No. 12-9490

In the Supreme Court of the United States

LORENZO NAVARETTE AND
JOSE P. NAVARETTE,

Petitioners,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Court of Appeal
of the State of California
First Appellate Division, Division Five

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amicus curiae National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice, including the administration of federal criminal law. NACDL files numerous amicus curiae briefs each year in this Court and other courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. In particular, in furtherance of NACDL's mission to safeguard fundamental constitutional rights, the Association

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of the brief.

frequently appears as amicus curiae in cases involving the Fourth Amendment and its state analogues, speaking to the importance of balancing core constitutional search and seizure protections with other constitutional and societal interests. As relates to the issues before the Court in this case, NACDL has an interest in protecting both privacy and associational rights from unwarranted and unreasonable government intrusion.

Amicus curiae the National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. The NAFD seeks to promote the fair adjudication of criminal cases by appearing as amicus curiae in litigation relating to criminal law issues, particularly those affecting indigent defendants in federal court. Through its amicus role, the NAFD endeavors to provide a practical view of the federal criminal justice system from the perspective of counsel representing a majority of those charged with federal crimes throughout the circuits. The NAFD submits this amicus brief because the instant case raises an important constitutional question that will have a significant effect on federal criminal practice due to the frequency of searches of vehicles and passengers following traffic stops of the sort at issue here.

SUMMARY OF ARGUMENT

This Court has held that police cannot stop and question someone unless they have "reasonable suspicion" that he is engaged in a crime. *Terry* v. *Ohio*, 392 U.S. 1 (1968). Tips from known informants often provide such suspicion. The police can judge their reliability from the tipster's past performance and can hold a known tipster responsible for any false information he provides. Anonymous tips, however, come with no such assurance. The police have no way to judge their reliability from the tipster's past performance and they cannot hold anyone responsible if the tips turn out to be false. Recognizing this difference, this Court has allowed police to stop people identified through anonymous tips only when the tip shows "that the tipster has knowledge of concealed criminal activity." *Florida* v. *J.L.*, 529 U.S. 266, 272 (2000). This requires that the police corroborate in some way not just the tip's identification and description of a suspect but, more importantly, its assertion of criminality. To do so, they must witness some suspicious behavior themselves, verify that some significant "predictive information," *id.* at 271, in the tip that would be unknown to an ordinary bystander is true, or find confirmation from independent sources. They cannot rely on the tip's mere level of detail, its repetition, its apparent earnestness, or its seeming urgency to support its reliability.

Because of the nature of road travel, anonymous tips of irregular driving are especially unreliable. There exist many innocent causes for momentary irregular driving, which observers cannot see; people's standards of appropriate driving are, to

some degree, subjective; and people can call in such tips in order to harass. 911 technology, moreover, can provide little assurance of an anonymous tip's reliability.

This Court should not adopt an "irregular driving" exception to the Fourth Amendment. As this Court has recognized, such single-issue exceptions are hard to cabin and tend "to swallow the [Fourth Amendment]." *J.L.*, 529 U.S. at 273. Requiring the police to corroborate anonymous tips' allegations of criminality before stopping drivers would, moreover, dramatically improve their reliability at little cost. It would also safeguard against the risk of police abuse.

ARGUMENT

I. The Fourth Amendment Requires That Police Corroborate An Anonymous Tip That Someone Is Driving Irregularly Before They Stop The Car

A. Uncorroborated, Anonymous Tips Lack The Indicia Of Reliability Necessary To Establish Reasonable Suspicion

In *Terry*, 392 U.S. 1, this Court held that a police officer could briefly stop and question someone he reasonably suspects might be engaged in or about to commit a crime. "[A] tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated," *J.L.*, 529 U.S. at 270 (citing *Adams* v. *Williams*, 407 U.S. 143, 146-147 (1972)), can often furnish such reasonable suspicion. By contrast, "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," *ibid.*

(quoting *Alabama* v. *White*, 496 U.S. 325, 329 (1990)), and thus cannot provide such suspicion. Only when "an anonymous tip, *suitably corroborated*, exhibits 'sufficient indicia of reliability to provide reasonable suspicion'" can police make an investigatory stop. *Ibid.* (emphasis added) (quoting *White*, 496 U.S. at 327).

This central question—whether an anonymous tip is reliable—turns not so much on the tip's ability "to identify a determinate person" as a possible culprit, *J.L.*, 529 U.S. at 272 (citing 4 W. LaFave, *Search and Seizure* § 9.4(h), at 213 (3d ed. 1996)), as on its ability to "assert[] illegality," *ibid.* That is, an anonymous tip that accurately describes only "a subject's readily observable location and appearance is * * * reliable in [only a] limited sense" and thus "misapprehend[s] the reliability needed for a tip to justify a *Terry* stop." *Ibid.* Such a tip simply fails to show the most necessary element: "that the tipster has [any] knowledge of concealed criminal activity." *Ibid.* It is reliable knowledge of this latter type, not mere knowledge of someone's "location and appearance," that is necessary to provide a police officer reasonable suspicion to stop and question someone about a crime.

In *J.L.*, this Court applied these fundamental principles to invalidate a stop and frisk based on an uncorroborated anonymous tip. There the anonymous tipster reported "that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun." 529 U.S. at 268. The police arrived at the bus stop, saw three black males, one of whom was wearing a plaid shirt, "just hanging out," and frisked the one in plaid. *Ibid.* They found

a gun and charged him with firearm violations. *Ibid.* He moved to suppress the gun and on review this Court held the search unlawful because the anonymous tip provided "no predictive information" through which the police could "test the informant's knowledge or credibility" and thus judge the allegation's overall reliability. *Id.* at 271. This Court held in particular that a "bare report," *ibid.*, that a person was committing a crime could not provide reasonable suspicion for a *Terry* stop no matter how well the person himself was identified.

B. Because Of The Nature Of Road Travel, Uncorroborated, Anonymous Tips Are Especially Unreliable

Anonymous tips of irregular driving similarly lack the indicia of reliability necessary to establish reasonable suspicion unless the police independently corroborate any "assertion of illegality," *J.L.*, 529 U.S. at 272, before making a stop. Like the anonymous, "bare report," *id.* at 271, that a particular person was carrying a gun in *J.L.*, an anonymous claim that a particular vehicle is being driven irregularly provides no way for the police to test its reliability, let alone speculate about the cause of any irregular driving. Such tips, as in the present case, typically describe the car, identify its location and direction, and indicate that it is being driven oddly—then offer little more. The anonymous tipster typically has no reason to know why—whether because of fatigue, momentary inattention, surprise, understandable distraction, or other reasons—someone might be driving irregularly and often has no opportunity to observe whether the driver continues to drive irregularly or not. One person's

notion of irregular driving, moreover, may be another's idea of more ordinary, if less than perfect, highway behavior.

In many cases, moreover, the tipster may allege criminality solely in order to harass the driver with an official police traffic stop. As this Court noted in *J.L.* when it rejected the government's entreaty to graft an automatic "firearm exception" onto *Terry*, 529 U.S. at 272, requiring less than reasonable suspicion "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" activity. *Ibid.* If the tip "is truly anonymous, the informant has not placed his credibility at risk and can lie with impunity." *Id.* at 275 (Kennedy, J., concurring).

C. Anonymous Tips Cannot Corroborate Themselves

Unless that tip offers special "predictive information" unavailable to most ordinary people that the police can, as in *White*, 496 U.S. at 332, verify in order to establish the tip's overall reliability, the police themselves must corroborate the tip's allegations of criminality by direct observation or perhaps by receiving independent corroboration from others. The tip cannot corroborate itself by simply reporting that the driver was behaving in specific irregular ways or that the anonymous tipster witnessed the irregular driving herself. Nor does elaborate detail or repetition that fails to furnish "predictive information" help. See *United States* v. *Freeman*, No. 12-2233, 2013 WL 5943134, at *5 (2d Cir. Nov. 7, 2013) ("The fact that

the anonymous caller made [two] calls, refused to identify herself, and could not be reached back via phone by the 911 operator merely indicates that there were two anonymous calls from the same individual, instead of just one. It does nothing to bolster her credibility."). More information more emphatically presented cannot justify a stop unless it gives police a meaningful way to test the tipster's reliability.

D. 911 Technology Cannot Boost An Anonymous Tip's Reliability

That an anonymous tip, like the one here, comes in on a 911 line provides no boost to the tip's reliability either. For starters, although police do now have the ability to trace the number from which a 911 call originated, see 47 C.F.R. § 64.1601(d)(4)(ii), many do not do so, see Dary Fiorentino et al., NHTSA, *Programs Across The United States That Aid Motorists In The Reporting Of Impaired Drivers To Law Enforcement*, tbls. 2-11 (2007), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.nhtsa.gov%2Flinks%2Fsid%2F3674ProgramsAcrossUS%2F3674FinalReport2.pdf&ei=LJaKUuOnKpOl4AOf1YGAAg&usg=AFQjCNGja8o-We9_aN9sGuvqtjXYqZGFSQ&sig2=o-iA1RcR_UCxoLkABd4-YA&bvm=bv.56643336,d.dmg (NHTSA, *Programs In Reporting Of Impaired Driving*) (indicating that 15 of the states that responded to federal request for information did not track the 911 calls they received). Many leading law enforcement agencies, including the Department of Homeland Security and the police departments of New York, Los Angeles, Chicago, Houston, Toronto,

and Vancouver, have, moreover, adopted parallel reporting systems that make it impossible for them to identify the number from which tips are made. TipSoft Online, https://www.tipsoftonline.com/index.aspx (last visited Nov. 12, 2013). They advertise that fact in order to encourage people to make tips they otherwise would not because the potential tipsters distrust 911 technology's ability to safeguard their true anonymity.

Second, as lower courts have noted, although a tipster who makes a 911 call on a prepaid cell phone may give the police access to its number, the police have no way then to trace it. See, e.g., *Freeman*, 2013 WL 5943134, at *5 (noting that "[w]hile a landline is necessarily registered to a particular person and particular place, * * * mobile phones * * * prepaid with cash[are] strip[ped] of all identifying information"). Industry data show that postpaid mobile phone use is now declining while prepaid mobile use is growing rapidly. John Tweardy et al., Deloitte, *The Changing Face of Prepaid* (May 19, 2011), http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_TMT_The%20Changing%20Face%20of%20Prepaid_051911.pdf. In fact, 25 percent of mobile phone users in this country now use prepaid phones, New Millennium Research Council, *Experts: "Middle-Class Mainstreaming" of Prepaid Wireless Could Push One Out of Three U.S. Consumers to No-Contract Cell Phones in Next 12 Months* (July 19, 2012), http://newmillenniumresearch.org/news/071912_NMRC_prepaid_trends_news_release.pdf, which are often purchased specifically to prevent the police from identifying the source of the call, see Gordon A. Gow & Jennifer Parisi, *Pursuing the Anonymous*

User: Privacy Rights and Mandatory Registration of Prepaid Mobile Phones, 28 Bull. of Sci., Tech. & Soc'y 60, 60 (2008); Jim Dwyer, *It's Not Just Drug Dealers Who Buy Prepaid Phones*, N.Y. Times, May 28, 2010, http://www.nytimes.com/2010/05/30/nyregion/30about.html ("Usually, a prepaid cellphone is a dead end for law enforcement."). Their use makes it difficult, if not impossible, for the police to determine that a tip has the reliability necessary to justify a *Terry* stop.

Third, even if the police use 911 technology to record the number from which an anonymous call originates and can later find out to whom the phone is registered, the caller is unlikely to realize that he is not anonymous at the time of the call. Unless the police inform him when he calls that they may later be able to find out who he is—a practice that would greatly discourage anonymous tipping—the caller will still behave as if he "has not placed his credibility at risk and can lie with impunity." *J.L.*, 529 U.S. at 273 (Kennedy, J., concurring). It is the tipster's belief in anonymity, not its reality, that will control his behavior.

Fourth, even if the would-be anonymous tipster realizes the police "have his number," he is unlikely to change his behavior unless he also believes that the police will pursue callers whose tips prove inaccurate, regularly find them, and be able to punish them for their behavior. In cases short of outrageous, willful pranks, however, none of these assumptions is likely true. No data indicate that police spend time and resources chasing tipsters for allegations of irregular driving that do not result in arrest. For one thing, such cases would be hard to

prosecute, for the state would have to prove that the tipster actually did not see what he reported, not just that the driver of the car he reported was blameless at some later point in time. And, as the North Carolina Supreme Court has noted in exactly this context, calling in a mistaken, even objectively false, tip is often not against the law:

> making a false statement to the police, standing alone, is not against an individual's penal interest because doing so is not a crime. To be charged with the crime of making a false report to law enforcement agencies or officers, the evidence must show that the person willfully made a false or misleading statement to a law enforcement agency or officer *for the purpose of interfering with the law enforcement agency or hindering or obstructing the officer in the performance of his duties*. N.C.G.S. § 14–225 (1994).

State v. *Hughes*, 539 S.E.2d 625, 629 (N.C. 2000).

To make matters worse, anonymous tipsters can easily disguise their numbers as someone's else's. As described by the FCC, "[u]sing a practice known as * * * 'spoofing,' callers can deliberately falsify the telephone number and/or name relayed as * * * Caller ID information to disguise the identity of the calling party." FCC, *Caller ID and Spoofing*, http://www.fcc.gov/guides/caller-id-and-spoofing (last visited Nov. 13, 2013). Such calls are a serious source of fraud. *Ibid*. They have also enabled the dangerous practice of "swatting." As the FBI describes it:

> The distraught-sounding man told the 9-1-1 operator he shot a family member and might

> kill others in the house. A SWAT team was urgently dispatched to the address corresponding to the caller's phone number. But when the tactical team arrived, ready for a possible violent encounter, they found only a surprised family panicked by the officers at their door.
>
> It's called "swatting"—making a hoax call to 9-1-1 to draw a response from law enforcement, usually a SWAT team. The individuals who engage in this activity use technology to make it appear that the emergency call is coming from the victim's phone. Sometimes swatting is done for revenge, sometimes as a prank. Either way, it is a serious crime, and one that has potentially dangerous consequences.

F.B.I., *The Crime of 'Swatting': Fake 9-1-1 Calls Have Real Consequences* (Sept. 3, 2013), http://www.fbi.gov/news/stories/2013/september/the-crime-of-swatting-fake-9-1-1-calls-have-real-consequences. As swatting shows, a 911 tipster can not only easily keep his phone number from the police but, in fact, also easily fool them into identifying him as someone else entirely, whom they might reasonably find, under the circumstances, inherently credible.[2]

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[2] The practice is quite widespread. Pranksters have swatted Tom Cruise, Kim Kardashian, Ryan Seacrest, Miley Cyrus, Magic Johnson, Clint Eastwood, Justin Timberlake, Selena Gomez, Russell Brand, and Rihanna, among others, Adrianne Jeffries, *Meet 'swatting,' the dangerous prank that could get someone killed*, The Verge (Apr. 23, 2013, 10:00 AM) http://www.theverge.com/2013/4/23/4253014/swatting-911-

II. This Court Should Not Adopt An Irregular Driving Exception To The Fourth Amendment

A. Empirical Evidence And Practical Concerns Militate Strongly Against Such An Exception

In *J.L.*, this Court declined the government's invitation to create "a 'firearm exception'" to "standard *Terry* analysis." 529 U.S. at 272. It acknowledged that "[f]irearms are dangerous, and extraordinary dangers sometimes justify unusual precautions." *Ibid.* It found, however, that "*Terry*'s rule, which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standards of probable cause, responds to this very concern." *Ibid.* In other words, *Terry*'s calculus, which looks to the "totality of the circumstances," *White*, 496 U.S. at 328, to test a tip's reliability, contained sufficient flexibility to accommodate any valid governmental interests.

This Court recognized, moreover, that "an automatic * * * exception would rove too far." *J.L.*, 529 U.S. at 272. No one, it noted, "could * * *

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prank-wont-stop-hackers-celebrities; *Paris Hilton Swatted Again*, TMZ (May 19, 2013, 5:00 AM), http://www.tmz.com/2013/05/19/paris-hilton-repeat-swatting-victim/, the last four all in a single week, *ibid.* And Paris Hilton has been swatted at least twice. *Ibid.* Nor are celebrities the only targets. People have used swatting to punish investigative journalists, Adrianne Jeffries, The Verge, *supra*, and politicians, including those who have proposed laws against swatting, Catherine Saillant, *L.A. City Council Strikes Back Against 'Swatting' Pranks*, L. A. Times, Nov. 2, 2013, http://www.latimes.com/local/la-me-1103-swatting-calls-20131103,0,2147628.story#axzz2kBehTQrs.

securely confine such an exception to firearms," *ibid*., and it predicted that allowing "*Terry* [stops] on the basis of bare-boned tips about guns" would lead to stops "based on bare-boned tips about narcotics," *id*. at 273. "'[T]he reasons for creating an exception in one category [of Fourth Amendment cases],'" it feared, "'can, relatively easily, be applied to others,' thus allowing the exception to swallow the rule." *Ibid*. (quoting *Richards* v. *Wisconsin*, 520 U.S. 385, 393-394 (1997)) (second emendation in original).

Petitioners demonstrate why it would be equally dangerous to create an automatic "irregular driving" exception to the Fourth Amendment and why there is no need to do so. As they argue, the factors some lower courts have seized upon to justify such an automatic exception, including the size of the risk, such tips' degree of reliability, the relative difficulty of corroboration, and the relative intrusiveness of an automobile stop, actually cut against, not in favor of, overriding the Fourth Amendment. Pet. Br. 30-38. Several other reasons point powerfully to this same conclusion.

For one thing, even when someone sees an act of irregular driving, the cause is likely not one that is illegal and continuing, that is, one for which police could make an arrest without witnessing unsafe driving themselves. In one of its studies, the National Highway Traffic Safety Administration ("NHTSA") reports examples of erratic driving with innocent explanations, including the following:

> The officer observed a vehicle weaving, weaving across lane lines, varying speed to as low as 38 mph in a 55 mph zone, and driving on the shoulder. He found that the vehicle's "check

> engine" light had come on, which startled the driver, who then dropped her purse on the floorboard and still attempted to drive while retrieving the spilled items.

Jack W. Stuster, NHTSA, *The Detection of DWI at BACs Below 0.10*, at 29-30 (Sept. 1997), *available at* http://isddc.dot.gov/OLPFiles/NHTSA/007372.pdf (*The Detection of DWI at BACs Below 0.10*). Other common possibilities include momentary inattention while adjusting the radio, justifiable distraction from a dangerous insect, swerving quickly to miss an animal running onto the road, and a flat tire or other car trouble.

Second, requiring the police to corroborate anonymous tips of irregular driving greatly improves such tips' reliability at little cost. NHTSA has found, for example, that with proper training police can use 24 visual cues to identify appropriate targets for drunken driving stops. See *The Detection of DWI at BACs Below 0.10*, at i, 30-31. Depending on the number of simple cues observed, varying from one to five or more, the percent of DWIs found in traffic stops ranged from 20 to 83 percent. See *id*. at 31 tbl. 10 (calculating second column, "Numbers of DWIs," for each "Number of Cues Observed" in first column as percentage of fourth column, "Number of All Cases"). There is good reason to believe that the untrained public does much worse. See *id*. at 9 tbl. 2 (finding that even experienced, but untrained, police could visually identify drunken driving only 34 percent of the time they conducted a *Terry* stop) (calculated by adding entries in column three, "Percent of Drivers Stopped," for BAC ranges above .08 percent, the standard legal threshold).

Such improvements in reliability come, moreover, at little cost. A NHTSA study has found that of all the states participating in a self-reported study, North Carolina, which requires police to corroborate anonymous tips before stopping a driver for suspected drunken driving, see *State* v. *Hughes*, 539 S.E.2d 625, 631 (N.C. 2000) (rejecting uncorroborated anonymous tip as unreliable because "the information provided did not contain the range of details required * * * to sufficiently predict defendant's specific future action"); *State* v. *Peele*, 675 S.E.2d 682, 687 (N.C. Ct. App. 2009) (rejecting as unreliable anonymous tip of possible impaired driving corroborated by police observation that the "defendant on a single occasion float[ed] to the dotted line and then float[ed] back to the fog line"), has the highest "percentage of calls resulting in arrest" at "51%-75%," NHTSA, Programs In Reporting Of Impaired Driving**,** tbl. 8. The same study indicates that the "[a]verage time between call and stoppage of vehicle" for North Carolina, only "15 minutes," is in the middle for all states self-reporting this statistic. *Ibid*. Requiring police corroboration, in other words, adds little time and increases the likelihood that those stopped deserve to be arrested.

In addition to these anecdotes, much research has shown that conditions other than inebriation can more commonly lead to irregular driving. Mothers Against Drunk Driving estimates, for example, that "about one out of every two thousand trips are taken by those who are driving under the influence of alcohol," MADD, *About Drunk Driving*, http://www.madd.org/drunk-driving/about/ (last visited Nov. 12, 2013), a rate of approximately .05 percent. By contrast, NHTSA estimated that in 2007

11 percent of drivers used cell phones while driving at any daylight moment. NHTSA, *Traffic Safety Facts Research Note: Driver Electronic Device Use in 2007* (2008), available at http://www.nsc.org/safety_road/Distracted_Driving/Documents/Driver%20Electronic%20Device%20Use%20in%202007.pdf. An estimated 45 percent of these used hands-free devices, *id*. at 5, the use of which is not illegal in any state, see Insurance Institute for Highway Safety, *Distracted Driving: Cellphone Use And Texting*, Nov. 2013, http://www.iihs.org/iihs/topics/laws/cellphonelaws?topicName=distracted-driving. The other 55 percent used hand-held phones, the use of which during driving only 12 states make illegal. *Ibid*. Both types of devices lead, moreover, to the same degree of driving impairment. See David L. Strayer et al., *A Comparison of the Cell Phone Driver and the Drunk Driver*, 48 Hum. Factors 381, 388 (2006); Suzanne P. McEvoy et al., *Role of Mobile Phones in Motor Vehicle Crashes Resulting in Hospital Attendance: A Case-Crossover Study*, 331 Brit. Med. J. 428, 428-430 (2005); Donald A. Redelmeier & Robert J. Tibshirani, *Association Between Cellular-Telephone Calls and Motor Vehicle Collisions*, 336 New Eng. J. Med. 453, 455 (1997).

Several studies show, moreover, that this large group of cell phone users is just as impaired while driving as those who are legally drunk. One performance study reports "that when driving conditions and time on task are controlled for, the impairments associated with using a cell phone while driving can be as profound as those associated with a blood alcohol level of 0.08%." Strayer, 48 Hum. Factors at 390. Another epidemiological study reports that the "relative risk [of being in a traffic

accident while using a cell phone] is similar to the hazard associated with driving with a blood alcohol level at the legal limit." Redelmeier & Tibshirani, 336 New. Eng. J. Med. at 456; see also Peter C. Burns et al., *How Dangerous is Driving with a Mobile Phone? Benchmarking the Impairment to Alcohol*, Transport Res. Libr. Rep. 547 (2002). One recent study even reports that one of the most common and most accepted of driver behaviors—talking to a passenger in the car—was slightly more cognitively distracting than using a hands-free cellphone while driving. David L. Strayer et al., AAA Foundation for Traffic Safety, *Measuring Cognitive Distraction in the Automobile* 28 (2013), https://www.aaafoundation.org/sites/default/files/MeasuringCognitiveDistractions.pdf.

B. An Irregular Driving Exception Would Increase The Risk Of Police Abuse

In addition to empowering malicious private individuals to harness the police to harass others whom they dislike, the police themselves can use anonymous tips to try to bring the full power of the law against those whom they want to punish. Even without the exception, such cases already appear to be unfortunately frequent. The following represent a sample drawn from the case law and public reports.

In one case, police received a phoned-in tip that the city's mayor was possibly driving while under the influence of alcohol. They stopped him and, although he passed a field sobriety test, the mayor felt he needed to have his attorney immediately drive him to the local hospital for a more authoritative blood-alcohol test at his own expense, which showed a blood alcohol level of .02 percent—75 percent below

the legal limit. See *Sheridan Mayor Passes DUI Test After Phoned-in Tip*, Billings Gazette, July 10, 2005, http://billingsgazette.com/news/state-and-regional/wyoming/sheridan-mayor-passes-dui-test-after-phoned-in-tip/article_4255521e-805f-57a3-9bfd-9b5774005621.html. After investigation, the city discovered that it was a police officer who had called in the anonymous tip, allegedly to smear the mayor, see *Sheridan Police Chief Recommends Firing Officers Who Pulled Over Mayor*, Billings Gazette, Oct. 23, 2005, http://billingsgazette.com/news/state-and-regional/wyoming/sheridan-police-chief-recommends-firing-officers-who-pulled-over-mayor/article_7d776364-ae49-51b9-9d9a-6261938c8293.html.

In another case, a police chief of a small town in North Carolina who was driving off-duty with his girlfriend saw a car parked outside a local bar that he recognized as belonging to someone convicted of a DWI years before. See *State* v. *Watkins*, 463 S.E.2d 802, 803 (N.C. Ct. App. 1995). The car's owner had already called his wife to tell her that he had had too much to drink and would not be coming home. *Ibid*. The police chief then went to his girlfriend's home to make a call to the bar to tell the car's owner "that there was an emergency" at his home and that "there was an ambulance at [his] house." *Id*. at 803. The chief "intended [both false statements] to cause the defendant ... to leave the [bar] and to get on the public road, so that he could be arrested for driving while impaired." *Ibid*. The police chief then instructed another police officer to call the sheriff's office and report the "suspicious vehicle." *Id*. at 804. When the dispatcher received this "anonymous tip," *ibid*., he sent an officer and the driver was arrested. Only when the police chief's "trickery," *ibid*., came to

light years later (through the testimony of his former girlfriend) was the defendant able to have his conviction reversed.

In another well-reported incident, a person on supervised release fell afoul of his former employer after sending a copy of the employer's indictment for wire fraud to the employer's girlfriend. *Bazzi* v. *City of Dearborn*, 658 F.3d 598, 601 (6th Cir. 2011). The former employer then enlisted a Dearborn police officer to call another officer on duty and tell him to listen to someone who would shortly call him. *Ibid*. The former employer then called the second officer ten times within one hour and, without identifying himself, told the officer that his former employee was driving a particular car at a particular location and was carrying guns and drugs. *Ibid*. He even reported that his cousin had seen the driver with a gun. *Ibid*. The second officer then pulled the former employee over on the basis of the anonymous tip, searched the car, and found nothing. *Ibid*. As a result of the stop, which another officer falsely wrote up as due to "suspicion of driving a stolen vehicle," *ibid*., the driver was wrongly arrested for violating the terms of his supervised release, *ibid*.

Recent revelations that law enforcement officers have been manufacturing tips in drug prosecutions in order to hide the real source of their information highlights this concern of law enforcement misuse. According to these reports, the Special Operations Division ("SOD") of the United States Drug Enforcement Administration ("DEA"), which receives National Security Agency and other intelligence agency intercepts, has directed law enforcement officers who will use the information to "[r]emember

that the utilization of SOD cannot be revealed or discussed in any investigative function." See John Shiffman & Kristina Cooke, *U.S. Directs Agents to Cover Up Program Used to Investigate Americans*, Reuters, Aug. 5, 2013, http://www.reuters.com/article/2013/08/05/us-dea-sod-idUSBRE97409R20130805. Law enforcement agents are told "to omit the SOD's involvement from investigative reports, affidavits, discussions with prosecutors and courtroom testimony" and to then use "normal investigative techniques to recreate the information provided by SOD." *Ibid*. As one former DEA agent described the practice: "It's just like laundering money—you work it backwards to make it clean." *Ibid*.

One easy way of doing so is for the agent to manufacture a tip—presumably an anonymous one in order to avoid discovery. "One current federal prosecutor [recounted] how agents were using SOD tips after a drug agent misled him":

> In a Florida drug case he was handling, the prosecutor said, a DEA agent told him the investigation of a U.S. citizen began with a tip from an informant. When the prosecutor pressed for more information, he said, a DEA supervisor intervened and revealed that the tip had actually come through the SOD and from an NSA intercept.
>
> "I was pissed," the prosecutor said. "Lying about where the information came from is a bad start if you're trying to comply with the law because it can lead to all kinds of problems with discovery and candor to the court." The prosecutor never filed charges in the case because he lost confidence in the investigation, he said.

Shiffman & Cooke at 1. As these examples show, allowing police to justify a stop and seizure on the basis of a non-corroborated anonymous tip may in some cases prove too tempting. If only to uphold the integrity of the law enforcement process, this Court should decline to create an "automobile exception" to the Fourth Amendment.

CONCLUSION

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

Respectfully submitted.

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