No. 01-631

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTOPHER DRAYTON AND CLIFTON BROWN, JR.

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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1. Respondents principally contend that the judgment in this case does not warrant this Court's review because any difference in outcomes in the courts of appeals results not from a disagreement over the Fourth Amendment standards that govern police-citizen encounters on buses, but from the individual facts and circumstances of each case. Br. in Opp. 14. Analysis of the cases, however, establishes that there is a circuit conflict on a matter of legal principle, *i.e.*, what is necessary for a police-citizen encounter on a means of public transportation to remain consensual. That conflict on an important police practice warrants this Court's review.

a. The court of appeals held that respondents had been illegally seized, and that their consent to search was therefore involuntary, even though the officers

that approached respondents spoke in a quiet voice, did not reveal their weapons or make any intimidating movements, left the aisle of the bus unencumbered so that respondents could exit, and said nothing to suggest that respondents could not leave the bus or were required to cooperate. Pet. App. 3a-4a. The court of appeals did not dispute the district court's conclusions that "everything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests that [the encounter] was cooperative," that "[t]here was nothing coercive," and that "there was nothing confrontational about" the interaction. *Id.* at 13a. The court of appeals nevertheless refused to hold the police encounter consensual "without some positive indication that consent" or cooperation "could have been refused." *Id.* at 6a (quoting *United States* v. *Washington*, 151 F.3d 1354, 1357 (11th Cir. 1998)).

The facts of this case do not differ in relevant respects from those of *United States* v. *Flowers*, 912 F.2d 707 (4th Cir. 1990), cert. denied, 501 U.S. 1253 (1991), and *United States* v. *Broomfield*, 201 F.3d 1270 (10th Cir.), cert. denied, 531 U.S. 830 (2000), in which other courts of appeals examining encounters on buses found both that there was no seizure and that the passengers' consent was voluntary. See Pet. 18-21. In *Flowers*, as here, multiple officers boarded a bus to interdict guns and drugs. 912 F.2d at 711. In *Flowers*, as here, the officers 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." *Ibid.* And in *Flowers*, as here, no warning of the right to refuse consent was given. The Fourth Circuit in *Flowers* concluded that "[t]he officers did not seize [the defendant] merely by engaging him in conversation. * * * Nothing about the officers' conduct * * *

impaired [the passenger's] right to refuse to talk to them or to leave the bus." *Id.* at 709. See also Pet. 21. In contrast, here the Eleventh Circuit held that a seizure had occurred and that the officers had violated respondents' Fourth Amendment rights on virtually identical facts.

Respondents make no attempt to distinguish *Flowers*. They do not identify any relevant fact or circumstance that might explain the disparate results. Nor could any persuasive explanation be offered: the only difference between this case and *Flowers* is the circuit in which each case arose.

The decision below also conflicts with the Tenth Circuit's decision in *Broomfield*. See Pet. 18-19. Respondents do not dispute that, in *Broomfield*, the Tenth Circuit held that the bus passenger's consent was voluntary where the officer, like the officers here, "displayed his badge," "spoke * * * in an even tone [,] * * * and made no coercive or threatening gestures or comments," even though the officer "did not inform [the defendant] of his right to refuse consent." 201 F.3d at 1275. Nor do respondents dispute that *Broomfield* "declined to follow" the Eleventh Circuit's decision in *United States* v. *Washington*, 151 F.3d 1354 (1998)—the decision deemed "controll[ing]" of this case, see Pet. App. 5a—because the Tenth Circuit concluded that *Washington* effectively "creat[ed] a per se rule that authorities must notify bus passengers of the right to refuse consent before questioning those passengers and asking for consent." 201 F.3d at 1275; see Pet. App. 2a n.2.

Instead, respondents note (Br. in Opp. 15) that the United States, in opposing the petition for a writ of certiorari in *Broomfield*, distinguished that case from *Washington*. *Broomfield*, the government noted, in-

volved an officer who approached passengers individually in a non-confrontational manner; in contrast, in *Washington* the officer made an announcement at the front of the bus that the court of appeals thought potentially coercive. See Pet. 19-20 n.1. Although respondents criticize that distinction as "thin," Br. in Opp. 16, it was well supported by the Eleventh Circuit case law that existed before this decision. As the court of appeals explained in this case, an earlier precedent, *United States* v. *Guapi*, 144 F.3d 1393 (11th Cir. 1998), relied precisely on that distinction. "[W]hen officers individually approach passengers and communicate an intention to conduct a search, instead of making a general announcement," *Guapi* stated, "there is 'no reason to believe . . . that they are coercing or intimidating citizens.'" Pet. App. 7a n.5 (quoting *Guapi*, 144 F.3d at 1396).

In this case, however, the court of appeals dismissed that distinction as dictum, and held that an officer renders an encounter on a bus "coercive" even if he makes no general announcement at the front of the bus and instead engages each passenger in polite conversation on an individual basis. Pet. App. 7a. As a result, there remains no persuasive distinction between this case on the one hand and *Flowers* and *Broomfield* on the other.[1] Equally significant, there is no advice that

[1] Respondents also point out that, in *Broomfield*, the officer entered the bus alone, while in this case there were three officers on the bus. Br. in Opp. 16. Even if that were a persuasive distinction, it does not distinguish *Flowers*; there too multiple officers entered the bus. The distinction's relevance is also highly questionable. While an overwhelming number of officers might under some circumstances contribute to a coercive atmosphere, there is no evidence here that the presence of three officers on a 40-passenger bus created coercion. See Pet. 14 (discussing *INS* v.

the government can offer law enforcement officers on how to prevent citizen-police encounters on a bus from being transformed into seizures, and consent from being rendered involuntary, other than through the provision of express *Miranda*-like warnings of the right to leave and to refuse consent. That requirement, uniquely in effect in the Eleventh Circuit and rejected by two other circuits, creates a conflict that justifies this Court's intervention.

b. Respondents err in suggesting that the United States has sought review here simply because the decision below was adverse. Br. in Opp. 11, 16. Following the Eleventh Circuit's decision in *Washington* and the Tenth Circuit's decision in *Broomfield*, the United States repeatedly decided not to seek review of adverse court of appeals decisions which, like the decision below, required the suppression of evidence obtained from bus passengers during consent searches. See, *e.g.*, *United States* v. *Stephens*, 232 F.3d 746, 747 (9th Cir. 2000) (dissent from denial of rehearing en banc) (Eleventh Circuit case law "of dubious validity" and following it "foment[s] a circuit split over an issue that the Supreme Court has already resolved"); *United States* v. *Standberry*, No. 99-11624 (11th Cir. Dec. 15, 1999), slip op. 4, 5 (Br. in Opp. App. A); Pet. 22 n.2 (citing additional cases). Such forbearance was warranted before the decision here because it remained

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Delgado, 466 U.S. 210 (1984), in which multiple officers conducted "factory sweeps" and this Court found no Fourth Amendment seizure). In any event, prohibiting more than one officer from entering a bus at a time would raise significant officer safety concerns in some locations. As the court of appeals noted (Pet. App. 3a, 7a), in this case it was precisely to ensure officer safety that an additional officer was stationed at the front, where he could observe the passengers.

possible to reconcile the relevant authorities and to offer guidance to police officers short of requiring *Miranda*-like warnings in all circumstances. Now, however, it is not possible to do either.

c. Respondents appear to suggest that this case is distinguishable from other cases involving encounters on buses because respondents were subjected to a frisk of their persons and not merely to a search of their luggage. Br. in Opp. 10. Respondents assert that such a frisk is something to which no member of the traveling public "would likely consent" if he had a genuine choice. *Ibid.* That line of argument, however, has already been rejected by this Court, which has upheld even more intrusive searches based on consent. See, *e.g.*, *United States* v. *Mendenhall*, 446 U.S. 544, 559 (1980) (upholding strip search where defendant consented). Individuals will often voluntarily subject themselves to inconvenience to assist law enforcement for the public good; and criminals may do so in an effort to eliminate suspicion (hoping that the officers will not follow through with the search) or in the hope of more lenient treatment. Respondents' decision to cooperate thus is not inexplicable. It was simply unsuccessful in throwing the officers off the track.[2]

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[2] Respondents assert in passing (and without citation to the record) that the officers failed "to await a response before initiating their frisks." Br. in Opp. 10. The officers, however, did wait for responses. Agent Lang "requested and received permission from Brown to conduct a pat-down," Pet. App. 5a; and when Lang asked Drayton for permission to perform a pat down, Drayton responded (non-verbally) by lifting his hands off his legs to permit the search, *ibid.* The district court thus found that respondents "consented to this search," *id.* at 14a, and respondents offer no evidence suggesting that finding to be clearly erroneous. The question here thus is not whether respondents consented; it is

2. The court of appeals' decision also conflicts with this Court's decisions in *Florida* v. *Bostick*, 501 U.S. 429 (1991), *INS* v. *Delgado*, 466 U.S. 210 (1984), and *Florida* v. *Rodriguez*, 469 U.S. 1, 5-6 (1984) (per curiam). As the petition explains, see Pet. 17-23, this Court repeatedly has rejected the use of per se rules in analyzing the reasonableness of law enforcement action and the voluntariness of consent, and has specifically declined to require, as a prerequisite to a voluntary consent, that officers warn citizens of their right to refuse cooperation. Respondents do not contend otherwise. Instead, respondents deny that the Eleventh Circuit has established a such a rule. See Br. in Opp. 14. Respondents, however, identify no circumstance under which, consistent with Eleventh Circuit case law, a bus passenger's consent to search will be deemed voluntary absent such a warning.

a. This is not a case in which the court of appeals has merely placed greater (or perhaps undue) emphasis on one of multiple factors while adhering to the totality-of-the-circumstances approach. It is instead a case in which the court of appeals has effectively converted a single factor into the only one that makes a difference. Eleventh Circuit case law now effectively requires officers to issue warnings to bus passengers, advising them of their right to refuse cooperation, as a prerequisite to a valid consent. Indeed, the court required warnings in this case even though the district court found that "everything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests that it was cooperative. There was nothing coercive, there was nothing confrontational about it." Pet. App. 13a.

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whether the consent that was given was the product of a Fourth Amendment seizure.

See also *id.* at 3a-4a (officers showed no weapons, spoke to the passengers quietly, and said nothing to suggest that cooperation was mandatory). If warnings are mandatory in these circumstances, they are required in all cases. See *Washington*, 151 F.3d at 1358 (Black, J., dissenting) ("Short of telling the passengers of the right to refuse consent, it is difficult to conceive of any actions these officers could have taken to make this search any more reasonable. With this case as precedent, it is not clear that there will ever be any set of circumstances under which this Court can uphold a bus search if the officers do not inform the passengers of the right to refuse consent.").

Respondents rely primarily on the court of appeals' acknowledgment that per se rules are inappropriate in this context. Br. in Opp. 13. The question here, however, is not whether the court of appeals has explicitly established a *de jure* warning requirement. It is instead whether the decision has the *effect* of requiring warnings. As this Court has commented, there is nothing remarkable about an "ostensibly * * * highly fact-dependent totality-of-the-circumstances test approach-[ing] a *per se* rule in application." *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 373 (1998). It is precisely such a "per se rule in application" that the decision in this case has created.

b. Finally, respondents assert (Br. in Opp. 14) that the absence of a per se rule is proved by Eleventh Circuit decisions upholding the admission of evidence obtained in other bus search cases. The cases respondents cite, however, are hardly reassuring. In *United States* v. *Smith*, 201 F.3d 1317 (11th Cir. 2000) (Br. in Opp. App. C), for example, the court of appeals concluded that, under circuit precedent, it was required to find a seizure. *Id.* at 1322 (court "bound by the *Wash-*

ington court's decision on the question of seizure."). It held the evidence admissible because the seizure was supported by reasonable suspicion. *Ibid.* The published decision in *Smith* thus does not represent a departure from the de facto per se warning requirement; it instead represents an application of that requirement.[3]

Similarly, neither *United States* v. *Hammock*, 860 F.2d 390, 392 (11th Cir. 1988) (per curiam), nor *United States* v. *Fields*, 909 F.2d 470 (11th Cir. 1990), supports respondents' claim. *Hammock* did not involve consent to search; rather, it involved abandonment. 860 F.2d at 391. In that case, moreover, the defendant "initiated the conversation with the detectives, rather than the reverse." *Id.* at 393. It is not the law that police-citizen encounters on a bus are consensual only when initiated by the citizen. In *Fields* the court concluded that the bus passenger's consent was voluntary. But in *Fields* the officer warned the passengers that they "had the right to refuse to consent to the search." 909 F.2d at 472. The fact that the court of appeals will uphold consent where bus passengers are given such warnings

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[3] Respondents for the same reason err in asserting (Br. in Opp. 13-14) that a number of unpublished Eleventh Circuit cases belie the per se rule because they "balance" the competing facts and circumstances. Far from "balancing" the relevant facts and circumstances, however, the cases that respondents cite merely conclude that Eleventh Circuit precedent (including *Washington*) requires them to find a seizure, and to invalidate the passengers' consent, absent warnings of the right to refuse. See *Standberry*, slip op. 4, 5 (Br. in Opp. App. A) (notwithstanding fact that officer was "polite, calm, and not intimidating," the case "is controlled by *Washington*."); *United States* v. *Hill*, No. 99-12662 (11th Cir. July 24, 2000), slip op. 3-5 (Br. in Opp. App. B) (similar).

does not undermine the fact that it regularly invalidates consent where, as here, they are not.[4]

* * * * *

Investigations by police officers that rely on citizen cooperation are an important component of law enforcement. This Court's decisions make clear that approaching individuals to request that cooperation, even on a bus, does not amount to a Fourth Amendment seizure per se. The court of appeals' departure from that rule, and the circuit conflict it has created, warrants this Court's review.

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

Respectfully submitted.

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[4] Respondent's reliance on *United States* v. *Cofield*, 2001 WL 1422144 (11th Cir. Nov. 14, 2001) (Resp. Supp. Br. 1), is also misplaced. In that case, the police approached the defendant in a train station, and the defendant abandoned his luggage by denying that it was his. The court of appeals held that the defendant was not in custody or subject to any sort of compulsion at the time he abandoned his luggage. *Id.* at *3. Because the police-citizen interaction in *Cofield* did not take place on a bus, but in a train *station*, it does not undermine the fact that the Eleventh Circuit has effectively established a per se warning requirement for police-citizen interactions that take place on a bus. To the contrary, *Cofield* underscores that the Eleventh Circuit subjects police-citizen encounters on a bus to unique Fourth Amendment analysis.