NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

SHANE MAURITZ VANDERGROEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Police officers may stop a person under an exception to the warrant requirement only if they have reasonable suspicion to support an assertion of illegal activity. "[A]n anonymous tip that a person is carrying a gun" is not, "without more, sufficient to justify a police officer's stop . . . of that person." *Florida. v. J.L.*, 529 U.S. 266, 268 (2000). Rather, the reasonable suspicion necessary to perform a warrantless stop requires law enforcement to independently corroborate an anonymous tip, so that it is "reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Id.* at 272.

   Must police independently corroborate the reliability of a *secondhand* anonymous tip before relying on it to stop a person under an exception to the warrant requirement? The circuit courts of appeal are split on this issue.

2. *Terry v. Ohio* permits a police officer to perform a warrantless limited search of a person when the officer "observes unusual conduct which leads him reasonably to conclude" that the person is "armed and presently dangerous." 392 U.S. 1, 30 (1968). This Court has extended this holding to allow searches of parts of the passenger compartment of an automobile during an automobile stop when a police officer "possesses a reasonable belief ... that the suspect is dangerous and the suspect may gain immediate control of weapons." *Michigan v. Long*, 463 U.S. 1032, 1049 (1983).

   Does the alleged possession of a firearm, without any evidence of intent to use the firearm, make the person "presently dangerous" so that a warrantless search of the person's automobile for weapons is justified? The circuit courts of appeal are split on this issue.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption.

DIRECTLY RELATED LOWER-COURT PROCEEDINGS

United States v. Shane Mauritz Vandergroen No. 18-cr-00133 PJH

United States v. Shane Mauritz Vandergroen No. 19-10075 (9th Cir. July 7, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Shane Vandergroen respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The district court's unpublished decision denying Mr Vandergroen's motion to suppress is attached as Appendix ["App."] 18-35. The Ninth Circuit's published opinion and unpublished memorandum affirming the denial of Mr Vandergroen's motion to suppress and affirming his conviction are reported at *United States v. Vandergroen*, 964 F.3d 876 (9th Cir. 2020) and 817 F. App'x 420 (9th Cir. 2020), respectively, and attached at App. 1-12 and 13-17, respectively.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit entered its judgment in favor of respondent on July 7, 2020. App. 1. This petition is timely under S. Ct. R. 13.3 and this Court's Order of March 19, 2020.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment guarantees freedom from unreasonable searches and seizures:

> 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

Based on a second-hand tip that he had a gun "on him," police officers conducted a "high risk" car stop of Mr Vandergroen's vehicle. The officers pointed their guns at Mr Vandergroen and ordered him to get out of the car and lie on the ground. They handcuffed him. The officers searched him for a weapon and did not find one. They then searched his vehicle, recovering a loaded handgun.

The courts below upheld the seizure and searches. They rejected Mr. Vandergroen's challenge to the basis for the stop: a 911 tip reporting information from third parties, not the caller himself. They also concluded that police were entitled to search Mr Vandergroen, just because the tip gave them reason to believe he carried a firearm, and thus was "dangerous."

The lower courts' bases for upholding the stop and search conflict with other federal courts of appeal and state courts of last resort. This case is a good vehicle for the Court to finally resolve these splits and, significantly, to clarify for courts, police officers and state governments how the Court's holding in *Heller* impacts the "armed and dangerous" assessment for a protective search. This Court should grant the petition.

STATEMENT OF THE CASE

I. Factual Background

Late in the evening of February 17, 2018, a worker ("the caller") at a bar in Concord, California, called 911 to report that three of the bar's customers had told

him they saw a man in the area with a pistol "on him." *Vandergroen*, 964 F.3d at 878. The caller gave his name, indicated he was calling from the bar and identified his position at the bar. *Id.* The caller said he could see the man, described his appearance and that the man had walked out of the neighboring bar and was then in an adjacent parking lot. *Id.* The police operator asked for more details about the man, including whether the man had been fighting; the caller said the man had not. The operator also asked where the gun was located on the man, and the caller indicated that he would ask the bar patrons who had told him about the gun. *Id.*

Before the caller provided more information, however, the man started running through the parking lot. *Id.* The caller reported the man's movements, including that he had jumped into a black four-door sedan. *Id.* The caller identified the car as a "Crown Vic," noted the man was driving out of the parking lot, and told police officers arriving on the scene which car to follow. *Id.* At the end of the call, the caller gave his full name and phone number. *Id.* The caller did not describe or identify the bar patrons who allegedly reported the gun to him. The caller did not report seeing the gun himself.

In response to the 911 call, dispatch alerted police officers that "3 patrons think they saw a HMA [Hispanic Male Adult], blu[e] warriors logo carrying a pistol." Dispatch directed officers to the bar and stated,

> 3 patrons think they saw an HMA with a blue sweatshirt on carrying a pistol. We're getting further . . . . HMA wearing a blue sweatshirt with a Warriors logo on it . . . . currently IFO Pizza Guys. No 4-15 [*i.e.*, no fight] prior to patrons seeing the male with a pistol. Three females say they saw it on him. We're still getting further . . . . Subject is running

> toward DV8 Tattoos and just got into a black vehicle . . . . getting into a four-door sedan, black in color . . . .

Id. at 878-79.

Shortly thereafter, an officer reported, "we're gonna do a high-risk car stop." *Id.* at 879; *see Vandergroen*, 817 F. App'x at 422 (referring to police tactics during stop as "quite aggressive"). The police then stopped the car driven by the man, later identified as Mr Vandergroen, and ordered him out at gunpoint. *Vandergroen*, 964 F.3d at 879; ER 7. The officers forced Mr Vandergroen to lie face-down on the pavement, handcuffed him, searched his person and put him in a police car. *Vandergroen*, 817 F. App'x at 422-23; ER 8-9, 15. Not finding any weapons, the officers then searched his car and discovered a loaded handgun under the center console. *Vandergroen*, 964 F.3d at 879. Police formally arrested Mr Vandergroen. *Id.*

II. Procedural History

The government charged Mr Vandergroen with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), based on the gun found in the warrantless search of his car. *Id.* He moved to suppress all fruits of the warrantless seizures of his person and searches of his person and car. *Id.* The district court denied the motion. *Id.*

The district court held first that the 911 call provided the necessary reasonable suspicion to stop Mr Vandergroen even though the 911 caller provided only second-hand information about the alleged illegal activity, and the call lacked predictive information or any indication it was reliable in its assertion of illegality,

like the anonymous tip in *J.L.* App. 26. The information the identified caller reported from the bar customers, combined with the caller's general description of the person and his movements, was sufficient. *Id.* The district court also held that the police had reasonable suspicion to search the car under *Long*. App. 32. Because Mr Vandergroen "was dangerous and might gain immediate control of a weapon inside the car" once police allowed him to leave, police were justified in searching the car. App. 35.

The parties then agreed to a stipulated-facts bench trial, preserving Mr Vandergroen's right to appeal the denial of the suppression motion. *Vandergroen*, 964 F.3d at 879. Based on the parties' factual stipulations, the district court found Mr Vandergroen guilty. *Id.* He appealed.

The Ninth Circuit upheld the warrantless stop and search of Mr Vandergroen and his vehicle based on similar reasoning. It held that the 911 call was sufficiently reliable because the caller identified himself and explained the source of his information, which itself was sufficiently reliable because it was "based on fresh, first-hand knowledge" and reported conduct -- "carrying a concealed firearm [--] which is presumptively a crime in California." *Id.* at 880-81. It held that, even without any basis for believing Mr Vandergroen was dangerous, the pat-search of his person was justified based on reasonable suspicion that he was carrying a gun. *Vandergroen*, 817 F. App'x at 422. The Ninth Circuit upheld the warrantless search of his car "as a protective search" under *Long* because there was reasonable suspicion that he had had a gun, and "he would have gained immediate access to

this weapon if the police had released him after finding no open warrants and no weapon on his person." *Id.* at 423.

REASONS FOR GRANTING THE WRIT

The Court should grant review because this case presents a good opportunity to address two recurrent, important and unresolved questions about the reasonable suspicion necessary to justify warrantless seizures and searches of individuals and their vehicles in gun cases.

I. This Court should resolve the issue of how courts should analyze the reliability of a tip whose source is an unknown third party when determining if a police had reasonable suspicion to stop a person.

The Fourth Amendment permits investigative stops, including traffic stops, when law enforcement can articulate " 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.' " *Navarette v. California*, 572 U.S. 393, 396 (2014) (quoting *United States v. Cortez*, 449 U.S. 411, 417-418 (1981)). This reasonable suspicion requires that "[t]he facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *Terry*, 392 U.S. at 21-22.

When the basis for suspicion is a tip from a civilian, the tip must be reliable both as to its source, the tipster, and "in its assertion of illegality, not just in its tendency to identify a determinate person." *J.L.*, 529 U.S. at 272. A tip from an identified informant is facially more reliable than an anonymous tip, because the

informant's reputation can be assessed and the informant held responsible if her allegations prove to be fabricated. *Id.* at 270.

Under the "general rule," an anonymous tip, on its own, cannot establish reasonable suspicion for an investigative stop because it provides insufficient indicia of reliability. *Alabama v. White*, 496 U.S. 325, 329 (1990). And this Court held that "an anonymous tip that a person is carrying a gun is, without more," insufficiently reliable to justify a stop or frisk. *J.L.*, 529 U.S. at 268. Only with suitable corroboration may an anonymous tip establish " 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.' " *Id.* at 270 (quoting *White*, 496 U.S. at 327).

Despite clear guidance on how to assess the reliability of tips from known versus unknown informants, federal courts of appeal and state courts of last resort have diverged when trying to apply this framework to tips whose source of knowledge is not the informant but a third party. In some circuits, the reliability of the third party is irrelevant to the court's reasonable-suspicion analysis. In others, courts have looked for indicia of reliability in what the police know about the third party. And at least one court has held that independent police corroboration was necessary to establish the reliability of a tip whose source is a third party.

The answer to this question is important and has divided the circuits. This Court should address it. Its answer not only will give guidance to law-enforcement officers investigating tips based on third-party allegations but also will give lower courts a rule for applying constitutional standards consistently.

a. Courts have split on how to analyze a tip whose source is not the informant but a third party.

1. At least one federal circuit treated third-party tips, relayed to police via a known informant, as anonymous tips that require independent police corroboration under *J.L.*

The First Circuit held that third-party tips relayed by a known informant, even if not technically "anonymous," are "akin to the anonymous tips" in *J.L.* and *White* and thus cannot provide reasonable suspicion unless "corroborated." *United States v. Monteiro*, 447 F.3d 39, 45-48 (1st Cir. 2006). There, a witness to a shooting reported to police that an unnamed female relative had told him she had witnessed a different drive-by shooting and gave the license plate number for one of the vehicles allegedly involved. *Id.* at 41. The court concluded that, even though the police "had some limited means of narrowing the class of people who might have provided the tip," and the informant's description of the report "provided some small measure of context for the information," the tip was in some ways even more problematic than an anonymous tip. *Id.* at 45-46. Police could not judge the "age, cognitive ability, and motivations" of the tip's source based on tone of voice, appearance or demeanor, which prevented them from determining if she could be trusted. *Id.* at 46. Further, there was a heightened risk of fabrication, akin to the risk caused by the inherent unreliability of anonymous tips, because both the informant and third party could have individual motives to lie. *Id.* at 46. Under these circumstances, and because the initial police investigation did not corroborate

the contents of the tip, the First Circuit affirmed the district court's suppression of all fruits of the tip-based stop. *Id.* at 50.

> 2. The Ninth Circuit has deemed tips based on third-party information "anonymous," but it upheld the stop here despite the lack of any corroboration, contravening *J.L.*

In *United States v. Brown*, the Ninth Circuit characterized information provided by an identified 911 caller, based on a report that "an unidentified resident at the YWCA" saw someone with a gun, as an "anonymous tip." 925 F.3d 1150, 1152-53 (9th Cir. 2019) (suppressing evidence because third-party tip was anonymous and did not report "presumptively unlawful activity"). In this case, however, the court upheld the finding of reasonable suspicion based on "the reliability of both the caller himself and the third party whose tip he convey[ed]." *Vandergroen*, 964 F.3d at 880. The informant was reliable because he identified himself and his basis of knowledge and called 911. *Id.* Although the tipsters "remained anonymous during the call, . . . which generally cuts against reliability," the information they provided was sufficiently reliable because there were multiple people, they were members of a narrower class of individuals (bar patrons) and their information was "based on fresh, first-hand knowledge." *Id. But see Monteiro*, 447 F.3d 39, 45-48 (rejecting narrowing of class as basis for finding reliability); *United States v. McCaw*, 664 F. App'x 578, 581 (7th Cir. 2016) (unpublished) (rejecting multiple people as basis for finding reliability: "the patrons could have colluded to provide a false report or obtained their information from an erroneous source").

3. Several federal courts of appeal have held that tips based on third-party information are not anonymous and do not require any corroboration.

The Fifth, Seventh and Tenth circuits have declined to analyze tips from identified informants based on information from unknown third parties as anonymous tips. *United States v. Robinson*, 537 F.3d 798, 802 (7th Cir. 2008); *United States v. Hopes*, 286 F.3d 788, 790 (5th Cir. 2002); *United States v. Tucker*, 305 F.3d 1193, 1200-1201 (10th Cir. 2002). Accordingly, they have not required police to obtain any independent corroboration of these tips.

The Fifth and Seventh circuits have upheld stops based solely on the third-party information when either the police have a preexisting relationship with the informant or the defendant and/or they observe corroborating suspicious activity. *See Robinson*, 537 F.3d at 800, 802 (finding reliability based on police being "familiar with both of the sources who relayed information about Robinson" and with Robinson himself, as well as their observations suggesting that "he had something heavy in [his pants] pocket"); *Hopes*, 286 F.3d at 790 (finding reliability based on informant's preexisting relationship with police as "the operator of two halfway houses"); *McCaw*, 664 F. App'x at 580-81 (finding reliability based on bar-owner informant's preexisting relationship with police).

The Tenth Circuit upheld a reasonable-suspicion parole search based on information from an employee of the U.S. Attorney's office that her former federal-employee coworker had told her that another former coworker had seen child pornography at their coworker Tucker's house and learned that Tucker had

contacted and might contact again a young girl. *Tucker*, 305 F.3d at 1196. The police learned that Tucker had a prior conviction for sexually abusing a child and was on parole that prevented him from having unsupervised contact with minors. *Id.* Under these circumstances, the Tenth Circuit found reasonable suspicion for a parole search, despite the lack of corroboration of the third party's information. *Id.* at 1201. Relying heavily on *Tucker*, the Idaho Supreme Court also held that the fact that a tip comes from a third party does not make it anonymous but is merely relevant to assessing the basis of the known informant's knowledge. *State v. Bishop*, 203 P.3d 1203, 1212 (Idaho 2009).

b. This Court should resolve the split.

As the foregoing makes clear, the issue of anonymous tips or tips that may be considered to be anonymous for lack of firsthand knowledge, is persistent. How such tips are handled impacts both law enforcement's approach to investigating alleged criminal activity and the liberty interests of the individuals subjected to investigatory stops.

Tips are often the first and only indications that a person may have engaged in criminal activity. Accordingly, how courts assess the reasonableness of an officer's belief of criminal conduct is likely to determine the outcome of any challenge to a warrantless seizure or search. In circuits that ignore that the allegation of criminality came from a third party, incriminating evidence from an investigatory stop based on uncorroborated and unreliable information would be admitted. The same evidence would be subject to the exclusionary rule in a circuit

that did require a finding of the third party's reliability or independent corroboration. The Fourth Amendment's protection should not turn on geography.

c. The Fourth Amendment requires independent police corroboration of a third-party tip relayed by a known informant.

Anonymous tips have been deemed facially unreliable primarily because law enforcement cannot weigh the informant's "basis of knowledge or veracity." *White*, 496 U.S. at 329. A tipster is unlikely to "provide extensive recitations of their everyday observations," and their truthfulness is "largely unknown, and unknowable," *Navarette*, 572 U.S. at 397 (quoting *White*, 496 U.S. at 329), so law enforcement cannot probe the informant further to establish the reliability of the tip or hold the tipster responsible for providing information that she may know is false. *J.L.*, 529 U.S. at 270. In light of these concerns, such tips are rarely trustworthy enough, on their own, to establish reasonable suspicion. *Id.*

These same concerns are raised, and indeed amplified, when the source of the information for a second-hand tip cannot be assessed for reliability or truthfulness. In discussing anonymous telephone tips, Justice Kennedy noted,

> even if the officer's testimony about receipt of the tip is found credible, there is a second layer of inquiry respecting the reliability of the informant that cannot be pursued. If the telephone call is truly anonymous, the informant has not placed his credibility at risk and can lie with impunity. The reviewing court cannot judge the credibility of the informant and the risk of fabrication becomes unacceptable.

Id. at 275 (Kennedy, J. concurring). Similarly in this case, the credibility of the informant may be unimpeachable, but the truthfulness and credibility of the third-party declarant cannot be tested to determine their reliability. Further, the social

and penal pressures encouraging honest tip-giving evaporate when, as here, the third party's identity is unknown and unknowable. *Monteiro*, 447 F.3d at 45-46.

Outside the investigatory stop context, the unreliability of second- or third-hand statements is well-established. They have remained suspect over the centuries because they bear the "intrinsic weakness[es]" of being less likely to establish fact and providing greater opportunity for making fraudulent statements. *Queen v. Hepburn*, 11 U.S. (7 Cranch) 290, 296 (1813). Today, statements made by an individual outside of court and reported in court by a different individual are excluded from evidence at trial as hearsay, Fed. R. Evid. 801, unless an exception or exclusion provides "circumstantial guarantees of trustworthiness" justifying the statement's admission. Fed. R. Evid. 803, Advisory committee's notes on proposed rules.

The process of determining reasonable suspicion for an investigatory stop lacks the clear rules of hearsay law, as well as the opportunity to contextualize a hearsay statement and a jury full of factfinders to weigh the statement's and declarant's reliability. Rather, when a police officer decides whether she is justified in infringing on a person's Fourth Amendment rights through an investigatory stop and search, only the officer assesses the facts. Accordingly, when balancing law enforcement's interest in protecting the public against a suspect's constitutional rights, this Court repeatedly has held that a tip from an unknown source requires "suitabl[e] corroborat[ion]" to provide the reasonable suspicion necessary to justify an investigatory stop. *J.L.*, 529 U.S. at 270.

Corroboration needs to be more than an accurate description of a "subject's readily observable location and appearance." *Id.* at 272. It must be "reliable in its assertion of illegality." *Id.* This Court should insist on the same level and kind of corroboration for the "'requisite quantum of suspicion,'" *Monteiro*, 447 F.3d at 47 (quoting *White*, 496 U.S. at 330), when, as here, the source of the tip is an unknown third party.

II. This Court should clarify that a police officer's suspicion that a person possesses a firearm, without more, does not create a presumption of dangerousness, and that the Fourth Amendment requires police to have a reasonable belief a person is "armed and presently dangerous" before performing a warrantless protective search.

This Court has reiterated that a *Terry* pat-search for weapons is justified when police have reasonable suspicion that a suspect is "armed and dangerous." *See Arizona v. Johnson*, 555 U.S. 323, 332 (2009) (explaining that this formulation, for when police may pat-search the occupants of a car stopped for a traffic violation, "captures the combined thrust of the Court's decisions"). In extending *Terry* weapons searches of people to weapons searches of cars, this Court emphasized that police must have a reasonable suspicion both that "the suspect may gain immediate control of weapons" *and* "that the suspect is dangerous." *Long*, 463 U.S. at 1049. It does not matter "whether the weapon is possessed in accordance with state law." *Id.* at 1052 n.16. "'The sole justification of the search is the protection of police officers and others nearby.'" *Id.* at 1049 n.14 (quoting *Terry*, 392 U.S. at 29; ellipses omitted).

Contravening this Court's armed-and-dangerous requirement for warrantless weapons searches, some federal and state courts have allowed police to conduct protective searches of people, and their vehicles, based solely on the reasonable belief that the person is armed. The split impacts how states and federal courts handle the warrantless searches of the millions of citizens who carry guns—and people who the police reasonably believe may be carrying a gun—in America. Resolving this issue will invest state and local governments with a clear understanding of what the Fourth Amendment requires in order to constitutionally craft and implement policies governing the carrying and transportation of firearms. It also will inform firearm owners of what they should expect when they choose to carry their weapon in public, on their person or in their vehicle.

Finally, the Ninth Circuit's decision here is wrong. In holding that officers can search any individual they believe to be carrying a firearm, the Ninth Circuit upheld precedent contrary to the spirit of this Court's decisions in *Terry* and *District of Columbia v. Heller*, 554 U.S. 570 (2008). In so doing, it created a *presumption* of dangerousness that contravenes this Court's rejection of "an automatic firearm exception" to established Fourth Amendment standards. *J.L.*, 529 U.S. at 273.

a. Courts nationwide are irreconcilably divided over the constitutional requirements for a protective search when a person is suspected of having a weapon.

1. At least five federal courts of appeal and one state supreme court have concluded that a reasonable belief that an individual presently possesses a weapon is sufficient to make a person "presently dangerous" and thus subject to a *Terry* protective search.

The Ninth Circuit has held — and upheld in this case, *Vandergroen*, 817 F. App'x at 422 — that "an officer's reasonable suspicion" that an individual possesses a gun "is all that is required for a protective search under *Terry*." *United States v. Orman*, 486 F.3d 1170, 1176 (9th Cir. 2007). Several other circuits, as well as at least one state high court, have agreed that reasonable suspicion of gun possession is sufficient for a weapons search without regard to indicia of dangerousness.

The Fourth Circuit, en banc, held that "an officer who makes a lawful traffic stop and who has a reasonable suspicion that one of the automobile's occupants is armed" has the categorical right to frisk that individual. *United States v. Robinson*, 846 F.3d 694 (4th Cir. 2017) (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977) (per curiam)). The court emphasized that the danger justifying the frisk "arises from the combination of a forced police encounter and the presence of a weapon, not from any illegality of the weapon's possession." *Id.* at 696.

The Eighth Circuit, citing *Mimms*, likewise held that police may "frisk a suspect reasonably believed to be armed even where it could be that the suspect possesses the arms legally." *United States v. Pope*, 910 F.3d 413, 416 (8th Cir. 2018). The court further stated that even if *Mimms* and related precedent were

decided in an era in which the primary gun carriers were criminals, "it remains reasonable to allow an officer" to frisk an individual who is lawfully stopped and reasonably believed to be armed. *Id.* at 416-17.

The Tenth Circuit also held that an officer's knowledge that an individual is carrying a handgun is "enough to justify" a *Terry* search, regardless of whether state law permits concealed carry. *United States v. Rodriguez*, 739 F.3d 481, 491 (10th Cir. 2013); *see also United States v. Gurule*, 935 F.3d 878, 886 (10th Cir. 2019). The Eleventh Circuit held that a reliable tip that an individual is carrying a gun is enough to permit "a *Terry* stop and search." *United States v. Montague*, 437 F. App'x 833, 835-36 (11th Cir. 2011). And the Supreme Court of Illinois held that an officer's "reasonable suspicion that a gun [is] present" justifies a *Terry* search because any individual with a gun is "potentially dangerous"; the danger is the same regardless of whether possession of the weapon is legal. *People v. Colyar*, 996 N.E.2d 575, 587 (Ill. 2013).

> 2. Five courts have reached a contrary conclusion, rejecting the proposition that an officer's belief that a person is armed categorically justifies a *Terry* search.

True to this Court's precedents, the Seventh Circuit held that a *Terry* search is permissible only if officers "have an articulable suspicion that the person is both armed and a danger to the safety of officers or others." *United States v. Leo*, 792 F.3d 742, 748 (7th Cir. 2015); *accord United States v. Williams*, 731 F.3d 678 (7th Cir. 2013). In *Northrup v. City of Toledo Police Dep't*, the Sixth Circuit explained that at least in a state that permits public carrying of firearms, a person's being

armed does not make that person "'armed *and dangerous*.'" 785 F.3d 1128, 1132 (6th Cir. 2015) (emphasis in original) (quoting *Sibron v. New York*, 392 U.S. 40, 64 (1968)); *see also United States v. Johnson*, 246 F. App'x 982, 988 (6th Cir. 2007) (unpublished) ("before an officer effectuates a limited frisk for weapons . . . the officer must have a reasonable belief that the suspect is both (1) armed, and (2) dangerous").

The New Mexico Supreme Court has held that "[t]o justify a frisk for weapons, an officer must have a sufficient degree of articulable suspicion that the person being frisked is both armed *and* presently dangerous. Any indication in previous cases that an officer need only suspect that a party is either armed *or* dangerous is expressly disavowed." *State v. Vandenberg*, 81 P.3d 19, 25 (N.M. 2003) (emphases in original). The Arizona Supreme Court likewise emphasized that the second *Terry* prong "involves a dual inquiry; it requires that a suspect be "armed and presently dangerous." *State v. Serna*, 331 P.3d 405, 410 (Ariz. 2014). And the Idaho Supreme Court held that because Idaho law authorizes people to carry concealed firearms, "weapon possession, in and of itself, does not necessarily mean that a person poses a risk of danger" sufficient to justify a search. *Bishop*, 203 P.3d at1219 n.13.

> b. These contrary applications of "armed and dangerous" in the firearm context subject members of the public to inconsistent standards between circuits and across state-federal jurisdictions.

The conflict among lower courts leads federal and state courts reviewing searches in the same jurisdiction to disagree on whether evidence is admissible.

For instance, an individual subjected to a search in Arizona or Idaho based solely on an officer's belief the individual is armed will lead to suppression of any evidence uncovered during the search if the individual is prosecuted in state court. *See Bishop*, 203 P.3d at 1219 n.13; *Serna*, 331 P.3d at 410. But the same evidence will be admissible if the case is turned over to the federal government to prosecute. *See Orman*, 486 F.3d at 1176 (Ninth Circuit). The same conflict exists in the Tenth Circuit with respect to cases from New Mexico. *Compare Vandenberg*, 81 P.3d 25 *with Rodriguez*, 739 F.3d at 491. The converse is true in Illinois: the state courts will admit evidence that the Seventh Circuit would suppress. *Compare Colyar*, 996 N.E.2d at 587, *with Leo*, 792 F.3d at 748. These disparities encourage the sort of prosecutorial forum shopping this Court has long condemned. *Cf. Elkins v. United States*, 364 U.S. 206, 221-22 (1960).

Likewise, the split among courts allows police in different states to submit people to inconsistent constitutional standards. Police in California, relying on Ninth Circuit precedent, may consider a person suspected of carrying a firearm both armed and dangerous, despite no actual evidence of a violent intent, and overcome his Fourth Amendment rights to submit him to a *Terry* search. In contrast, police in the Seventh Circuit and a handful of states may not consider an individual both armed and dangerous, despite reasonable suspicion he carries a firearm; some evidence of dangerous conduct, past or future, is required to overcome the warrant presumption.

c. The question presented is important.

The answer to the question of how the government may respond to an armed person affects the liberty protections of both the Fourth and Second amendments. *See* Alexander Butwin, *"Armed and Dangerous" a Half Century Later: Today's Gun Rights Should Impact Terry's Framework*, 88 Fordham L. Rev. 1033, 1043 (2019) (Because *Terry* was decided back in 1968, interpreting its framework today—in light of recent gun law developments enshrining the individual right to bear arms—. . . has proven problematic"). In some jurisdictions, people exercising their Second Amendment right to own and carry a firearm open themselves up to intrusive searches any time a police officer reasonably believes they have a weapon, whether or not it is legally possessed and whether or not they have indicated that they are likely to misuse it. *Robinson*, 846 F.3d at 711 (Harris, J., dissenting) (noting that holding a gun possessor to be automatically dangerous "has the effect of depriving countless law-abiding citizens of what would otherwise be their Fourth Amendment and other constitutional rights"). Such an outcome, in light of this Court's recent recognition of the individual rights inherent in the Second Amendment, creates a conflict that could not have been intended by the Founders and should be resolved to prevent the intrusion on individuals' personal dignity. *See Heller*, 554 U.S. at 591 (holding the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation" and noting that the Second and Fourth amendments both codify a *"pre-existing* right").

Further, the current variation in the law subjects millions of Americans to inconsistent constitutional standards. Forty percent of Americans own guns or live in a home with someone who owns a gun. Kim Parker, *et al.*, *America's Complex Relationship with Guns: An in-depth look at the attitudes and experiences of U.S. adults*, Pew Research Center (June 22, 2017), https://www.pewsocialtrends.org/2017/06/22/americas-complex-relationship-with-guns/. Additionally, as of 2019, some 18.66 million gun owners also had concealed-carry permits for handguns—a 304% increase since 2007. National Rifle Association-Institute for Legislative Action, *Number of Concealed Carry Permit Holders Increased Again*, NRA-ILA (October 13, 2019), https://www.nraila.org/articles/20191013/number-of-concealed-carry-permit-holders-increased-again. And a significantly greater number of people may carry concealed firearms, given that fifteen states now do not require a concealed carry permit at all. Giffords Law Center to Prevent Gun Violence, *Guns in Public: Concealed Carry*, Giffords Law Center, https://bit.ly/2ISUkYA (last visited November 17, 2020).

The courts' current disagreement about interpretation of "armed and dangerous" allows police to deem some of these people dangerous, and so searchable, merely because of their firearm possession, while finding other people, engaging in the same behaviors, to be not dangerous and constitutionally protected from the "serious intrusion" of a protective search. *Terry*, 392 U.S. at 26. While states play an important role in determining local gun regulations, the scope of an

individual's right to privacy should not wax or wane based solely on the state in which they live.

Additionally, state governments and law enforcement have a strong interest in having this question resolved. If police officers may constitutionally search any lawfully stopped person they reasonably think is armed, then jurisdictions may respond by instituting policies that limit law enforcement's ability to initiate a search beyond what the Fourth Amendment requires. If on the other hand, the automatic search rule is rejected as unconstitutional, states may institute additional requirements for firearm carriers, such as duty-to-inform laws that require firearm carriers to tell police they are armed when they are stopped. This issue is important not just to people who lawfully carry firearms but to anyone in the state who " 'could possibly' " be carrying a firearm because a categorical rule allowing an automatic search impacts all. *Bishop*, 203 P.3d at 1219 n.13. At a time when states and courts are working out the balance between the firearm rights of individual and states' duty to ensure the safety of police officers and the public, clarification on how the Second Amendment implicates Fourth Amendment rights would benefit both policy making and implementing.

d. The Ninth Circuit's decision is incorrect.

The Ninth Circuit's holding here permits police to search any person they lawfully stop, or their car, based solely on a reason to believe that person is armed, regardless of the basis for the stop. The Ninth Circuit has identified a broad range of circumstances that may suffice, including a bulge in clothing, certain hand or

body movements or "postures" and "evasive" responses to police questioning. *Thomas v. Dillard*, 818 F.3d 864, 877 (9th Cir. 2016). But this Court in *Terry* held that police officers have only a "narrowly drawn authority" to search an individual when she reasonably believes that person is "armed and dangerous." 392 U.S. at 27. Although subsequent courts have read additional language in *Terry* and *Mimms* to mean that someone who is armed with a firearm is "thus" dangerous, such a reading is flawed for three reasons.

First, *Terry* and its progeny have consistently held that officers must have a reasonable belief the suspect is both "armed and dangerous." *See, e.g., Johnson,* 555 U.S. at 332 (reviewing cases and reiterating standard); *Long,* 463 U.S. at 1049 (requiring "'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous *and* the suspect may gain immediate control of weapons"; internal citations omitted, emphasis added); *Adams*, 407 U.S. at 146 ("the frisk for weapons *might* be equally necessary and reasonable whether or not carrying a concealed weapon violated any applicable state law"; emphasis added). Reasonable suspicion that a weapon exists is not enough; the ability of police to search for weapons is limited to "circumstances where the officers have a reasonable belief that the suspect is potentially dangerous to them." *Long*, 463 U.S. at 1053 n. 16.

Second, this Court's recent recognition of the constitutional right to possess firearms requires a corresponding recognition of the right to possess firearms in Fourth Amendment law. *See Williams*, 731 F.3d at 6 (Hamilton, J., concurring) ("as

public possession and display of firearms become lawful under more circumstances, Fourth Amendment jurisprudence and police practices must adapt"). The purpose and scope of a *Terry* search is to balance the Fourth Amendment privacy rights of individuals with the necessity of ensuring the safety of police officers as they engage in criminal investigations. 392 U.S. at 26. When *Terry* was decided, possession of a handgun was illegal, *Northrup*, 785 F.3d at 1131, but this Court has since held that possession of such weapons is constitutionally legal. *Heller*, 554 U.S. at 591; *McDonald v. Chicago*, 561 U.S. 742 (2010). Even in states that limit public carrying of firearms, like California, transportation of firearms is permitted, *see* Cal. Penal Code § 25610, and is implicated in situations like the search of Mr Vandergroen's vehicle.

Although the Constitution leaves "a variety of tools for combating" the problem of gun violence, "the enshrinement of constitutional rights," including the right to bear arms, "takes certain policy choices off the table." *Heller,* 554 U.S. at 636. *Heller* and *McDonald* have shifted the needle balancing the competing interests underlying the pat-searches for weapons, and Fourth Amendment law must now catch up. Requiring police who seek to conduct a warrantless search of a person or vehicle to have reasonable suspicion not only that the person is armed but also that they pose a danger strikes the appropriate constitutional balance. "History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns. But that power

extends only to people who are *dangerous*." *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) (emphasis in original).

III. This case is an excellent vehicle for resolving these questions.

Both questions presented arrive on direct review after having been briefed by both parties and directly addressed by the courts below. Moreover, this case provides a typical example of the context in which these issues arise.

With regard to the third-party tip issue, courts are frequently confronted with how to weigh the reliability of tips from identified informants that are based on information from unidentified third parties. Here, the police had no preexisting relationship with or information about either the informant or Mr Vandergroen before they stopped him. Nor did they seek to corroborate the tip or observed any suspicious activity before the stop. This case thus cleanly presents the issue of how to analyze the reliability of the third-party information that was the sole basis for police actions. It will allow the Court to offer meaningful guidance on how to make such an assessment, akin to that in *White* and *J.L.*

This case also presents a good basis for addressing the weapons-search issue. A tip about gun possession instigated the police response, and the police had nothing more than naked suspicion that Mr Vandergroen had carried a gun to justify their warrantless search of his car. This case exemplifies the core conflict arising from *Heller*'s interaction with *Terry's* progeny — how law enforcement's interest in police safety should be balanced against an individual's Second and Fourth amendment rights. George Dery III, *Unintended Consequences: The*

Supreme Court's Interpretation of the Second Amendment in District of Columbia v. Heller Could Water Down Fourth Amendment Rights, 13 U. Pa. J.L. & Soc. Change 1 (2009).

Finally, the legality of the *Terry* stop and search here are both outcome determinative: If the officers lacked a sufficient basis to either stop Mr Vandergroen or to believe that he posed a present danger to them, then either, or both, the stop and search violated the Fourth Amendment, and a lower court should have suppressed the evidence. At that point, the charges—based solely on his possessing the gun found during car search—would have to be dismissed.

CONCLUSION

For the reasons stated, petitioner Shane Vandergroen respectfully asks this Court to issue a writ of certiorari.

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