of their right to refuse cooperation. Pet. App. 2a n.2 (discussing *United States* v. *Broomfield*, 201 F.3d 1270 (10th Cir.), cert. denied, 531 U.S. 830 (2000)). The court also acknowledged that the Tenth Circuit had, for that reason, "declined to follow" *Washington*. *Ibid.* Nevertheless, the court deemed itself bound by *Washington* as in-circuit precedent. *Ibid.* The court of appeals denied the government's petition for rehearing en banc. Pet. App. 15a-16a.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Officer Lang approached respondents on the Greyhound bus, he spoke to them individually and politely in a quiet voice, did not show a weapon or make intimidating movements, left the aisle free so that respondents could exit, and said nothing that would suggest that respondents were required to cooperate or were barred from leaving the bus. Pet. App. 3a-4a. The district court thus expressly found that "everything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests that it was cooperative"; that "[t]here was nothing coercive" or "confrontational" about the encounter; and that it was "obvious" that respondents could have left the bus at any time. Pet. App. 13a; J.A. 132 (Tr. 106-107). The court of appeals did not dispute those findings. Nonetheless, it held that respondents had been illegally seized and that

their consent to search was therefore invalid. Such an encounter cannot be considered consensual, the court of appeals stated, "without some positive indication" from the police officers that consent or cooperation "could have been refused." Pet. App. 6a (quoting *United States* v. *Washington*, 151 F.3d 1354 (11th Cir. 1998)).

A. That conclusion cannot be reconciled with this Court's cases. Because consensual encounters between the police and citizens implicate no Fourth Amendment interests, *Florida* v. *Bostick*, 501 U.S. 429, 434 (1991); *Florida* v. *Rodriguez*, 469 U.S. 1, 6 (1984) (per curiam), this Court repeatedly has recognized that the police may approach individuals, ask questions, and even request consent to search without violating the Fourth Amendment, "as long as the police do not convey a message that compliance with their requests is required," *Bostick*, 501 U.S. at 435. Thus, "mere police questioning does not constitute a seizure." *Id.* at 434; *INS* v. *Delgado*, 466 U.S. 210, 216 (1984) ("police questioning, by itself, is unlikely to result in a Fourth Amendment violation"). That is true whether the police-citizen interaction takes place in a public airport, *Florida* v. *Rodriguez*, *supra*, in a private building, *Delgado*, *supra*, or on an interstate bus, *Bostick*, *supra*. Here, there was no police conduct that "would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter," *Bostick*, 501 U.S. at 439, and nothing the police said or did created circumstances "so intimidating as to demonstrate that a reasonable person would have believed" cooperation to be mandatory, *Delgado*, 466 U.S. at 216. The officers showed no weapons; spoke politely and quietly with the passengers; and said nothing that might convey the message that cooperation was mandatory.

B. The court of appeals nonetheless held that a seizure had occurred because, when Officer Lang introduced himself to respondents, he showed respondents his badge and identified himself as a police officer—an action the court characterized as a "show of authority." Pet. App. 6a-7a. Contrary to the court of appeals' suggestion, introducing oneself to a citizen and showing a badge or other official form of identification does not by itself effect a seizure. Instead, it reassures the citizen that he is communicating with the police rather than a random or potentially threatening stranger. This Court, moreover, has consistently recognized that police officers do not effect a seizure or otherwise coerce citizens merely by approaching and identifying themselves as law enforcement officials. For example, the officers began the interactions at issue in *Delgado* and *Rodriguez* by identifying themselves as law enforcement officials. *Delgado*, 466 U.S. at 212-213; *Rodriguez*, 469 U.S. at 4, 6-7. Yet, in each of those cases, this Court held that the encounter was consensual.

C. By finding that self-identification is a "show of authority" that effects a seizure of bus passengers absent some "positive indication" that cooperation can be refused, the court of appeals effectively created a per se rule that officers must afford bus passengers *Miranda*-like warnings of their right to refuse consent before asking for permission to conduct a search. Police-citizen encounters almost uniformly begin with the officer identifying himself and explaining his purpose. Moreover, if the polite interactions at issue here are not consensual absent warnings of the right to refuse consent, there are few situations in which such warnings would not be necessary. This Court has repeatedly rejected the use of per se rules in determining the reasonableness of a law enforcement official's

conduct under the Fourth Amendment. *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). Seizure determinations must be made in light of the "totality of the circumstances." *Bostick*, 501 U.S. at 437. Those circumstances show that the police-citizen encounter at issue here was not a seizure but rather a consensual interaction.

ARGUMENT

THE INTERACTION BETWEEN OFFICER LANG AND RESPONDENTS WAS CONSENSUAL

A. An Officer's Encounter With A Citizen On A Bus Does Not Implicate The Fourth Amendment If A Reasonable Person Would Feel That It Is Permissible To Decline The Encounter

In *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968), this Court noted that "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." As long as a reasonable person would feel free "to disregard the police and go about his business," *California* v. *Hodari D.*, 499 U.S. 621, 628 (1991), the encounter is purely consensual and outside the confines of the Fourth Amendment. "Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment." *INS* v. *Delgado*, 466 U.S. 210, 216 (1984).

In a variety of settings, this Court has held that law enforcement officers may, consistent with the Fourth Amendment, approach individuals whom they have no

reason to suspect of wrongdoing and ask them questions, *Florida* v. *Rodriguez*, 469 U.S. 1, 5-6 (1984) (per curiam); *United States* v. *Mendenhall*, 446 U.S. 544, 557-558 (1980); ask to see their identification, *Florida* v. *Royer*, 460 U.S. 491, 501 (1983) (plurality opinion); and request consent to search, *Royer*, 460 U.S. at 501 (plurality opinion); *Rodriguez*, 469 U.S. at 4, 7. In each of those settings, police officers enjoy "the liberty (again, possessed by every citizen) to address questions to other persons," for "ordinarily the person addressed has an equal right to ignore his interrogator." *Mendenhall*, 446 U.S. at 553 (plurality opinion) (quoting *Terry* v. *Ohio*, 392 U.S. at 32-33 (Harlan, J., concurring)); see also *Terry*, 392 U.S. at 34 (White, J., concurring) ("There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets").

In *Florida* v. *Bostick*, 501 U.S. 421 (1991), this Court applied that principle in the context of police-citizen interactions on a bus. Federal, state, and local law enforcement authorities, the Court observed, often assign police officers to "airports, train stations, and bus depots" to watch for suspicious activity. "Law enforcement officers stationed at such locations routinely approach individuals, either randomly or because they suspect in some vague way that the individuals may be engaged in criminal activity, and ask them * * * questions" in order to confirm or dispel their suspicions; sometimes, they also ask for consent to perform searches. *Id.* at 431. *Bostick* itself concerned the Broward County Sheriff's Department's practice of boarding buses at scheduled stops and asking passengers for permission to search their luggage for narcotics. The Florida Supreme Court had adopted a per se rule that all police-citizen encounters occurring in the

"cramped confines" of a bus are seizures, and that any passenger's consent to a search in that context is automatically involuntary.

This Court reversed. "Our cases," the Court explained, "make it clear" that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen." *Bostick*, 501 U.S. at 434 (quoting *Royer*, 460 U.S. at 497). "[W]e have held repeatedly," the Court emphasized, that "mere police questioning does not constitute a seizure." *Ibid.* That "unbroken line of decisions," the Court further held, "applies equally to encounters on a bus." 501 U.S. at 439-440.

Like most other Fourth Amendment determinations, the Court explained, the determination of whether a bus passenger has been "seized" must be made in view of "all the circumstances surrounding the encounter." *Bostick*, 501 U.S. at 439. Because the totality-of-the-circumstances test must be context-sensitive, the Court rejected the Florida Supreme Court's focus on whether a reasonable bus passenger would have felt "free to leave" the bus. The Court observed:

> When police attempt to question a person who is walking down the street or through an airport lobby, it makes sense to inquire whether a reasonable person would feel free to continue walking. But when the person is seated on a bus and has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter.

Id. at 435-436. That is true, the Court explained, because any confinement felt by the bus passenger may be "the natural result of his decision to take the bus" and not a product of police activity. Indeed, in *Bostick* itself, the Court observed that the bus's imminent departure might have prevented the defendant from feeling "free to leave the bus even if the police had not been present." *Ibid.*

For that reason, the decision in *Bostick* explains that courts examining police-citizen encounters on a bus should not ask whether a reasonable person would have felt "free to leave." Instead, courts must inquire whether the police conveyed the message that it is not permissible to "decline the officer's request or otherwise terminate the encounter." 501 U.S. at 436. The location of the encounter is a permissible but not dispositive consideration in that determination. *Id.* at 435. Even on a bus, the Court emphasized, "no seizure occurs when police ask questions of an individual, ask to examine the individual's identification, and request consent to search his or her luggage—so long as the officers do not convey a message that compliance with their requests is required." *Id.* at 437.

Bostick thus makes it clear that the seizure principles applicable in other contexts apply when determining whether the police have effected a seizure on a bus. Courts must consider "all the circumstances surrounding the encounter to determine 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." 501 U.S. at 439. See *id.* at 437 ("the crucial test" is whether, "taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at

liberty to ignore the police presence and go about his business.'"). Those circumstances include whether the officers displayed any weapons; whether they conveyed any type of threat; whether they used authoritative language or a tone of voice showing that compliance is required; whether they physically touched the citizen; whether they advised the citizen of his right to refuse cooperation; the location of the encounter; whether there was a threatening number of officers; and the officers' proximity to the citizen, as well as the timing of their arrival. See *id.* at 432, 437; *Mendenhall*, 446 U.S. at 554 (plurality opinion); *United States* v. *Hill*, 199 F.3d 1143, 1148 (10th Cir. 1999), cert. denied, 531 U.S. 830 (2000); *United States* v. *Lewis*, 921 F.2d 1294, 1297 (D.C. Cir. 1990).

B. Respondents Were Not Seized Or Otherwise Coerced To Consent When A Police Officer Approached Them On A Bus And Asked To Speak With Them

1. Nothing the police officers said or did in this case would have communicated to a reasonable person that he had no choice but to cooperate. To the contrary, as the district court found, the interaction between Officer Lang and respondents was entirely consensual. Pet. App. 13a; J.A. 132 (Tr. 107).

Three officers boarded the bus with the permission of the driver around the same time as the passengers. The officers were casually dressed, and no weapons were visible. See Pet. App. 3a; J.A. 43, 76-77 (Tr. 11-12, 45-46). When the officers boarded, they did not make a general announcement to the passengers; they did not use the public address system; and they did not hold their badges over their heads. Pet. App. 3a; J.A. 130, 132 (Tr. 105, 107). One officer remained at the front, kneeling in the driver's seat so that he could watch the

other officers and the passengers without obstructing the exit; the other two walked to the back of the bus, so they could interact with individual passengers without blocking the aisle. Pet. App. 3a. The district court thus observed that the officers "could have been mistaken for other passengers." J.A. 126 (Tr. 100); see also *id.* at 108 (Tr. 80) ("We boarded the bus just like we were passengers."); *id.* at 130 (Tr. 105).

To ensure that each passenger with whom he spoke could leave or otherwise avoid him, Officer Lang addressed the passengers from the side or just behind. Pet. App. 3a. Passengers thus were free to get off and on the bus, and passengers on other occassions regularly did so. See Pet. App. 4a; J.A. 81 (Tr. 51). The district court expressly found that, when Officer Lang spoke with respondents, "no one [was] standing in their way," Pet. App. 13a; J.A. 131 (Tr. 106), and that it was "obvious" that respondents could "get up and leave, as [could] the people ahead of them." Pet. App. 13a; J.A. 132 (Tr. 106). Officer Lang spoke to respondents in a quiet, conversational tone of voice, "just loud enough for [respondents] to hear." Pet. App. 4a. See also J.A. 51, 58 (Tr. 19, 26) (officer's testimony that he spoke in a "friendly and courteous" manner, using "a nice tone of * * * voice"). Officer Lang identified himself as a police officer and showed them his badge. He said he was conducting drug and illegal weapons interdiction, and asked if respondents had any bags on the bus. When respondents pointed to a bag in the overhead rack, Lang asked if he could check it and Brown said yes. And when Officer Lang—suspicious that respondents might be wearing heavy jackets and baggy clothing "to conceal weapons or narcotics on their person," J.A. 61 (Tr. 29-30)—asked Brown for permission to pat him down for weapons, Brown said "Sure," pulled

a cell phone out of his pocket, and opened his coat. J.A. 61-62 (Tr. 30); Pet. App. 5a.

As the district court—which heard the testimony and observed Officer Lang's temperament and demeanor—explained, "everything that[] [was] said, everything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests it was cooperative. There was nothing coercive, there was nothing confrontational about it." Pet. App. 13a; J.A. 132 (Tr. 107); see Pet. App. 13a; J.A. 132 (Tr. 107-108) ("There was * * * nothing in what Officer Lang said or did or the other officers did on that bus that would suggest to a reasonable person that they were not free to leave.").[2] Indeed, respondents faced none of the factors typically found to intimidate people into thinking that they must comply with an officer's request. There were no uniforms, no applications of force, no intimidating movements, no overwhelming show of force, no pointing of weapons, no visible weapons, no blocking of the exit path, no threats, no commands—not even an authoritative tone of voice. Nothing about the officers' conduct

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[2] Seeking to contradict the trial court's express finding that the interaction was cooperative and non-coercive, respondents argued (Br. in Opp. 10) that Officer Lang "agreed" that his style was "kind of 'in your face.'" Respondents, however, omitted Officer Lang's actual testimony and the clarification that followed. Officer Lang's response to the question put to him makes it clear that he thought he was being asked whether he spoke with respondents *face-to-face*, which he did. J.A. 56-57 (Tr. 25). In fact, the Assistant United States Attorney immediately clarified any possible confusion: "I think the question the judge was asking, was there anything confrontational about your discussions?" Officer Lang answered "No, sir. No, sir." J.A. 57 (Tr. 25). See also J.A. 58 (Tr. 26) ("I'm not talking loud. I'm being friendly and courteous, and I'm using 'How are you doing?' this type of—the tone of voice that I'm using. * * * I'm just talking to them in a nice tone of voice.").

suggested that respondents could not decline the officer's request or otherwise terminate the encounter.

Both before and after this Court's decision in *Bostick*, the courts of appeals have almost uniformly agreed that no seizure occurs under such circumstances. For example, in *United States* v. *Flowers*, 912 F.2d 707 (4th Cir. 1990), cert. denied, 501 U.S. 1253 (1991), multiple officers boarded a bus to prevent trafficking in guns and drugs. There, as here, they spoke to the bus passenger "in a casual tone of voice," did "not block the aisle," and did not "display[] weapons or restrain [the passenger] in any way." *Id.* at 711. Under the circumstances, the Fourth Circuit concluded that no seizure had occurred. *Id.* at 709, 712. "Nothing about the officers' conduct here impaired [the passenger's] right to refuse to talk to them or to leave the bus." *Id.* at 709.

Likewise, in *United States* v. *Madison*, 936 F.2d 90, 93, 96 (1991), the Second Circuit held that an officer does not effect a seizure when he speaks to the bus passenger from behind, does not touch him, does not display a weapon, and uses a polite and conversational tone—notwithstanding the presence of another plainclothes officer between the passenger and the exit. Nothing about such an interaction, the court held, would suggest to a reasonable passenger that he could not "go about his business, either by remaining on the bus and declining to cooperate * * *, or by getting off the bus." *Ibid.* Similar decisions abound. See, *e.g.*, *United States* v. *Peters*, 194 F.3d 692, 698 (6th Cir. 1999) (officers did not convey "message that compliance with their request to speak" to train passenger was "required" when officers, dressed in civilian clothes and without any visible weapons, approached passenger, identified themselves, asked questions, and requested the passenger's ticket), cert. denied, 528 U.S. 1174

(2000); *United States* v. *Cooper*, 43 F.3d 140, 146 (5th Cir. 1995) (consent voluntary where plainclothes officer approached bus passenger, asked questions, and requested consent to pat the passenger down); *Lewis*, 921 F.2d at 1297-1300 (passengers not seized when multiple officers entered bus, officer identified himself as a police officer, showed his identification and, in a conversational tone, sought consent to search person or luggage). See also *United States* v. *Broomfield*, 201 F.3d 1270 (10th Cir.), cert. denied, 531 U.S. 830 (2000); *United States* v. *Kim*, 27 F.3d 947, 951-954 (3d Cir. 1994), cert. denied, 513 U.S. 1110 (1995).

The encounter here, in fact, was far less intimidating than the one at issue in *Bostick*. In *Bostick*, the officers —"complete with badges, insignia and one of them holding a recognizable zipper pouch, containing a pistol," 501 U.S. at 431, boarded the bus wearing "raid jackets," *Madison*, 936 F.2d at 96. The officers also asked the defendant for identification and his ticket. *Ibid.* Under the circumstances, warning the passenger of his right to refuse consent could have been thought prudent to dispel any potential discomfort created by the visible weapons or the officers' attire. Here, in contrast, the officers wore plain, casual clothing; they ensured that their weapons were not visible; they deliberately avoided blocking ingress and egress; and they did not ask to see the passengers' tickets or identification. Under such circumstances, there was no hint of coercion to dispel, and no warning of the right to refuse cooperation was required.

2. In the decision below, the Eleventh Circuit did not examine the totality of the circumstances. It did not dispute the district court's findings that "[e]verything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests that it was coopera-

tive"; that "[t]here was nothing coercive" or "confrontational" about the encounter; and that it was "obvious" that respondents could have left the bus at any time. Pet. App. 13a; J.A. 132 (Tr. 106). Instead, the court relied principally on the fact that Officer Lang began the encounter by identifying himself as a police officer, showing his badge, and explaining that he was conducting drug and weapons interdiction. That introduction, the court held, constitutes a "show of authority" and establishes a seizure. Pet. App. 7a.

In earlier cases, the Eleventh Circuit had specifically distinguished between individual police-citizen interactions on a bus and general announcements made by the police from the front of the bus. General announcements, the court explained, might create an element of coercion that typical personal interactions do not. See Pet. App. 6a; *Guapi*, 144 F.3d at 1396. See also *Broomfield*, 201 F.3d at 1274. In this case, the court of appeals dismissed that distinction as dictum and treated *every* police-citizen interaction on a bus as inherently coercive—as a seizure—if it begins with the officer identifying himself as a law enforcement official. Declaring that Officer Lang's introduction and display of his badge was a "passenger-specific show of authority," the court of appeals found such conduct to be no "less coercive than a general bus-wide" announcement. Pet. App. 7a & n.5.

a. An officer's introduction of himself, display of identification, and announcement of his law-enforcement mission does not convert a consensual encounter into a seizure, even on a bus. A seizure occurs if an officer *invokes* his legal authority to restrain the citizen's liberty, such as where the officer issues a command or otherwise communicates that the citizen is not free to go about his business. See, *e.g.*, *United States* v.

Alarcon-Gonzalez, 73 F.3d 289 (10th Cir. 1996) (order to "freeze"). As the Court explained in *California* v. *Hodari D.*, 499 U.S. 621, 628 (1991), an officer's "show of authority" may establish a seizure if "the officer's words and actions would have conveyed * * * to a reasonable person" that "he was being ordered to restrict his movement." See also *id.* at 627, 629 (example of a "'show of authority' enjoining [the citizen] to halt"). A seizure does not occur merely because an officer introduces and identifies himself. For that reason, *Bostick* explains that the police may not "demand of passengers their 'voluntary' cooperation" through "an '*intimidating* show of authority,'" such as pointing their weapons or otherwise communicating that the passenger must cooperate. 501 U.S. at 438. But merely introducing oneself as a law enforcement officer and showing a badge or other official form of identification allows the citizen to understand that he is communicating with the police rather than a random or potentially threatening stranger. It is not a seizure.

The suggestion that the police necessarily seize citizens when they identify themselves in one-on-one interactions is contrary to this Court's precedents. In *Florida* v. *Rodriguez*, 469 U.S. at 4-6, for example, the Court rejected the claim that the defendant was seized when an officer approached him in an airport, "showed his badge," and asked the defendant if he might "step aside and talk with" him. Instead, the Court held, the interaction was "clearly the sort of consensual encounter that implicates no Fourth Amendment interest." *Id.* at 5-6.

Similarly, in *INS* v. *Delgado*, 466 U.S. at 212, 217-221, armed INS agents wearing badges moved through a private factory, identified themselves as they approached individual employees, and asked those em-

ployees questions about their citizenship. The Court concluded that the agents had not "seized" the employees within the meaning of the Fourth Amendment because they had not created "circumstances * * * so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave" unless he cooperated. *Id.* at 216. Indeed, after reviewing the description of the individual interviews, the Court was "satisfie[d] * * * that the encounters were classic consensual encounters rather than Fourth Amendment seizures." *Id.* at 221. See also *Royer*, 460 U.S. at 497 (initial approach by police officer, identifying himself and asking to speak with citizen, not a seizure); *Mendenhall*, 446 U.S. at 555 (same).

More recently, the Court in *Bostick* reaffirmed the proposition—which had "been endorsed by the Court any number of times"—that a police officer does not effect a seizure by asking questions of an individual who is willing to listen. *Bostick*, 501 U.S. at 439. That proposition, the Court further clarified, "applies equally to encounters on a bus." *Id.* at 439-440. The court of appeals' contrary conclusion, that officers effect a seizure merely by introducing and identifying themselves as police officers, cannot be reconciled with those decisions.

b. Although not necessary to its decision, the court of appeals also suggested that Officer Hoover's presence in the bus driver's seat could contribute to a finding that respondents had been seized. Pet. App. 9a.[3]

[3] The presence of the officer near the front of the bus does not appear to have been a necessary factor in the court of appeals' decision. The court first concluded that this case is indistinguishable from *Washington*—an earlier Eleventh Circuit decision that found a Fourth Amendment seizure—and rejected the government's efforts to distinguish *Washington*. Pet. App. 6a-8a. Then,

The court of appeals did not suggest that Officer Hoover blocked the exit. Nor did the court suggest that Officer Hoover, who was wearing casual attire, did or said anything to suggest that passengers would not be allowed to leave. Indeed, the court cited nothing in the record suggesting that the passengers even realized that Hoover was a police officer. See J.A. 126, 130 (Tr. 100, 105). Nonetheless, the court of appeals suggested that "seeing an officer stationed at the bus exit during a police interdiction might make a reasonable person feel less free to leave the bus." Pet. App. 9a.

That suggestion is directly at odds with this Court's decisions. For example, there were multiple officers stationed near the exits of the factory in *Delgado*. See 466 U.S. at 217-218. See also *Bostick*, 501 U.S. at 436 (indicating that, in *Delgado*, "[s]everal INS agents" stood "near the building's exits"). This Court expressly rebuffed the suggestion that their presence converted otherwise consensual interactions into seizures. Rejecting the *Delgado* plaintiffs' contention that the "stationing" of agents near the exits suggested an "intent to prevent people from leaving," the Court explained that "there is nothing in the record indicating that this is what the agents at the doors actually did." 466 U.S. at 218. As a result, the Court explained, "[t]he presence of agents by exits posed no reasonable threat of detention to" the factory workers, and "the mere possibility that they would be questioned if they sought to leave * * * should not have resulted in any reasonable apprehension by any of them that they would

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in the final paragraph of its analysis, the court of appeals stated that Officer Hoover's presence at the front of the bus is a "factual difference between this case and *Washington*" that "cuts in the defendant's favor." *Id.* at 9a.

be seized or detained in any meaningful way." *Id.* at 219. The court of appeals offered no reason why *Delgado*'s analysis does not apply with equal force here. See also *United States* v. *Stephens*, 232 F.3d 746, 747-748 (9th Cir. 2000) (O'Scannlain, J., dissenting from denial of rehearing en banc).

Indeed, the record undercuts the court of appeals' suggestion that Officer Hoover's presence communicated to passengers that they could not leave the bus. As the court of appeals conceded, passengers "often exited the bus while officers were on it." Pet. App. 8a. "That's every day," Officer Lang testified. "Somebody is always getting up and getting off the bus when we're coming down the aisle." J.A. 81 (Tr. 51).[4] Testimony in other cases similarly confirms that bus passengers regularly decline cooperation or leave the bus while the officers are on it. See, *e.g.*, *Lewis*, 921 F.2d at 1299 (noting officer's testimony that "about one in five passengers declines to cooperate"). See also J.A. 95-96 (Tr. 66) (individuals declined to give Lang consent about once a week).

The court of appeals' analysis, in any event, focuses on the wrong question. Like the Florida Supreme Court in *Bostick*, the court of appeals asked whether a particular circumstance (here, Hoover's presence in the bus driver's seat) would make "a reasonable person feel less free *to leave the bus*." Pet. App. 9a (emphasis added). *Bostick* makes it clear that "the degree to which a reasonable person would feel that he or she

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[4] The record shows that the officers ordinarily followed the same pattern when conducting interdictions. One officer was generally positioned in the bus driver's seat to ensure officer safety, while the other two officers proceeded to the back of the bus. J.A. 43, 77 (Tr. 10-11, 46).

could *leave* is *not* an accurate measure of the coercive effect of the encounter." 501 U.S. at 435-436 (emphases added). Instead, courts must ask "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." *Id.* at 439. See also *id.* at 436 (the "appropriate inquiry is whether a reasonable person would feel free to decline the officers' request or otherwise terminate the encounter"); *id.* at 437 ("the crucial test" is whether, "taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'"). Like the presence of INS agents near the factory exits in *Delgado*, a plainclothes officer's presence at the front of the bus "should have given respondents no reason to believe they would be detained" or otherwise punished if they refused to cooperate. 466 U.S. at 218. As the Court explained in *Bostick*, "an individual may decline an officer's request without fearing prosecution. * * * [R]efusal to cooperate, without more, does not furnish the minimum level of objective justification needed for a detention or seizure." 501 U.S. at 437. See also Pet. App. 3a-4a ("passengers who declined to have their baggage searched or who wished to exit the bus at any time would have been permitted to do so without argument"); J.A. 70-71, 98 (Tr. 39-40, 69) (officer's testimony).

C. The Court of Appeals' Decision Effectively Establishes A Per Se Warning Requirement In Conflict With *Florida* v. *Bostick*

Rather than engage in the necessary examination of the "totality of the circumstances," the Eleventh Cir-

cuit has, through a series of cases, effectively established a per se rule that officers must offer bus passengers *Miranda*-like warnings of the right to refuse consent. That requirement is at odds with *Bostick*'s specific rejection of per se rules governing bus encounters and this Court's repeated rejection of such a warning requirement in the Fourth Amendment context more generally.

1. In *Guapi*, two officers boarded the bus at a scheduled stop, and one of them made a general announcement to all passengers that he wanted to check onboard luggage for drugs and contraband. After waiting for the passengers to open their bags, one of the officers proceeded down the aisle and inspected each passenger's bag. Because the officers started at the front of the bus—and because the bus driver had ordered the passengers to get off the bus—the passengers had to maneuver around the officers in the aisle. The Eleventh Circuit held that a Fourth Amendment seizure had occurred. Under *Florida* v. *Bostick*, 501 U.S. 429 (1991), that court explained, "the appropriate inquiry is whether under 'all the circumstances surrounding the encounter . . . 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.'" 144 F.3d at 1394 (quoting 501 U.S. at 439). In the case before it, the Eleventh Circuit stated, the officer's general announcement effectively meant that "the attention and cooperation of all passengers [was] required." 144 F.3d at 1396.

The *Guapi* court reasoned that the coercive effect of such an announcement was qualitatively different from a one-on-one interaction. It is not unusual for one passenger to approach another, the court explained, and "there is no reason to believe that when police officers

engage in similar behavior that they are coercing or intimidating citizens." 144 F.3d at 1396. The court also thought it significant that the officer, "[i]nstead of beginning his search in the rear of the bus, which would have permitted those passengers who felt uncomfortable with the procedures to exit without confronting the police," had "stood in front of each passenger" and thereby "blocked the aisle." *Ibid.* While declining to impose a "per se rule requiring passengers to be informed of their constitutional rights," the court found that the announcement and the blocking of the aisle effectuated a seizure because a reasonable person would not have felt free to refuse cooperation absent a warning of the right to do so. *Id.* at 1395-1396.

In *Washington*, the Eleventh Circuit again concluded that the police had seized the defendant and thereby rendered his consent to search invalid. *Washington*, 151 F.3d at 1356. As in *Guapi*, the court noted that the "appropriate inquiry" under the Fourth Amendment and *Bostick* was whether, under all of the circumstances, a reasonable person would have felt that cooperation was required. *Washington*, 151 F.3d at 1355. The officer in *Washington* had made an announcement from the front of the bus, while holding "his badge above his head and identif[ying] himself as a federal agent." *Id.* at 1357. "He announced what he wanted the passengers to do, and what he was going to do." *Ibid.* Under those circumstances, and "[a]bsent some positive indication that [the passengers] were free not to cooperate," the court found it "doubtful a passenger would think he or she had the choice to ignore the police presence." *Ibid.* Judge Black dissented. The majority, she explained, had in effect established a "per se rule" that officers must explicitly advise bus passengers of their right to refuse consent before consent will be

deemed voluntary. *Id.* at 1357-1358. That result, she contended, "conflicts" with this Court's "consistent[] reject[ion] [of] per se rules in the Fourth Amendment context." *Id.* at 1358 (citing *Bostick*, 501 U.S. at 439-440, and *Ohio* v. *Robinette*, 519 U.S. 33 (1996)); see also *ibid.* (majority's rule "departs from the spirit, if not the letter, of *Bostick* and *Robinette*").

In this case, the officers made no general announcement from the front of the bus. Rather, they approached passengers individually, explained their identity and purpose, and sought consent to perform searches, without suggesting that passengers must cooperate or remain on the bus. The officers started at the back of the bus to avoid blocking the aisle; they approached each passenger from the side or slightly behind to ensure that the passenger could leave; and the plainclothes officer who stayed at the front (for safety reasons) knelt in the driver's seat so as to leave the exit unobstructed. The Eleventh Circuit nonetheless held that the case was "controlled" by *Washington* and that, absent warnings of the right to refuse consent, the passengers on the bus were seized. Pet. App. 5a-6a.

Collectively, those Eleventh Circuit cases effectively require officers to warn passengers that they have the right to decline cooperation. As respondents' counsel explained to the district court, "[t]he Eleventh Circuit has made it fairly clear that they're going to insist that police officers tell the passengers they have a right to refuse the search or they're going to find the searches illegal." J.A. 119 (Tr. 92). See also J.A. 127 (Tr. 101) (asserting that the officers have an affirmative "obligation * * * to make sure" passengers "understand * * * that they have the right to refuse, or the right not to consent"). If warnings are required in the in-

nocuous circumstances of this case, it is difficult to imagine a situation in which they would not be necessary. For that reason, Judge Black dissented in *Washington*: "Short of telling the passengers of the right to refuse consent," she explained, "it is difficult to conceive of any actions these officers could have taken to make this search any more reasonable." *Washington*, 151 F.3d at 1358 (Black, J., dissenting). And for that reason, the Tenth Circuit properly declined to follow decisions like this one and its predecessors. See *Broomfield*, 201 F.3d at 1275 (characterizing *Washington* as having created a "per se rule" that officers must advise bus passengers of their right to refuse consent). See also *Stephens*, 206 F.3d at 920 n.2 (Sneed, J., dissenting) (under Eleventh Circuit approach, officers must use "a *Miranda*-like warning incorporating the advice that all passengers * * * could stay on the bus and refuse to answer any questions").

The requirement that officers warn bus passengers of their right to refuse consent violates two central teachings of this Court's Fourth Amendment cases. First, as *Bostick* reiterated in the context of bus encounters, per se rules are not an appropriate means of resolving most Fourth Amendment "reasonableness" determinations. 501 U.S. at 439-440. See also *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996). Instead, the "endless variations in the facts and circumstances" must be examined under an objective standard based on the "totality of the circumstances." *Royer*, 460 U.S. at 506; see also *Michigan* v. *Chesternut*, 486 U.S. 567, 572-573 (1988).

Second, such a rule would contravene this Court's holding that consent to search need not be preceded by individual advice of the right to refuse consent. Addressing that issue in the context of voluntariness, in

Schneckloth v. *Bustamonte*, *supra*, the Court carefully explained that a specific "waiver" of one's rights, made with full knowledge of those rights, is required only where the right is fundamental and necessary to guarantee a fair trial, such as the right to counsel. By contrast, the Court explained, the "protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial." 412 U.S. at 245. See also *New York* v. *Hill*, 528 U.S. 110, 114 (2000) ("What suffices for waiver depends on the nature of the right at issue."); *United States* v. *Olano*, 507 U.S. 725, 733 (1993) ("Whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed * * * all depend on the right at stake."). The Court regarded it as both unnecessary and unrealistic to impose the exacting standards of a knowing and intelligent waiver to the "informal, unstructured context of a consent search." 412 U.S. at 245. Instead, it held that the voluntariness of consent must be examined in light of all the circumstances, with the subject's knowledge of the right to refuse as one relevant factor, but that it need not be shown "as a prerequisite to establishing a voluntary consent." *Id.* at 249.[5]

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[5] Whether or not there has been a "seizure" and whether or not consent is "voluntary" are sometimes distinct inquiries. A defendant who has been "seized" may nonetheless voluntarily and validly consent to a search. See, *e.g.*, *United States* v. *Watson*, 423 U.S. 411, 424 (1976) ("[T]he fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search."). The inquiries are related, however, where an individual's movement is "restricted by a factor independent of police conduct—*i.e.*, by his being a passenger on a bus." 501 U.S. at 436.

More recently, the Court reiterated the same principle when it held that a motorist stopped for a traffic violation need not be told he was "free to go" before being asked for his consent to search. *Ohio* v. *Robinette*, 519 U.S. at 39-40. Recalling its holding in *Schneckloth*, the Court observed that, "just as it 'would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning,' * * * so too would it be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary." *Robinette*, 519 U.S. at 39-40 (quoting *Schneckloth* v. *Bustamonte*, 412 U.S. at 231). See *United States* v. *Watson*, 423 U.S. 411, 424-425 (1976); *United States* v. *Matlock*, 415 U.S. 164, 167 n.2 (1974).[6]

In that context, the relevant inquiry is whether the encounter was consensual, and such "consent" must be voluntary. It may be that, even after an involuntary encounter—a "seizure"—the defendant can still give voluntary consent to a search. Because there was no seizure in this case under the *Bostick* test, however, the Court need not address whether the voluntariness of respondents' consent would independently justify the admission of a potential fruit of an unlawful seizure. Cf. *Watson*, 423 U.S. at 426 (Powell, J., concurring) (Because the "evidence that [the defendant's] consent was the product of free will is so overwhelming, * * * I would have held the consent voluntary even on the assumption that the preceding warrantless arrest was unconstitutional").

[6] Indeed, any requirement that officers warn individuals of their right to refuse consent creates numerous dangers. Passengers might be confused or intimidated by incomplete or inarticulate warnings. Courts, moreover, would repeatedly be called upon to pass on the adequacy of such warnings. For example, in *United States* v. *Stephens*, the majority faulted the officer's warning because the officer advised passengers that they were "not under arrest" and were "free to leave," but added, "[h]owever, we would like to talk to you." 206 F.3d at 916. The warning, the majority stated, conveyed the impression that passengers could avoid co-

When the correct legal standard is applied in this case, and all the facts and circumstances are considered, it is readily apparent that no seizure took place. As the district court found, "[t]here was nothing coercive" or "confrontational" about the interaction, and "[e]verything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests that it was cooperative." Because the court of appeals' contrary decision rests on fundamental legal errors, it should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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operating only by getting off the bus. *Id.* at 917. Officers should not be placed in the predicament of having to give warnings, yet risk that the very warnings might be found coercive.