No. 18-1554

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

BRIEF OF *AMICUS CURIAE* FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS—MIAMI CHAPTER IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*

Pursuant to Federal Circuit Rule 29(a), the Florida Association of Criminal Defense Lawyers—Miami Chapter respectfully submits this brief in support of the Petitioner.[1]

Founded in 1963, the Miami Chapter of the Florida Association of Criminal Defense Lawyers (FACDL-Miami) is one of the largest bar associations in Miami-Dade County. The 450-plus attorneys in the Miami Chapter include private practitioners and public defenders who are committed to preserving fairness in the state and federal criminal justice systems and defending the rights of individuals guaranteed by the Florida and United States Constitution.

SUMMARY OF THE ARGUMENT

This Court should grant certiorari to address whether the Fourth Amendment should prevent officers from performing a *Terry* stop to investigate completed misdemeanors. The purpose of a *Terry* stop is to enable officers to prevent crime that is afoot. *Terry v.*

[1] All parties have consented to the filing of this brief under Rule 37(2)(a) of the Supreme Court Rules. Pursuant to Supreme Court Rule 37(2)(a), *amicus* affirms that all parties received notice of intent to file this *amicus curiae* brief earlier than ten (10) days before the due date, and pursuant to Supreme Court Rule 37(6) no counsel for any party authored this brief in whole or in part, and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

Ohio, 392 U.S. 1, 30 (1968). This rule was extended to completed felonies for reasons of public safety as felonies are serious and often violent crimes. *See United States v. Hensley*, 469 U.S. 221, 229 (1985). However, *Terry* should not be extended to *completed* misdemeanors. Such an extension contradicts the original purpose of *Terry* to prevent *ongoing* crimes. Unlike felonies, misdemeanors are low-level offenses that involve substantially less risk to public safety. There is no compelling public interest that justifies detaining an individual to investigate a misdemeanor that the officer did not witness.

Additionally, allowing officers to detain individuals to investigate completed misdemeanors would invite virtually limitless investigative detentions. This will only serve to compound the burgeoning problems of overcriminalization and foster distrust of law enforcement. Throughout the United States, there are incalculable numbers of behaviors that qualify as misdemeanors. Most of these misdemeanors are innocuous, *e.g.*, jaywalking, fishing without a license, or dyeing a poodle's fur pink.[2] Allowing investigations based only on reasonable suspicion that such innocuous activity was completed outside the officer's presence creates the potential for abuse.

[2] *See, e.g.*, Ohio Rev. Code Ann. § 4511.48 (jaywalking); Fla. Stat. § 379.401 (unlawful fishing); Fla. Stat. § 828.1615(4) (making dyeing or artificially coloring animals a misdemeanor).

ARGUMENT

Police officers have often commented that "you can beat the rap, but you can't beat the ride."[3] Detention by law enforcement officials impacts citizens before they are even tried. This is true even if charges are eventually dropped. "While it is true that any one stop is a limited intrusion in duration and deprivation of liberty, each stop is also a demeaning and humiliating experience. No one should live in fear of being stopped whenever he leaves his home to go about the activities of daily life." *Floyd v. City of New York*, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013).

In *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001), the petitioner drove her truck with her two young children in the front seat. None of them was wearing a seatbelt. *Id.* at 324. A police officer "*observed the seatbelt violations*, pulled [the petitioner] over, verbally berated her, handcuffed her, placed her in his squad car, and drove her to the local police station, where she was made to remove her shoes, jewelry, and eyeglasses, and empty her pockets." *Id.* at 319 (emphasis added). The petitioner in *Atwater* was then booked, placed in a jail cell, and brought before a magistrate judge. *Id.*

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[3] *See Sorenson v. Ferrie*, 134 F.3d 325, 328 n. 5 (5th Cir. 1998) ("At oral argument, the officers' counsel conceded his familiarity with the saying, 'You can beat the rap, but you can't beat the ride,' but insisted that Sorenson's night in jail was not the result of a personal grudge.").

A majority of the Court in *Atwater* recognized that "the physical incident of arrest [in that case was] a gratuitous humiliation imposed by a police officer who was (at best) exercising extremely poor judgment." *Id.* at 346–47. Nevertheless, this Court held that police officers could arrest individuals without a warrant if the officer had probable cause to believe that the individual committed or was about to commit a non-jailable misdemeanor *in the officer's presence*. *Id.* at 354. The *Atwater* decision did not address the Fourth Amendment implications of a warrantless arrest for a *completed* misdemeanor. *See id.* at 341 n. 11.

Justice O'Connor's dissent, joined by three other justices, explained why the majority's rule in *Atwater* was unreasonable under the Fourth Amendment. Justice O'Connor pointed out that the petitioner and her children felt the emotional and psychological effects of the petitioner's arrest long after the seatbelt fine was paid. *Id.* at 395. Because an interaction with law enforcement can have such an impact on an individual's life, Justice O'Connor urged that the reasonableness of the arrest "hinges on the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* at 365. The dissent analyzed the potential government interests served by permitting the officer to arrest the petitioner in *Atwater*. *Id.* In doing so, Justice O'Connor found that the legislature, by deciding that a fine, but not imprisonment, was the appropriate punishment for the offense, had determined that the state had only a "limited" interest in arresting a person who committed such an offense. *Id.* The dissent inferred

that warrantless arrests for low-level offenses do not serve any *significant* government interests and are often not worth the substantial invasion of an individual's personal privacy. *See id.* at 370. Moreover, the dissent warned that "a minor traffic infraction may often serve as an excuse for stopping and harassing an individual" and the majority's rule has contributed to that risk by extending "the arsenal available to any officer . . . to a full arrest and the searches permissible concomitant to that arrest." *Id.* at 371.

The Petitioner's case presents a parallel to the question reserved by this Court in *Atwater*: whether a *Terry* stop for a misdemeanor *not committed in an officer's presence* is permitted under the Fourth Amendment. *See Atwater*, 528 U.S. at 341 n. 11 ("We need not, and thus do not, speculate whether the Fourth Amendment entails an 'in the presence' requirement for purposes of misdemeanor arrests."). Should this Court adopt the Eleventh Circuit's position that the Fourth Amendment allows *Terry* stops for completed misdemeanors,[4] there will be another item in the "arsenal" available to officers looking for an excuse to stop an individual. *Id.* at 371 (O'Connor, J., dissenting). Instead, *Atwater* should be the limit. A "*per se* rule" allowing *Terry* stops for misdemeanors, ongoing or not, "has potentially serious consequences for the everyday lives of Americans." *Id.* Therefore, this Court should take this opportunity to proclaim that the Fourth Amendment protects individuals suspected of a completed

[4] *United States v. Blessinger*, 752 F. App'x 765, 770 (11th Cir. 2018).

misdemeanor from warrantless detentions by law enforcement.

A. A majority of the states have recognized a distinction between ongoing and completed misdemeanors.

By our count, twenty-seven (27) of the states and the District of Columbia have enacted statutes prohibiting warrantless arrests for misdemeanors not committed in the officer's presence.[5] This bolsters the Petitioner's and the Sixth Circuit's interpretation[6] of the Fourth Amendment for two reasons. First, this

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[5] *See, e.g.*, Ala. Code § 15-10-3(a) (**Alabama**); Alaska Stat. § 12.25.030(1) (**Alaska**); Ariz. Rev. Stat. Ann. § 13-3883(A)(2) (**Arizona**); Ark. Code Ann. § 16-81-106(b)(2)(A) (**Arkansas**); Cal. Penal Code § 836(a)(1) (**California**); Conn. Gen. Stat. Ann. § 54-1f(a) (**Connecticut**); Del. Code Ann. tit. 11, § 1904(a)(1) (**Delaware**); D.C. Code Ann. § 23-581(a)(1)(B) (**D.C.**); Fla. Stat. § 901.15 (**Florida**); Ga. Code Ann. § 17-4-20(a)(2)(A) (**Georgia**); Idaho Code § 19-603(1) (**Idaho**); Ind. Code § 35-33-1-1(a)(4) (**Indiana**); Ky. Rev. Stat. Ann. § 431.005(1)(d) (**Kentucky**); Md. Code Ann., Crim. Proc. § 2-202(a)-(c) (**Maryland**); Mich. Comp. Laws § 764.15(1)(a) (**Michigan**); Minn. Stat. § 629.34(c)(1) (**Minnesota**); Miss. Code Ann. § 99-3-7(1) (**Mississippi**); N.D. Cent. Code § 29-06-15(1)(a) (**North Dakota**); Ohio Rev. Code Ann. § 2935.03(A)(1) (**Ohio**); Okla. Stat. tit. 22, § 196(1) (**Oklahoma**); Pa. Stat. and Cons. Stat. Ann. § 6304(a) (**Pennsylvania**); S.C. Code Ann. § 17-13-30 (**South Carolina**); S.D. Codified Laws § 23A-3-2(1) (**South Dakota**); Tenn. Code Ann. § 40-7-103(a)(1) (**Tennessee**); Tex. Code Crim. Proc. Ann. art. 14.01(a)-(b) (**Texas**); Va. Code Ann. § 19.2-81(B) (**Virginia**); Wash. Rev. Code Ann. § 10.31.100 (**Washington**); and W. Va. Code Ann. § 8-14-3 (**West Virginia**).

[6] *See Gaddis v. Redford Twp.*, 364 F.3d 763, 771 (6th Cir. 2004).

widespread restriction of an officer's ability to arrest individuals for completed misdemeanors without a warrant evinces a general agreement on the limitations of police power in this area. Second, if the detention of an individual by an officer cannot result in that individual's arrest without a warrant, then the government interest served by allowing the officer to stop that individual in the first place is reduced.

The Ohio Supreme Court provided a particularly illustrative example of the justification for the distinction between ongoing and completed misdemeanors. *State v. Henderson*, 554 N.E.2d 104, 106 (Ohio 1990). The Ohio Supreme Court analyzed Ohio's prohibition on warrantless arrests for completed misdemeanors. *Id.* The highest court in Ohio noted that the power of an officer to arrest someone for a minor offense is primarily given to the officer so that he may "maintain the public peace." *Id.* That interest is furthered when an officer conducts a stop based on reasonable suspicion that a crime is about to happen, and the officer can make moves to prevent that crime.[7] *See id.*

[7] For example, in *Henderson* the officer observed the defendant intoxicated and then driving a vehicle. *Id.* The Ohio Supreme Court held that an officer could stop such an individual because the state interest in preventing drunk driving is significantly furthered by enabling an officer to stop an individual that the officer observed to be intoxicated. *Id.* However, that interest is mitigated when the offense is an accomplished fact that cannot be prevented. *Id.* at 107. The Ohio Court pointed to another case in which an officer did not have the authority to arrest the suspect because the officer was called to the scene to break up a fight, but when the officer arrived to the scene "the parties [to the fight] had gone and good order had been restored." *Id.* (quoting *State v. Lewis*, 33 N.E. 405, 406 (Ohio 1893)).

Consequently, warrantless arrests for completed misdemeanors, when balanced against an individual's privacy interest, do not advance the government's interest in crime control to a significant enough degree. *See id.* Therefore, even though the officer could arrest for an ongoing misdemeanor, the state of Ohio was justified in restricting police officers' power in the case of a completed misdemeanor. *See id.*; *compare with State v. Glover*, 422 P.3d 64, 66, 69 (Kan. 2018) (cert. granted April 1, 2019, No. 18-556) (analyzing whether a police officer could initiate a traffic stop to investigate the suspected, ongoing offense of driving with a revoked license).

Similar language can be found in the opinions of many other states' high courts highlighting this distinction, so important to the Sixth Circuit, between arrests for ongoing or imminent crimes versus arrests for completed misdemeanors. *See, e.g.*, *State v. Almanzar*, 316 P.3d 183, 186 (N.M. 2013) ("In order to lawfully arrest an individual for a misdemeanor [in New Mexico], a police officer must have a warrant, unless the misdemeanor was committed in the officer's presence."); *Telfare v. City of Huntsville*, 841 So. 2d 1222, 1229 (Ala. 2002); *Rubey v. City of Fairbanks*, 456 P.2d 470, 474 (Alaska 1969); *Lunn v. Commonwealth*, 477 Mass. 517, 530 (Mass. 2017); *Mahoney v. Commonwealth*, 489 S.W.3d 235, 238 (Ky. 2016); *Henry v. Commissioner of Public Safety*, 357 N.W.2d 121, 122 (Minn. Ct. App. 1984); and *Howard v. State*, 112 Md. App. 148, 158 (Ct. App. Md. 1996). *Cf. Calhoun v. Villa*, 761 F. App'x 297, 300 (5th Cir. 2019) (explaining that Texas police officers had the authority to make warrantless arrests

for jaywalking and standing on railroad tracks because the misdemeanor violations occurred within the officer's view).

These state statutes and opinions underscore a general determination of how a balancing of interests under the Fourth Amendment should go in cases of completed misdemeanors. The states have recognized that such a balancing of interests is different depending on whether the misdemeanor is ongoing or completed. When the misdemeanor is ongoing, the state interest is enough that it outweighs concerns for individual privacy. But the result is not the same in cases of completed misdemeanors: the valid state interest in preventing crime is not as high with completed misdemeanors, and so the scales tip back in favor of individual liberties and an arrest must be based on probable cause and supported by a warrant.

The fact that twenty-seven (27) states have decided that policing completed misdemeanors is so limited a state interest that warrantless arrests in this area should be prohibited bears on the analysis of whether *Terry* stops for completed misdemeanors should be prohibited as well. To be sure, a *Terry* stop is less intrusive than a full-blown arrest. But both are an invasion of an individual's liberty and freedom of movement. Whether an investigatory stop or a full-blown arrest, exigencies inherent in ongoing or imminent criminal activity and the government's interest in ferreting out crime are diminished when the crime is a past event; and any interest that exists is still

outweighed by an individual's right to privacy. *See also United States v. Grigg*, 498 F.3d 1070, 1080 (9th Cir. 2007) (quoting *Blaisdell v. Comm'r of Public Safety*, 375 N.W.2d 880, 881, 883–84 (Minn. Ct. App. 1985)) (explaining that the formal distinction between allowing arrests for completed felonies but prohibiting arrests for completed misdemeanors amounts to "'a legislative recognition that *the public concerns served by warrantless misdemeanor arrests are in some degree outweighed by concerns for personal security and liberty*'") (emphasis added). This Court has a duty to protect individual liberty from needless erosion. Accordingly, an interpretation of the Fourth Amendment that prevents officers from conducting *Terry* stops to investigate completed misdemeanors would more closely comport with many states' evaluation on this subject.

B. Failing to recognize the distinction between ongoing and completed misdemeanors in the context of *Terry* stops invites limitless investigative detentions and risks escalating tensions between police and citizens, particularly given the trend of overcriminalization.

There are so many activities that are categorized by statute as misdemeanors that, if this Court allows officers to conduct investigative detentions for completed misdemeanors, an officer could effectively conduct an investigative detention on any and every individual. According to the Florida Department of Law Enforcement's website, there are 3,136 misdemeanor crimes

currently on the books in Florida.[8] And that number continues to rise, a product of overcriminalization.[9]

Misdemeanors encompass a wide range of activities, including many of an innocuous nature. Some examples of activities that constitute misdemeanors include littering,[10] jaywalking,[11] unlawful fishing,[12]

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[8] Florida Department of Law Enforcement, https://web.fdle.state.fl.us/statutes/about.jsf (last visited July 12, 2019).

[9] Overcriminalization is the overuse and abuse of criminal law to address every societal problem and punish every mistake through the criminal court system. The exponential growth of activities that are criminalized restricts the freedom of the people to live their own lives. "As the criminal law expands, there is a concomitant diminution of liberty." Cato Institute, https://www.cato.org/cato-handbook-policymakers/cato-handbook-policy-makers-8th-edition-2017/overcriminalization. More crimes also means an increasing involvement of the citizenry in the criminal justice system, which carries with it lifelong consequences and inherent stigmatization. Law enforcement officers feel the negative effects from overcriminalization as well. *See* Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 Am. Crim. L. Q. 17, 28 (1968) ("Not only does the use of the criminal law, therefore, divert substantial law-enforcement resources away from genuinely threatening conduct, but the whole criminal-justice system is denigrated by the need to process massive numbers of pathetic and impoverished people through clumsy and inappropriate procedures.").

[10] *See, e.g.*, Ala. Code § 13A-7-29; Ark. Stat. Ann. § 8-6-404; Fla. Stat. § 403.413; Ga. Code § 16-7-43; Utah Code Ann. § 73-18A-2; Wyo. Stat. § 6-3-204; N.C. Gen. Stat. Ann. § 14-399; Neb. Rev. Stat. Ann. § 28-523.

[11] *See, e.g.*, Wash. Rev. Code Ann. § 9A.84.030; Ohio Rev. Code Ann. § 4511.48.

[12] *See, e.g.*, Wash. Rev. Code Ann. § 77.15.370; 18 U.S.C. § 41; Fla. Stat. § 379.401; N.C. Gen. Stat. Ann § 14-159.6; W. Va. Code Ann. § 20-2-5.

loitering,[13] trespassing,[14] using profanity over the phone,[15] intentional annoyance of others,[16] playing one's car stereo too loudly,[17] drinking a beer in public,[18] and—of course—dyeing an animal's fur.[19] These crimes are categorized as misdemeanors because they do not pose as great a risk to the public as felonies. Indeed, "[b]y classifying the commission of a crime as a misdemeanor, a legislature is pronouncing its belief that that crime is not terribly serious and that a person who commits that crime does not represent a significant threat to society." Rachel S. Weiss, *Defining the Contours of United States v. Hensley: Limiting the Use of Terry Stops for Completed Misdemeanors*, 94 Cornell L. Rev. 1321, 1344 (2009). And state legislatures across the country reinforce that view by affording alleged misdemeanants fewer procedural rights than those accused of more serious offenses.[20] Moreover, many

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[13] *See, e.g.*, 18 Pa. Stat. and Cons. Stat. Ann. § 5506; Fla. Stat. § 856.021(1); Ga. Code Ann. § 16-11-36.

[14] *See, e.g.*, Fla. Stat. § 810.08; Conn. Gen. Stat. Ann. § 53a-107.

[15] Va. Code Ann. § 18.2-427; Ariz. Rev. Stat. Ann. § 13-2916.

[16] Tex. Penal Code Ann. § 42.07.

[17] *See Grigg*, 498 F.3d at 1081.

[18] *See, e.g.*, D.C. Code Ann. § 25-1001; Ohio Rev. Code Ann. §§ 4301.62, 4301.99.

[19] *See* Fla. Stat. § 828.1615(4).

[20] *See, e.g.*, Minn. R. Crim. P. 26.01 (codifying that people who commit mere "petty misdemeanors" are not entitled to a jury trial); *see Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (holding that misdemeanant who was not subject to "actual imprisonment" upon conviction was not entitled to counsel); *United States v. Fridman Santisteban*, 127 F. Supp. 2d 1304, 1304 (D.P.R. 2000)

misdemeanors are considered so trivial or outdated that prosecutors decline to prosecute them. *See* Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313, 1330 (2012) ("In some jurisdictions, prosecutors decline to prosecute as many as half of all misdemeanor arrests.").

Despite many misdemeanors being of such innocuous nature, the Eleventh Circuit's rule invites *Terry* stops for the pettiest of past offenses. The Eleventh Circuit's decision makes it so that, without judicial (or even prosecutorial) oversight, police officers on the beat can detain an individual on suspicion of having committed a trivial misdemeanor. Because of the marginal interests at stake with completed misdemeanors, the significant intrusion into the personal autonomy and liberty of an individual implicated by *Terry* stops is unjustified and unreasonable. *Cf. Delaware v. Prouse*, 440 U.S. 648, 657 (1979) (explaining that stops by law enforcement "interfere with freedom of movement, are inconvenient . . . consume time . . . [and] may create substantial anxiety"). "Evaluation of a *Terry* stop in the context of a completed misdemeanor should tend to give primary weight to a suspect's interests in personal security, while considering the law enforcement's interest in the immediate detention of a suspect is not paramount." *Grigg*, 498 F.3d at 1080.

Under the Eleventh Circuit's view, a cop could arguably detain a citizen holding an empty beer bottle to

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(holding that the Speedy Trial Act does not apply to Class B misdemeanors because they are "petty offenses").

determine if he violated the drinking in public statute;[21] or the officer could conduct an investigative detention on an individual to determine whether earlier in the day that person was blasting his car stereo[22] or had failed to wear his seatbelt;[23] or the officer could stop someone with a pink poodle at the end of his leash to determine if he (who is perhaps a dog-walker, not the dog's owner) violated the statute prohibiting individuals from dyeing an animal's fur.[24]

In a country where pretextual stops and racial profiling should be of great concern, investigatory stops based on past misdemeanors could have negative consequences. Such stops could generate "resentment and distrust" of law enforcement,[25] especially in communities where tensions are already at a near boiling point. With 3,136 misdemeanors for a Florida cop on the beat to choose from, the purported reasons for detaining an individual are effectively limitless. Expanding a police officer's power under *Terry* to allow detentions for so many completed misdemeanors could

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[21] *See, e.g.*, D.C. Code Ann. § 25-1001; Ohio Rev. Code Ann. §§ 4301.62, 4301.99.

[22] *See Grigg*, 498 F.3d at 1080.

[23] *See Atwater*, 532 U.S. at 347.

[24] *See* Fla. Stat. § 828.1615(4).

[25] *See Floyd*, 959 F. Supp. 2d at 588–89 (explaining that during the height of New York's stop and frisk practice, "the climate in many of New York's minority neighborhoods . . . was one of resentment and distrust of the NYPD").

engrain that "resentment and distrust" for generations.

CONCLUSION

WHEREFORE, this Court should grant the Petitioner's request for review.

Respectfully submitted,

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