No._____

IN THE SUPREME COURT OF THE UNITED STATES

AMIN DE CASTRO,
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

A police officer "seizes" a person under the Fourth Amendment if he makes a request that a reasonable person would not feel free to refuse, and the person then complies. *See California v. Hodari D.*, 499 U.S. 621, 627-628 (1991).

The question in this case is whether a reasonable person would feel free to refuse a police officer's polite request to take his hands out of his pockets.

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Amin De Castro respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on October 3, 2018.

OPINION BELOW

The opinion of the court of appeals affirming the district court's judgment is reported at 905 F.3d 676 (3d Cir. 2018), and is attached as Appendix A.

JURISDICTION

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated…

STATEMENT OF THE CASE

One fall evening in North Philadelphia, Amin de Castro was chatting with a neighbor outside his house when a police car responding to an anonymous tip about a man pointing a gun at children suddenly pulled up 15-20 feet away from him. An officer got out of the car, immediately focused on Mr. de Castro and strode toward him, and when he was a few feet away, asked him "could you please take your hands out of your pockets?" Mr. de Castro complied, revealing a pistol grip in his pocket that ultimately led to his arrest, prosecution, and conviction for being an alien in possession of a firearm.

Mr. de Castro challenged his conviction, arguing that the evidence was obtained in violation of the Fourth Amendment. Since a reasonable person in his position would not have felt free to refuse the officer's request to show hands, he was "seized" when he complied. And at the moment the officer made the request, he did not have reasonable suspicion to suspect Mr. de Castro of a crime, making that seizure unconstitutional.

The district court denied Mr. de Castro's motion to suppress and the Third Circuit affirmed on appeal, holding that Mr. de Castro was not seized when he complied with the officer's request to take his hands out of his pockets and therefore the encounter was not subject to the Fourth Amendment. *See United States v. De Castro*, 905 F.3d 676, 681-683 (3d Cir. 2018). The Third Circuit noted that the officer was alone, did not draw his weapon, and used a conversational tone, concluding that a reasonable person would have felt free to refuse his request to show hands. Although the opinion cited decisions of other courts holding that compliance with a polite request to show hands is not a seizure, there is in fact a circuit split on this question. Several other courts have recognized that no reasonable person would risk

refusing a police officer's safety-related request, even if politely phrased, which makes compliance a seizure under the Fourth Amendment.

A request to show hands is one of the most common – and most fraught – moments in a police/civilian encounter. Refusing to take hands out of pockets communicates defiance and even a threat, since it suggests that the person is hiding something that he does not want the police to see, such as a weapon. No reasonable person would choose to take that risk, even if the officer's request was politely phrased. Indeed, the news today is full of tragic stories of police shootings of people who failed to comply – or complied too slowly, or complied in an equivocal manner – with a safety-related request. As the nation's streets echo with protestors' cries of "Hands up! Don't shoot!" it should be clear a reasonable person would not feel free to refuse a police officer's polite request take hands out of pockets.

Of course, personal liberty is not the sole consideration in this case. Given the prevalence of firearms in the United States, police officers are understandably concerned for their safety whenever they approach strangers on the street. Even when there is no reasonable suspicion of criminal activity, therefore, officers will want to be able to see peoples' hands in order to make sure that they are not carrying a weapon that could pose an imminent threat. Indeed, police officers are specifically trained to watch people's hands and to ask to see them if concealed. In this case, the Third Circuit cited public safety as one reason why the officer's request for Mr. de Castro to take his hands out of his pockets should not be subject to the Fourth Amendment, and other courts have openly acknowledged raising the standard for what constitutes a seizure in order to enable police to make such requests without reasonable suspicion.

Only this Court can resolve the Fourth Amendment puzzle presented by this case, which has divided the lower courts and recurs every day in cities and neighborhoods across the United States: Is compliance with a police officer's polite request to take hands out of pockets a "seizure" under the Fourth Amendment?

A. Legal Background

"Few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures." *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018). The Fourth Amendment safeguards this right by requiring the police to have reason to suspect someone of a crime in order to stop or search them. Under the landmark decision in *Terry v. Ohio*, 392 U.S. 1 (1968), a police officer may "conduct a brief, investigatory stop" of a person only "when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry*, 392 U.S. at 30).

Nevertheless, *Terry* also recognized that "[s]treet encounters between citizens and police officers are incredibly rich in diversity" and that not all receive Fourth Amendment protection. *Terry*, 392 U.S. at 13. If an encounter is "consensual," then the Fourth Amendment does not apply, such as when a police officer "merely approach[es] an individual on the street" and "put[s] questions to him if the person is willing to listen." *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (quoting *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion)). Yet any encounters between police and civilians that lack such "consensual nature" are "seizures" that "trigger Fourth Amendment scrutiny." *Id.*

A police officer "seizes" a person within the meaning of the Fourth Amendment when he uses physical force or makes a show of authority to which the person then submits. *Hodari D.*, 499 U.S. at 625-626. A "show of authority" is a request that, based on "all the circumstances

surrounding the incident," a reasonable person would not feel "free to disregard … and go about his business." *Id.* at 627-28 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)). Circumstances indicating a show of authority include the presence of several officers, the display of a weapon, physical touching, or the use of language and tone suggesting compliance with the police is required. *See Mendenhall*, 446 U.S. at 554. Other factors include the person's age, gender, race, and education, *see id.* at 558, as well as the location of the encounter, *see Bostick*, 501 U.S. at 437.

This analysis reflects a careful balance of the Fourth Amendment right to personal autonomy and bodily integrity against the need to protect public safety. "The purpose of the Fourth Amendment is not to eliminate all contact between the policy and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *Mendenhall*, 446 U.S. at 553-554. So "[a]s long as the person … remains free to disregard the [police] and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." *Id.* at 554. Moreover, "characterizing every street encounter between a citizen and the police as a 'seizure' … would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices." *Id.* But it also "must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry*, 392 U.S. at 16. Interfering with a person's freedom of movement in this way, "even momentarily," requires legal justification. *Royer*, 460 U.S. at 498. After all, stopping or giving orders to people on the street infringes on personal liberty and is "a major source of friction" between the police and the communities they serve. *Terry*, 392 U.S. at 14 n.11 (citation omitted).

B. Factual and Procedural Background

One September evening in North Philadelphia, an unidentified 911 caller reported that a Hispanic male wearing a bucket hat, grey shirt, and grey pants was pointing a gun at juveniles outside a vacant flower shop. (C.A. App. 10). The address was in a high-crime area where "drug and firearm offenses were prevalent." (C.A. App. 10). A police officer sped over in a marked patrol car to investigate, arriving in under three minutes. (C.A. App. 10).

As the officer drove onto the scene, he saw two men talking in front of what looked like abandoned flower shop. (C.A. App. 10). There were no juveniles nearby. (C.A. App. 10). One of the men, Mr. de Castro, matched the caller's description, but he did not appear to be carrying a weapon or engaged in any illegal activity. (C.A. App. 10, 147-148). He had his hands in his pockets. (C.A. App. 10).

The officer stopped his car about 15-20 feet away, exited his vehicle, and "immediately" "focus[ed]" on Mr. de Castro, striding toward him. (C.A. App. 10-11, 148). When the officer was about 5-10 feet away, he politely asked Mr. de Castro "could you please take your hands out of your pockets?" (C.A. App. 11, 140, 148-149). The officer later testified that he made this request of Mr. de Castro because he wanted to "see his hands" in order to avoid "any misunderstandings or aggressions or anything like that, just to keep us both safe." (C.A. App. 155-156).

Mr. de Castro complied, and when he removed his hands, he revealed a pistol grip sticking out of his pocket. (C.A. App. 11). Seeing the grip, the officer told Mr. de Castro to raise his hands further, took control of the firearm, and asked him whether he had any identification or permit to carry. (C.A. App. 11). When Mr. de Castro admitted that he only had a passport from the Dominican Republic, the officer frisked him – discovering ammunition – and

arrested him. (C.A. App. 11). Mr. de Castro was charged with one count of being an alien in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(5)(A). (C.A. App. 29-30).

Mr. de Castro moved to suppress the firearm and ammunition, arguing that they were the fruit of an unlawful seizure not justified by reasonable suspicion. (C.A. App. 106-120). The district court denied his motion in a written memorandum. (C.A. App. 9-19). The court found that Mr. de Castro's compliance with the police officer's request to take his hands out of his pockets was not a seizure for Fourth Amendment purposes because "a reasonable person would have felt free to decline," and therefore reasonable suspicion was not required. (C.A. App. 13). The court emphasized that the officer "used a polite, conversational, and non-threatening tone to communicate his single request from a distance of at least five feet, with his weapon holstered and without any physical touching." (C.A. App. 13). When Mr. de Castro removed his hands from his pockets, he revealed the pistol grip, thus giving the officer reasonable suspicion to seize and arrest him.[1] (C.A. App. 14).

His motion to suppress denied, Mr. de Castro pled guilty, reserving his right to appeal the district court's decision. (C.A. App. 241). On appeal, he argued that he was seized when he complied with the officer's request to take his hands out of his pockets because a reasonable person would not have felt free to refuse a safety-related request when suddenly approached by a police officer in a high-crime neighborhood. And because the officer did not actually see the

[1] The district court also held that the police officer had reasonable suspicion to seize Mr. de Castro based on the anonymous 911 call. (C.A. App. 14-18). Mr. de Castro argued on appeal that this holding was in conflict with *Navarette v. California*, 134 S. Ct. 1683 (2014) and *Florida v. J.L.*, 529 U.S. 266 (2000). The Third Circuit did not reach the issue in resolving the case and therefore would have to address it on remand. *See De Castro*, 905 F.3d at 678 n.1.

pistol grip until after he complied with the request, the seizure was not justified by reasonable suspicion.

The Third Circuit Court of Appeals rejected Mr. de Castro's argument and affirmed the district court's denial of his motion to suppress in a published opinion. *See United States v. De Castro*, 905 F.3d 676 (3d Cir. 2018). Focusing on the officer's request to remove his hands from his pockets, the court held that "the totality of the circumstances indicates that a reasonable person in De Castro's position would have felt free to ignore the officer's request and end the encounter," and therefore no reasonable suspicion was required. *Id.* at 682. The court noted that the officer was "the only officer present during the initial encounter, and made a sole, polite, and conversational request for De Castro to remove his hands from his pockets, rather than an order for him to show his hands. No weapons were drawn, and no threats were made." *Id.* The court also stressed that "it was appropriate for [the officer] to request that De Castro remove his hands from his pockets for the safety of himself and others." *Id.* By "voluntarily remov[ing] his hands from his pockets," the court noted in closing, Mr. de Castro "reveal[ed] a weapon that furnished [the officer] with the necessary reasonable suspicion" to seize him. *Id.* at 682-683.

This timely petition for certiorari follows.

REASONS FOR GRANTING THE WRIT

This case presents an ever-present tension in Fourth Amendment law, expressed at one of the most common and most fraught moments of a police/civilian encounter. When police approach civilians on the street, they naturally want to see their hands in order to keep themselves and the public safe, even when there is no reason to suspect criminal activity. But because refusing an officer's request to show hands risks communicating aggression and provoking violence, no reasonable person would feel free to refuse, making compliance a seizure requiring reasonable suspicion.

The difficulty of resolving this tension and the frequency of its occurrence have led to disparate outcomes among the courts of appeal. Some courts have applied established Fourth Amendment precedent to hold that a police officer's polite request to show hands requires reasonable suspicion of criminal activity because a reasonable person would not feel free to refuse. Other courts have effectively created a firearm exception to *Terry* by raising the standard for what constitutes a seizure in order to permit the police to ask people to show their hands even when there is no reasonable grounds to suspect them of a crime.

This Court should answer the important and recurring question of whether compliance with a police officer's polite request to take hands out of pockets is a seizure under the Fourth Amendment. Because there is no "firearm exception" to *Terry*, *Florida v. J.L.*, 529 U.S. 266, 272-73 (2000), the Third Circuit was wrong to deny Mr. de Castro's appeal. And because a decision for Mr. de Castro would likely lead to reversal of his conviction, he respectfully requests that the Court grant the petition for certiorari.

I. The Question of Whether a Compliance With a Polite Request to Show Hands Is a Seizure Under the Fourth Amendment Is Both Important and Recurring.

This case involves the collision of two competing truths about the Fourth Amendment. First, a reasonable person would not feel free to refuse if a police officer asked him to take his hands out of his pockets, no matter how politely phrased, which makes compliance with that request a seizure requiring reasonable suspicion of criminal activity. But second, there is a strong public-safety interest is allowing the police to ask people to remove their hands from their pockets in order to protect themselves from a concealed weapon, even if there is no reasonable grounds to suspect a crime. This dilemma plays out across American streets every day, as police officers are trained to watch people's hands and ensure they can be seen at all times. This Court should strike the proper balance between these competing concerns by deciding whether compliance with a polite request to take hands out of pockets is a seizure under the Fourth Amendment.

No reasonable person would want to provoke a stand-off with law enforcement, which is the likely result of refusing a request to show hands. Refusing to show hands communicates aggression and even a threat, since it implies that the person has something in their pocket they do not want the officer to see, such as a weapon. Police/civilian encounters can escalate to violence in a matter of seconds, and thus a reasonable person would not feel free to decline a safety-related request to show hands, even if it was politely phrased. Indeed, the news today is full of tragic stories of people shot and killed by the police for even ambiguous compliance with a safety-related request.[2] Public schools now teach their students to obey police instructions in

[2] *See, e.g., Video footage shows Minn. Traffic stop that ended with Philando Castile's death*, THE WASHINGTON POST (June 20, 2017), available at https://www.washingtonpost.com/news/post-nation/wp/2017/06/20/video-footage-shows-minn-traffic-stop-that-ended-with-philando-castiles-death; *Dash-Cam Video Released Showing Laquan McDonald's Fatal Shooting*, NBC CHICAGO

order to stay safe, and above all to keep their hands where they can be seen. *See, e.g., 'Keep your hands visible': Texas teens can't graduate until they watch this video about police*, THE WASHINGTON POST (Oct. 16, 2018), available at https://www.washingtonpost.com/education/2018/10/17/keep-your-hands-visible-texas-teens-cant-graduate-until-they-watch-this-video-about-police/?utm_term=.e2b33b9c1cae. As the police officer in this case explained, he asked Mr. de Castro to take his hands out of his pockets because he feared he might have a weapon and wanted to "see his hands" in order to avoid "any misunderstandings or aggressions or anything like that, just to keep us both safe." (C.A. App. 155-156).

The risk is especially high for racial minorities like Mr. de Castro, who understandably fear that they may be perceived as more dangerous by the police and therefore must take special care to comply with officers' safety-related requests. "For generations, black and brown parents have given their children 'the talk' – instructing them never to run down the street; *always keep your hands where they can be seen*; do not even think of talking back to a stranger – all out of fear of how an officer with a gun will react to them." *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (emphasis added). The test for whether a reasonable person would feel free to refuse a request takes this unfortunate reality into account. *See Mendenhall*, 446 U.S. at 558 (seizure analysis includes whether defendant, "a female and a Negro, may have felt unusually threatened by the officers, who were white males").

Though it may seem like a small demand, asking someone to take their hands out of their pockets works a tangible infringement on personal liberty. Complying with a request to show

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(Nov. 24, 2015), available at http://www.nbcchicago.com/news/local/Police-Release-Disturbing-Video-of-Officer-Fatally-Shooting-Chicago-Teen-352231921.html; *Video shows Cleveland officer shooting 12-year-old Tamir Rice within seconds*, THE WASHINGTON POST (Nov. 26, 2014), available at https://www.washingtonpost.com/news/post-nation/wp/2014/11/26/officials-release-video-names-in-fatal-police-shooting-of-12-year-old-cleveland-boy.

hands requires the person to stand in place while giving up temporary control of their body to law enforcement. The Constitution protects against such intrusions, "even momentarily," *Royer*, 460 U.S. at 498, since they inflict real "indignities and invasions of privacy," *Byrd*, 138 S. Ct. at 1526, and "risk treating members of our communities as second-class citizens," *Strieff*, 136 S. Ct. at 2069 (Sotomayor, J., dissenting). Because no reasonable person would feel free to refuse a police officer's polite request to take his hands of out of his pockets, compliance is a seizure under the Fourth Amendment and requires the officer to have reasonable grounds to suspect the person of a crime. *See Hodari D.*, 499 U.S. at 625-626.

Yet at the same time, requiring the police to have reasonable suspicion in order to ask someone to take their hands out of their pockets also seems to put officers at a dangerous disadvantage. "[P]olice officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 397 (1989). Moreover, there are more than 300 million guns in the United States, *Guns in America, By the Numbers*, NPR POLITICS (Jan. 5, 2016), available at https://www.npr.org /2016/01/05/462017461/guns-in-america-by-the-numbers, and "[r]oughly 50 percent of American homes contain at least one firearm of some sort," *Staples v. United States*, 511 U.S. 600, 613-614 (1994). As a result, every time officers approach someone on the street, there is good reason for them to wonder whether there might be a weapon in his pocket that could pose an imminent deadly threat. Indeed, just as police shootings of civilians are sadly common, so too are shootings of the police.[3]

[3] *See, e.g.*, *North Carolina trooper shot dead during traffic stop*, NBC News (Oct. 17, 2018), available at https://www.nbcnews.com/news/us-news/north-carolina-trooper-shot-dead-during-traffic-stop-n921081, *Police Officer is 'Murdered for Her Uniform' in the Bronx*, THE NEW YORK TIMES (July 5, 2017), available at https://www.nytimes.com/2017/07/05/nyregion/nypd-bronx-police-shooting.html; *Five Dallas Officers Were Killed as Payback, Police Chief Says*,

Understandably, then, police officers often seek to protect themselves by asking the people they approach on the street to show their hands, even when there are no reasonable grounds to suspect them of a crime. In fact, police are specifically trained to make sure they can see the hands of the people they interact with, making this a recurring scenario. *See, e.g.*, *United States v. Christian*, 673 F.3d 702, 709 (7th Cir. 2012) (police officers "trained to watch individuals' hands when approaching a situation" and "concealment of … hands raised a red flag"); *see also United States v. Fernandes*, 708 F. Supp. 2d 130, 133 (D. Mass. 2010) ("Department of Alcohol, Tobacco, Firearms and Explosives (ATF)-sponsored video training lecture … warned … to watch peoples' hands"); *What To Do When Stopped by the Police*, Michigan Association of Chiefs of Police, available at https://www.michiganpolicechiefs.org/resource/resmgr/Traffic_Stop_Brochure/Traffic_Stop_Brochure.rev.1..pdf ("Keep your hands where the officer can see them and don't put them in your pockets."); *Interacting With Police Officers*, The City of Oklahoma City, available at https://www.okc.gov/government/social-justice/justice-and-the-law/interacting-with-police-officers ("Always keep your hands visible to the officer. They are trained to look for suspicious movements and behavior.").

This case thus presents the classic paradox of an unstoppable force meeting an immovable object. The police naturally want to see the hands of the people they approach on the street even if they do not suspect them of a crime. But because reasonable people would not feel free to refuse such requests, compliance is a seizure requiring reasonable suspicion. Only this Court can resolve this tension by deciding whether compliance with an officer's polite request to show hands is a seizure within the meaning of the Fourth Amendment.

THE NEW YORK TIMES (July 8, 2016), available at https://www.nytimes.com/2016/07/09/us/dallas-police-shooting.html.

II. The Lower Courts Are Divided as to Whether Compliance With a Polite Request to Show Hands Is a Seizure, Reflecting Deeper Disagreement About the Fourth Amendment.

The question of whether compliance with a police officer's polite request to remove hands from pockets is a seizure under the Fourth Amendment has divided the lower courts. Some courts have acknowledged the reality that reasonable people would not feel free to refuse requests to show hands, making compliance a seizure under established precedent. Other courts have focused on the danger posed by firearms and effectively raised the standard for what constitutes a seizure in order to allow police to make such requests without reasonable suspicion. While these cases involve slightly different factual scenarios, they all come down to the same fundamental issue. Their disparate outcomes reflect a deeper dispute about the balance between individual liberty and public safety under Fourth Amendment that this Court should resolve.

Those courts that have held that compliance with a polite request to take hands out of pockets is a seizure under the Fourth Amendment have emphasized the danger of defying this kind of safety-related request, concluding that a reasonable person would not feel free to refuse. In *United States v. Jackson*, 901 F.2d 83 (7th Cir. 1990), for example, police officers were searching an apartment with the permission of the owner when the defendant knocked on the door. *Id.* at 83. One officer opened the door and another asked the defendant to take his hands out of his pockets, which he did. *Id.* at 83. The court held that by complying with this request, the defendant had been seized, explaining that a reasonable person in this situation "would not think himself free to leave," since "[t]he fact that the police have asked him to take his hands out of his pockets implies that they anticipate some potential menace from him," and "[i]n these circumstances he would be foolhardy to try to leave." *Id.* at 84. "[I]t is plain," the court

concluded, "that if [the defendant] had tried to leave, the police would have stopped him. … So we may assume that [the defendant] was not free to leave, and that he knew it." *Id.*

Similarly, in *United States v. Dubose*, 579 F.3d 117 (1st Cir. 2009), police officers saw the defendant lean into the front window of a double-parked car, have a brief conversation with the occupants, and then walk away with his right hand in his sweatshirt pocket. *Id.* at 119. A single officer approached the defendant with his badge displayed, and asked him several times if he could talk to him. *Id.* When the defendant turned around to face him, the officer, "[c]oncerned that [the defendant] might have a firearm in his pocket," repeatedly told him to remove his hand from his pocket, and the defendant complied. *Id.* The court held that it "ha[d] no difficulty concluding that by the time [the defendant] had complied with [the officer's] demand that he stop and remove his hand from his sweatshirt pocket, there had been a seizure." *Id.* at 121.

In other analogous cases, courts have held that compliance with a polite, safety-related request is a seizure within the meaning of the Fourth Amendment, because a reasonable person would not feel free to refuse. *See, e.g.*, *United States v. Hayden*, 759 F.3d 842, 847 (8th Cir. 2014) (defendant "was seized when he turned his body away from [the officer], reached his hand into his jacket pocket, and complied with [the officer's] command that he remove his hand from his pocket"); *United States v. Jones*, 678 F.3d 293, 297, 303 (4th Cir. 2012) (defendants seized when officer asked them "Hey, guys, can you do me a favor? Just lift your shirt for me so I can see you have no guns," and "Hey, guys, would you mind if I pat you down for weapons?"); *United States v. Richardson*, 385 F.3d 625, 630 (6th Cir. 2004) ("The United States makes much of the fact that Officer Fisher did not display an intimidating demeanor or use coercive language, but rather said, 'Okay, just hang out right here for me, okay?' Regardless of Officer Fisher's

demeanor, however, his words alone were enough to make a reasonable person in Collier's shoes feel that he would not be free to walk away and ignore Officer Fisher's request.").

On the other side of the divide, those courts that have held that compliance with a polite request to show hands is not a seizure have stressed the danger posed by firearms and the need for police to see people's hands without reasonable suspicion. In Mr. de Castro's case, for example, the Third Circuit acknowledged that "the recent history of police encounters resulting in death" might deter people from refusing a request to show hands, but nevertheless concluded that "it was appropriate for [the officer] to request that De Castro remove his hands from his pockets for the safety of himself and others." *De Castro*, 905 F.3d at 682.

In *United States v. Barnes*, 496 A.2d 1040 (D.C. 1985), on which the Third Circuit relied, police saw the defendant standing in front of a clothing store in a high-crime area, looking up and down the street while his companion went in and out of the store several times. *Id.* at 1041. A single police officer approached and "asked him to remove his hands from his pockets," and then "inquired what [he] was doing there" and "if he had ever been arrested." *Id.* The court held that the officer's "request that [the defendant] remove his hands from his pockets … followed by two questions and [the defendant's] 'voluntary answers,' met the Supreme Court's test for a pre-seizure, 'consensual encounter.'" *Id.* at 1045. Highlighting the "practical policy reason" for this conclusion, the court read Fourth Amendment precedent as "increasingly … opt[ing] in favor of public safety" by "rais[ing] the threshold of what is meant by a 'seizure.'" *Id.* at 1044.

Similarly, in *United States v. Broomfield*, 417 F.3d 654 (7th Cir. 2005), a police officer saw the defendant near the site of a recent robbery, with few other pedestrians in the area. *Id.* at 654-655. The officer told him to stop and "to take his hands out of his pockets," and he immediately complied. *Id.* at 655. The court held that compliance with this request was not a

seizure because "[t]he interference with personal liberty is too slight to activate constitutional concerns." *Id.* at 656 (citation omitted). "All the officer had said was take your hands out of your pockets, an obvious precaution since it was dark and an armed robber was on the loose." *Id.*

III. This Case Is an Ideal Vehicle for Answering the Question Presented.

This case is an ideal vehicle for deciding whether compliance with a polite request to take hands out of pockets is a seizure under the Fourth Amendment. Mr. de Castro's encounter with the police squarely presents the question, the Third Circuit reached the wrong conclusion in finding that he was not seized, and because the officer did not have reasonable suspicion at that moment, a decision in Mr. de Castro's favor will likely result in reversal of his conviction.

Mr. de Castro's argument on appeal was that he was seized when he complied with the police officer's polite request to show hands, and that the seizure was not justified by reasonable suspicion. The Third Circuit denied his appeal on the ground that he was not seized when he removed his hands from his pockets because a reasonable person would have felt free to refuse the officer's request. *See De Castro*, 905 F.3d at 682-683. That conclusion was wrong. Mr. de Castro was standing in a high-crime area when he was suddenly approached by an armed and uniformed police officer. In those circumstances, a reasonable person would feel he was the target of an urgent inquiry and would not want to communicate aggression by refusing to show his hands. Instead, a reasonable person would feel compelled to submit to the officer's safety-related request, even if phrased politely. Because a reasonable person would not feel free to refuse a police officer's polite request to show hands, Mr. de Castro was seized when he complied.

While the Third Circuit emphasized that the officer needed to see Mr. de Castro's hands in order to guard himself from a concealed firearm, the Fourth Amendment protects people from having to give up control of their body to law enforcement without reasonable suspicion. This Court has firmly held that there is no "firearm exception" to *Terry*, since the rule in *Terry* itself, "which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause," already "responds to this very concern." *J.L.*, 529 U.S. at 272. Moreover, a "firearm exception" would unduly infringe on Fourth Amendment rights, and could not be "securely confine[d] … to allegations involving firearms." *Id.* at 272. Instead of violating *Terry*, police officers can protect themselves from concealed firearms in circumstances where they do not have reasonable suspicion by instead surveilling from a distance or by engaging in a less coercive manner. *See United States v. Lowe*, 791 F.3d 424, 436 (3d Cir. 2015) (noting that police "have many tools at their disposal to gather additional evidence" that could give rise to reasonable suspicion justifying a seizure, including "investigation, surveillance, and even approaching the suspect without a show of authority"); *United States v. Roberson*, 90 F.3d 75, 81 (3d Cir. 1996) (explaining that police are "not powerless to act" on less than reasonable suspicion because they may "set up surveillance of the defendant" to "observe[] suspicious behavior" that would then give them "appropriate cause to stop – and perhaps even arrest – him").

Since the Third Circuit did not reach Mr. de Castro's argument that the police officer lacked reasonable suspicion to seize him at the moment he took his hands out of his pockets, *see De Castro*, 905 F.3d at 681-683, it will have to address that question if this Court rules in his favor and the matter is remanded for further proceedings. Mr. de Castro is likely to prevail on that point as well. At the moment he asked Mr. de Castro to take his hands out of his pockets,

the police officer's only reason to suspect him of a crime was a report from an anonymous 911 caller who accused him of pointing a gun at juveniles, but did not give a basis for this accusation, nor claimed to be an eyewitness or to be giving a contemporaneous account. When the officer arrived on the scene, he not see Mr. De Castro engaged in any illegal activity whatsoever and did not see any juveniles in the area. There was therefore not reasonable suspicion to seize Mr. de Castro at the moment he complied with the officer's request to take his hands out of his pockets, requiring suppression of the evidence and reversal of his conviction. *See Navarette v. California*, 134 S. Ct. 1683 (2014) (911 call creates reasonable suspicion if caller gives eyewitness, contemporaneous report of ongoing crime); *Florida v. J.L.*, 529 U.S. 266 (2000) (anonymous tip accusing someone of crime does not create reasonable suspicion).

CONCLUSION

For the foregoing reasons, Mr. de Castro respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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