No. ____

IN THE

Supreme Court of the United States

PAUL JOHNSON, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Amendment permits a police officer to seize a freestanding round of ammunition identified during a pat down conducted pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968).

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties to the proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's en banc opinion is reported at 921 F.3d 991 and is reproduced as Appendix ("App.") A. App. 1a–88a. The Eleventh Circuit's vacated panel opinion is reported at 885 F.3d 1313 and is reproduced as Appendix B. App. 89a–108a. The district court's order denying the motion to suppress is unreported but is reproduced as Appendix C. App. 109a–22a.

JURISDICTION

The en banc Eleventh Circuit issued its decision on April 16, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. 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, 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."

INTRODUCTION

Every day in cities across this country, police officers pat down Americans reasonably suspected of being armed and dangerous. This Court authorized those frisks over fifty years ago in *Terry v. Ohio*, 392 U.S. 1 (1968). But, astonishingly,

that now-routine practice is contrary to the original meaning of the Fourth Amendment. As Justice Scalia explained twenty-five years ago, there is no "support at common law for physically searching" a suspect upon less than the probable cause required to arrest him. *Minnesota v. Dickerson*, 508 U.S. 366, 380–81 (1993) (Scalia, J., concurring). And he doubted that "the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity." *Id*. at 381. Scholars have since confirmed his doubts: *Terry* frisks are contrary to the original meaning.

Equally astonishing, that historical fact has never mattered. Adhering to the "original-meaning-is-irrelevant, good-policy-is-constitutional-law school of jurisprudence" of the time, *id*. at 382 (Scalia, J., concurring), *Terry* considered only policy, not history. And, in *Dickerson*, Justice Scalia wrote only for himself, as originalism had not yet taken hold as a dominant method of constitutional interpretation. But times have changed. When interpreting the Fourth Amendment, the Court now "begin[s] with history," "look[ing] to the statutes and common law of the founding era." *Virginia v. Moore*, 553 U.S. 164, 168 (2008). Although *stare decisis* counsels against overruling *Terry* at this juncture, courts must narrowly apply it to prevent any further departure from the original meaning.

That did not happen here. During a *Terry* frisk, an officer immediately identified a freestanding round of ammunition in Petitioner's pocket and seized it. Petitioner argued that this seizure exceeded the lawful scope of a *Terry* frisk because the bullet was not a "weapon," and "[n]othing in *Terry* can be understood to

allow . . . any search whatever for anything but weapons." *Ybarra v. Illinois*, 444 U.S. 85, 93–94 (1979). He further argued that, because "this Court has been careful to maintain [*Terry*'s] narrow scope," *Dunaway v. New York*, 442 U.S. 200, 210 (1979), and because Justice Scalia correctly observed that *Terry* frisks were contrary to the Fourth Amendment's original meaning, *Terry* should not be extended to permit the seizure of a freestanding round of ammunition.

By a vote of 7–5, the en banc Eleventh Circuit disagreed. The majority reasoned that, although the bullet was not a weapon, seizing it was reasonably related to officer safety. Believing that *Terry* directly controlled the issue, the majority expressly refused to consider Petitioner's originalist argument. App. 17a–19a. In dissent, Judge Jordan forcefully criticized the majority for expanding *Terry* and for ignoring Petitioner's historical argument, thereby "dilut[ing] originalism's constraining power." App. 38a–45a (citation omitted).

Because the en banc Eleventh Circuit not only disregarded the Fourth Amendment's original meaning but permitted an even further departure therefrom, this Court's review is warranted. Moreover, while ahistorical *Terry* frisks occur every day, this Court has never considered how to apply *Terry* in light of the Fourth Amendment's original meaning, and it has not analyzed the scope of a *Terry* frisk since *Dickerson*. Finally, there is significant confusion about how *Terry* applies to ammunition. Yet countless Americans carry ammunition, and seizing it absent probable cause risks offending not only the Fourth Amendment but the Second Amendment as well. Those critical rights must be protected, not diluted.

STATEMENT

A. FACTUAL BACKGROUND

One Saturday night in 2015, Petitioner returned home in the pre-dawn hours after celebrating his 24th birthday. He lived in a multi-family duplex in Opa-Locka, Florida, a Miami neighborhood. Upon arriving, Petitioner found himself locked out. His girlfriend was inside, but she had taken sleeping pills. To wake her, he began knocking on the door. Unfortunately, he lived in a high-crime area, where burglaries (including by armed individuals) sometimes took place. Mistaking his knocking for a burglary, an unknown neighbor called the police. Although it was almost 5:00 a.m. and still dark out, the anonymous caller reported seeing a black man in a white shirt trying to enter the home through a window.

Police dispatch alerted the field, and Officer Williams, along with Corporal Colebrooke, arrived at the location less than five minutes later. Although Officer Williams had no information about the anonymous tipster, he and Corporal Colebrooke saw a black male fitting the general description on the side of the complex, where it was dark. The officers decided to detain the man, who turned out to be Petitioner. They did not pause to consider whether he lived there.

Both drawing their guns, the officers ordered Petitioner to walk towards them with his hands up. He complied. When Petitioner approached the officers—now also including a third officer—they ordered him to get on the ground. Again, Petitioner complied. Once he was on the ground, Officer Williams placed him in

handcuffs and advised him that he was being detained. Although Petitioner fully complied, the officers did not ask him for identification or whether he lived there.

The officers laid Petitioner on his left side, such that his right front pants pocket was raised in the air. While on the ground in handcuffs, Officer Williams conducted a pat down of that front pocket. Officer Williams immediately felt a very soft piece of nylon material, and then, underneath it, a hard, round, oval-shaped object towards the bottom of the pocket. In light of his training and experience, and that object's smooth texture and oval shape, Officer Williams immediately identified that object as a round of ammunition. Although the officers had holstered their weapons due to Petitioner's detention, Officer Williams was concerned that there might be a weapon somewhere nearby or that an accomplice was on the scene. Thus, to make the scene secure, he reached inside the pocket and seized its contents: the bullet and an empty nylon holster. The bullet was a .380 caliber, which was fairly small and even smaller than a 9 millimeter round.

Their discovery of the bullet and the holster led the officers, for the first time, to begin canvassing the property for a firearm. The officers found no firearms in the immediate area surrounding Petitioner or anywhere on the property. Officer Williams, however, discovered a hole in a wooden fence towards the back of the property. To view the other side of the fence, he drove around the block and walked across the adjoining property towards the hole, where he found two firearms.

As Officer Williams was canvassing the property, and after the pat down was complete, a fourth officer arrived. He surveyed the scene: Petitioner remained

handcuffed on the ground; and the bullet and holster were on the ground beside him. The officer proceeded to investigate the burglary report. Petitioner advised that he lived there, and he had been knocking to wake up his girlfriend. The officer verified that account. After knocking on the door himself, Petitioner's girlfriend answered it and confirmed Petitioner lived there. Although cleared of any burglary, Petitioner was placed in a patrol car and read his rights. After the firearms were found, he was taken to the police station and made incriminating statements.

B. PROCEEDINGS BELOW

1. Petitioner was charged in the Southern District of Florida with being a felon in possession of ammunition and firearms, in violation of 18 U.S.C. § 922(g)(1). Petitioner moved to suppress the evidence and statements, arguing that the stop and frisk were not supported by reasonable suspicion, and, alternatively, that seizing the ammunition exceeded the lawful scope of a pat down under *Terry v. Ohio*, 392 U.S. 1 (1968). Following evidentiary hearings, the district court denied the motion. The district court concluded that reasonable suspicion supported the stop and frisk, and that reaching inside Petitioner's pocket did not exceed the lawful scope of the pat down under *Terry*. App. 117a–20a. On the latter point, the court acknowledged that the ammunition was neither a "weapon" nor "contraband." But the court upheld its seizure because doing so was "sufficiently connected to officer safety" so as to not "run afoul of the Fourth Amendment." App. 120a.

2. On appeal, a unanimous panel of the Eleventh Circuit reversed. The court agreed that reasonable suspicion supported the stop and frisk. App. 101a–

04a. But it concluded that removing the ammunition (and holster) from Petitioner's pocket exceeded the lawful scope of a *Terry* frisk because the ammunition was neither a "weapon" nor "contraband." App. 104a–08a. It reasoned that "[i]tems not in these two categories cannot be retrieved. To allow the intrusion into a pants pocket to retrieve an object that is not contraband or a weapon would expand *Terry*-based searches beyond what is constitutionally allowed." App. 106a. The panel therefore held that "the presence of a single round of ammunition—without facts supporting the presence, or reasonable expectation of the presence, of a firearm—was insufficient to justify the seizure of the bullet and the holster." App. 107a.

3. The Eleventh Circuit *sua sponte* vacated the panel opinion and granted rehearing en banc to determine whether Officer Williams was constitutionally permitted to seize the round of ammunition that he felt during the pat down. By a vote of 7–5, the en banc court concluded that he was.

a. The seven-judge majority held that, "during a *Terry* frisk, an officer may remove ammunition from a suspect when the removal is reasonably related to the protection of the officers and others nearby." App. 15a. Purporting to apply a totality-of-the-circumstances test, the majority emphasized that doing so here was reasonably related to officer safety because, although Petitioner was handcuffed, Officer Williams encountered an unsecure scene in a high-crime area before dawn while investigating a reported burglary. App. 9a–10a, 16a–17a, 20a–24a. The majority also emphasized that a bullet was an "integral part of what makes a gun lethal," and examining the ammunition would have helped the officers search for a

matching firearm nearby. App. 10a–11a, 16a. Although the majority did not dispute that the ammunition was not a weapon, the majority nonetheless rejected Petitioner's argument that the freestanding round of ammunition itself posed no danger on the facts here. App. 10a–11a, 14a–15a. In response to Petitioner's argument that the court should narrowly apply *Terry* because it was inconsistent with the Fourth Amendment's original meaning, the majority refused to consider original meaning because it believed that *Terry* directly controlled. App. 17a–19a.

b. Although joining the majority in full, Judge Newsom concurred to express his view that, rather than examining the totality of the circumstances—which, in his view, cut both ways here—officers should always be permitted to seize ammunition during a lawful *Terry* frisk because it is an "instrument of assault." *See* App. 25a–30a. Judge Branch, joined by Judge Grant, also joined the majority in full but wrote separately in agreement with Judge Newsom that there should be a *per se* rule for ammunition. In her view, the totality of the circumstances are relevant only when analyzing the stop and frisk at their inception. But once an officer feels ammunition, he may automatically seize it. *See* App. 31a–37a.

c. Judge Jill Pryor, joined by Judges Wilson, Martin, and Jordan, authored the principal dissent. In her view, the majority had "unjustifiably broadened the scope of *Terry*'s narrow exception, tipping the balance too far in favor of law enforcement." App. 75a. She opined that *Terry* was limited to a search for "weapons," which excluded ammunition, and that the bullet posed no plausible danger under the particular circumstances here. In that regard, she emphasized

that multiple officers had handcuffed a fully-compliant Petitioner at gunpoint and placed him on the ground before conducting the frisk, and there had been no indication of a weapon or accomplice at the scene. *See* App. 74a–88a. She further opined that the majority had effectively and improperly created a categorical rule permitting officers to seize a freestanding bullet. App. 84a–87a.

In a separate dissent, Judge Rosenbaum developed the latter point. She explained at length that, although the majority insisted that it was merely applying a totality-of-the-circumstances test, its reasoning had effectively and necessarily created a *per se* rule that ammunition will always be seizable. *See* App. 46a–73a.

Despite joining Judge Jill Pryor's dissent, Judge Jordan wrote a separate dissent for the purpose of criticizing the "majority's failure to address, in any meaningful way, Mr. Johnson's originalist argument for limiting the reach of *Terry*." App. 38a. He explained that scholars had confirmed Justice Scalia's observation that *Terry* was contrary to the original meaning of the Fourth Amendment. App. 38a–39a & n.1. The "proper originalist response," therefore, was to "stop where *Terry* and its progeny stop, and prohibit, absent probable cause, the seizure of items which are neither weapons nor contraband." App. 40a–41a (citation omitted). But, he argued, by expanding *Terry* beyond its narrow scope, and by refusing to consider original meaning in this particular Fourth Amendment context, "the majority gives credence to those who have noted that originalism, when applied selectively, can be just as subjective (and just as subject to manipulation) as other competing theories of constitutional interpretation." App. 40a–45a.

REASONS FOR GRANTING THE PETITION

I. *TERRY* FRISKS ARE CONTRARY TO THE FOURTH AMENDMENT'S ORIGINAL MEANING, WHICH THE ELEVENTH CIRCUIT REFUSED TO CONSIDER

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court held that officers may pat down a suspect's outer clothing upon reasonable suspicion that he is armed and dangerous. The Court acknowledged that pat downs were a Fourth Amendment "search" constituting a "serious intrusion upon the sanctity of the person." *Id.* at 16–19. It nonetheless permitted such frisks based on reasonable suspicion (rather than probable cause) after balancing the government's interest in officer safety with the individual's interest in personal security. *See id.* at 20–27. That was a naked policy judgment. At no point did the Court attempt to reconcile that holding with, or even mention, the original meaning of the Fourth Amendment.

Twenty-five years later, Justice Scalia went out of his way to criticize "the original-meaning-is-irrelevant, good-policy-is-constitutional-law school of jurisprudence that the *Terry* opinion represents." *Minnesota v. Dickerson*, 508 U.S. 366, 382 (1993) (Scalia, J., concurring). Specifically, he explained that *Terry* "made no serious attempt to determine compliance with traditional standards, but rather, according to the style of this Court at the time, simply adjudged that such a search was 'reasonable' by current estimations." *Id.* at 380. He believed that "the 'stop' portion of the *Terry* 'stop-and-frisk' holding accords with the common law," as evidenced "by the so-called night-walker statutes, and their common-law antecedents." *Id.* He was "unaware, however, of any precedent for a physical search of a person thus temporarily detained for questioning." *Id.* at 381.

He explained that, where a suspect was subject to arrest based on probable cause, "it is clear that the common law would permit not just a protective 'frisk,' but a full physical search incident to arrest." *Id.* "When, however, the detention did not rise to the level of a full-blown arrest (and was not supported by the degree of cause needful for that purpose), there appears to be no clear support at common law for physically searching the suspect." *Id.* To the contrary, there was "no English authority" for "tapping [the] pockets" of a nightwalker absent probable cause. *Id.* (citations omitted). He "frankly doubt[ed], moreover, [that] the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity." *Id.*

Scholars have since confirmed Justice Scalia's doubts. *See, e.g.*, Sophie J. Hart & Dennis M. Martin, *Judge Gorsuch and the Fourth Amendment*, 69 Stan. L. Rev. Online 132, 136 (2017) ("Scholars and judges seeking a historical hook for *Terry* have uncovered little evidence linking *Terry*'s stop and frisks to police actions at common law."); Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against* Terry v. Ohio, 43 Tex. Tech. L. Rev. 299, 330–37 (2010) (surveying historical record and concluding that "there is no framing-era precedent for the warrantless detention or search of a person on less than the standard that would justify arrest"); George C. Thomas, III, *Time Travel, Hovercrafts, and the Framers: James Sees the Future and Rewrites the Fourth Amendment*, 80 Notre Dame L. Rev. 1451, 1514–16 (2005) (opining that frisks based on less than probable cause "would

have baffled the Framers"); App. 39a & n.1 (Jordan, J., dissenting) (citing additional sources, including *People v. Chiagles*, 237 N.Y. 193, 197 (N.Y. 1923) (Cardozo, J.)).

Justice Scalia's valid originalist critique of *Terry* should affect how it is applied today. This Court no longer employs the same ahistorical, policy-based mode of Fourth Amendment analysis that *Terry* did. Instead, it has made clear that, "[i]n determining whether a search of seizure is unreasonable, [it] begin[s] with history," "look[ing] to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve." *Virginia v. Moore*, 553 U.S. 164, 168 (2008); *see Atwater v. City of Lago Vista*, 532 U.S. 318, 326–27 (2001) ("We begin with the state of pre-founding English common law"); *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999) ("we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the [Fourth] Amendment was framed"); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) ("look[ing] to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing").

Given the Court's modern-day emphasis on original meaning, Petitioner relied on Scalia's concurrence in *Dickerson* and urged the court of appeals to narrowly apply *Terry* so as to "limit[ ] the damage being inflicted on the original meaning of the Fourth Amendment." Pet. C.A. En Banc Br. 18–20. In response, neither the government nor any member of the Eleventh Circuit disputed that *Terry* frisks were contrary to the original meaning. App. 40a & n.2 (Jordan, J., dissenting). Rather, the government simply ignored Petitioner's originalist

argument. *See* Gov't C.A. En Banc Br. 18–50. And, although the en banc majority recognized that this Court "has considered the original meaning of the Fourth Amendment" in several areas, the majority expressly refused to consider it here. App. 17a–19a. "According to the majority, [it] [was] bound by *Terry*, and must therefore ignore the original understanding of the Fourth Amendment." App. 40a (Jordan, J., dissenting). Indeed, the en banc majority stated that, in deciding how to apply *Terry*, this Court—and only this Court—could consider that original meaning. App. 19a. Because the court of appeals flatly refused to do so, and because this Court has never addressed how to apply *Terry* in light of the Fourth Amendment's original meaning, the Court should do so now.

II. THE ELEVENTH CIRCUIT EXTENDED *TERRY*'S AHISTORICAL PAT-DOWN AUTHORITY BEYOND A LIMITED SEARCH FOR "WEAPONS"

Not only did the court of appeals refuse to consider original meaning, but it extended *Terry*'s ahistorical pat-down authority beyond its own narrow terms.

1. Despite authorizing pat downs based on less than probable cause, *Terry* still cautioned that they must remain "carefully limited." 392 U.S. at 30. Emphasizing the "traditional limitations placed upon the scope of searches," the Court stated that pat downs must be "strictly tied to" and "strictly circumscribed by" their protective justification. *Id.* at 17–19, 25–26, 28–29. To ensure that close connection, the Court created a "narrowly drawn authority to permit a reasonable search for *weapons*." *Id.* at 27 (emphasis added).

Because "*Terry* for the first time recognized an exception" to the default requirement of probable cause—which "represented the accumulated wisdom of

precedent and experience as to the minimum justification necessary"—"this Court has been careful to maintain its narrow scope." *Dunaway v. New York*, 442 U.S. 200, 208–10 (1979). To do so, the Court has repeatedly recognized that "*Terry* permitted pat-downs for weapons, and only weapons." App. 40a (Jordan, J., dissenting); *see Dickerson*, 508 U.S. at 373 (reiterating that a *Terry* frisk "must be strictly 'limited to that which is necessary for the discovery of weapons'") (quoting *Terry*, 392 U.S. at 26); *Michigan v. Long*, 463 U.S. 1032, 1052 n.16 (1983) ("We have recognized that *Terry* searches are limited . . . to weapons."); *Ybarra v. Illinois*, 444 U.S. 85, 93–94 (1979) ("Nothing in *Terry* can be understood to allow . . . any search whatever for anything but weapons."); *Terry*, 392 U.S. at 30 (authorizing "carefully limited search of the outer clothing . . . in an attempt to discover weapons").

In *Dickerson*, this Court scrupulously enforced that limitation. The frisking officer felt a lump in the suspect's jacket, and, even though he "certainly knew [that it] was not a weapon," he nonetheless "examined it with [his] fingers and it slid," at which point he determined that it was crack cocaine. *Dickerson*, 508 U.S. at 369–70 (citations omitted). The Court concluded that "the police officer in th[at] case overstepped the bounds of the 'strictly circumscribed' search for weapons allowed under *Terry*." *Id*. at 378 (quoting *Terry*, 392 U.S. at 26). That was so because "the officer's continued exploration of respondent's pocket after having concluded that it contained no weapon" exceeded the sole justification for the pat down. *Id*. By "manipulating the contents of the defendant's pocket—a pocket which the officer

already knew contained no weapon"—the officer conducted "the sort of evidentiary search that *Terry* expressly refused to authorize." *Id.* (internal citation omitted).[1]

2. The Eleventh Circuit jettisoned that important limitation on *Terry*, authorizing the seizure of an item on officer-safety grounds, even where the officer knows that the item is not a weapon. Indeed, there was no dispute here that the freestanding round of ammunition in Petitioner's pocket was not a weapon. And no officer could have reasonably believed that it was given its small size and oval shape. Nonetheless, the en banc majority upheld the seizure of that known non-weapon because it believed that doing so was related to officer safety.

In effect, the Eleventh Circuit substituted a free-wheeling, generalized officer-safety analysis in place of *Terry*'s narrow "weapon" criterion. *See* App. 13a (rejecting the reasoning of another court because it merely "describ[ed] ammunition as a 'nonweapon'" without "consider[ing] whether or in what circumstances an officer might be justified in seizing it as a safety measure"); App. 14a (failing to dispute that "ammunition is not a weapon," but asking instead whether seizing it is related to officer safety); App. 15a (holding that "an officer may remove ammunition from a suspect when the removal is reasonably related to the protection of the officers and others nearby," regardless of whether it qualifies as a "weapon"). Moving forward, officers in the Eleventh Circuit may now seize any item that they

[1] *Dickerson* also held that an officer may seize "contraband" felt during a pat down where its status as such is "immediately apparent." 508 U.S. at 373–79. But neither the court of appeals nor the district court found that holding applicable here, as Officer Williams did not know that Petitioner was a felon when he felt the ammunition in his pocket. App. 13a, 74a n.1 (Jill Pryor, J., dissenting), App. 120a.

reasonably believe bears some relationship to officer safety, even if they know for sure that it is not a weapon.

3. As the dissenting opinions below recognized, that represents an expansion of *Terry*'s narrowly-drawn authority. *See* App. 40a (Jordan, J., dissenting) ("*Terry* permitted pat-downs for weapons, and only weapons. By allowing officers to seize a stand-alone bullet . . . , the majority expands *Terry* beyond its 'narrow scope'"); App. 74a–75a (Jill Pryor, J., dissenting) (opining that *Terry* frisks are limited to weapons alone); *id.* at 75a ("the majority has unjustifiably broadened the scope of *Terry*'s narrow exception"); *id.* at 85a ("*Terry* was careful to carve out an exception for *weapons*, not parts of weapons—no matter how integral to the weapon those parts might be."); *id.* ("A freestanding bullet is neither a weapon nor lethal."); *id.* at 87a ("the majority's conclusion that a single freestanding bullet could be used as a weapon is a significant extension of *Terry*").

While the en banc majority found that *Terry* "directly control[led]" this case, App. 18a, nothing in *Terry* addressed ammunition, let alone held that an officer may seize a known non-weapon. And this Court has never before permitted an officer to seize an item that he knew was not a weapon (or contraband). Thus, the majority's decision extends *Terry* beyond where this Court has ever taken it. *See* App. 43a (Jordan, J., dissenting) (observing that no "precedent compels the expansion of *Terry* to permit the seizure of items that are neither weapons nor contraband"); *id.* ("The majority wants to make it seem that its holding results a priori from *Terry* and its progeny. That is not so."); App. 86a (Jill Pryor, J., dissenting) ("we're having

this discussion because [*Terry*] does not expressly allow seizure of a freestanding bullet"). And while other lower courts have also upheld the seizure of ammunition under *Terry*, *see* App. 12a–13a (discussing cases), "[n]one . . . has expanded *Terry* this far," authorizing the seizure of ammunition where there are no other facts indicating that a firearm is present, App. 40a n.3. (Jordan, J., dissenting); *see* App. 82a (Jill Pryor, J., dissenting).

4. That expansion is particularly troubling because, as explained above, even the narrow frisking authority that *Terry* did permit conflicts with the Fourth Amendment's original meaning. As a result, the majority should have "stop[ped] where *Terry* and its progeny stop[ped], and prohibit[ed], absent probable cause, the seizure of items which are neither weapons nor contraband." App. 41a (Jordan, J., dissenting). "Declining to broaden" *Terry* in light of its "shaky originalist foundation" would have been the "proper originalist response." *Id.* (citations omitted). But by incorrectly asserting that a straightforward application of *Terry* authorized the seizure, and "[b]y choosing to avoid [Petitioner's] originalist argument against the extension of *Terry* and its progeny, the majority gives credence to those who have noted that originalism, when applied selectively, can be just as subjective (and just as subject to manipulation) as other competing theories of constitutional interpretation." App. 44a–45a (Jordan, J., dissenting). Thus, this Court's intervention is necessary not only to ensure that *Terry* frisks do not depart even further from the Fourth Amendment's original meaning, but also to clarify that courts may not selectively apply originalism to reach desired policy outcomes.

III. THE QUESTION PRESENTED WARRANTS REVIEW

Dispelling that corrosive critique of originalism, and preventing an even further departure from the Fourth Amendment's original meaning, alone warrants this Court's review. But this Court's intervention is also necessary to clarify confusion about how *Terry* applies to ammunition, an important question implicating not only the Fourth Amendment but the Second Amendment as well.

1. The fractured en banc decision here illustrates the confusion. In analyzing whether Officer Williams was permitted to seize the ammunition, multiple approaches were advanced. The majority purported to assess whether the seizure was reasonably related to officer safety in light of the totality of the circumstances—without regard for whether the item is a "weapon" or for the Fourth Amendment's original meaning. *See* App. 9a–24a.

Despite joining the majority, three judges disagreed with its approach, believing that ammunition is always seizable during a lawful pat-down, regardless of the circumstances or their relationship to officer safety. *See* App. 25a–30a (Newsom, J., concurring); App. 31a–37a (Branch, J., concurring). And they found that "instruments of assault," not "weapons," was the proper criterion under *Terry*.

Meanwhile, four judges believed that *Terry* is strictly limited to "weapons," and that the bullet here did not pose a plausible threat to officer safety under the circumstances. *See* App. 74a–88a (Jill Pryor, J., dissenting). And one of those judges emphasized that *Terry* must be narrowly applied because it is contrary to the Fourth Amendment's original meaning. App. 38a–45a (Jordan, J., dissenting).

In addition to that general confusion, the majority's "reasonably related" standard highlights a specific point of confusion. In discussing whether the scope of a frisk is reasonable, *Terry* simultaneously stated that it should be "reasonably related" and "strictly tied to/circumscribed by" its justification. 392 U.S. at 19–20, 26, 29. But those are two very different legal standards. Although this Court subsequently used the stricter standard in *Dickerson*, 508 U.S. 373, 378, the majority here ignored that standard and used only the liberal one.

In short, that this case was reheard en banc, sharply divided 7–5, and produced several separate opinions—all advocating different analytical approaches—reflects significant confusion about how *Terry* applies to ammunition.

2. Ammunition cases decided by other courts exacerbate that confusion. The en banc majority referenced several cases upholding the seizure of ammunition, App. 12a–13a, but each employed a wholly conclusory analysis, failing to meaningfully grapple with the issues dividing the en banc court here.[2] By upholding the seizures without reasoned explanation, those cases create further analytical confusion in the legal landscape about *Terry*'s application to ammunition.

Meanwhile, two courts *have* found a *Terry* violation in that context. *See* App. 82a–84a & n.7 (Jill Pryor, J., dissenting) (discussing *United States v. Miles*, 247

[2] *See People v. Colyar*, 996 N.E.2d 575, 585–87 (Ill. 2013) (analysis assumes that seizure of bullets was lawful); *United States v. Ward*, 23 F.3d 1303, 1306 (8th Cir. 1994) (single conclusory sentence of analysis and an unexplained citation to *Dickerson*'s contraband holding); *Scott v. State*, 877 P.2d 503, 509 (Nev. 1994) (conclusory assertion that seizure was a reasonable "precautionary measure"); *State v. Moton*, 733 S.W.2d 449, 451 (Mo. Ct. App. 1986) (conclusory assertion that seizure was lawful); *People v. Lewis*, 507 N.Y.S.2d 80, 81 (N.Y. App. Div. 1986) (same); *State v. Smith*, 665 P.2d 995, 998 (Ariz. 1983) (same).

F.3d 1009 (9th Cir. 2001) and *United States v. Lemons*, 153 F. Supp. 2d 948 (E.D. Wisc. 2001)); App. 43a–44a (Jordan, J., dissenting) (same). In both, the courts held that the officer exceeded the scope of a lawful pat down because, as in *Dickerson*, he manipulated an item he knew was not a weapon—a small box in *Miles* and a sock in *Lemons*. Although those cases are distinguishable, in that the officer did not know for sure that those items contained bullets, the facts in *Miles* were otherwise strikingly similar to, and more favorable to the government than, those here. *See* App. 83–84 & n.7 (Jill Pryor, J., dissenting) (explaining why). And, in *Lemons*, the court observed that, even if the officer had immediately identified the bullets, he still would have violated *Terry* because it authorized only "a limited search for weapons," and ammunition was not a weapon. 153 F. Supp. 2d at 958–59.

3. This Court should clarify the confusion. *Terry* frisks "have become embedded in routine police practice to the point where [they] have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). Yet, over the last five decades, this Court has analyzed the scope of a *Terry* frisk only once—in *Dickerson*. But *Dickerson* is over twenty-five years old. It predated the originalism renaissance. And it did not address how *Terry* applies to ammunition.

That specific question is also important. The case law above reflects a casual yet widespread expansion of *Terry* to ammunition, and thus a significant departure from the Fourth Amendment's original meaning. Moreover, many Americans carry ammunition—to their homes for protection, to the shooting range for practice, and to the forest for hunting. And many carry keychains and wear jewelry with bullets

as the centerpiece. Thus, seizing ammunition absent probable cause not only offends the Fourth Amendment rights of many; it may also offend their Second Amendment rights. *See Luis v. United States*, 136 S. Ct. 1083, 1097–98 (2016) (Thomas, J., concurring in the judgment) ("The right to keep and bear arms . . . implies a corresponding right to obtain the bullets necessary to use them," otherwise the "Second Amendment would be toothless") (quotation omitted); *accord Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. of N.J.*, 910 F.3d 106, 116 (3d Cir. 2018) (large-capacity magazines protected); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 255–56 (2d Cir. 2015) (same); *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967–68 (9th Cir. 2014) (hollow-point ammunition).[3]

IV. THIS CASE IS AN IDEAL VEHICLE

1. Procedurally, the question presented is squarely before the Court. In the district court and on appeal, Petitioner argued at length that Officer Williams exceeded the lawful scope of a *Terry* frisk because a freestanding round of ammunition was neither a weapon nor contraband. *See* Dist. Ct. Dkt. Entries 33, 35; Pet. C.A. Panel Br. 14–23; Pet. C.A. Panel Reply Br. 4–9; Pet. C.A. En Banc Br. 15–40; Pet. C.A. En Banc Reply Br. 1–23. Both the district court and the en banc court of appeals upheld the seizure on the ground that, although neither a weapon nor contraband, the ammunition was related to officer safety. App. 3a, 23a, 118a–21a. And neither court justified that seizure on alternative grounds. As a result,

[3] The relationship between *Terry* and the Second Amendment is also implicated in two other petitions recently filed in this Court. *See Pope v. United States* (U.S. No. 18-8785) (response requested May 9, 2019); *Sykes v. United States* (U.S. No. 18-8988) (response requested May 10, 2019).

whether an officer may seize a freestanding round of ammunition during a lawful *Terry* stop is a question that is squarely presented for decision here.

2. In *Terry*, the Court predicted that "the limitations which the Fourth Amendment places upon a protective seizure and search for weapons . . . will have to be developed in the concrete factual circumstances of individual cases." 392 U.S. at 29. Here, the materials facts are all undisputed. And chief among them is that Officer Williams immediately identified the hard item in Petitioner's pocket as a single round of ammunition. That undisputed fact makes this case a natural sequel to *Dickerson*, where the officer also knew that the object was not weapon. And that undisputed fact neatly tees up the analytical questions dividing the en banc court below. In that regard, those questions have been fully aired: there were six separate opinions in the en banc proceeding, on top of the opinions by the original three-judge panel and the district court. And because every other court to previously uphold the seizure of ammunition has employed only a conclusory analysis, it is difficult to imagine a better vehicle coming to the Court in the future.

3. This case is especially attractive because Petitioner has emphasized the Fourth Amendment's original meaning. Neither the government nor the Eleventh Circuit disputed that *Terry* frisks lacked support at the time of the framing. That rare historical agreement prompted a robust debate between the en banc majority and Judge Jordan about whether lower courts may consider original meaning when deciding how to apply an established precedent like *Terry*. And, as mentioned above, this Court has never considered how to apply *Terry* in light of its

incompatibility with the Fourth Amendment's original meaning. To be sure, there may be future cases upholding the seizure of ammunition during a *Terry* frisk. But there is no guarantee that the defendant will vigorously press the originalist argument that Petitioner has in this case. Accordingly, granting review here will ensure "the development of a sound [and] fully protective Fourth Amendment jurisprudence." *Carpenter v. United States*, 138 S. Ct. 2206, 2272 (2018) (Gorsuch, J., dissenting). The Court should seize this unique opportunity.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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