No. 18-9399

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

REPLY BRIEF FOR PETITIONER

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At the time of the Founding, the Fourth Amendment did not permit officers to physically search a person who was not subject to arrest. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court departed from that original meaning. Substituting its own policy judgment for that of the Framers, Chief Justice Warren's opinion authorized officers to search anyone reasonably suspected of being armed and dangerous, even absent probable cause to arrest. For the last fifty years, officers have conducted countless *Terry* frisks every day. All have been contrary to the original meaning.

The en banc Eleventh Circuit made things worse. A faithful application of originalism requires a narrow application of *Terry*'s pat-down authority. And *Terry*'s own progeny strictly limits the scope of frisks to weapons. But the Eleventh Circuit refused to consider history and dismissed controlling precedent. Relying instead on its own policy judgment about officer safety, it extended *Terry* beyond weapons to a freestanding bullet that a handcuffed Petitioner could not even access.

Dissatisfied with the windfall *Terry* gave it, the government defends that expansion of *Terry*. But that defense is driven by policy, not law. The government fails to square the decision below with the original meaning or this Court's Fourth Amendment precedents. The government also argues that the decision below does not create a conflict among lower courts, but it creates serious tension at the very least. And the government does not deny that the question presented: recurs frequently; confounds lower courts; is unsettled by this Court; implicates the Second Amendment; and is squarely before the Court here. Certiorari should be granted.

I. *TERRY* FRISKS ARE CONTRARY TO THE ORIGINAL MEANING

1. As Justice Scalia explained in *Minnesota v. Dickerson*, 508 U.S. 366, 380–81 (1993), there is no framing-era authority permitting the search of a suspect upon less suspicion than that required to arrest him. Nowhere does the government dispute that historical fact. Remarkably, it does not even cite Justice Scalia's concurrence in *Dickerson* or any of the authorities supporting and confirming his originalist understanding. *See* Pet. 2, 10–12; Pet. App. 39a (Jordan, J., dissenting).

The government's only response is one conclusory sentence and citation to Akhil Reed Amar, Terry *and Fourth Amendment First Principles*, 72 St. John's L. Rev. 1097 (1998). BIO 11–12. But Professor Amar's article does not address that specific issue at all. It too does not cite, much less address, Justice Scalia's concurrence (or even the *Dickerson* case). And it does not contain one common-law example permitting the physical search of a person who was not subject to arrest.

Instead, Professor Amar's article advances the more general argument that reasonableness, not warrants or probable cause, was the governing standard at the time of the framing. *See* Amar, *supra*, at 1106–18. But other scholars have debunked that argument. *See, e.g.*, Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 591–600 (1998) ("If Amar's evidence is examined closely, it turns out that he has never identified a single framing-era source that endorsed a warrantless arrest or search on the ground that it was reasonable in the circumstances. That is because none did.") (footnote omitted). And, in any event, even if reasonableness was the touchstone for the Framers, there

is still no historical evidence that physically searching a person was deemed "reasonable" where that person was not subject to lawful arrest.

"The only historical evidence that Professor Amar identifies as supporting warrantless searches and seizures on less than the standard for arrest are two framing-era statutes in which Congress authorized suspicionless searches of ships and liquor storehouses." Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against* Terry v. Ohio, 43 Tex. Tech L. Rev. 299, 336 & n.247 (2010) (citing, *inter alia*, Amar, *supra*, at 1104–05). But those statutes did not involve the search of a person, and they can be "attribut[ed] to the framing era's indulgent attitude toward revenue-related searches of commercial premises." *Id.* at 336 & n.248. Moreover, "searches of vessels had always been governed by the special standards of admiralty law," and "the liquor-search statute provided only a highly limited authorization for premises likely to contain taxable alcohol." *Id.* at 336–37 & n.249. In short, "there is no framing-era precedent for the warrantless detention or search of a person on less than the standard that would justify arrest." *Id.* at 337.

2. Unable to muster a single framing-era precedent for *Terry* frisks, the government seeks to minimize the role of history. *See* BIO 12. But this Court's precedents now require the Court to "begin 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* Pet. 12 (citing three more precedents). The government ignores that methodology entirely. So did *Terry*. Snubbing the Framers, *Terry* adhered to the

"original-meaning-is-irrelevant, good-policy-is-constitutional-law school of jurisprudence." *Dickerson*, 508 U.S. at 382 (Scalia, J., concurring); *see* Pet. 2, 10. That school of jurisprudence is no longer accredited.

How, then, should the Court reconcile *Terry*'s ahistorical pat-down authority with the Court's modern-day emphasis on original meaning? There are two options. First, the Court could overrule *Terry*'s pat-down holding. However, doing so is not necessary for Petitioner to prevail here; and, as a matter of *stare decisis*, *Terry* has been the law for fifty years, and pat downs have become routine police practice. The other more modest option, and the one that Petitioner urges, is to "'refuse to extend [*Terry*] one inch beyond its previous contours.'" Pet. App. 41a (Jordan, J., dissenting) (quoting Richard A. Epstein, *The Classical Liberal Alternative to Progressive and Conservative Constitutionalism*, 77 U. Chi. L. Rev. 887, 907 (2010)). Short of overruling it, declining to broaden a constitutional precedent that is contrary to the original meaning is the only proper originalist response. *See, e.g.*, *Idaho v. Garza*, 139 S. Ct. 738, 756–59 (2019) (Thomas, J., dissenting); *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 366–67 (2016) (Thomas, J., concurring).

Thus, rather than "avoid" *Terry*, BIO 12, Petitioner seeks only to ensure that its pat-down authority is applied narrowly, preventing any further dilution of the original meaning of the Fourth Amendment. The government responds that this Court has treated *Terry* as a "settled" rather than a "suspect" precedent. BIO 12. But this Court has never analyzed *Terry*'s pat-down authority in light of the Fourth Amendment's original meaning. Were the Court to do so here, it would conclude

that *Terry*'s pat-down authority is indeed "suspect" and therefore should be applied narrowly. The government is desperate to avoid this Court "questioning [*Terry*'s] underpinnings." BIO 12. But after fifty years, it is time to look under the hood.

3. Unable to dispute Petitioner's originalist argument, the government suggests that the Court can accept it only if it also eliminates the exclusionary rule, since it claims that rule is contrary to the original meaning too. BIO 12. But the Court does not issue advisory opinions to ensure general doctrinal harmony. It decides concrete cases and controversies. And, in this one, the government has never made an originalist argument against the exclusionary rule. In fact, as explained below, it has waived any argument against that rule's application. The Court should not reject Petitioner's originalist argument just because the government declined to make its own originalist argument about a different issue.

It is therefore the government, not Petitioner, who seeks to have it both ways. Under its logic, the Fourth Amendment's original meaning would *always* benefit the government in criminal cases. For even where, as here, the original meaning established rather than refuted a violation of a criminal defendant's rights, courts would be powerless to exclude tainted evidence at trial. The government would prevail in every case where originalism was invoked: heads I win, tails you lose. But originalism is not a one-way ratchet favoring the government. *See* Neil M. Gorsuch, *Why Originalism Is the Best Approach to the Constitution*, Time (Sept. 6, 2019) ("[S]ome suggest that originalism leads to bad results because the results

inevitably happen to be politically conservative results. Rubbish. Originalism is a theory focused on *process*, not on *substance*.").[1]

Implying that two constitutional wrongs make a right, the Eleventh Circuit refused to even consider the merits of Petitioner's originalist argument. Pet. App. 19a. Its refusal to do so here, where it benefitted a defendant, is troubling given its eagerness to do so in other recent cases where it benefitted the government. *See, e.g.*, *United States v. Touset*, 890 F.3d 1227, 1232 (11th Cir. 2018) (upholding suspicionless search of electronic device at the border); *United States v. Phillips*, 834 F.3d 1176, 1179–82 (11th Cir. 2016) (holding that a writ of bodily attachment was a "warrant"). Ironically, that is "precisely the type of 'halfway originalism' that [the court] purport[ed] to reject." Pet. App. 42a–43a (Jordan, J. dissenting).

Such "hot-and-cold originalism" not only denies equal justice to litigants like Petitioner; it undermines a key justification of the methodology itself: to provide an objective criterion for constitutional interpretation that is insulated from subjective ideology. *Id.* at 44a–45a (citations omitted). Originalism operates to constrain judges who "would *like* to be able to apply the law without importing nonlegal considerations." William Baude, Essay, *Originalism as a Constraint on Judges*, 84 U. Chi. L. Rev. 2213, 2224 (2017). But originalism is doomed to fail if courts are free to use it only when it suits their preferred policy outcomes or if it always benefits one party over another. The Court should take this opportunity to re-affirm that originalism must be applied evenly, not selectively.

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[1] https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/.

II. THE DECISION BELOW EXPANDS *TERRY*'S NARROW AUTHORITY

1. Originalism is not the only reason why *Terry*'s pat-down authority must be narrowly applied: *Terry* and its progeny already require it. In *Terry* itself, the Court recognized only a "narrowly drawn authority" to conduct a pat down for weapons. 392 U.S. at 27. And the Court has since explained that, "[b]ecause *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope." *Dunaway v. New York*, 442 U.S. 200, 210 (1979); *accord Ybarra v. Illinois*, 444 U.S. 85, 93–94 (1979). The government does not merely ignore these precedents; it criticizes Petitioner for urging the very narrow application they require. BIO 12. Similarly, the Eleventh Circuit insisted that it could do no more than "faithfully" apply *Terry*, but it failed to recognize that a faithful application required a narrow application. Pet. App. 17a.

In addition to directing that *Terry* be applied narrowly, the Court has emphasized that the scope of a pat down must be "strictly circumscribed" by its protective justification. *Dickerson*, 508 U.S. at 373, 378. And to ensure that limited scope, the Court has made clear that "[n]othing in *Terry* can be understood to allow . . . any search whatever for anything but *weapons*." *Ybarra*, 444 U.S. at 93–94 (emphasis added); *see Dickerson*, 508 U.S. at 373; *Michigan v. Long*, 463 U.S. 1032, 1052 n.16 (1983); Pet. 14. The government again ignores these controlling Fourth Amendment precedents. For it cannot dispute that the single round of ammunition in Petitioner's pocket was not a "weapon" (or "contraband"). *See* BIO 10. Accordingly, seizing it exceeded *Terry*'s narrow-drawn authority.

2. Discounting the precedents above, the Eleventh Circuit asked not whether the bullet was a "weapon," but rather whether it was "reasonably related" to officer safety. *See* Pet. 15–16. In light of the precedents above, the Eleventh Circuit failed to justify its substitution of an amorphous, liberal officer-safety analysis for *Terry*'s "weapon" criterion. At the very least, the court's analysis represents a broad (not narrow) application of *Terry*. Practically, the decision below will permit frisking officers to seize *any* object that they reasonably believe is "related" to officer safety, even if they know for sure it is not a weapon. *See* Pet. 15–16. And any small, round object resembling a bullet will be seizable as well.

Doctrinally too, the Eleventh Circuit's decision breaks new ground. The government does not dispute that, aside from "contraband" (inapplicable here), this Court has never authorized the seizure of an item that was not a "weapon" or reasonably believed to be a "weapon." And this Court has never addressed how *Terry* applies to ammunition, much less held that a freestanding round may be seized during a pat down. *See* Pet. 16–17. Thus, the decision below is hardly a "straightforward application of *Terry*." BIO 11. To the contrary, by expanding the scope of pat downs beyond weapons, the court's broad application conflicts with this Court's precedents and further drains the original meaning.

3. The government makes no attempt to characterize the decision below as a narrow application of *Terry*. Instead, it defends the Eleventh Circuit's analysis on its own overbroad policy-oriented terms. *See* BIO 9–11. But even that defense omits crucial facts illustrating the breadth of the court's application.

In this case, multiple officers detained Petitioner at gunpoint, directed him to the ground, and handcuffed him—all before conducting the pat down. He fully complied with their demands, despite being on his own property at 5 am. Tellingly, once he was handcuffed, the officers holstered their firearms. And after they removed the bullet and holster from his front pocket, they simply left those items on the ground next to him. *See* Pet. 4–5. The officers' own actions thus confirm what common sense tells us: a single bullet posed no plausible threat to the officers after Petitioner "was compliant with officers' commands, on the ground, in handcuffs behind his back, and held at gunpoint by several officers." Pet. App. 79a–81a & n.6, 84a & n.7, 86a–88a (Jill Pryor, J., dissenting). Petitioner was not Houdini.

Of course, a bullet can become deadly when loaded into a matching firearm. But *Terry* permitted the officers to search Petitioner, the surrounding area, and other suspects on the scene, and to seize any firearm found. Without a firearm, however, the bullet in Petitioner's inaccessible front pocket was no more dangerous than a pebble, a marble, or a gemstone. *See State v. Andrade-Reyes*, 442 P.3d 111, 123 (Kan. 2019) ("It is hard to imagine what danger, if any, loose ammunition could pose absent the presence of a firearm."). The full-scale detention and frisk brought the officers to the outer edge of *Terry*'s limited authority; reaching inside Petitioner's pocket to seize an inaccessible non-weapon exceeded that authority.

The point is not that the Eleventh Circuit incorrectly analyzed the facts of this case with regard to officer safety (though it did). Rather, the point is that those facts vividly illustrate how the Eleventh Circuit's liberal officer-safety analysis

represents an expansion of *Terry* and a significant departure from the original meaning. After all, the government has never disputed that the officers lacked probable cause to arrest Petitioner at the time of the pat down. Thus, not even the pat down would have been permitted at the time of the Founding. Yet the Eleventh Circuit permitted the officers to go well beyond the frisk, upholding the seizure of a known non-weapon that a fully-restrained Petitioner could not even access, let alone use to do harm. It is difficult to imagine a broader application of *Terry*.

III. THIS COURT'S REVIEW IS WARRANTED

1. Because *Terry* frisks are contrary to the Fourth Amendment's original meaning, and because the Eleventh Circuit improperly broadened *Terry*'s judicially-invented pat-down authority, this Court's review is warranted for that reason alone. Only this Court can reverse that continued expansion and prevent further erosion of the original meaning. Even the Eleventh Circuit invited this Court's intervention, opining that only this Court could analyze *Terry* in light of the original meaning. Pet. App. 19a. The Court should accept that invitation.

In addition to depleting the Fourth Amendment, the decision below threatens the Second Amendment as well. *See* Pet. 20–21; Downsize D.C. Found. Amicus Br. 5–6, 21–26. The government does not dispute that countless Americans carry ammunition on their person, that ammunition is protected by the Second Amendment, and that seizing it without probable cause would be unlawful. Instead, the government argues only that the Second Amendment question is not properly before the Court. BIO 14. But Petitioner has not presented any such

question here. Rather, he contends that expanding *Terry* to ammunition impinges on the Second Amendment, and that expansion bolsters the need to review the Fourth Amendment question that Petitioner does present. Two rights are at stake.

The Fourth Amendment question is not only important but recurring and unsettled. Police officers conduct *Terry* frisks every day in cities across this country.[2] It is therefore imperative that officers understand the scope of their authority and that citizens understand their rights. Yet the government does not dispute that this Court: has never analyzed *Terry*'s pat-down authority in light of the original meaning; has not analyzed the scope of a pat down since *Dickerson*; and has never analyzed how to apply *Terry* to ammunition. *See* Pet. 20, 22–23.

2. The lower courts therefore need guidance. The government does not dispute that, although several lower courts have upheld the seizure of ammunition during a *Terry* stop, they have simply assumed it was lawful without explanation or legal analysis. *See* Pet. 19 & n.2. The government, notably, makes no effort to defend those opinions. Meanwhile, the lower courts in this case did thoroughly analyze whether the seizure of ammunition exceeded the lawful scope of a *Terry* frisk, and the results are telling: the district court found it lawful; a unanimous three-judge panel found it unlawful; and an en banc court found it lawful by a vote

[2] For example, the D.C. police department recently reported that, just in the last month, it conducted approximately 600 *Terry* frisks. And, in addition to seizing guns, drugs, and other contraband, officers also seized ammunition. Interestingly, *Terry* frisks were the most common type of pre-arrest search, but officers uncovered seizable property only 13% of the time, far less than searches based on probable cause or a warrant. *See* D.C. Metro. Police Dep't, Stop Data Report 3, 13–15 & n.9 (Sept. 2019), https://www.scribd.com/document/425136306/Stop-Data-Report-r6.

of 7 to 5. That's a grand total of 14 federal judges dividing 8 to 6 on the question presented. And the en banc proceeding produced 6 opinions, the mere existence of which reflects the analytical confusion about the question presented.

Ignoring that confusion, the government argues only that the decision below does not conflict with *United States v. Miles*, 247 F.3d 1009 (9th Cir. 2001) or *United States v. Lemons*, 153 F. Supp. 2d 948 (E.D. Wis. 2001). BIO 12–14. It contends that those cases are distinguishable because, unlike here, the frisking officer there did not immediately know that an item in the suspect's pocket contained ammunition and improperly manipulated it. But the government fails to explain why that distinction cuts in its favor. After all, where an officer cannot immediately identify an item, there will always be a potentially-valid reason to explore further—*i.e.*, to determine whether the unknown item is a weapon. But where, as here, the officer immediately and positively identifies an item during a frisk—and he knows for sure that it is not a weapon—there is no valid reason to escalate the intrusion and seize that non-weapon from the suspect's person.

Moreover, the facts in *Miles* are otherwise even more favorable to the government than they are here. They are strikingly similar, except the officer in *Miles* had received a report of gunshots being fired into residence; the officers were outnumbered at the scene; and it was 1:40 am. 247 F.3d at 1010–11, 1013. Here, by contrast, there was no report of any firearm, much less an active shooting; the officers were not outnumbered; the incident occurred at 5 am; and, although the officers never asked, Petitioner was on his own property. Despite the aggravating

facts in *Miles*, including the officers' "legitimate safety concerns," the Ninth Circuit still found that manipulating the unknown item in the defendant's pocket exceeded the "strictly circumscribed limits of *Terry*." *Id.* at 1013–15. It added that, "[h]aving already used significant force to secure the scene for safety purposes," including by handcuffing the defendant at gunpoint, "the officers cannot leverage the safety rationale into a justification for a full-scale search." *Id.* at 1015. "If *Miles* was a difficult case, this is an easier one." Pet. App. 84a n.7 (Jill Pryor, J., dissenting).

In addition to ignoring the facts in *Miles*, the government ignores the alternative holding in *Lemons*. Pet. 20. Specifically, the court held that, "[e]ven if [the officer] did recognize the bullets immediately upon patting" down the suspect, the officer "still committed a [*Terry*] violation" just by questioning the suspect about the bullets. 153 F. Supp. 2d at 958–59. The court explained that the "*Terry* search was a limited search for weapons. It is clear that at the time [the officer] asked Lemons about the items in Lemons's pocket [the officer] was sure the items were not weapons. Thus, questioning Lemons about the nonweapons in his pocket—whether ammunition or anything else—was an intrusion beyond the scope of the *Terry* search." *Id.* at 959. That holding is irreconcilable with the decision below.

3. Finally, the government does not argue that this case would be an unsuitable vehicle. Procedurally, the question presented was pressed and passed on in the courts below. Again, it was fully aired before 14 federal judges, who authored a total of 8 separate opinions. Factually too, there is no dispute about what

happened. And there is no dispute that the officers lacked probable cause to arrest Petitioner at the time of the frisk, neatly teeing up his originalist argument.

Although the government does not formally make any vehicle arguments, it states that it is "far from clear what bearing the *seizure* of the ammunition here had on the arrest or charges." BIO 14. But there is nothing unclear about it: Petitioner was charged with unlawfully possessing the very bullet that the officer seized from his pocket. Dist. Ct. Dkt. Entry 1 at 1. It is unlawful for felons and other persons to possess "any firearm *or* ammunition." 18 U.S.C. § 922(g) (emphasis added). Thus, to the extent the government suggests that seizing ammunition is unlikely to result in arrest or prosecution, the facts of this case belie that suggestion. And in cases where the possession is lawful, the Second Amendment looms even larger.

Emptying Petitioner's pocket also directly led the officers to discover two firearms on the neighboring property, and Petitioner was charged with unlawfully possessing those as well. To the extent the government suggests that the officers would have inevitably discovered the firearms, the record refutes that. The officers testified that discovering the bullet and the holster in Petitioner's pocket is what led them to scour the area for a matching firearm. Dist. Ct. Dkt. Entry 22 at 10, 60. Had they not found the bullet and the holster, they testified that they would have searched only the "immediate area" where Petitioner was detained, which was "very far" from where the firearms were ultimately found. *Id*. at 12, 33–34.

Regardless, the government concedes (BIO 14) that it failed to argue against application of the exclusionary rule in the district court, despite being afforded

numerous opportunities to do so. Under circuit precedent, that waived its ability to do so on appeal. *See* Pet. C.A. En Banc Reply Br. 24–26 (documenting the waiver). Ultimately, neither the district court nor the court of appeals denied relief on any alternative ground. Thus, the question presented is squarely before the Court, and its favorable resolution would require suppressing the firearms and ammunition. And, as the government stipulated in the conditional plea agreement, suppressing that evidence would be "case dispositive." Dist. Ct. Dkt. Entry 41 at 3–4 of 8 ¶ 2.

In short, the government's lackluster suggestion that the question presented might not be outcome determinative here is contrary to the decisions below, the evidence in the record, the government's waiver, and the plea agreement it signed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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