No. 18-1166

In the Supreme Court of the United States

COLTON W. SIEVERS,
Petitioner,

v.

STATE OF NEBRASKA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

REPLY BRIEF FOR PETITIONER

ORIN S. KERR
Counsel of Record
699 Exposition Boulevard
Los Angeles, CA 90089
(626) 657-0253
orin@orinkerr.com

JOSEPH D. NIGRO
LANCASTER COUNTY
PUBLIC DEFENDER
NATHAN J. SOHRIAKOFF
DEPUTY PUBLIC DEFENDER
633 S 9th St.,
Lincoln, NE 68508

FRED A. ROWLEY, JR.
COLIN A. DEVINE
MAGGIE THOMPSON
MUNGER, TOLLES & OLSON
LLP
350 S. Grand Ave., 50th Floor
Los Angeles, CA 90071
(213) 683-9100
Fred.Rowley@mto.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

REPLY BRIEF FOR PETITIONER

This is an unusual case. As the Brief in Opposition notes, the parties have agreed that the Nebraska Supreme Court "erred in relying on *Lidster*." BIO at 7. The State makes only a single argument against certiorari. According to the State, the Nebraska Supreme Court's amended opinion can be read as adding an implicit alternative holding that reasonable suspicion existed. BIO at 8-11. The petition should be denied, the State argues, because Sievers failed to challenge this implicit second holding. BIO at 11.

The State is wrong because no alternative holding exists. The amended decision below is explicitly based exclusively on the Nebraska Supreme Court's application of *Illinois v. Lidster*, 540 U.S. 419 (2004), which then triggered the three-part balancing test of *Brown v. Texas*, 443 U.S. 47 (1979). This Court should not be misled by the Nebraska Supreme Court's *Brown* analysis: The analysis is premised entirely on the court's erroneous application of *Lidster*. The court below did not rule on whether there was reasonable suspicion.

When the State's sole argument against certiorari is properly cast aside, it becomes clear that certiorari is warranted. The Nebraska Supreme Court reached a holding that no party supports and that deepens lower court disagreement on the scope of *Lidster*. As the amicus brief from the NYU Policing Project and a wide range of civil liberties groups recognized, the decision in this case is a "particularly glaring" error that "warrants either clear guidance in a summary reversal or this Court's plenary review." NYU Amicus Brief at 5, 22.

This Court's intervention is needed to ensure that lower courts properly adhere to the reasonable suspicion requirement.

I. The Amended Opinion Does Not Add An Alternative Holding That Reasonable Suspicion Existed.

To understand why there is no implicit alternative holding in the decision below, it helps to first review the two basic standards for stopping a car to question persons inside. First, stopping a car to question a suspect requires reasonable suspicion, based on objective facts, that the person stopped is involved in criminal activity. *See, e.g.*, *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). The requirement of reasonable suspicion is a well-understood threshold that resembles probable cause but requires a lesser showing. *See Alabama v. White*, 496 U.S. 325, 328-32 (1990).

Second, there is no reasonable suspicion requirement under the information-seeking stop exception of *Lidster*. *See Lidster*, 540 U.S. at 424-26. When *Lidster* applies, the reasonableness of the stop is based instead on a consideration of three factors from *Brown v. Texas*, 443 U.S. 47, 51 (1979), namely, "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." No individualized suspicion is required that the person is involved in criminal activity. *See generally Lidster*, 540 U.S. at 427-28 (articulating and applying the *Brown* factors to an information seeking stop).

The parties agree that the district court treated this case as a reasonable suspicion case, the first category above. *See* Pet. App. 72a ("The officers had reasonable

suspicion to justify the stop given the information known at the time."). The parties also agree that the Nebraska Supreme Court's initial opinion treated this case as a *Lidster* case, the second category above. *See* BIO at 6-7. The sole disagreement between the parties is whether the Nebraska Supreme Court's amendment to the initial opinion, Pet. App. 26a-30a, added a second holding on reasonable suspicion.

It did not. The Nebraska Supreme Court made three changes in its amended opinion. First, it rephrased one sentence so that it broadly asked whether Sievers' Fourth Amendment rights were violated. Pet. App. 27a. Surely this did not amount to a holding that reasonable suspicion existed.

Second, the Nebraska Supreme Court replaced one paragraph with a new paragraph to more thoroughly explain why it had concluded that "the application of the *Brown* balancing test [was] appropriate." Pet. App. 17a, 27a-28a. This paragraph is about the *Brown* factors, and it cites to Judge Posner's application of *Lidster* in *United States v. Brewer*, 561 F.3d 676 (7th Cir. 2009). Pet. App. 27a-28a. Again, this change clearly did not hold that reasonable suspicion existed.

The third change replaced two paragraphs with five new paragraphs in the section labeled "BALANCING *BROWN* FACTORS." Pet. App. 28a-30a. Nothing in these five paragraphs explicitly or implicitly added an alternative holding that reasonable suspicion existed. To the contrary, the new material expressly contrasted its reasoning from the reasonable suspicion holding of the district court. *See* Pet. App. 28a ("*Although our reasoning differs from that of the district court*, when

all of the factors are weighed, we conclude that the stop was reasonable under *Brown*." (emphasis added)).

The State suggests that the Nebraska Supreme Court must have held that there was reasonable suspicion because the amended opinion included various statements that the stop in this case was reasonable and justified. *See* BIO at 9-10. But those statements were added to the section of the Court's opinion labeled "BALANCING *BROWN* FACTORS," Pet. App. 25a, 28a, and they are consistent with analysis of the *Brown* factors. It is hard to see how those phrases amount to a conclusion about reasonable suspicion.

II. Although the Nebraska Supreme Court Did Not Reach the Question, the Record Shows That the Officers Lacked Reasonable Suspicion to Make the Stop.

The State also argues that, on the merits, reasonable suspicion existed. BIO at 10-11. The fact that the Nebraska Supreme Court did not reach this issue is response enough. But it is also worth realizing why reasonable suspicion is clearly lacking here, as it presumably explains why the Nebraska Supreme Court felt compelled to reach out for the *Lidster* rationale that no party had briefed and that no party will defend.

The core problem is that the officers' suspicion was just a hunch. The truck was parked near the residence under surveillance, and the truck was seen driving away. That was it. There was no evidence that anyone in the car had any connection to the residence under surveillance. The proximity of the truck to the residence cannot create reasonable suspicion that its driver was involved in criminal activity. A motorist's

mere proximity to suspected criminal wrongdoing "describe[s] a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure." *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (finding no reasonable suspicion where the petitioner appeared to the agent to fit the "drug courier profile").

In its supplemental briefing before the Nebraska Supreme Court below, and again in the Brief in Opposition, the State has suggested a second factual basis to bolster its argument that reasonable suspicion existed. The State claims that there was an "apparent observation of Sievers walking between the residence and the 'camper-style vehicle' on the property while appearing to conceal items in his hands before getting into the truck." BIO at 10-11.

This "apparent observation" is not supported by the record. None of the four officers who testified at the suppression hearing said that they or anyone else had seen Sievers walk near the residence or conceal items before getting into the truck. And neither the trial court nor the Nebraska Supreme Court suggested that anyone saw Sievers exit the residence, move between the residence and the camper, or carry anything into the truck. Pet. App. 6a; 71a-72a.

At the suppression hearing, the only testifying officer who observed the truck driving away from the residence testified as follows:

- "Q. Okay. You were not in a position to see him exit the house and get into the truck? A. I don't remember him doing that, so, no. I would say no." Pet. App. 64a.

- "Q. I'm not asking about his statements, but at the time you made the stop, you did not know whether he had ever been in the house. You guessed based on the fact the pickup truck was parked in the parking lot, or in the driveway. A. From my own knowledge, correct." Pet. App. 65a.
- "Q. The sole reason for the stop was because his vehicle was parked in the driveway of the house in question. A. Correct." Pet. App. 67a.

The other officers' testimony was consistent. None of them testified to seeing or even hearing that Sievers was seen exiting the residence or carrying any objects; they all understood the sole basis of suspicion to be that the pickup was parked near the residence. *See* Pet. App. 35a-36a ("Q. Because that truck was parked near that house, that's the only connection to any law violation, correct? A. Well, as far as I know, I guess that would be correct."); 39a ("Q. Okay. When the investigators told you to execute the stop, did they say that they saw the defendant with firearms? A. No. Q. Did they say they just saw the defendant with coins? A. No. Q. Did they say they saw the defendant with drugs? A. No."); 45a ("Aside from the truck being located in the driveway of that house, you're not aware of any other law violations that were conducted by that truck – committed by that truck. A. No."); 61a-62a ("Q. Did your investigators see Mr. Sievers leave the house? A. I don't recall. … Q. Okay. But there was no indication, to your recollection, that anybody saw Mr. Sievers carrying anything like that? A. I don't recall anyone saying anything about Mr. Sievers carrying anything.").

The State's basis for the "apparent observation" of Sievers presumably is language in a search warrant affidavit obtained after the stop of Sievers' truck that was used to search the residence. BIO 11; Pet. App. 89a. The affidavit states: "Members of the task force were able to see individuals moving between the building identified at 2612 ½ South 9th Street and an open camper-style vehicle located on the property, and moving with objects apparently concealed in their hands. Some of these individuals were observed to leave the address in a vehicle, and this vehicle was contacted on a traffic stop by a marked unit of the Lincoln Police Department after probable cause for a traffic stop was obtained."

The basis of these statements is unknown. Nor is it clear that Sievers was one of these alleged individuals. But the important point is that none of the officers at the suppression hearing testified consistently with the affidavit. They were the ones involved in the stop: It is their testimony about the basis for suspicion that matters. See *United States v. Shareef*, 100 F.3d 1491, 1504 & n.5 (10th Cir. 1996) (information "scattered among various officers in a police department cannot substitute for possession of the necessary facts by a single officer" required to have sufficient cause).

Of course, the Court need not wade into this reasonable suspicion morass because the Nebraska Supreme Court did not do so. It rested its holding on *Lidster* and the *Brown* factors. But the lack of reasonable suspicion based on the record explains why the Nebraska Supreme Court turned to *Lidster* and why it did not reach an alternative holding. The sole basis for suspi-

cion was that Sievers' truck was parked near the residence. This cannot satisfy the reasonable suspicion threshold.

III. The Court Should Resolve the Split Among Lower Courts Over Whether *Lidster* Allows Police to Stop a Suspect Without Reasonable Suspicion

By relying on *Lidster* to justify the stop of a suspect without reasonable suspicion, the Nebraska Supreme Court deepened the divide among lower courts over the scope of *Lidster*. The D.C. Circuit and the Supreme Courts of Kentucky and Maine have all held that *Lidster* cannot be relied upon to justify the stops of suspects without reasonable suspicion. *See Mills v. District of Columbia*, 571 F.3d 1304 (D.C. Cir. 2009); *Maine v. Whitney*, 54 A.3d 1284 (Me. 2012); *Singleton v. Kentucky*, 364 S.W.3d 97 (Ky. 2012). In contrast, the Seventh Circuit and the Nebraska Supreme Court below held that *Lidster* can be relied upon to justify such stops, on the ground that these stops are "information-seeking." *See Brewer*, 561 F.3d 676.

As the amicus brief from the NYU Policing Project and numerous civil liberties groups recognized, the Seventh Circuit's and Nebraska Supreme Court's reliance on *Lidster* is "profoundly wrong." NYU Amicus Brief at 18. "Because *Lidster* implicates Fourth Amendment principles applicable to 'suspicionless' stops, it provides no guidance regarding 'suspicion-based' stops like the one here." *Id*. at 5.

The requirement of reasonable suspicion to stop a suspect is a core constitutional protection. In holding

otherwise, the Seventh Circuit and the Nebraska Supreme Court turned this requirement on its head. Their rule would give police nearly unbridled authority to stop any individual in the vicinity of a crime scene based on the mere possibility that he may have been involved in unlawful conduct. The Fourth Amendment requires more.

Because both petitioner and respondent agree that the police treated Sievers as a suspect, not a witness, this case is an ideal vehicle to resolve the lower court disagreement over the scope of *Lidster*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, the Court should grant the petition and summarily reverse the Nebraska Supreme Court.

Respectfully submitted,

ORIN S. KERR
Counsel of Record
699 Exposition Boulevard
Los Angeles, CA 90089
(626) 657-0253
orin@orinkerr.com

JOSEPH D. NIGRO
LANCASTER COUNTY
PUBLIC DEFENDER

NATHAN J. SOHRIAKOFF
DEPUTY PUBLIC DEFENDER
633 S 9th St.,
Lincoln, NE 68508

FRED A. ROWLEY, JR.
COLIN A. DEVINE
MAGGIE THOMPSON
MUNGER, TOLLES & OLSON
LLP
350 S. Grand Ave., 50th Floor
Los Angeles, CA 90071
(213) 683-9100
Fred.Rowley@mto.com

June 3, 2019