No.

IN THE

SUPREME COURT OF THE UNITED STATES

EDUARDO GOMEZ, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does suspected possession of a firearm, on its own, provide a police officer with reasonable suspicion of criminal activity to justify an investigatory seizure under the Fourth Amendment?

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The petitioner, Eduardo Gomez, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The decision of the Illinois Appellate Court (Appendix A) is reported at 2018 IL App (1st) 150605, 105 N.E.3d 901, and is published. A copy of order denying rehearing (Appendix B) is not reported. The order of the Illinois Supreme Court denying leave to appeal (Appendix C) is reported at 108 N.E.3d 868 (Ill. Sept. 26, 2018).

JURISDICTION

On April 3, 2018, the Appellate Court of Illinois issued its decision. A petition for rehearing was timely filed on April 24, 2018, and denied on May 3, 2018. A petition for leave to appeal was timely filed on June 6, 2018, and the Illinois Supreme Court denied the petition on September 26, 2018. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Second Amendment to the United States Constitution

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Fourth Amendment to the United States Constitution

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

Motion to Suppress

The testimony at the hearing on Eduardo Gomez's motion to suppress established that on July 3, 2014, at about 10:45 p.m., Eduardo and his friends, Frankie Baez and Enriquez Salvador ("Junior") were sitting in a parked car in a residential area in Chicago, Illinois, waiting for Frankie's baby's mother to join them. (R. F.4-5) Junior was in the driver's seat, Eduardo was in the rear driver's side seat, and Frankie was in the rear passenger's side seat. (R. F.5, 11)

Chicago Police Department Officer Anthony Amato testified that he and his two partners were driving around in an unmarked car that evening. (R. F.20) They had seen Junior's car driving around twice that night in a span of 30 to 40 minutes, so they decided to pull up next to it when they saw it parked in front of a residential building. (R. F.20, 22) Frankie testified that the officers came "out of nowhere." (R. F.5)

Amato began questioning Junior, the driver, asking him what he was doing there and where he lived. (R. F.33) Junior initially said that he lived down the street, but when Amato asked him for the exact address, he said, "[N]o, you know what, I don't live down the street. I live on the other side of Pulaski." (R. F.24)

During this brief conversation, Amato noticed Eduardo slouching down in his seat past the window to the point where he could only see Eduardo's head. (R. F.24) Amato found Eduardo's behavior to be "suspicious." (R. F.25) Amato said that, based on the conversation with the driver and Eduardo's slouching, the officers "exited [their] vehicle to, you know, speak with him more[.]" (R. F.25)

Amato noticed that Eduardo was leaning toward the middle portion of the car

with his forearm over his waistband and his right hand underneath his shirt. (R. F.26) He again found Eduardo's behavior to be "suspicious," so the officers ordered the friends to show their hands. (R. F.27) Eduardo first showed his left hand and then his right, while continuing to hold his forearm over his waistband. (R. F.27) Although Amato did not see a gun or a bulge in Eduardo's pants, he believed Eduardo "had a weapon on him," specifically a gun. (R. F.28, 42)

The officers ordered the friends out of the car. (R. F.28) Eduardo got out of the car with his forearm over his waistband and bent the top portion of his body over the trunk with his arms laid out. (R. F.29) Amato's partner grabbed Eduardo by his arms and stood him upright, at which point a handgun fell from Eduardo's waistband onto the ground. (R. F.29) Amato recovered the loaded gun and placed Eduardo under arrest. (R. F.30)

The State asserted in its argument at the suppression hearing that "[d]uring that conversation [with Junior] the officers develop[ed] reasonable articulable suspicion that some criminal activity is afoot. Specifically, that the defendant was armed because of bizarre behavior he exhibited in the back seat of that car." (R. F.45) The State further asserted that the officers' suspicion grew when Eduardo leaned over in the car with his right arm covering his waistband. (R. F.46) The State argued there was no Fourth Amendment violation, as the officers were justified in ordering the three friends out of the car based on Eduardo's behavior and the officers' experience. (R. F.46)

Defense counsel noted that the police saw Junior's car twice driving around and a third time lawfully parked on a residential street. (R. F.46) Counsel argued there was nothing about Eduardo's behavior that gave the officers a reasonable, articulable

suspicion of criminal activity; Eduardo was never aggressive, nor did he ever flash a gun. (R. F.48) Eduardo merely slouched in his seat. (R. F.48) The officers nevertheless ordered the friends out of the car, and a gun fell out of Eduardo's waistband during the unlawful detention, requiring suppression of the gun. (R. F.48)

The court denied the defense's motion to suppress. (R. F.50) The court found that during the "lawful" "field interview," Eduardo slouched below the window. (R. F.49) The officers then got out of their car, shone their flashlights on the friends, and asked to see their hands. (R. F.49) The court found that Eduardo did not show his hands in the same manner as the other two occupants; his hand and arm were positioned differently. (R. F.49) Then, when Eduardo got out of the car, he bent over and would not stand up. (R. F.49) The court found there was no search because the gun fell out when the officers stood Eduardo up. (R. F.49) The court found that this was a proper stop, the officers had probable cause, and there was no unlawful detention. (R. F.50) There was, thus, no Fourth Amendment violation. (R. F.49-50)

Trial

The parties stipulated to Amato's testimony from the suppression hearing. (R. F.53) The court then admitted the following stipulations: 1) Eduardo did not possess a valid Firearm Owner's Identification Card on the date of the offense; 2) Eduardo was on parole on the date of the offense; and 3) Eduardo had previously been convicted of robbery and aggravated robbery. (R. F.56-57) The court found Eduardo guilty of armed habitual criminal, aggravated unlawful use of a weapon, and unlawful use of a weapon by a felon. (R. F.59) The court then sentenced Eduardo to concurrent terms of seven years' imprisonment. (R. H.9; C.101)

Appellate Proceedings

On appeal before the First District Appellate Court in Illinois, Eduardo argued, *inter alia*, that the officers did not have the requisite reasonable suspicion of criminal activity to justify their seizure, as mere possession of a firearm was no longer a crime in Illinois, and there was no indication Eduardo was committing any other crime. *People v. Gomez*, 2018 IL App (1st) 150605, ¶ 29 n.3. In a published decision, the majority declined to consider Eduardo's argument, finding instead that the officers developed reasonable suspicion, based on Eduardo's behavior, that his suspected possession of a firearm was unlawful. *Id.*, ¶¶ 29-30. The dissenting justice did not opine on this issue, but determined that Eduardo was seized earlier than the majority concluded, and, in any event, the officers never developed reasonable suspicion to justify their seizure. *Id.*, ¶¶ 51, 55-60 (Hyman, J., dissenting).

Eduardo filed a petition for rehearing, which the appellate court denied. (Appendix B) Eduardo then filed a petition for leave to appeal in the Illinois Supreme Court, asking the court to decide: 1) whether suspicion of mere possession of a firearm justifies a Fourth Amendment seizure; 2) what constitutes a seizure of someone in a parked car; and 3) whether allegedly furtive movements, on their own, provide reasonable suspicion to justify a seizure. On September 26, 2018, the Illinois Supreme Court denied Eduardo's petition for leave to appeal. (Appendix C)

REASON FOR GRANTING CERTIORARI

This Court Should Grant Certiorari to Decide a Question of Significant National Importance With Which Federal and State Courts Are Struggling: When Does Suspected Mere Possession of a Firearm–a Lawful Act Guaranteed by the Second Amendment and Permitted to Some Extent by All States–Provide Reasonable Suspicion of Criminal Activity to Justify a Fourth Amendment Intrusion?

This case lies at the center of the Second and Fourth Amendments to the United States Constitution. Traditionally, courts viewed gun possession as criminal activity unto itself or at least associated with other criminal activity, such as drug trafficking. Since this Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010), which established an individual's right to bear arms, however, gun possession is no longer necessarily criminal activity; it is lawful, constitutionally protected conduct. In fact, every State now allows some form of gun possession in public.

Given the changes in the law regarding the legality of gun possession, both federal and state courts have struggled to figure out how these changes interact with well-established Fourth Amendment principles. Indeed, courts are divided on the question of whether a police officer has reasonable suspicion of criminal activity to justify a Fourth Amendment intrusion where she suspects an individual merely possesses a gun. Given the prevalence of gun ownership in the United States, and the countless police-citizen encounters that occur on a daily basis, resolution of this issue is of critical national importance. Gun owners and police officers alike need to know what the Fourth Amendment guarantees to those who choose to exercise their constitutional or statutory rights to possess a gun. For these reasons, this Court should grant certiorari in this case.

I. The changing nature of gun possession under the Fourth Amendment.

The Fourth Amendment protects individuals from unreasonable searches and seizures. U.S. Const. amends IV, XIV; *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968). To protect that right, this Court has established certain bedrock principles that govern police-citizen encounters. The police may briefly detain an individual if the officer has reasonable, articulable suspicion that criminal activity is afoot. *Terry*, 392 U.S. at 21-22. During a lawful *Terry* stop, officers may frisk an individual for weapons if there is reasonable, articulable suspicion that the individual is armed and dangerous. *Id.* at 24.

In establishing these standards, this Court commented that this type of seizure is not just a "petty indignity," but "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and [] is not to be undertaken lightly." *Id.* at 16-17 (internal quotation omitted). Indeed, these rules "apply to the innocent and guilty alike," and are in place "to protect[] innocent persons from being subjected to 'overbearing or harassing' police conduct . . . ." *United States v. Sokolow*, 490 U.S. 1, 11-12 (1989) (Marshall, J., dissenting) (quoting *Terry*, 392 U.S. at 15). If an officer violates the Fourth Amendment, therefore, any evidence obtained from the unlawful intrusion must be suppressed. *See, e.g., Wong Sun v. United States*, 371 U.S. 471, 484-88 (1963).

Traditionally, when firearm possession was tightly regulated, possession of a concealed gun was indicative of criminal activity. *United States v Robinson*, 846 F.3d 694, 707 (4th Cir. 2017) (en banc) (Harris, J., dissenting). Either the act of possessing a gun was illegal, or it was associated with other criminal activity. *Id.* Accordingly, the mere suspected presence of a gun could provide the requisite reasonable suspicion of

criminal activity to justify a *Terry* stop and frisk. *Id.*

That all changed with this Court's decisions in *Heller* in 2008 and *McDonald* in 2010, which established that the Second Amendment guarantees an individual right to bear arms, made applicable to the States through the Fourteenth Amendment. *Heller*, 554 U.S. at 592; *McDonald*, 561 U.S. at 791. In other words, mere possession of a firearm went from being a presumptively illegal act, or one with nefarious connotations, to lawful, constitutionally protected conduct. And, while this Court has not yet decided whether this Second Amendment right extends to the public sphere, at least one circuit court of appeal has decided there is a constitutional right to possess a gun in public, as it is a logical extension of *Heller* and *McDonald*. *See Moore v. Madigan*, 702 F.3d 933, 935-36 (7th Cir. 2012). *See also People v. Aguilar*, 2013 IL 112116, ¶¶ 20-22 (holding that an Illinois statute that categorically prohibited the possession of a ready-to-use gun outside the home violated the Second Amendment).

Other jurists have hinted that such a right does exist. *See, e.g.*, *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (assuming *Heller* applies outside of the home); *Drake v. Filko*, 724 F.3d 426, 444-46 (3d Cir. 2013) (Hardiman, J., dissenting) (asserting that *Heller* and *McDonald* indicate the Second Amendment extends beyond the home); *see also United States v. Marzzarella*, 614 F.3d 85, 92 (3d Cir. 2010) (noting that Second Amendment protects possession "for other, as-yet-undefined, lawful purposes"); *but see Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (assuming that Second Amendment has different application in public than in the home). Justice Thomas, joined by Justice Gorsuch, commented in his dissent from the denial of certiorari in *Peruta v. California* that *Heller* and *McDonald* indeed suggest

that the Constitution protects the right to carry a firearm in public, as it is "the most natural reading" of the Second Amendment. *Peruta v. California*, 137 S. Ct. 1995, 1998 (mem.) (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari).

Regardless of whether a federal constitutional right to possess a firearm in public exists, the fact remains that every State now allows public possession in some form. Indeed, as the Seventh Circuit noted in *Moore* in 2012, Illinois was the only State at that time that had a flat ban on public possession, which *Moore* invalidated as unconstitutional. *Moore*, 702 F.3d at 940. Thus, it is now legal for Americans throughout the country to possess guns, even in public, by virtue of the Second Amendment or State laws.

The changing landscape regarding the legality of gun possession begs the question: when does an officer develop reasonable suspicion of criminal activity to justify a *Terry* stop when she merely suspects an individual has a gun? This Court has never answered that question. The closest this Court has ever come to addressing this issue was in its pre-*Heller* decision in *Florida v. J.L.*, 529 U.S. 266, 268, 274 (2000), which found that an anonymous tip lacking indicia of reliability that an individual at a bus stop had a concealed gun did not amount to reasonable suspicion of criminal activity to justify the *Terry* stop and frisk. The Court acknowledged "the serious threat that armed criminals pose to public safety," but declined to make a blanket firearms exception to the requirement that officers have reasonable suspicion to effectuate a *Terry* stop. *Id.* at 272. In other words, the tip that an individual simply possessed a concealed weapon, without more, was insufficient to justify the officers' Fourth Amendment intrusion.

II. Federal and state courts are divided over whether suspected possession of a firearm justifies a Fourth Amendment intrusion.

Given the lack of any guidance from this Court on this issue, both federal and state courts are struggling to figure out just how the changing nature of the legality of gun possession fits in to the Fourth Amendment calculus in determining whether an officer has reasonable suspicion for a stop or frisk. In some cases, the answer is straightforward: if the officer suspects only that an individual has a gun, with no information regarding the legality of its possession, there is no reasonable suspicion to justify a brief investigatory detention.

For instance, in *United States v. Ubiles*, 224 F.3d 213, 215 (3d Cir. 2000), decided well before *Heller*, the police received a tip from an anonymous informant that an individual at a street fair in the Virgin Islands had a gun. The officers located the individual, seized him, and discovered that he unlawfully possessed a defaced, unlicensed gun. *Id.* The Third Circuit Court of Appeals found that the officers did not have reasonable suspicion of criminal activity because it was not necessarily a crime in the Virgin Islands for someone to possess a gun. *Id.* at 214, 217-18. Because courts determine reasonable suspicion based on what the officer knew before the seizure, the officer here did not have any information indicating that the individual's gun possession was unlawful. *Id.* at 218-19. *Accord United States v. Lewis*, 672 F.3d 232, 240 (3d Cir. 2012) (finding, post-*Heller*, that officers did not have reasonable suspicion to stop defendant, where anonymous tip indicated that defendant simply had a gun without any allegation that his possession was illegal, and noting that law in Virgin Islands does not presume individual lacks permit to carry concealed gun).

Similarly, in *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013), the

Fourth Circuit Court of Appeals found that a valid exercise of one's right to openly carry a firearm in public, which was legal in North Carolina, cannot justify an investigatory detention. In that case, officers observed the defendant sitting with several other men in a high crime area. *Id.* at 534-35. One of the men pointed to his displayed, holstered gun—legal conduct in North Carolina. *Id.* at 535. The police confiscated that man's gun and began frisking the other men in the group, believing they would find another gun. *Id.* The defendant attempted to leave, but the officers caught him and subsequently recovered an unlawfully possessed gun. *Id.* at 536. The court nevertheless found that the officers had no reason to believe the defendant illegally possessed a weapon; "[b]eing a felon in possession of a firearm is not the default status." *Id.* at 540. The court stated that permitting someone's exercise of her right to openly carry a gun to justify a *Terry* stop "would eviscerate Fourth Amendment protections for lawfully armed individuals in those states," and took special note of "the slow systematic erosion of Fourth Amendment protections for a certain demographic." *Id.* at 540, 542.

In *United States v. Parker*, 240 F. Supp. 3d 318, 323-26 (M.D. Pa. 2017), the district court similarly found that the officers did not have reasonable suspicion to seize the defendant, where they had no information that his alleged gun possession was illegal. There, a store employee reported an "uncomfortable feeling" about two people wanting to sell guns, but did not know if there was anything illegal going on. *Id.* at 319-20, 323. When the police arrived, the co-defendant fled, but the defendant remained and was cooperative. *Id.* at 320, 325-26. In finding that the officers did not have reasonable suspicion to detain the defendant, the district court noted that at the

time of the detention, the police "had not asked for Defendant's name, requested a firearm license, or even observed any firearms on Defendant or in the SUV." *Id.* at 325. Given that the officers had no indication the defendant's alleged possession was unlawful or any other information indicating wrongdoing, they did not have reasonable suspicion to detain him. *Id.* at 325-26.

In the same vein as the aforementioned cases, there are other courts that begin with the premise that mere possession of a gun is a non-criminal act, thus requiring the officers to have information of actual criminal activity to develop reasonable suspicion. In *United States v. Kehoe*, 893 F.3d 232 (4th Cir. 2018), *pet'n for cert. filed on other grounds* (Nov. 19, 2018) (No. 18-6775), the court stated that, to justify the detention there, "the officers needed reasonable suspicion that, while in [the sports bar], [the defendant] was carrying a concealed handgun *and* drinking alcohol," as it was a crime in Virginia for someone to carry a concealed gun in a restaurant or bar and consume alcohol. *Id.* at 237 (emphasis in original). Likewise, in *United States v. Fonville*, 127 F. Supp. 3d 790, 801 & n.4 (E.D. Mich. 2015), police had reasonable suspicion to detain the defendant in part where they suspected he had a gun and smelled alcohol on his breath, in violation of a Michigan statute criminalizing the concealed possession of a handgun while under the influence of alcohol.

At least two State supreme courts have followed the above line of reasoning to find that suspected mere possession of a firearm, without more, does not justify a Fourth Amendment intrusion. In *State v. Williamson*, 368 S.W.3d 468, 480-81 (Tenn. 2012), the Tennessee Supreme Court held that the police must have some information that an individual's suspected possession of a firearm is illegal before detaining and

searching him. Without any "'assertion of illegality,'" the officers do not have the requisite level of suspicion. *Id.* at 481 (quoting *J.L.*, 529 U.S. at 272). In *Pinner v. State*, 74 N.E.3d 226, 231-33 (Ind. 2017) (quoting *J.L.*, 529 U.S. at 273), the Indiana Supreme Court also held that the police need more than a "'bare-boned tip[] about guns'" to justify a *Terry* stop; there must be some indication that the suspect's gun possession is illegal, otherwise the detention violates the Fourth Amendment.

Departing from the line of cases above, there are courts that have upheld *Terry* stops based on suspected gun possession, where the relavant State's legislative scheme presumes that an individual's gun possession in public is unlawful. Under those circumstances, it is essentially up to the individual to furnish her permit to rebut the presumption of illegality. For instance, in *United States v. Gatlin*, 613 F.3d 374, 378-79 (3d Cir. 2010), the Third Circuit was confronted with facts largely similar to its decision in *Ubiles*, but held that the officers, who had received an anonymous tip that someone had a gun in public, did have reasonable suspicion to detain the defendant. The court noted that in Delaware, unlike in the Virgin Islands, the law presumed that public possession of a handgun was unlawful; the State placed the burden on the defendant to prove that her possession was legal. *Id.* at 379. In *United States v. Lewis*, 674 F.3d 1298, 1304 (11th Cir. 2012), the Eleventh Circuit upheld a *Terry* stop based on suspicion of gun possession because, in Florida, carrying a concealed firearm was presumptively unlawful; a concealed-carry permit operated as an affirmative defense. *Accord United States v. Pope*, ___ F.3d ___, No. 18-1264, 2018 WL 6442656, at *2 (8th Cir. Dec. 10, 2018) (finding officers had reasonable suspicion of gun possession, where Iowa made it a crime to carry a concealed weapon and required an individual to furnish

a permit when asked by police); *see also United States v. Polite*, ___ F.3d ___, No. 18-1752, 2018 WL 6358491, at *3 (8th Cir. Dec. 6, 2018) (finding officers had reasonable suspicion of gun possession to seize 18-year-old defendant, where Omaha Municipal Code made it a crime for an individual under 21 to carry a concealed firearm, and Nebraska prohibited carrying a concealed weapon in public unless individual had a valid permit); *United States v. Hudson*, No. 18-0017-WS, 2018 WL 3543058, at *3 (S.D. Ala. July 23, 2018) (finding defendant's statement to officers that he was carrying a concealed firearm amounted to reasonable suspicion to justify detention).

The common theme among the cases finding that officers had the requisite reasonable suspicion for a *Terry* stop is that they start with a presumption that gun possession in public is illegal. The Indiana Supreme Court in *Pinner*, however, raised an interesting and critical point regarding the presumption that mere possession in public is unlawful: it could lead to a violation of this Court's precedent in *Delaware v. Prouse*, 440 U.S. 648 (1979). *Pinner*, 74 N.E.3d at 233. In *Prouse*, this Court held that the police must have reasonable, articulable suspicion that a motorist is unlicensed or a car is unregistered to justify a *Terry* stop of a vehicle in question. *Prouse*, 440 U.S. at 662-63. The police cannot detain someone just to perform a license check to ensure that the individual is operating within the bounds of the law. *Id.* In that same vein, *Pinner* asserts, the police cannot stop an individual to ascertain the legality of her possession of a weapon. *Pinner*, 74 N.E.3d at 233. "'Were the individual subject to unfettered governmental intrusion every time he [exercised his right to bear arms], the security guaranteed by the Fourth Amendment would be seriously circumscribed.'" *Id.* (quoting *Prouse*, 440 U.S. at 662-63) (bracketed text added in *Pinner*).

The tension between the Second and Fourth Amendments, and among the various approaches courts have taken to figure out how those rights interact, is best exemplified by the Fourth Circuit's en banc decision in *United States v. Robinson*, 846 F.3d 694 (4th Cir. 2017) (en banc), with its accompanying concurring and dissenting opinions. Although this case dealt with a *Terry* frisk for weapons, it nevertheless raises some of the same issues in determining the propriety of a *Terry* stop in the first instance.

The majority in *Robinson* held that the *Terry* frisk, after a lawful traffic stop, was proper, where the officers had a reasonable suspicion that the defendant was simply armed. *Id.* at 699. The majority recognized that guns are inherently dangerous weapons, so if officers have reasonable suspicion that a detainee is armed, they have reasonable suspicion she is dangerous. *Id.* The majority's holding essentially collapses this Court's requirement that the police have reasonable suspicion an individual is "armed and presently dangerous" to justify a frisk, *Terry*, 392 U.S. at 30, into one demanding reasonable suspicion that an individual simply has a weapon.

The concurrence took this reasoning one step further and suggested that individuals pose a categorical danger to police officers by virtue of carrying a firearm, so they in turn sacrifice certain other constitutional protections, such as some of their rights under the Fourth Amendment. *Robinson*, 846 F.3d at 705-07 (Wynn, J., concurring); *but see Peruta*, 137 S. Ct. at 1999 (Thomas, J., dissenting from denial of certiorari) (stating that there is no hierarchy among constitutional rights). Notably, this case took place in West Virginia, which "broadly allows public possession of firearms." *Robinson*, 846 F.3d at 707, 708, 713 (Harris, J., dissenting). Nevertheless,

for the majority and concurring judges, the mere possession of a firearm—lawful conduct in West Virginia—is considered dangerous and has negative connotations and consequences under the law.

The dissent in *Robinson* began by noting that this Court has not pronounced a rule regarding the intersection of the Second and Fourth Amendments. *Id.* at 707 (Harris, J., dissenting). The dissent then acknowledged that the Second Amendment landscape has changed, but counseled courts to take those changes into account in their Fourth Amendment jurisprudence, not change the fundamental Fourth Amendment principles and standards themselves. *Id.* at 707-08 (Harris, J., dissenting). The majority's holding put both constitutional rights on a collision course, giving the police the type of unbridled discretion that the Fourth Amendment was designed to prevent. *Id.* at 707, 712 (Harris, J., dissenting). The dissent concluded that while States with concealed-carry laws implicate officer safety, those are legislative decisions; the court cannot presume mere possession is dangerous. *Id.* at 716 (Harris, J., dissenting).

Given these competing concerns and views, as well as the lack of any guidance from this Court on how the new Second Amendment landscape interacts with the Fourth Amendment, this Court should grant certoriari to resolve the issue of if and when an officer who simply suspects an individual has a gun develops reasonable suspicion to justify a *Terry* stop, at least under the Second Amendment and in States where the possession of a gun in public is not presumptively unlawful.

III. The issue in this case is of critical national importance, affecting virtually every person in America, given that the Second Amendment guarantees the right to bear arms, and all 50 States permit, on some level, individuals to carry guns in public.

The issue presented here affects virtually every American. The Second Amendment guarantees the right to bear arms, and every State, to some extent, allows possession of a gun in public. Certainly there are factors that may disqualify an individual from owning a firearm, such as a felony conviction. But the starting point, particularly for Fourth Amendment inquiries, is an innocent person—that is, one who may legally own a firearm. *See Florida v. Bostick*, 501 U.S. 429, 438 (1991) (stating that "reasonable person" standard for determining whether seizure occurred under Fourth Amendment "presupposes an *innocent* person") (emphasis in original). That reasonable, innocent person, however, does not know where she stands on the Fourth Amendment spectrum if she chooses to exercise her constitutional right to own a firearm or carry her firearm in public in accordance with State law. American citizens need to know whether they enjoy the full protection of the Fourth Amendment if they choose to own or carry a gun, or whether they forfeit some of those Fourth Amendment rights.

Similarly, the police need clarity and guidance on when they can assert their power to seize and search an individual when they suspect she simply has a gun. Police officers depend on this Court's decisions to inform their policing practices and policies, and know what the constitution and the laws permit. The law on whether suspected gun possession constitutes reasonable suspicion to justify a *Terry* stop, however, is not clear. Rather, as discussed above, the issue is largely unsettled, resulting in uneven enforcement of the law and the type of unbridled discretion that the Fourth

Amendment was designed to prevent. *See Robinson*, 846 F.3d at 707, 712 (Harris, J., dissenting). Given the thousands of police-citizen encounters that occur on a daily basis, and the very real possibility that officers will come across someone who is lawfully exercising her right to carry a gun, this Court should grant certiorari to provide this much-needed clarity and guidance for citizens and police alike.

IV. This case is an excellent vehicle to decide this issue.

This case is straightforward and, thus, allows this Court to resolve the legal question of whether suspicion of mere possession of a gun justifies a Fourth Amendment intrusion. The Court does not have to concern itself with the usual factors that weigh heavily in the "reasonable suspicion" calculus, such as a high crime area, an officer's prior knowledge of the defendant's criminal history, the defendant's headlong flight, or an anonymous tip reporting criminal activity. None of those factors is present here.

In this case, Eduardo Gomez and his two friends, Enriquez Salvadaor ("Junior") and Frankie Baez, were sitting in a lawfully parallel-parked car in a residential area in Chicago waiting for Frankie's girlfriend to join them. (R. F.4-5) None of the three friends was doing anything to arouse suspicion. "[O]ut of nowhere," three officers pulled up next to the car because, as Officer Anthony Amato testified, they had seen the car driving in that area two times in the previous 30 to 40 minutes. (R. F.5, 21) Amato began questioning Junior, the driver, about what he was doing there and where he lived. (R. F.22-24, 35) Junior first responded that he lived down the street, which prompted Amato to ask for his exact address. (R. F.17, 24, 35) Amato testified that

Junior said he did not live down the street, but on the other side of Pulaski, (R. F.24), which was actually just four blocks away from where they were parked.

During this brief conversation, Eduardo, who was sitting behind Junior, slouched in his seat to the point where only his head was visible. (R. F.24) Amato thought Eduardo's behavior was suspicious, so the officers exited their vehicle and surrounded Junior's car, each officer pairing up with each of the three occupants. (R. F.25) Eduardo was leaning toward the middle of the car, with his forearm over his waistband and his right hand underneath his shirt. (R. F.26) Amato found this behavior to be suspicious, so the officers ordered the friends to show their hands. (R. F.27) Eduardo first showed his left hand and then his right, while his arm remained over his waistband. (R. F.27) Although Amato did not see a gun or a bulge in Eduardo's pants, he believed Eduardo had a gun on him. (R. F.28, 42) The friends were ordered out of the car, at which point a gun fell from Eduardo's waistband. (R. F.28-29)

Gomez argued in the Illinois appellate court that the officers did not have reasonable suspicion of criminal activity to justify the seizure, as Amato simply believed Eduardo possessed a gun, which is not a crime in Illinois. *People v. Gomez*, 2018 IL App (1st) 150605, ¶ 29 n.3.[1] The appellate court avoided this issue, finding

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[1] Eduardo also argued that he was seized without reasonable suspicion when the officers pulled up next to Junior's car, blocking it in its parallel spot and preventing the occupants from leaving, or at least when the officers surrounded Junior's car, blocking all of the available means of egress for the occupants. *Gomez*, 2018 IL App (1st) 150605, ¶¶ 23-25. The dissenting justice agreed with Eduardo and concluded that Eduardo was illegally seized without reasonable suspicion of criminal activity when the police surrounded the car, or perhaps even earlier when they pulled up next to Junior's car. *Id.*, ¶¶ 55-60 (Hyman, J., dissenting). The majority, however, found that Eduardo was not seized until the officers ordered him to show his hands. *Id.*, ¶¶ 27, 29.

instead that Eduardo's behavior and Junior's allegedly false answers gave the officers reasonable suspicion that Eduardo's gun possession was unlawful. *Id.*, ¶¶ 29-30 & n.3. Amato, however, did not testify that he suspected Eduardo had an illegal gun, just that he had a gun. (R. F.28, 42) Furthermore, the State argued at the suppression hearing that "the officers develop[ed] reasonable articulable suspicion that some criminal activity [was] afoot. Specifically, that [Eduardo] *was armed*[,]" (R. F.45) (emphasis added), not that his suspected possession was unlawful. The appellate court, therefore, misinterpreted the facts and, as a result, did not appropriately decide the question presented in this petition.

In any event, the only particularized suspicion the officers had regarding Eduardo was his allegedly "suspicious" behavior in avoiding engaging with the officers. This Court and others have repeatedly commented that while "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion," *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000), such behavior alone does not amount to reasonable suspicion. *See also id.* at 129-30 (Stevens, J., dissenting) (noting that individual's motivation for headlong flight depends on various other circumstances, such as character of neighborhood and time of day); *United States v. Bonner*, 363 F.3d 213, 217 (3d Cir. 2004) (requiring some other indicia of wrongdoing in addition to flight upon noticing police to justify *Terry* stop, as "the Supreme Court has never held that unprovoked flight alone is enough to justify a stop"); *United States v. Woodrum*, 202 F.3d 1, 7 (1st Cir. 2000) ("[S]louching, crouching, or any other arguably evasive movement, *when combined with other factors particular to the defendant or his vehicle*, can add up to reasonable suspicion. *** But not every slouch, crouch, or other

supposedly furtive movement justifies a stop.") (emphasis added).

In the context of this case, Eduardo's allegedly furtive movements occurred when the officers appeared "out of nowhere" in the middle of the night, when the three friends were doing nothing to arouse suspicion. (R. F.5) As Justice Stevens wrote in *Wardlow*, "[a]mong some citizens, particularly minorities . . . , there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence." *Wardlow*, 528 U.S. at 132 (Stevens, J., dissenting). This rings particularly true in the current climate, where even the presence of an individual's lawfully possessed handgun may unnecessarily escalate an otherwise non-violent police-citizen encounter and have deadly consequences. *See, e.g., Thornton v. City of Columbus*, No. 2:15-cv-1337, 2017 WL 2573252, at *12 n.10 (S.D. Ohio June 14, 2017) (discussing well-publicized case of Philando Castile, who was shot and killed by Minnesota police during a traffic stop, even though he was lawfully registered to carry a firearm). It is, thus, perfectly understandable why someone, even in lawful possession of a firearm, would want to avoid engaging with the police and drawing unnecessary attention to her weapon.

In light of the changes in the legality of firearm possession, the courts' struggle to take those changes into account in determining the contours of the Fourth Amendment, and the likelihood of a firearm being present in any given police-citizen encounter, this Court should grant certiorari to decide when a police officer develops reasonable suspicion of criminal activity to justify a Fourth Amendment intrusion, where the officer suspects only that an individual has a gun.

CONCLUSION

For the foregoing reasons, petitioner, Eduardo Gomez, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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