No. _____

In The
Supreme Court of the United States

LAWRENCE BLESSINGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States v. Hensley*, 469 U.S. 221, 228–29 (1985), the Court held that investigatory stops for completed felonies are permitted under the Fourth Amendment based on "reasonable suspicion." The Court explicitly reserved on "whether *Terry* stops to investigate all past crimes, however serious, are permitted." *Id.* at 229 (referring to *Terry v. Ohio*, 392 U.S. 1 (1968)).

Petitioner was detained by a police officer investigating a littering offense—"dumping" yard clippings on vacant, heavily-wooded, private property—a misdemeanor under Florida law. The Eleventh Circuit upheld the *Terry* stop, placing it in conflict with decisions from other circuits. *Compare, e.g.*, *United States v. Roberts*, 986 F.2d 1026, 1030 (6th Cir. 1993) ("[P]olice may stop a person to investigate . . . 'a completed felony,' but not . . . a completed misdemeanor.") (quoting *Hensley*, 469 U.S. at 229), *with United States v. Grigg*, 498 F.3d 1070, 1081 (9th Cir. 2007) ("We adopt the rule that a reviewing court must consider the nature of the misdemeanor offense in question . . . when balancing the privacy interests at stake against the efficacy of a *Terry* stop."). Thus, the question presented is:

> Whether the Fourth Amendment permits police to detain a suspect under *Terry v. Ohio* to investigate a completed misdemeanor.

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OPINION BELOW

The opinion of the Eleventh Circuit, *United States v. Blessinger*, No. 17-12805, available at 752 F. App'x 765 (11th Cir. Oct. 2, 2018), is not reported in the Federal Reporter and is attached as App. 1–12.

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its decision on October 2, 2018, and denied rehearing on January 15, 2019. App. 33–34. Justice Thomas granted the Application to extend the time to file a petition for a writ of certiorari until June 14, 2019. No. 18A1021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND OTHER PROVISIONS

U.S. Const. amend. 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

Petitioner Lawrence Blessinger entered a conditional plea of guilty to two counts of bringing an alien to the United States at a location other than a designated point of entry, in violation of 8 U.S.C. § 1324(a)(2)(B)(iii). Petitioner preserved his right to appeal from the district court's denial of his motion to suppress evidence derived from a traffic stop. The district court sentenced petitioner to one year and one day of imprisonment, to be followed by three years of supervised release.

The traffic stop at issue was effectuated by a local police officer, who stopped Blessinger to investigate him for violating the "Florida Litter Law." Fla. Stat. § 403.413(4)(c). During the traffic stop, the officer observed a female passenger in the vehicle. The officer's further investigation, emanating from the traffic stop, revealed that the female passenger was an undocumented alien whom petitioner had smuggled into the United States. The police encounter was captured on videotape by a police dash camera.

Petitioner was originally prosecuted in Florida state court for the littering offense, but the state court granted petitioner's motion to suppress, concluding that the officer lacked the requisite reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1 (1968). *See* App. 23–24.

Upon dismissal of the state court charges, federal prosecutors filed alien-smuggling charges, and petitioner once again moved to suppress the fruits of the traffic stop. A U.S. Magistrate Judge conducted an

evidentiary hearing and issued a Report and Recommendation, App. 15–32, which the district court adopted, App. 13–14, denying the motion to suppress.

On appeal following the entry of his conditional guilty plea, the Eleventh Circuit affirmed. It described the relevant facts as follows:

> On December 5, 2014, Sergeant Joel Slough of the Monroe County Sherriff's [sic] Office was driving on Coco Plum Drive in Marathon, Florida, in the Florida Keys. . . . A number of short, dead-end roads connect to Coco Plum Drive, including Pescayo Avenue. Other than three vacation rental homes near the end of the street, no other properties are located on Pescayo Avenue.
>
> As he was driving by Pescayo Avenue, Sergeant Slough saw a black truck parked at the far end of street, past the rental houses. He patrolled the area every day, but rarely saw any vehicles parked on Pescayo Avenue. Sergeant Slough suspected the truck might be illegally dumping trash or other debris. He turned his vehicle around and pulled onto Pescayo Avenue.
>
> At that point the black truck was traveling up Pescayo Avenue toward Coco Plum Drive. As he passed the truck, Sergeant Slough saw the driver of the truck—Blessinger—[wave] to him. Once Sergeant Slough passed the truck, he drove until he was 100 to 150 feet from the end of Pescayo Avenue. From there he saw a six-foot tall pile "of green

> vegetation where the truck [had been] parked and it was surrounded by brown or dehydrated vegetation." Sergeant Slough suspected the vegetation was recently cut yard clippings. The pile was on land Sergeant Slough believed was private property.
>
> Sergeant Slough turned his car around and followed the black truck. He activated his lights and caught up to the truck at the intersection of Coco Plum Drive and US-1. . . . The truck pulled over.

App. 2–3.

Because the yard clippings were placed in a spot on private property where the property owner was authorized to leave such trimmings, and because the officer had no information regarding whether petitioner was the property owner or was authorized by the owner to place such trimmings on the property, petitioner argued on appeal that the officer did not know whether or when *any* offense had been committed, or by whom. Pet. C.A. Br. at 8 (citing Fla. Stat. § 403.413(4)(c) ("[I]t is unlawful for any person to dump litter . . . on any private property, *unless* prior consent of the owner has been given and *unless* the dumping of such litter by such person will not cause a public nuisance. . . .") (emphasis added)); *see also* App. 10–11. Moreover, the amount of tree trimmings the officer thought he observed weighed only "a hundred [pounds] or so," well within the 500-pound threshold for a littering misdemeanor, not a felony. Suppression Hearing Exhibit 10

(Dash Cam Video) at 24:57-25:10; *see* Fla. Stat. § 403.413(6).[1] Thus, petitioner argued:

> [T]he district court failed to appropriately "balance the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." *United States v. Hensley*, 469 U.S. 221, 228 (1985). The reasonableness analysis must include considering that the warrantless seizure of Mr. Blessinger was based on Sgt. Slough's suspicion of the *completed* (not ongoing) *innocuous* (not dangerous) *misdemeanor* (not felony) of *littering on private property* (which is legal with the consent of the owner).

Pet. C.A. Br. at 37–38 (emphasis in original).

Upholding petitioner's detention under *Terry*, the Eleventh Circuit first concluded that reasonable suspicion of an illegal dumping of yard clippings existed because the officer found it "unusual" to see a vehicle on the dead-end street where the potential litter was seen, illegal dumping had allegedly occurred in a nearby location about a mile away in the preceding weeks, and the vehicle petitioner was driving was

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[1] Only after conducting a further investigation following the traffic stop—which yielded, among other things, a confession by the passenger in petitioner's truck linking him to additional piles of yard waste—did the officer develop evidence sufficient to formally arrest petitioner for felony littering. Exhibit 10 at 54:10-56:52 (Sgt. Slough explaining to other officers that, after further investigation, "now that we got [petitioner] in his truck for all three loads [of tree trimmings,] it's over the felony amount").

capable of carrying the amount of yard clippings that the officer observed when he drove to the end of Pescayo Avenue. App. 11. The court of appeals then concluded that *Terry* was applicable to the stop of petitioner, which was premised on the officer's initial suspicion of a completed misdemeanor, holding that a reasonable suspicion that "'the person has committed or is about to commit a crime'" satisfies the *Terry* exception to the probable cause standard. App. 9 (quoting *United States v. Espinosa-Garcia*, 805 F.2d 1502, 1506 (11th Cir. 1986)).[2]

In reaching this conclusion on the scope of the *Terry* stop rule, the court of appeals diverged from the decisions of other circuits which either exclude completed misdemeanors from the *Terry* exception or apply *Terry* to such offenses only where they present significant public safety or similar risks. On that basis, petitioner sought rehearing and rehearing *en banc*, which was denied. App. 32–33.

[2] Because the decision in petitioner's case purports to be a direct application of the published decision in *Espinosa-Garcia*, it will likely be treated by law enforcement officers as controlling law in the Circuit.

REASONS FOR GRANTING THE WRIT

The Court Should Decide Whether The Fourth Amendment Permits Police To Detain A Suspect Under *Terry v. Ohio* To Investigate A Completed Misdemeanor.

In *United States v. Hensley*, 469 U.S. 221, 228–29 (1985), this Court held that investigatory stops for completed felonies are permitted under the Fourth Amendment provided that the officer had "reasonable suspicion, grounded in specific and articulable facts," that the person stopped was involved in, or wanted in connection with, such an offense.

> [L]aw enforcement agents may briefly stop a moving automobile to investigate a reasonable suspicion that its occupants are involved in criminal activity. Although stopping a car and detaining its occupants constitute a seizure within the meaning of the Fourth Amendment, the governmental interest in investigating an officer's reasonable suspicion, based on specific and articulable facts, may outweigh the Fourth Amendment interest of the driver and passengers in remaining secure from the intrusion.

Hensley, 469 U.S. at 226. By its own terms, the Court's holding in *Hensley* did not address the permissibility of *Terry* stops to investigate completed misdemeanors:

> We need not and do not decide today whether *Terry* stops to investigate all past crimes, however serious, are permitted. It is enough to say that, if police have a reasonable suspicion,

> grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion.

Id. at 229.

A. The Circuits Are Divided Over Whether Police Can Effect A *Terry* Stop To Investigate A Completed Misdemeanor.

In the half century since the Court adopted the rule of *Terry*, 392 U.S. 1, federal and state courts have reached differing conclusions on the application of the rule to completed petty or misdemeanor offenses investigated by police. Kletter, *Permissibility Under Fourth Amendment of Terry Stop to Investigate Completed Misdemeanor*, 78 A.L.R.6th 599 (2012) ("Whether *Terry* stops are justified in cases involving completed misdemeanor offenses is a question that has been left open by the U.S. Supreme Court and has been answered inconsistently by federal circuit and state courts.").

Following *Hensley*, and with the Eleventh Circuit's decision in petitioner's case, a three-way federal circuit split has developed as to *Terry* stops for completed misdemeanors. Only the Eleventh Circuit has proceeded without making any distinction between misdemeanor and felony offenses. The Eleventh Circuit's decision directly conflicts with the law in the Sixth Circuit that "an investigative stop of a vehicle"

can never be justified based solely on "reasonable suspicion of . . . a mere completed misdemeanor." *Gaddis ex rel. Gaddis v. Redford Twp.*, 364 F.3d 763, 771 n.6 (6th Cir. 2004) ("Police may make an investigative stop of a vehicle when they have reasonable suspicion of an[y] ongoing . . . felony or misdemeanor" or "of a completed felony."); *United States v. Halliburton*, 966 F.2d 1454 (Table), 1992 WL 138433 at *4 (6th Cir. 1992) ("Officer Burris lacked grounds for a *Terry* stop of defendant because he lacked a reasonable and articulable suspicion that defendant was committing or was about to commit a crime or that defendant had committed a completed felony."); *United States v. Roberts*, 986 F.2d 1026, 1030 (6th Cir. 1993) ("[P]olice may stop a person to investigate if they 'have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony,' but not for a *completed* misdemeanor.") (quoting *Hensley*, 469 U.S. at 229); *United States v. Simpson*, 520 F.3d 531, 541 (6th Cir. 2008) (holding that the reasonable suspicion standard applies to *ongoing* misdemeanors, even if the probable cause standard applies to *completed* misdemeanors); *United States v. Blair*, 524 F.3d 740, 748 (6th Cir. 2008) ("This circuit has developed two separate tests to determine the constitutional validity of vehicle stops: an officer must have probable cause to make a stop for a civil infraction, and reasonable suspicion of an ongoing crime to make a stop for a criminal violation."); *United States v. Hughes*, 606 F.3d 311, 316 n.8 (6th Cir. 2010) ("Here, the government raises only either civil infractions or misdemeanors that were

clearly *completed* by the time Atnip actually stopped Hughes. In other words, in order for the stop to have been proper in this case, Atnip needed to have probable cause rather than reasonable suspicion that Hughes had violated Nashville Ordinances."); *see also United States v. Jones*, No. 5:17-CR-00039-TBR, 2018 WL 5796149 at *4 (W.D. Ky. Nov. 5, 2018) ("*Halliburton*, in conjunction with the dictum from *Roberts* and *Gaddis*, is enough to convince the Court that the Sixth Circuit is more likely to find an investigative stop based on a completed misdemeanor unreasonable under the Fourth Amendment. Thus, so must this Court."); *Blaisdell v. Comm'r of Pub. Safety*, 375 N.W.2d 880, 884 (Minn. Ct. App. 1985), *aff'd on other grounds*, 381 N.W.2d 849 (Minn. 1986) ("We therefore hold that vehicle stops to investigate completed misdemeanors violate the fourth amendment of the United States Constitution.").

The Eighth, Ninth, and Tenth Circuits have declined to follow the Sixth Circuit's bright-line rule prohibiting *Terry* stops for completed misdemeanors. But, contrary to the Eleventh Circuit, those courts do not categorically permit *Terry* stops for completed misdemeanors, holding instead that completed misdemeanors may justify an investigatory stop only when the government's interest in the stop outweighs the intrusion on individual freedom. *United States v. Grigg*, 498 F.3d 1070, 1081 (9th Cir. 2007) ("Despite the misdemeanor-felony distinction, and the fact that some courts have relied on this distinction to limit *Hensley*, we decline to adopt a *per se* standard that police may

not conduct a *Terry* stop to investigate a person in connection with a past completed misdemeanor simply because of the formal classification of the offense. We think it depends on the nature of the misdemeanor."); *United States v. Moran*, 503 F.3d 1135, 1141, 1143 (10th Cir. 2007) ("We note that this is a matter of first impression in our Circuit and that the Sixth and Ninth Circuits have split on the issue. . . . We do not suggest that all investigatory stops based on completed misdemeanors are reasonable or even that any stop based on a completed criminal trespass is per se reasonable."); *United States v. Hughes*, 517 F.3d 1013, 1017 (8th Cir. 2008) ("Like the Ninth and Tenth Circuits, this court declines to adopt a *per se* rule that police may never stop an individual to investigate a completed misdemeanor. To determine whether a stop is constitutional, this court must balance the 'nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion.' ") (quoting *Hensley*, 469 U.S. at 228).

Other courts have acknowledged the conflict without having to resolve the issue:

> There is a question whether the government is right that the police would have been justified under the Fourth Amendment in seizing Fields on the basis of reasonable suspicion that he had committed that trespassing offense, given that it was a completed non-felony offense. *Compare Gaddis v. Redford Township*, 364 F.3d 763, 771 n.6 (6th Cir. 2004) ("Police . . . may make a stop when they have reasonable suspicion of a completed felony, though

> not of a mere completed misdemeanor [or lesser infraction]."), *with United States v. Moran*, 503 F.3d 1135, 1141 (10th Cir. 2007) (noting the circuit split on whether reasonable suspicion of a completed non-felony offense can justify a *Terry* stop under the Fourth Amendment and declining to adopt the Sixth Circuit's *per se* rule). But we need not decide that question. And that is because we affirm the District Court's conclusion that no show of authority—and thus no seizure—had occurred as of the time that the four backup officers arrived on the scene.

United States v. Fields, 823 F.3d 20, 26 (1st Cir. 2016); *United States v. Haynesworth*, 879 F. Supp. 2d 305, 311–12 (E.D.N.Y. 2012) ("[W]hile certain appellate courts have stated an investigatory stop is permissible where law enforcement has 'reasonable suspicion of a completed felony, though not of a mere completed misdemeanor,' neither the United States Supreme Court nor the Second Circuit has imposed a bright line test for when a *Terry* Stop to investigate a completed crime is forbidden."), *aff'd*, 568 F. App'x 57 (2d Cir. 2014);[3] *see*

[3] The district court in *Haynesworth* sustained the *Terry* stop after conducting a balancing of interests:

> [T]his Court notes the Government has a strong interest in solving crimes and bringing offenders to justice. Larceny can pose a threat to public safety because the crime involves an inherent risk of confrontation. The fact that none occurred here is irrelevant. The investigatory stop in this case would have been a *de minimus* intrusion on Defendant's personal security were it not for the illegal handgun tucked in his waistband.

Haynesworth, 879 F. Supp. 2d at 312.

also Commonwealth v. Easterling, No. 2017-CA-001786-MR, 2018 WL 6015931, at *2–3 (Ky. Ct. App. Nov. 16, 2018) ("It is a conflict we do not need to resolve in this opinion because the Commonwealth analyzes this case as if it involved an ongoing crime."); *People v. Brown*, 353 P.3d 305, 317 (Cal. 2015) ("We need not decide . . . what circumstances, if any, the holding in *Hensley* extends to misdemeanor offenses.").

B. This Case Presents An Excellent Vehicle To Resolve The Circuit Split Over An Important Question.

The facts are simple. The question presented is straightforward. The outcome of the case is important to our citizenry and law enforcement, given the ubiquity of minor offenses (and litter itself) that, according to the Eleventh Circuit, can justify detention on less than probable cause.

In the Sixth, Eighth, Ninth, and Tenth Circuits, the government could not have justified the stop of petitioner based on reasonable suspicion of a completed, misdemeanor littering offense. *E.g.*, *Grigg*, 498 F.3d at 1081 ("We adopt the rule that a reviewing court must consider the nature of the misdemeanor offense in question, with particular attention to the potential for ongoing or repeated danger (*e.g.*, drunken and/or reckless driving), and any risk of escalation (*e.g.*, disorderly conduct, assault, domestic violence). An assessment of the 'public safety' factor should be considered within the totality of the circumstances, when balancing the

privacy interests at stake against the efficacy of a *Terry* stop, along with the possibility that the police may have alternative means to identify the suspect or achieve the investigative purpose of the stop."). It is difficult to hypothesize a less harrowing criminal offense, more divorced from the original justification for *Terry* stops, i.e., officer or public safety, than the disposal of tree trimmings on heavily-wooded, vacant, land at the end of a cul-de-sac, in broad daylight.

Contrast that to *Terry*, where the officer on that beat was investigating men who appeared to be casing a business for a robbery; the officer was concerned that they might be armed and dangerous. *Terry*, 392 U.S. at 28 ("The actions of Terry and Chilton were consistent with [Officer] McFadden's hypothesis that these men were contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons—and nothing in their conduct from the time he first noticed them until the time he confronted them and identified himself as a police officer gave him sufficient reason to negate that hypothesis.").

If leaving the scene of (what an officer suspects to be) litter is sufficient to authorize a *Terry* stop, then "a very large category of presumably innocent [citizens] would be subject to virtually random seizures." *Reid v. Georgia*, 448 U.S. 438, 441 (1980).[4]

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[4] The Florida Litter Law, after all, encompasses any and all "garbage; rubbish; trash; refuse; can; bottle; box; container; paper; tobacco product. . . ." Fla. Stat. § 403.413.

As this Court cautioned in *Hensley*:

> The proper way to identify the limits is to apply the same test already used to identify the proper bounds of intrusions that further investigations of imminent or ongoing crimes. That test, which is grounded in the standard of reasonableness embodied in the Fourth Amendment, balances the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion.

469 U.S. at 228; *see also Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984) ("[A]n important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made."); *see also id*. at 751 (" 'When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by *pointing to some real immediate and serious consequences* if he postponed action to get a warrant.' ") (quoting *McDonald v. United States*, 335 U.S. 451, 459–60 (1948) (Jackson, J., concurring)) (emphasis added).

The protections of the Fourth Amendment are fundamental to ordered liberty:

> Few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures. The Framers made that right explicit in the Bill of Rights following their experience with the indignities and invasions of privacy wrought by "general warrants and warrantless searches that had so

> alienated the colonists and had helped speed the movement for independence."

Byrd v. United States, 138 S.Ct. 1518, 1526 (2018) (quoting *Chimel v. California*, 395 U.S. 752, 761 (1969)). Clarity and uniformity in the application of such privacy and property protections are of paramount importance.

Courts across the country remain divided over whether police may conduct *Terry* stops to investigate a completed misdemeanor. *See generally* Kletter, *Permissibility Under Fourth Amendment of Terry Stop to Investigate Completed Misdemeanor*, 78 A.L.R.6th 599 (2012) (collecting cases). This case is the appropriate vehicle to resolve that question.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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