No. 12-9490

IN THE

Supreme Court of the United States

LORENZO PRADO NAVARETTE
AND JOSE PRADO NAVARETTE,

Petitioners,

v.

THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Does the Fourth Amendment require an officer who receives an anonymous tip regarding a drunken or reckless driver to corroborate dangerous driving before stopping the vehicle?

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OPINIONS BELOW

The opinion of the First Appellate District Court of Appeal for the State of California appears at Appendix A to the Petition For A Writ Of Certiorari ("Petition") and is unpublished. The opinions of the Mendocino County Superior Court appear at Appendix B to the Petition and are unpublished. The order of the California Supreme Court denying a petition for review appears at Appendix C to the Petition and is unpublished. The order of the Court of Appeal denying a petition for rehearing appears at Appendix D to the Petition and is unpublished.

JURISDICTION

The First Appellate District Court of Appeal for the State of California issued its opinion in this case on October 12, 2012. A petition for review to the California Supreme Court was filed on November 26, 2012 and denied on January 3, 2013. The Petition to this Court was filed on March 29, 2013, and granted on October 1, 2013.

This Court's jurisdiction is invoked under 28 U.S.C. section 1257.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

1. Matia Moore and Sharon Odbert were working as dispatchers for the California Highway Patrol ("CHP") out of Ukiah, Mendocino County, on August 23, 2008. Joint Appendix ("JA") 20a-21a, 34a-35a. Dispatchers sometimes receive calls on an inside or allied telephone line from CHP dispatchers in other areas, including reports of reckless vehicles or possible drunk drivers heading into their area. JA 23a-24a. Information from all of the calls is typed into computer or "CAD" logs. JA 21a-22a, 24a-25a, 35a-36a.

Although Moore did not recall the specific incident in this case, JA 31a, she generated a CAD log based on a telephone call with a Humboldt County dispatcher who indicated that a silver Ford F150 pickup truck had run someone off the roadway and was last seen five minutes before, southbound near mile marker 88 on Highway 1, approximately 3 miles south of the Humboldt County border. JA 25a-27a, 29a-30a, 42a-44a. The Humboldt dispatcher said the information had come from a 911 call,

but provided no further information. JA 27a-28a. Neither Moore nor Odbert heard the 911 call, and Moore did not even know whether the Humboldt dispatcher she spoke to had personally received the 911 call. JA 32a, 45a. There was no way to tell whether the reporting party was in Humboldt or Mendocino County. JA 33a-34a.[1]

The information was routed to Odbert's computer and appeared as follows:

> Showing southbound Highway 1 at mile marker 88. Silver Ford 150 pickup. Plate of 8-David-949925. Ran the reporting party off the roadway and was last seen approximately five [minutes] ago.

JA 36a, see 29a.

Odbert broadcast the information over the radio to "coastal" officers in Mendocino County from Elk to Fort Bragg at 3:47 p.m, stating, "Attention, coastal units. BOL for – well, in this case it was a reckless driver, [California Vehicle Code section] 23103. And then give the information, the silver, the F150 pickup, etc. *(sic)*." JA 36a-37a, 42a. Although the broadcast was recorded, the tapes are only kept for six months, and were no longer available at the time of the preliminary hearing. JA 33a, 41a.

1. The prosecutor indicated that the tape of the 911 call "has the woman's name," but said she had mistakenly failed to have the Humboldt County dispatcher appear at the hearing and did not play the tape. Accordingly, the tip was treated as anonymous by the courts below. JA 18a-19a, 64a-65a, 73a-74a; Appendix A to Petition, A2, A24; Appendix B to Petition, A27.

Officer Thaddeus Williams was in central Fort Bragg when he heard a "dispatch of a reckless driver southbound on Highway 1," in the area he was patrolling. JA 48a–49a, 57a-58a.[2] The vehicle was described as a silver pickup truck with a specific license plate number, though Williams could not recall if he noted the plate number. JA 49a, 58a. Williams, who received only oral information over the radio from dispatch that day, JA 58a, headed north in an attempt to find the truck. JA 49a, 59a. Williams was a few miles behind a Sergeant Francis, who was also enroute from Fort Bragg. JA 37a-38a.

At 4:00, Francis advised dispatch that he had passed the truck, which was going the opposite direction, just south of mile marker 69, approximately 19 miles south of the last sighting. JA 37a, 39a, 42a-46a. Shortly after hearing that Francis had spotted the vehicle, Williams saw Francis following the truck at mile marker 66, which was a couple of miles north of a state park located in the town of Cleone. JA 49a-51a, 59a-60a. Williams let both vehicles pass, then made a U-turn to follow Francis. JA 50a-51a, 61a. At 4:05, Francis advised dispatch that he was making a stop at the entrance to the state park and Williams pulled up behind him, approximately five miles south of where Francis had first seen the truck. JA 39a,

2. The Court of Appeal found that substantial evidence supported an implied finding by the magistrate that the dispatcher had told the officers that the suspect vehicle ran the tipster off the road, not just that there was a reckless driver. Appendix A at A20-A23. Petitioner filed a petition for rehearing, arguing that the magistrate had not made that finding, which was contrary to the testimony of both Odbert and Williams, and that no substantial evidence supported such a finding had it been made. The petition was denied on October 30, 2012. Appendix D.

46a-47a, 49a-51a, 61a. There was no evidence that either officer had seen any erratic driving while following the truck. JA 49a-51a, 57a-61a.

There were two people in the truck, which had a camper shell with darkened windows so the officers could not see into its bed. JA 51a-52a. Petitioner Lorenzo Navarette was driving, with petitioner José Navarette as a passenger. JA 61a-62a. Although they did not notice anything unusual at first, the officers eventually detected a distinct smell of marijuana coming from the truck. JA 52a-54a, 63a-64a. During a subsequent search, the officers discovered four large, closed bags of marijuana in the bed, along with a box of oven bags, clippers, and fertilizer. JA 54a-57a.

2. The Mendocino County District Attorney alleged that petitioners had transported marijuana in violation of California Health and Safety Code section 11360, subdivision (a), and possessed marijuana for sale in violation of section 11359. JA 14a-16a. Petitioners filed a motion to suppress the warrantless search and seizure pursuant to Penal Code section 1538.5, which was heard and denied as part of the preliminary hearing. JA 73a-74a; Appendix E to Petition. In denying the motion, the magistrate relied primarily on *People v. Wells*, 38 Cal.4th 1078, 136 P.3d 810, 45 Cal.Rptr.3d 8 (2006), which held that, despite this Court's holding in *Florida v. J.L.*, 529 U.S. 266 (2000), officers investigating an anonymous tip of a possibly intoxicated driver were constitutionally justified in stopping a vehicle immediately, without corroboration. The magistrate rejected petitioners' attempts to distinguish the case from *Wells,* determining that the report of someone forcing another person off

the road could be consistent with drunk driving, and the officers' corroboration of the innocent details justified the stop. JA 73a-74a.

Petitioners subsequently filed a motion to dismiss pursuant to Penal Code section 995, in part seeking review of the magistrate's denial of the motion to suppress. The trial court denied the section 995 motion, rejecting petitioners' claim that the tip's assertion of being run off the road was too vague to satisfy *Wells*, and finding that the officers had reasonable suspicion for the stop under *Wells*. Appendix B to Petition, A32-A33. The trial court also denied a motion to reconsider, finding it immaterial that the officer testified only to receiving information about a reckless driver, with no mention of the tipster's claim to being run off the road. Appendix B to Petition, A35-A37.

3. Petitioners filed a joint petition for writ of mandate with the Court of Appeal, which was denied on timeliness and procedural grounds. *Navarette v. Superior Court*, Case No. A127541; JA 8a-9a. Petitioners then filed a petition for review with the California Supreme Court, which was denied without comment. *Navarette v. Superior Court*, Case No. S180366; JA 10a.

4. Petitioners ultimately pled guilty to transportation of marijuana in violation of Health and Safety Code section 11360, subdivision (a), pursuant to a plea agreement. Clerk's Transcript on Appeal ("CT") 268; Reporter's Transcript on Appeal ("RT") 147-148, 153-156. On June 10, 2011, the trial court suspended imposition of judgment, placed petitioners on thirty-six months formal probation, and ordered them to serve 90 days in county jail. CT 303-309; RT 177-178.

5. Petitioners timely appealed. The Court of Appeal affirmed the judgment in an Opinion filed on October 12, 2012. Appendix A to Petition, A1-A25. The Court of Appeal acknowledged this Court's holding in *J.L.*, but found that it was bound by the decision of the California Supreme Court in *Wells*, which "held that the danger exception postulated in *J.L.*, ... applies when an anonymous tipster contemporaneously reports drunken or erratic driving on a public highway and officers are able to corroborate significant innocent details of the tip,..." A16. The Court of Appeal rejected petitioners' claim that the tip in this case did not provide enough information about the alleged illegal driving to satisfy *Wells*. A18-A19. The Court further determined that it need not decide "whether a report of 'reckless driving' alone would have been too vague to support reasonable suspicion for the stop," A23, because there was substantial evidence in the record to support an implied finding by the magistrate that "the dispatcher told the officers that the suspect vehicle ran the reporting party off the roadway." A20; see A20-23, nn. 7-8. Finally, the Court of Appeal dismissed petitioners' contention that, by the time they stopped the truck, the officers had no reasonable suspicion of criminal activity because they had been following the truck "for five minutes without observing any erratic driving." A23-A24.

The Court of Appeal denied without comment a timely petition for rehearing on October 30, 2012. Appendix D to Petition.

6. The California Supreme Court denied without comment petitioners' timely petitions for discretionary review on January 3, 2013. Appendix C to Petition.

7. Petitioners filed a timely Petition to this Court on March 29, 2013, which was granted on October 1, 2013.

SUMMARY OF ARGUMENT

The Fourth Amendment prohibits an officer from stopping a vehicle and detaining its occupants based on an anonymous tip of drunken or reckless driving unless the officer can corroborate the dangerous driving.

I. Under the Fourth Amendment, an officer cannot stop an individual vehicle and detain its occupants unless, under the totality of the circumstances, that officer has a reasonable suspicion, supported by specific and articulable facts, that one of the occupants is engaged in criminal activity. *United States v. Arvizu*, 534 U.S. 266 (2001); *Terry v. Ohio*, 392 U.S. 1 (1968).

This Court has expressed a well-founded skepticism of anonymous tips. Anonymous informants cannot be held responsible for false assertions of illegal conduct and are therefore free to lie with impunity, putting innocent people at risk of unreasonable, intrusive searches and seizures. To protect the Fourth Amendment rights of those people, this Court has held that the suspicion engendered by anonymous tips does not rise to the level of the reasonable suspicion necessary to justify a seizure unless officers are able to corroborate those tips. *Alabama v. White*, 496 U.S. 325 (1990). In *Florida v. J.L.*, 529 U.S. 266 (2000), the Court further held that corroboration of innocent, readily observable facts contained in a tip does not satisfy the Fourth Amendment. "The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Id.* at 272.

II. The California Court of Appeal erroneously approved the vehicle stop in this case even though, as in *J.L.*, the officers made the stop based on information provided by an anonymous tipster that, except for the innocent details, the officers did not corroborate. Without that corroboration, the officers lacked the reasonable suspicion necessary to stop the vehicle and detain its occupants. *Delaware v. Prouse*, 440 U.S. 653 (1979); *Terry*. The Court of Appeal stated that it was bound by the California Supreme Court's decision in *People v. Wells*, 38 Cal.4th 1078, 1081, 1087-1088, 136 P.3d 810, 45 Cal.Rptr.3d 8 (2006), which had held that an anonymous tip about a possibly intoxicated driver provided an officer with the reasonable suspicion necessary to stop a vehicle immediately, without corroboration.

III. *Wells* and other lower court cases have created a new "automobile exception" to *Terry's* reasonable suspicion standard and to *J.L.*'s requirement that anonymous tips be corroborated. The courts have relied on a brief passage in *J.L.* speculating about the potential need to relax *Terry's* requirements if authorities received a tip about a catastrophic danger, such as a person carrying a bomb. 529 U.S. at 273-274. The *J.L.* opinion gives no indication that, in that passage, the Court intended to sanction a different exception to *Terry* that would be triggered by every anonymous tip about drunken or reckless driving. On the contrary, just prior to the bomb passage, the Court had emphatically rejected an automatic "firearm exception" to *Terry* that is doctrinally indistinguishable from the new automobile exception created by the courts. In rejecting the firearm exception, this Court was concerned both about the potential for any automatic exception to "swallow the rule," and about giving such a

weapon to anyone who wanted to harass another person. The new automobile exception created by the courts poses exactly the same risks.

Attempts to distinguish tips about drunken or reckless driving from the tip about illegal firearm possession in *J.L.* do not withstand scrutiny. Firearm possession can become firearm use in a matter of seconds, and the statistics show that more people die each year in firearm-related homicides than in alcohol-impaired vehicle crashes. There is nothing about anonymous tips involving driving that make them inherently more reliable than other type of tips. False, malicious tips about erratic driving are easy to make and less risky for the tipster than other types, because there is no way to prove that a driver did not drive erratically. Unlike tips about illegal possession, officers can easily corroborate tips about erratic driving through observation, if true, and corroboration may also be available from other sources, such as the receipt of multiple, independent reports about a particular, dangerous driver. Finally, the stop of a vehicle and the detention of its occupants is just as intrusive as a stop on a sidewalk. Like a pedestrian, drivers and occupants of stopped vehicles are subject to a *Terry* patdown search if the officer believes they are armed and dangerous.

IV. Anonymous tips about erratic driving are too unreliable to provide the reasonable suspicion required under the Fourth Amendment to justify the stop of a vehicle and the detention of its occupants. All of the compelling reasons given by this Court for rejecting the "firearm exception" in *J.L.* apply with equal force to the new "automobile exception" created by the lower courts, which puts everyone at risk of intrusive seizures based on malicious tips.

This Court should reverse the judgment of the California Court of Appeal.

ARGUMENT

I. An Anonymous Tip Does Not Provide The Reasonable Suspicion Necessary To Stop A Vehicle And Detain Its Occupants Unless Officers Corroborate The Informant's Allegation Of Dangerous Driving

The decision of California's First Appellate District Court of Appeal is contrary to this Court's unanimous holding in *Florida v. J.L.* 529 U.S. 266 (2000), and to important principles established by this Court to determine whether officers possess the reasonable suspicion necessary to detain an individual, or a vehicle and its occupants. As in *J.L.*, the officers' suspicions that petitioners had been driving recklessly "arose not from their own observations but solely from a call made from an unknown location by an unknown caller." *Id.* at 270. Anonymous tips alone do not provide reasonable suspicion because a truly anonymous informant cannot be held accountable for false allegations and is free to "lie with impunity" *Id.* at 275 (Kennedy, J., concurring). Elimination of accountability "is ordinarily the very purpose of anonymity." *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 385 (1994) (Scalia, J., dissenting).

In *J.L.*, this Court refused to adopt an automatic "firearm exception" to the reasonable suspicion standard established in *Terry v. Ohio*, 392 U.S. 1 (1968). Although firearms posed an obvious danger to the public, the creation of an exception to *Terry* based on an

uncorroborated, anonymous report of firearm possession "would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by making an anonymous call falsely reporting the target's unlawful carriage of a gun." 529 U.S. at 272. The firearm exception rejected by this Court in *J.L.* is doctrinally indistinguishable from a new "automobile exception"[3] created by the lower courts, permitting stops of vehicles based on uncorroborated, anonymous reports of drunken or reckless driving.

In deciding the case now before it, this Court should combine its well-founded skepticism of anonymous tips with its traditional determination that the Fourth Amendment prohibits officers from stopping individual vehicles and their occupants unless they have a reasonable, particularized suspicion of criminal activity. *United States v. Cortez*, 449 U.S. 411 (1981); *Delaware v. Prouse*, 440 U.S. 653 (1979). Without corroboration, an anonymous tip about reckless or drunken driving simply cannot supply the reasonable suspicion necessary to justify a vehicle stop under the Fourth Amendment. *J.L.*, 529 U.S. at 270-274. The level of suspicion in this case was even lower than in

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3. This new "automobile exception" adopted by lower courts is quite different from the traditional "automobile exception" to the warrant requirement adopted by this Court in *Carroll v. United States*, 267 U.S. 132 (1925). The new exception is not related to the warrant requirement, but is an exception to the principles established in *J.L.* and *Terry* to ensure that officers possess reasonable suspicion of criminal activity before they initiate a stop. The term "'automobile' exception" was first used in this context by a justice dissenting in one of the first post-*J.L.* cases to adopt the new exception, *State v. Boyea*, 171 Vt. 401, 765 A.2d 862, 880 (2000)(Johnson, J., dissenting).

J.L., because the officers' personal observations actually undermined the tip's assertion of illegality.

The new, automatic exception adopted by the lower courts is contrary to this Court's Fourth Amendment jurisprudence and constitutes a totally unacceptable violation of the individual citizen's "right to be let alone – the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)(overruled by *Katz v. United States,* 389 U.S. 347, 357 (1967).

A. Before Stopping A Vehicle And Detaining Its Occupants, An Officer Must Have A Particularized, Reasonable Suspicion That An Occupant Is Engaged In Criminal Activity

Prior to *Terry*, "the Fourth Amendment's guarantee against unreasonable seizures of persons was analyzed in terms of arrest, probable cause for arrest, and warrants based on such probable cause." *Dunaway v. New York*, 442 U.S. 200, 207-208 (1979). While warrants were not always required, the need for probable cause "was treated as absolute." *Id*. at 208. Warrantless searches were, and still are, "*per se* unreasonable under the Fourth Amendment – subject to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357; see *Missouri v. McNeely*, 133 S.Ct. 1552, 1558 (2013); *Arizona v. Gant*, 556 U.S. 332, 338 (2009); *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993).

Terry established a new exception to the warrant requirement, holding that an officer could briefly detain an individual without probable cause if the officer observed

"unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." 392 U.S. at 30. The Court "emphatically" rejected the suggestion that police actions short of a traditional arrest fell outside the Fourth Amendment, "recogniz[ing] that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.* at 16. But because the detention was substantially less intrusive than an arrest – even when followed by a patdown search for weapons, *id.* at 24 – the Court determined that probable cause was not required. *Dunaway*, 442 U.S. at 209-210, citing *Terry*, 392 U.S. at 20-27.

The Court emphasized that, despite the lower standard it was adopting, the "notions" underlying both probable cause and the warrant requirement "remain fully relevant in this context." *Terry*, 392 U.S. at 21. The officer cannot rely on "an inchoate and unparticularized suspicion or 'hunch,'" *id.*. at 27; on the contrary, "in justifying the particular intrusion, the officer must be able to point to specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Id.* at 21 n.18.

As the Court explained in *Dunaway*, "Because *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope." 442 U.S. at 210. One common form of seizure that falls within *Terry*'s narrow scope is the routine traffic stop of individual vehicles on public roads

and highways. "[S]topping an automobile and detaining its occupants constitute a 'seizure' ..., even though the purpose of the stop is limited and the resulting detention quite brief." *Prouse*, 440 U.S. at 653. The protections of the Fourth Amendment under *Terry* "extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273 (2001). This Court recently confirmed that stopping a vehicle constitutes a seizure of everyone in that vehicle, not just its driver. *Brendlin v. California*, 551 U.S. 249, 255-256 (2007).

When officers stop individual vehicles and detain their occupants, as they did in this case, the Fourth Amendment requires an evaluation of "the totality of the circumstances .... Based upon that whole picture, the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-418 (1981) ; see also *Arvizu*, 534 U.S. at 273-274.[4]

4. While the Court has not approved any suspicionless stops of individual vehicles, it has sanctioned the use of checkpoints in certain limited circumstances to stop all vehicles passing a particular point. See, *e.g.*, *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990)(sobriety checkpoints); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)(border checkpoints). These cases typically balance the governmental interest in interdicting certain actions against the much lower level of intrusion involved in checkpoints, an approach that heavily favors the government and is not appropriate in cases involving stops of individual vehicles, such as the one at issue in this case, which require individualized suspicion. See Thomas K. Clancy, *The Fourth Amendment: Its History and Interpretation* 473-531 (Carolina Press 2008), arguing that the Court should develop a hierarchy of approaches to determining reasonableness under the Fourth Amendment, with individualized suspicion as the first choice.

B. The Suspicion Provided By An Anonymous Tip Does Not Rise To The Level Of Reasonable Suspicion Unless Officers Corroborate It

While traffic stops are typically based on the personal observations of the officer making the stop, *Whren v. United States*, 517 U.S. 806, 810 (1996); *Prouse*, 440 U.S. at 659, the Court decided in *Adams v. Williams*, 407 U.S. 143 (1972), that the reasonable suspicion necessary to conduct a *Terry* stop could be based, not only on an officer's personal observations, but also on information provided to the officer by a known informant who had provided information in the past. *Id.* at 146-147.

The informant in *Adams* approached the officer personally to advise him "that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist." 407 U.S. at 144-145. The information provided by the informant was immediately verifiable and subjected her to immediate arrest if it turned out to be incorrect, making this "a stronger case than obtains in the case of an anonymous telephone tip." *Id.* at 146. The Court warned that such tips "vary greatly in their value and reliability" and some, "completely lacking in indicia of reliability, would warrant no police response or require further investigation before a forcible stop of a subject would be authorized." *Id.* at 147. Primarily because the tipster was known to the officer and was accountable for false information, the tip was deemed reliable enough that, under *Terry*, the officer could order the occupant out of the car and seize the gun from his waist. *Id.* at 147-148.

When the Court addressed the question of whether an anonymous telephone tip could provide reasonable

suspicion for a seizure in *Alabama v. White*, 496 U.S. 325 (1990), it followed the "totality of the circumstances" approach it had developed in *Illinois v. Gates*, 462 U.S. 213 (1983), to evaluate anonymous tips in the context of probable cause. *White*, 496 U.S. at 328-329. *Gates* had found that anonymous tips could help solve "otherwise 'perfect crimes'" even though "the veracity of persons supplying anonymous tips is by hypothesis largely unknown, and unknowable."[5] 462 U.S. at 237-238. The Court noted the continued relevance of factors such as the informant's veracity, reliability and basis of knowledge, *id.* at 230, and emphasized that its prior decisions in the area "have consistently recognized the value of corroboration of details of an informant's tip by independent police work." *Id.* at 241.

The anonymous tipster in *White* said that a woman would be leaving an apartment at a particular time and driving an easily identifiable car to a named motel, all the while carrying an ounce of cocaine in a brown attache case. 496 U.S. at 326. The Court noted that, "if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable." *Id.* at 330. Standing alone, the tip's indicia of reliability was too low to provide reasonable suspicion to stop the vehicle, but the police were able to corroborate the woman's actions in driving toward the motel, and "[w]hat was important was the caller's ability to predict [the suspect's] future

5. "I can imagine no reason why an anonymous leaflet is any more honorable, as a general matter, than an anonymous phone call or an anonymous letter. It facilitates wrong by eliminating accountability, which is ordinarily the very purpose of anonymity." *McIntyre*, 514 U.S. at 385 (Scalia, J., dissenting).

behavior, because it demonstrated inside information." *Id.* at 331-332. Applying the totality of the circumstances test the Court approved the stop, but described it as a "close case." *Id.* at 331-332.

Florida v. J.L., 529 U.S. 266, involved an anonymous caller who told police "that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun." *Id.* at 268. Officers saw three black males at the bus stop, including one in a plaid shirt, but they saw no gun, and no threatening or unusual movements. *Id.* Apart from the tip, the officers had no reason of suspecting any of the males were engaged in criminal activity, but they frisked all three and found a gun on J.L., who was fifteen at the time. *Id.* at 268-269.

While acknowledging the problems posed by anonymous tips that it had noted in *White*, the Court said that it had recognized in *White* that "there are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.'" 529 U.S. at 270, quoting *White*, 496 U.S. at 327. The tip in *White* provided the officers with suspicion, and that suspicion "became reasonable after police surveillance" showed the tipster had accurately predicted White's movements, though the Court also warned that simply having knowledge about a person's future movements "does not necessarily imply that the informant knows, in particular, whether that person is" engaged in criminal activity. *J.L.*, 529 U.S. at 270-271.

The tip about J.L. "lacked the moderate indicia of reliability present in *White*" because it "provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility." *Id.*

at 271. Discovery of the gun did not retroactively provide the requisite indicia of reliability to the tip. *Id.* at 271. "All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L." *Id.* at 271. While the tip had accurately described J.L. and said where he would be, "The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Id*. at 272.

Although the officers were able to corroborate the tip's description of J.L.'s "readily observable location and appearance," they saw nothing to corroborate the tip's assertion that he had illegal possession of a firearm, so the tip lacked the "indicia of reliability" necessary to justify a stop and frisk. 529 U.S. at 272-274. Unlike the situation in *White*, the suspicion prompted by the tip never became reasonable, due to the lack of corroboration. *Id.* at 272-274.[6]

II. The Vehicle Stop In This Case Violated The Fourth Amendment Because It Was Based On An Uncorroborated Anonymous Tip

California's First Appellate District Court of Appeal approved a vehicle stop and the detention of its occupants based solely on an anonymous tip about reckless driving that investigating officers did not corroborate, directly

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6. As discussed in detail in section III.A *infra*, the Court also rejected a request from Florida and from the United States as *amicus* to establish a "firearm exception" to *Terry*, under which a tip about an illegal gun would automatically justify a stop and frisk without corroboration. 529 U.S. at 272.

conflicting with this Court's holdings in cases involving both vehicle stops and anonymous tips. Appendix A, A14-A25.

Under the Fourth Amendment, officers must have a reasonable suspicion based on articulable facts that the occupants of a vehicle are engaged in criminal activity before they are justified in seizing that vehicle. *Cortez*, 449 U.S. at 417-418; *Prouse*, 440 U.S. at 653; *Terry*, 392 U.S. at 21, 27. Where officers are relying on anonymous tips rather than their own observations, they must corroborate not just the tip's innocent details, but also its "assertion of illegality." *J.L.*, 529 U.S. at 272.

The decision of the California Court of Appeal is clearly contrary to this Court's Fourth Amendment precedents. As in *J.L.*, the officers' decision to stop the truck "arose not from any observations of their own but solely from a call made from an unknown location by an unknown caller," *J.L.*, 529 U.S. at 270, with the tip potentially originating in either Humboldt or Mendocino County. JA 33a-34a. Dispatcher Odbert and Officer Williams both testified that Odbert advised Williams to be on the lookout for a reckless driver. JA 36a-37a, 45a, 48a-49a, 57a.[7] This "bare report of an unknown, unaccountable informant," *J.L.*, 529 U.S. at 271, may have prompted some suspicion about an identifiable truck, but the suspicion could not rise to the level of reasonable suspicion without corroboration. The assertion of "reckless driving" provided no information

7. While this Court has held that the "collective knowledge doctrine" allows police officers to rely on reasonable suspicion formed by other officers, *United States v. Hensley*, 469 U.S. 221, 229-236 (1985), it has never extended the doctrine to include information known to civilian dispatchers but not conveyed to the officers themselves.

about whether the tipster personally observed any reckless driving, or what it allegedly consisted of. *White*, 496 U.S. at 327-332; see also *State v. Kooima*, 833 N.W.2d 202, 208-211 (2013); *Nilsen v. State*, 2009 OK CR 6, 203 P.3d 189, 192 (2009). Even if the tipster had personally observed reckless driving, there are many reasonable explanations for a maneuver by a driver that could be construed by other motorists as "reckless" – such as an unruly child or other distraction – so that a single report, under the totality of the circumstance, would not warrant a seizure of the vehicle and all of its occupants. *Cortez*, 449 U.S. at 417-418.

Unlike the information given in *White*, the tip here did not provide any predictive or inside information, such as where the truck would be turning off or its final destination. The tipster did say the truck was going south on Highway 1, but anyone who saw the truck heading south on Highway 1 could have provided exactly the same information regarding the location and direction of the truck, including a "prankster, or someone with a grudge." *Harris v. Commonwealth*, 276 Va. 689, 668 S.E.2d 141, 145-146 (2008). The officers had no means of corroborating the tip's assertion that reckless driving had occurred nineteen miles away from the spot where Francis first spotted the truck, JA 37a, 39a, 42a-46a, and they were unable to corroborate any ongoing reckless driving despite following the truck for approximately five miles before pulling it over. JA 39a, 46a-47a, 49a-51a, 61a.[8]

8. The prosecution presented no evidence that the officers had observed dangerous driving even though, at a motion to suppress, the prosecution has the burden of establishing that a warrantless search or seizure was justified under the Fourth Amendment. *People v. Redd*, 48 Cal.4th 691, 719, 229 P.3d 101, 108 Cal.Rptr.3d 192 (2010).

Based on a presumed finding it believed had been made by the magistrate who conducted the suppression hearing, the Court of Appeal concluded the officers were told that the truck had run the reporting party off the roadway, as the tipster had advised the Humboldt dispatcher, not merely to be on the lookout for a reckless driver. A20-A23. Even accepting the Court of Appeal's interpretation of the evidence, its holding is not consistent with this Court's Fourth Amendment precedents. The addition of this uncorroborated assertion theoretically explains how the informant knew about the alleged reckless driving, but still provides no specific information about what the targeted vehicle actually did. The informant may simply have felt he or she had been forced off the roadway because the truck was following too closely on the "undivided two-lane road." A-24. Since the tip was still anonymous the tipster was free to "lie with impunity," *J.L.*, 529 U.S. at 275 (Kennedy, J., concurring), and could easily have exaggerated the incident, or fabricated it entirely.

This Court in *J.L.* rejected a "firearm exception" to its corroboration requirement because of the Court's concern that false, anonymous tips could too easily be used to deprive citizens of their Fourth Amendment rights, and required corroboration as to the "assertion of illegality" to address that concern. *J.L.*, 529 U.S. at 272. Contrary to the Court of Appeal's conclusion, the officers' corroboration of innocent details in this case did not "sufficiently establish[] the reliability of the tip to support reasonable suspicion." A18; see *J.L.*, 529 U.S. at 270-274.

The Court of Appeal justified its holding in part because "the report that the vehicle had run someone off the road sufficiently demonstrated an ongoing danger

to other motorists to justify the stop without direct corroboration of the vehicle's illegal activity." A18. But the report said the truck had last been seen more than twenty minutes before Francis next saw it, and more than nineteen miles away. JA 29a, 37a, 39a, 42a-47a. The officers had no information suggesting the truck was tailgating, running people off the roadway or engaging in any other form of reckless driving during that time, and therefore no reason to suspect that it constituted an "ongoing danger" to anyone. The "danger" posed by a single, distant, reckless driving incident – which was never connected in any way to drunken driving – did not provide the reasonable suspicion required to stop the truck. *Cortez*, 449 U.S. at 417-418.

The Court of Appeal acknowledged this Court's ruling in *J.L.*, including the requirements that an anonymous tip must be "'suitably corroborated' and be 'reliable in its assertion of illegality, not just in its tendency to identify a determinate person.'" A16, citing 529 U.S. at 270, 272. But the Court of Appeal felt bound by the California Supreme Court's decision in *People v. Wells*, 38 Cal.4th 1078, 1081, 1087-1088, 136 P.3d 810, 45 Cal.Rptr.3d 8 (2006), which had held that an anonymous tip about a possibly intoxicated driver provided an officer with the reasonable suspicion necessary to stop a vehicle immediately, without corroboration. Opinion at A18-A19 n.6. As discussed in detail in section III, *infra*, this new, bright-line exception to the bedrock requirement of reasonable suspicion to stop an individual vehicle is contrary to this Court's Fourth Amendment jurisprudence.

Finally, the Court of Appeal erred in rejecting petitioners' contention that, even if *Wells* had authorized

an immediate stop of the truck without corroboration, the officers in this case did not stop the truck immediately, and instead followed the truck for approximately five miles without observing anything to corroborate the tip's assertion of reckless driving. Opinion at A23-24; see JA 39a, 46a-47a, 49a-51a, 61a.[9] By the time the officers pulled the truck over they had confirmed that it was not being driven dangerously, undermining any suspicion of criminal activity prompted by the anonymous tip. The officers in this case had no more reasonable suspicion that petitioners were involved in criminal activity than did the officer conducting spot checks in *Prouse*, 440 U.S. at 650, and their discovery of marijuana was just as serendipitous. Under the totality of the circumstances, *Arvizu*, 534 U.S. at 273-274; *Cortez*, 449 U.S. at 417, the extended period of observation negated any justification for stopping the truck.

III. The New "Automobile Exception" Created By The Lower Courts Is Contrary To This Court's Fourth Amendment Jurisprudence

A. The Courts' Reliance On The Brief "Bomb" Passage In *J.L.* To Justify A New Exception That Swallows The Rule of *J.L.* and *Terry* Is Misplaced

In sanctioning the stop of petitioners' truck despite the officers' failure to corroborate the tip's assertion of reckless driving, the Court of Appeal relied on the

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9. Although the Court did not grant certiorari on the second question presented in the Petition, this distinction between *Wells* and the instant case provides the narrowest ground on which the Court could reverse the judgment of the Court of Appeal.

adoption of an "automobile exception" to *J.L.* and *Terry* by the California Supreme Court in *Wells*, 38 Cal.4th at 1082, 1088. A16-A19. *Wells* in turn relied heavily on *United States v. Wheat*, 278 F.3d 722 (8th Cir. 2001), which involved an anonymous tip about a particularly described vehicle being driven erratically, including "passing on the wrong side of the road, cutting off other cars, and otherwise being driven as if by a 'complete maniac.'" *Id.* at 724.

As in *Wells*, 38 Cal.4th at 1081, the officer in *Wheat* stopped the vehicle as soon as he saw it. *Wheat*, 278 F.3d at 724-725. The Eighth Circuit held, despite *J.L.*, that "an anonymous tip about the dangerous operation of a vehicle whose innocent details are accurately described may still possess sufficient indicia of reliability to justify an investigatory stop by a law enforcement officer who does not personally observe any erratic driving." *Id.* at 729. As mentioned in section II *supra*, *Wells* involved an anonymous tip about a possibly intoxicated driver, 38 Cal.4th at 1081, and the California Supreme Court similarly determined it was not bound by *J.L.*, holding that "an anonymous and uncorroborated tip regarding a possibly intoxicated highway driver" provided an officer with the reasonable suspicion necessary to justify a stop. *Id.* at 1082.

Wheat, *Wells*, and other courts that have refused to follow the holding in *J.L.* have relied, at least in part, on the following passage from that decision:

> The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for

> example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk.

529 U.S. at 273-274; see *State v. Hanning*, 296 S.W. 44, 52 (Tenn. 2009); *State v. Prendergast*, 83 P.3d 714, 718 (Haw. 2004); *State* v. *Golotta*, 837 A.2d 359, 370 (N.J. 2003); *Wheat*, 278 F.3d at 729-730; and *Wells*, 38 Cal.4th at 1085.

To state the obvious, there was no report of a person carrying a bomb in this case, or in any of the other cases, which all involved tips about reckless or drunken driving. *Hanning*, 296 S.W.2d at 46; *Prendergast*, 83 P.3d at 715-716; *Golotta* 837 A.2d at 360; *Wheat*, 278 F.3d at 724-725; and *Wells*, 38 Cal.4th at 1081. Petitioners' counsel is not aware of any decision that has lowered the requisite indicia of reliability and approved a *Terry* stop and frisk of a person who was reportedly carrying a bomb.

Instead, lower courts have seized on *J.L.*'s brief passage about a bomb as authority to establish a new, unconstitutional exception to *J.L.* and *Terry* that applies to hundreds if not thousands of traffic stops every day. There is no reason to believe that this Court, in declining to speculate about circumstances that might pose a danger significantly greater than the firearm in the case actually before it, *J.L.*, 529 U.S. at 273-274, intended to authorize "a possible public safety exception," *Wells*, 38 Cal.4th at 1085, that would completely undermine its holding.

In mentioning a report of a bomb, the Court was presumably imagining a report of a potentially cataclysmic

event such as a terrorist attack or similar activity; *e.g*, the Boston Marathon bombing. In such dire circumstances, the Court acknowledged it might be possible to relax the indicia of reliability otherwise constitutionally required by the Court's holdings. *J.L.*, 529 U.S. at 273-274; see *Wells*, 38 Cal.4th at 1091 (Werdegar, J., dissenting).

But there is nothing in those two sentences from the *J.L.* opinion to indicate that the Court surreptitiously intended to authorize an exception to its holding, and to *Terry*, that would come into play on a daily basis, throughout the country. While the dangers of drunk driving are well known to the Court, *McNeely*, 133 S. Ct. at 1565, those dangers played no role in the *J.L.* decision. There are apparently no comparable statistics about the dangers of reckless driving, yet the new "automobile exception" is so broad that anonymous reports of reckless driving are sufficient to strip drivers and passengers of their rights under *J.L.* and *Terry*.

Just before the bomb passage in *J.L.*, the Court had specifically refused to establish a "firearm exception" to *Terry*, in part out of concern that any automatic exception would be likely to spread, possibly "allowing the exception to swallow the rule." *J.L.*, 529 U.S. at 273. While recognizing the extraordinary danger posed by firearms, the Court ruled that Terry's lower level of suspicion "responds to this very concern," *id.* at 272, and explained:

> But an automatic firearm exception would rove too far. Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an

> anonymous call falsely reporting the target's unlawful carriage of a gun. Nor could one securely confine such an exception to allegations involving firearms.

Id. at 272.

The new, automatic exception established in *Wheat, Wells* and other cases enables anyone with a cell phone who wants to harass another to set in motion an intrusive, embarrassing stop of the targeted person's vehicle and all of its occupants simply by placing an anonymous call falsely reporting the target might possibly be drunk. The exception is not confined to allegations involving alcohol, and already encompasses allegations of reckless driving that may not pose any ongoing risk. In those jurisdictions that have adopted it, the new exception has swallowed the constitutional rule forbidding stops of individual vehicles based on less than reasonable suspicion of criminal activity. *Cortez*, 449 U.S. at 417-418.

The new blanket exception to *J.L.* and *Terry* is also contrary to this Court's general refusal to adopt bright line, *per se* rules in evaluating reasonableness under the Fourth Amendment. *McNeely*, 133 S. Ct. at 1567-1568; *United States v. Sokolow*, 490 U.S. 1, 7 (1989). In *McNeely*, this Court refused to adopt a *per se* rule for blood testing in cases involving drunken driving, even though the dissipation of alcohol has long been accepted as a scientific certainty. *McNeely*, 133 S. Ct. at 1560-1561. Rigid rules are even less appropriate when dealing with the myriad uncertainties surrounding informants' tips, which "vary greatly in their value and reliability." *Gates*, 462 U.S. at 232. The California Court of Appeal's ruling in this

case demonstrates that the new exception is too blunt an instrument to ensure the protection of motorists' Fourth Amendment rights.

While the Court in *J.L.* made no attempt to list the various dangers that might require dilution of the Fourth Amendment's protections, it seems safe to draw at least one conclusion: the report of a single incident of reckless driving that had been over for more than twenty minutes when the officers first spotted the offending vehicle would not justify a stop on anything less than full compliance with *Terry*.

This Court should reverse the decision of the Court of Appeal.

B. None Of The Purported Distinctions Between Firearm-Related And Automobile-Related Crimes Justifies The Adoption Of A New Exception to *J.L.* and *Terry*

In addition to relying on the bomb passage to justify adoption of a new exception to *J.L.* and *Terry*, *Wheat*, *Wells* and other decisions have found various other purported grounds for distinguishing tips involving alleged reckless or drunken driving from the tip about a firearm under consideration in *J.L.* See, *e.g.*, *Wheat*, 278 F.3d at 729-738; *Wells*, 38 Cal.4th at 1087-1089. Some of these purported distinctions would be more relevant if the Court were engaging in the type of balancing that is used in cases involving checkpoints, see *City of Indianapolis v. Edmond*, 531 U.S. 32, 37-44 (2000), and none justifies a stop of an individual vehicle and its occupants without the corroboration required to establish reasonable suspicion under *J.L.* and *Terry*.

1. A Reckless Or Possibly Drunken Driver Does Not Pose A More Serious Risk To The Public Than Someone Illegally Possessing Firearms

Courts seeking to justify their adoption of the automobile exception often argue that a reckless or possibly drunken driver poses a much more serious, imminent threat to the public than does a person who is illegally possessing a firearm, as in *J.L. Wheat*, 278 F.3d at 736-737; *Wells*, 38 Cal.4th at 1087; *Boyea*, 765 A.2d at 867.

The courts typically cite no data to support this claim, which is contrary not only to the data but also to common knowledge. Firearm possession can become firearm use in a matter of seconds, *Boyea*, 765 A.2d at 881 (Johnson, J., dissenting), and recent, tragic events in Newtown, Connecticut and Oslo, Norway remind us that a single person in possession of firearms can cause far more damage than a single driver, however reckless or drunk. While many types of firearms can be concealed easily, a truly drunken driver cannot conceal his erratic driving, which is readily observable by fellow motorists as well as officers.

Turning to the data, while drunken drivers certainly pose a serious risk to the public, they are not more dangerous than firearms. The National Highway Traffic Safety Administration recently stated that 9,878 people died in alcohol-impaired driving crashes in 2011, accounting for 31% of all highway fatalities, and representing a drop of 2.5% from 2010 (10,136), and 27% from 2002 (13,472). See NHTSA, *Traffic Safety Facts, 2011 Data* 1-2 (No. 811700, Dec. 2012), cited in *McNeely*, 133 S. Ct. at 1565.

According to the Department of Justice, Bureau of Justice Statistics, preliminary data for 2011 shows 11,101 homicides by firearm, compared to 11,078 the year before, part of hundreds of thousands of violent crimes committed with firearms. See Bureau of Justice Statistics, *Firearm Violence 1993-2011* 2-3 (No. NCJ241730, May 2013). Even if there were statistics to support the courts' claims that a report of an intoxicated driver poses a more serious threat than a person illegally carrying a firearm, an anonymous tip about a reckless driver enjoys the same automatic indicia of reliability as a tip about a drunk driver under the broad new automobile exception. A driver who has, perhaps out of necessity, made a single, seemingly reckless maneuver plainly does not pose the same threat to the public as an obviously intoxicated driver unable to control a vehicle, yet the California Court of Appeal applied the exception in this case despite the absence of any suggestion that the driver had been drinking or had driven erratically during the twenty minutes preceding his seizure. A formal vehicle stop consumes far more law enforcement resources than simply following a vehicle or engaging in a consensual encounter on a sidewalk, and those scarce resources will be stretched even further if officers are required to initiate vehicle stops every time they receive a tip of drunken or reckless driving.

Finally, stopping a vehicle based on an uncorroborated anonymous tip cannot be justified by the possibility that officers would be subject to criticism for failing to stop the vehicle in the event of a subsequent crash. *Wells*, 38 Cal.4th at 1087. As the *Wells* dissent notes, the same argument could have been made in *J.L.*, "but the possibility of such criticism did not convince the high court in that case to dispense with requiring confirmation of the illegal

aspects of the anonymous tip." *Id.* at 1094 (Wedegar, J., dissenting). Illegal activities create sometimes daunting law enforcement problems, "[b]ut the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." *Edmond*, 531 U.S. at 42.

2. Tips About Automobiles Are Neither More Reliable Nor Less Likely To Be Malicious Than Any Other Anonymous Tips

Another distinction from *J.L.* typically cited in cases justifying the adoption of the "automobile exception" is that tips about reckless or drunken driving are inherently more reliable because the tipster is more likely to have personally observed the driving, and less likely to be harassing a fellow motorist. *Wheat*, 278 F.3d at 732, 734-736; *Wells*, 38 Cal.4th at 1087; *Boyea*, 765 A.2d at 867.

But this factor varies considerably from case to case. While the tipster in *Wheat* "specifically alleged that he had personally observed several different traffic violations involving erratic driving," *Wheat*, 278 F.2d at 732, the California Supreme Court had to "reasonably infer that the tip came from a passing motorist. Where else would it have come from?" *Wells*, 38 Cal.4th at 1088. According to the dissenting justices, any claim that "the tip was from another driver or any other eyewitness is no more than conjecture." *Id.* at 1092 (Werdegar, J., dissenting). In the absence of a tipster's specific claim to have personally observed the reckless or drunken driving, the mere fact that driving is a public activity does not provide a basis for presuming personal knowledge, and this Court refused to presume that the tipster in *J.L.* had personal knowledge

about a concealed firearm. If the officer's determination of reliability is based on a presumption that is not supported by any evidence, then the officer is simply playing the type of "inchoate and unparticularized suspicion or 'hunch'" condemned in *Terry*, 392 U.S. at 27.

One early post-*J.L.* decision, *Boyea*, 765 A.2d 867, argued that a tip accurately stating which direction the vehicle was heading constituted the type of "predictive" information that this Court found necessary in *White*, 496 U.S. at 329-332, and missing in *J.L.*, 529 U.S. at 271-272. But the public nature of driving cuts both ways: passing on information available to any member of the public who happens to be in the same area as the targeted vehicle is simply not the type of predictive information based on "inside" information required to validate an anonymous tip in *J.L.* and *White*. *Harris*, 668 S.E.2d at 145-146. Even *Wheat* acknowledged that *J.L.* foreclosed this means of corroboration. *Wheat*, 278 F.3d at 733.

Wheat rejected any requirement that officers corroborate the tip's assertion of illegality – dangerous driving – as too "stringent," because the officer would then have probable cause, not just reasonable suspicion, to stop the vehicle. 278 F.3d at 733. This reasoning is not persuasive, because *J.L.* requires corroboration of the illegal assertion before the suspicion provided by an anonymous tip rises to the level of reasonable suspicion, *J.L.* 529 U.S. at 270-272, and there is nothing stringent about requiring corroborating information that is so readily available. Unlike the difficult job of verifying that J.L. possessed a concealed weapon, the task of confirming reckless or drunken driving requires only that the officer "have followed [the target vehicle] a short

distance to determine whether [the driver] was weaving or otherwise violating the traffic laws. The observation of even a small deviation, such as weaving slightly within a lane, may, when coupled with the anonymous tip, have been sufficient to justify a traffic stop." *Wells*, 38 Cal.4th at 1094 (Werdegar, J., dissenting). Corroboration may also be available from other sources, such as multiple, independent reports that a specific vehicle is being driven erratically, that would enhance the reliability of the tips.

Anonymous tips about reckless or drunken drivers could come from anywhere, which is why they pose such a danger to the rights protected by the Fourth Amendment. "If the telephone call is truly anonymous, the informant has not placed his credibility at risk and can lie with impunity." *J.L.*, 529 U.S. at 275 (Kennedy, J., concurring). Neither *Wheat*, 728 F.3d at 735-736, nor *Wells*, 38 Cal.4th at 1087, cites any evidentiary basis for the courts' sanguine presumptions that the harassing, false tips that concerned this Court in *J.L.*, 529 U.S. at 272, will be rare among highway travelers. *Wheat* dismisses the risk of officers themselves fabricating tips as "negligible," 278 F.3d at 735-736, but as the Missouri Supreme Court recently noted, "the mere fact that information came through a police dispatch does not provide a basis for finding reasonable suspicion, for if it did, 'the requirements of reasonable suspicion and probable cause would be rendered meaningless' because 'police could simply filter a "hunch" through a radio dispatch or cellular phone and have it come out reliable on the other end.' [Citation]." *State v. Grayson*, 336 S.W.3d 138, 144 (Mo. 2011).

Addressing the risk of false, malicious tips from citizens, some courts have suggested that the short

amount of time available to call in a report about erratic driving, as opposed to crimes like possession of firearms or drugs, makes fabrication unlikely. *Hanning*, 296 S.W.2d at 51; *Bloomingdale v. State*, 842 A.2d 1212, 1220 (Del. 2004). But at least one person in virtually every car now on this nation's roadways has a cellular phone, some prepaid and therefore untraceable, making instant anonymous tips available to almost everyone caught up in road rage. There is absolutely no reason to confer presumptive reliability on anyone reporting erratic driving.

If anything, people tend to act more aggressively toward their fellow motorists from the safety and anonymity of their cars than they would if they were meeting on the sidewalk. On the road, anyone angered by the driver or passengers in another car can get immediate revenge by placing a quick call to the authorities. Safety concerns that sometimes prompt requests for anonymity in other types of tips are usually absent when the tip involves erratic driving, where the motive will at best be a desire not to be involved, and at worst a desire to harass someone with impunity. Even if the tip is false and the caller's phone automatically identified, the tipster runs virtually no risk of prosecution because of the difficulty of establishing that the assertion of erratic driving was false, unlike the situation in *Adams*, where the veracity of a tip about gun possession could be established immediately and the known informant held responsible if it turned out to be false. *Adams*, 407 U.S. at 147-148.

The effect of granting an automatic exception to *J.L.* and *Terry* to every tip about erratic driving is "to turn over to anyone with a telephone the power to make the government intrude into a private citizen's life without any

oversight or control." *Boyea*, 765 A.2d 862, 882 (Johnson, J., dissenting). This is exactly why this Court rejected the "firearm exception" in *J.L.*, 529 U.S. at 272-273, and in order to protect the Fourth Amendment rights of this country's motorists, this Court should also reject this new exception to *J.L.* and *Terry*. "The mere fact that a tip, if true, would describe illegal activity does not mean that the police may make a *Terry* stop without meeting the reliability rquirements." *J.L.*, 529 U.S. at 273, n.*.

3. Stopping A Pedestrian Is No More Intrusive Than Stopping A Vehicle And Detaining Its Occupants, Who Enjoy The Same Fourth Amendment Rights As Pedestrians

The courts also argue that automobile-related tips should be treated differently from other anonymous tips because stopping a vehicle and detaining its occupants is less intrusive than the frisk of J.L., and those occupants have reduced privacy interests due to governmental regulation of automobiles. *Wheat*, 278 F.3d at 737; *Wells*, 38 Cal.4th at 1087; *Boyea*, 765 A.2d at 868.

The first part of this claim is based on a misreading of *J.L.*, because this Court stated clearly its holding was not based on the intrusiveness of a *Terry* frisk, and "in no way diminishes a police officer's prerogative, in accord with *Terry*, to conduct a protective search of a person who has already been legitimately stopped. We speak in today's decision only of cases in which the officer's authority to make the initial stop is at issue." *J.L.*, 529 U.S. at 274. Just like pedestrians legitimately stopped on a sidewalk, both the driver of a legitimately stopped

vehicle, *Pennsylvania v. Mimms,* 434 U.S. 106 (1977), and its passengers, *Arizona v. Johnson,* 555 U.S. 323 (2008), are subject to a *Terry* patdown search if the officer has reasonable suspicion that they are armed and dangerous.

The intrusion at issue is the initial detention, not whatever happens afterward, and vehicle stops are no less intrusive than stops on the sidewalk. In *Prouse*, this Court described automobile travel as "basic, pervasive and often necessary," and noted that many people probably "find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel." *Prouse*, 440 U.S. at 662. The intrusion in *Wells*, where "a woman alone in her car, was stopped by police on a deserted highway at nearly 2:00 in the morning," was certainly not insignificant. *Wells*, 38 Cal.4th at 1093 (Werdegar, J., dissenting).

While it is certainly true that "when it comes to the Fourth Amendment, the home is first among equals," *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013), *Terry* recognized that "people are not shorn of all Fourth Amendment protections when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles." *Prouse*, 440 U.S. at 663. A stop of a vehicle and its occupants must be based on articulable and reasonable suspicion of unlawful conduct, because:

> An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation.... Were the individual subject to

> unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.

Id. at 662-663.

IV. This Court Should Hold That There Is No "Automobile Exception" To *J.L.* And *Terry*

The answer to the question posed by the grant of certiorari, "Does the Fourth Amendment require an officer who receives an anonymous tip regarding a drunken or reckless driver to corroborate dangerous driving before stopping the vehicle?" is yes. When the officer's suspicions are based, not on the officer's own observations "but solely from a call made from an unknown location by an unknown caller," *J.L.* 529 U.S. at 270, the Fourth Amendment requires corroboration of the dangerous driving itself, not just of the innocent details. 529 U.S. at 270-274.

Bare assertions of reckless driving, like the one the officer in this case said he received, JA 48a–49a, 57a, provide the lowest indicia of reliability, and simply do not give officers reasonable suspicion for a stop unless the officers can corroborate reckless driving. While additional information about the informant's observations can increase the reliability of the tip, as long as the information is coming from a truly anonymous source who could simply be fabricating the scenario, however detailed, the tip cannot rise to the level of reasonable suspicion without corroboration. Fortunately, the asserted illegality is being carried out on a public roadway, making it quite easy for officers to corroborate the tip, if true.

In holding that the Fourth Amendment does not require officers to take this simple step before seizing a vehicle and all of its occupants, courts applying the new "automobile exception" essentially ignore the serious concerns this Court raised about false, anonymous tips in its unanimous *J.L.* decision. There is no evidentiary or logical basis to presume that anonymous tips about dangerous driving are any more reliable than anonymous tips about anything else, including firearms. Given the prevalence of road rage and the ubiquity of cell phones, false tips about other motorists are if anything likely to occur more frequently than other types of malicious tips.

All of the compelling reasons this Court gave for rejecting the automatic "firearm exception" support its rejection of this new automatic exception, which has already effectively swallowed the rule requiring reasonable suspicion for vehicle stops in the jurisdictions that have adopted it. *J.L.*, 529 U.S. at 273.[10] Firearms and erratic driving both pose risks to the public, but *Terry*'s requirement of only reasonable suspicion for detentions "responds to this very concern." *Id.* at 272.

Public safety does not require, in addition, that this country's drivers and passengers – in other words, its citizens – be subject to intrusive, embarrassing seizures based on nothing more than another person's malicious desire to harass them by calling in a false report of dangerous driving. *Id.* Such an easily abused exception

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10. As the Court predicted in *J.L.*, 529 U.S. at 273, the exception has not been confined to automobiles; there is also an "emergency exception" to *J.L.* See *United States v. Hicks*, 531 F.3d 555, 558-559 (7th Cir. 2008).

could seriously erode the public's confidence in law enforcement, as one prominent scholar argues. See Sherry F. Colb, *Anonymous Tips, Risks, and Type 1 Errors*, Dorf on Law (2013), http://www.dorfonlaw.org/2013/10/anonymous-tips-risks-and-type-1-errors.html (last visited November 11, 2013). The result will be officers routinely seizing vehicles and their occupants based entirely on false tips from harassers who risk nothing, because the targeted drivers cannot disprove the false allegations.

The Fourth Amendment was adopted to prevent such abuses, and this Court's precedents provide an efficient solution to the problem. Requiring officers to corroborate a tip's assertion of dangerous driving before detaining a vehicle and its occupants will simultaneously protect their right to be free from unreasonable searches and seizures, while ensuring that officers can quickly seize any actual reckless or drunk drivers.

The Fourth Amendment "is designed not to collapse at the cry of 'public safety' but to hold the government to the requirement of reasonableness even when the government argues it is acting for public safety.... [I]f danger becomes a justification for dispensing with the requirement of reliability, then there will be nothing left of the Fourth Amendment." *Boyea*, 765 A.2d at 885 (Johnson, J., dissenting).

As this Court has stated:

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Terry, 392 U.S. at 9, quoting *Union Pacific Railroad Company v. Botsford*, 141 U.S. 250, 251 (1891).

That right is in peril if an officer can constitutionally pull over individual vehicles based on nothing but an anonymous assertion of reckless or drunken driving that the officer need not corroborate.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the California Court of Appeal.

Respectfully submitted,

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