No. _____

IN THE

Supreme Court of the United States

DE'UNDRE TURNER,
***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

MICHAEL CARUSO
Federal Public Defender
ANSHU BUDHRANI
Assistant Federal Public Defender
Counsel of Record
150 West Flagler Street
Suite 1700
Miami, FL 33130
305-530-7000

Counsel for Petitioner

QUESTIONS PRESENTED

In 2015, the State of Florida amended its concealed carry statute in favor of firearm possession. That is, it is now presumptively lawful to be in possession of a concealed firearm, and the burden no longer falls on the firearm possessor to prove licensure status. As a result, Florida's state courts have declined to uphold seizures based merely upon the presence of a concealed firearm. The Eleventh Circuit, however, in reliance on outdated precedent, held differently below. Not only did the court sanction a seizure based upon suspicion of a *noncriminal* violation, but it also held that the mere presence of a concealed firearm alone provided reasonable suspicion to justify the seizure of not only the individual in possession of the firearm, but also of the people with him. The Eleventh Circuit's reasoning puts it at odds with this Court's Fourth Amendment jurisprudence, multiple state courts, and a number of its sister circuits, who have held both that reasonable suspicion of a noncriminal violation cannot form the basis of reasonable suspicion for a seizure, and that where a state's laws explicitly sanction firearm possession—whether open carry or concealed carry—a seizure must be based on more than just the mere presence of a firearm.

The questions presented are:

1. Whether a seizure can be initiated upon reasonable suspicion of a *noncriminal* violation.

2. Whether law enforcement officers have reasonable suspicion to effectuate a seizure based solely upon the presence of a concealed firearm in a state where carrying a concealed firearm is presumptively lawful.

PARTIES TO THE PROCEEDINGS

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

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

- *United States v. Turner*, No. 1:19-cr-20245-RNS (S.D. Fla.) (Judgment entered Nov. 7, 2019).
- *United States v. Turner*, No. 19-14656 (11th Cir. Sept. 17, 2020), *reh'g denied*, Feb. 10, 2021.

TABLE OF CONTENTS

TABLE OF APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

No: _____

DE'UNDRE TURNER,
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

De'Undre Turner ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit's opinion (App. A) is unreported, and available at 827 F. App'x 996 (11th Cir. 2020).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The Eleventh Circuit entered judgment on September 17, 2020. Petitioner then filed a petition for rehearing en banc, which was denied on February 10, 2021. Due to the ongoing public health concerns relating to COVID-19, the Court has ordered that the deadline to file a petition for a writ of certiorari be extended to 150 days from the date of the lower court judgment, making it due on or before July 10, 2021. Thus, the petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV

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

Fla. Stat. § 790.01

(1) Except as provided in subsection (3), a person who is not licensed under s. 790.06 and who carries a concealed weapon or electric weapon or device on or about his or her person commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(2) Except as provided in subsection (3), a person who is not licensed under s. 790.06 and who carries a concealed firearm on or about his or her person commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) This section does not apply to:
(a) A person who carries a concealed weapon, or a person who may lawfully possess a firearm and who carries a concealed firearm, on or about his or her person while in the act of evacuating during a mandatory evacuation order issued during a state of emergency declared by the Governor pursuant to

chapter 252 or declared by a local authority pursuant to chapter 870. As used in this subsection, the term "in the act of evacuating" means the immediate and urgent movement of a person away from the evacuation zone within 48 hours after a mandatory evacuation is ordered. The 48 hours may be extended by an order issued by the Governor.

(b) A person who carries for purposes of lawful self-defense, in a concealed manner:

1. A self-defense chemical spray.

2. A nonlethal stun gun or dart-firing stun gun or other nonlethal electric weapon or device that is designed solely for defensive purposes.

(4) This section does not preclude any prosecution for the use of an electric weapon or device, a dart-firing stun gun, or a self-defense chemical spray during the commission of any criminal offense under s. 790.07, s. 790.10, s. 790.23, or s. 790.235, or for any other criminal offense.

Fla. Stat. § 790.06

(1) The Department of Agriculture and Consumer Services is authorized to issue licenses to carry concealed weapons or concealed firearms to persons qualified as provided in this section. Each such license must bear a color photograph of the licensee. For the purposes of this section, concealed weapons or concealed firearms are defined as a handgun, electronic weapon or device, tear gas gun, knife, or billie, but the term does not include a machine gun as defined in s. 790.001(9). Such licenses shall be valid throughout the state for a period of 7 years from the date of issuance. Any person in compliance with the terms of such license may carry a concealed weapon or concealed firearm notwithstanding the provisions of s. 790.01. The licensee must carry the license, together with valid identification, at all times in which the licensee is in actual possession of a concealed weapon or firearm and must display both the license and proper identification upon demand by a law enforcement officer. Violations of the provisions of this subsection shall constitute a noncriminal violation with a penalty of $25, payable to the clerk of the court.

INTRODUCTION

Today, in states like Florida and beyond, citizens are legally entitled to carry a firearm in public, and there is no reason to think that a person carrying or concealing a weapon while sitting in a parked vehicle—conduct fully sanctioned by state law—is anyone but a law-abiding citizen who poses no threat to law enforcement. But that is not what the Eleventh Circuit held in Petitioner's case. As a result, per the Eleventh Circuit's reasoning, not only can an individual be seized upon suspicion of a *noncriminal* offense, that individual and anyone he is with can be seized for engaging in presumptively lawful conduct that is fully sanctioned and promoted by the state's legislature and its millions of voters.

It cannot be the case that individuals who choose to carry firearms must sacrifice certain constitutional protections afforded to individuals who elect not to carry firearms. As such, this Court's intervention is required to clarify both whether suspicion of a noncriminal violation can form the basis of a seizure, and whether, as public possession and display of firearms become lawful under more circumstances, Fourth Amendment jurisprudence and police practices must adapt. Courts are split—both inter-circuit and intra-state—necessitating this Court's review and guidance.

STATEMENT OF THE CASE

I. Factual Background

In the waning daylight hours of Monday, April 8, 2019, Petitioner and two of his friends were seated inside a dark blue sedan with its back brake lights on and

windows down, lawfully parked in a parking spot in the shared parking area of a multi-unit townhome complex located in an area known as Model City in Miami, Florida. (Dist. Ct. Dkt. No. 68 at 5, 7, 8, 20, 29.) As if out of nowhere, the car was suddenly surrounded by a tactical team of eight to ten armed law enforcement officers in tactical gear, who were at the townhome complex to serve an unrelated DNA search warrant on another individual with no ties whatsoever to Petitioner or his friends. (Dist. Ct. Dkt. No. 68 at 5–7, 16–17.)

As officers surrounded Petitioner's car, Detective Delgado peered inside the front passenger window and observed what he believed to be a firearm underneath the front passenger's t-shirt, tucked into his waistband. (Dist. Ct. Dkt. No. 68 at 8–9.) As a result, Detective Delgado asked the front passenger to step out of the vehicle, which he did, immediately informing Detective Delgado that he had a concealed carry permit for his firearm. (Dist. Ct. Dkt. No. 68 at 8–9.) When asked at the suppression hearing why he ordered the front passenger out of the car, Detective Delgado responded: "Obviously there's three individuals in the vehicle. The front passenger has a firearm on him, so I just asked him to step out." (Dist. Ct. Dkt. No. 68 at 24.) Detective Delgado answered in the negative when asked, "Do you see anything else that makes you uncomfortable?" (Dist. Ct. Dkt. No. 68 at 23–24.)

All the while, Petitioner remained inside the car, hands on the steering wheel, as at least two officers stood outside his door, peering in at him. (Dist. Ct. Dkt. No. 68 at 9, 45.) At this point, no one in the car was free to leave.

II. Procedural History

On April 30, 2019, a federal grand jury sitting in the Southern District of Florida returned a one-count indictment against Petitioner, charging him with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). (Dist. Ct. Dkt. No. 7.)

Petitioner filed a motion to suppress the physical evidence recovered—a firearm—which the district court denied after an evidentiary hearing. (Dist. Ct. Dkt. Nos. 68 at 74; 41.) In its written order, the district court found the warrantless seizure of Petitioner justified, in part, because of the presence of a firearm in the waistband of the front passenger of the vehicle. (Dist. Ct. Dkt. No. 41 at 4.)

Thereafter, the government filed a superseding information, charging Petitioner with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). (Dist. Ct. Dkt. No. 42.) Petitioner waived formal indictment and entered a conditional plea of guilty. (Dist. Ct. Dkt. Nos. 43; 45.) The plea agreement made clear that Petitioner entered into a:

> conditional plea of guilty and reservation of the right to seek appellate court review of the district court's denial of the motion to suppress evidence on the grounds that (1) law enforcement did not have reasonable suspicion or other grounds to stop or seize the Defendant on April 8, 2019 . . . .

(Dist. Ct. Dkt. No. 45 at 2–3.) The government acknowledged that an order suppressing the firearm, "or an appeal granting such relief," would be "case dispositive." (Dist. Ct. Dkt. No. 45 at 3.)

At the sentencing hearing on November 5, 2019, the district court sentenced Petitioner to a term of imprisonment of 24 months, followed by 3 years of supervised release. (Dist. Ct. Dkt. No. 69 at 7.) Petitioner timely filed a notice of appeal. (Dist. Ct. Dkt. No. 60.)

On appeal, Petitioner challenged the legality of his seizure. (Pet. C.A. Br. at 12–32.) More specifically, he argued that—when seized—law enforcement officers did not have any suspicion—let alone a reasonable, articulable, and particularized suspicion—that he was committing, or was about to commit, a crime. Officers seized Petitioner—seated in the driver's seat—based solely upon Detective Delgado's observation of a firearm in the waistband of the front passenger. But, post-2015 in Florida, the concealed carry of a firearm is presumptively lawful. That is, Detective Delgado's mere observation of a firearm in the waistband of the front passenger, without more—such as evidence indicating the front passenger was not licensed—is insufficient evidence of the crime of unlicensed concealed carry, or any crime at all. As a result, not only was the seizure of the front passenger unlawful, but Mr. Turner's seizure was as well.

In an unpublished per curiam opinion, the Eleventh Circuit affirmed Petitioner's conviction. In so doing, the Eleventh Circuit held as follows with regard to the seizure of all passengers in the vehicle:

> When Delgado saw a gun in plain view in the front passenger's waistband, the detective had reasonable suspicion to remove the passenger from the car to determine whether he possessed a valid permit to carry a concealed weapon, Fla. Stat. § 790.06(1). *See United States v. Lewis,* 674 F.3d 1298, 1304–05 (11th Cir. 2012).

(App. A at 2a.) The panel supported its holding that the seizure was valid after Detective Delgado saw a firearm in the front passenger's waistband by relying upon an outdated published opinion that has since been superseded by a change to Florida's concealed carry statute and a Florida statute that by its own terms deems violations to be "noncriminal."

As a result of the Eleventh Circuit's erroneous holding, relying upon outdated precedent and suspicion of noncriminal conduct, Petitioner moved for rehearing en banc, which the Eleventh Circuit denied.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's Reliance on a Noncriminal Statute to Justify a Seizure Conflicts with the Fourth Amendment, and Deepens a Split Amongst State and Federal Courts Regarding Whether a Seizure Can Be Initiated Upon Reasonable Suspicion of a Noncriminal Violation

The Eleventh Circuit relied upon Fla. Stat. § 790.06(1) in holding, "[D]etective [Delgado] had reasonable suspicion to remove the passenger from the car to determine whether he possessed a valid permit to carry a concealed weapon." (App. A at 2a.) At this moment, all passengers in the vehicle—including Petitioner—were seized. But, § 790.06(1) does not justify the seizure of an individual carrying a concealed firearm, let alone other individuals.

Police-citizen encounters generally fall within one of three tiers: "(1) police-citizen exchanges involving no coercion or detention; (2) brief seizures or investigatory detentions; and (3) full-scale arrests." *United States v. Jordan*, 635 F.3d

1181, 1185 (11th Cir. 2011) (citing *United States v. Perez*, 443 F.3d 772, 777 (11th Cir. 2006)). The second tier—brief seizures or investigatory detentions—must be based on "reasonable, articulable suspicion that *criminal* activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)) (emphasis added). An officer may stop and briefly detain a person only when he or she "has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in *criminal* activity." *United States v. Hensley*, 469 U.S. 221, 227 (1985) (emphasis omitted) (emphasis added). *See also United States v. Cortez*, 449 U.S. 411, 417 (1981) ("[I]nvestigatory stop[s] must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in *criminal* activity.") (emphasis added).

Here, no *criminal* activity was "afoot" at all. *Wardlow*, 528 U.S. at 123. The front passenger was lawfully carrying a concealed firearm. That Detective Delgado saw the concealed firearm does not afford him unfettered discretion to initiate a seizure on that basis alone. Investigations and investigatory detentions are not coterminous; an investigation can be done without a detention, but an investigatory detention requires much more to justify a departure from the Fourth Amendment.

Per the express language of § 790.06(1), a licensee "must display both the license and proper identification upon demand by a law enforcement officer." Fla. Stat. § 790.06(1). Critically, however, "[v]iolations of the provisions of [§ 790.06(1)] shall constitute a noncriminal violation with a penalty of $25, payable to the clerk of the court." *Id.* So, while Detective Delgado was free to approach the front passenger

and initiate a consensual encounter based upon his observation of a concealed firearm, he had no authority to seize the front passenger—let alone Petitioner—to investigate a possible violation of Fla. Stat. § 790.06(1), a civil violation. Neither the Fourth Amendment nor the Florida Legislature permit a seizure on this basis alone. *See Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984) (noting that where a state has chosen to classify an offense as "a noncriminal, civil forfeiture offense for which no imprisonment is possible . . . [t]his is the best indication of the State's interest in precipitating an arrest, and is one that can be easily identified both by the courts and by officers faced with a decision to arrest").

This Court has not yet explicitly considered whether a seizure can be predicated upon reasonable suspicion of a *noncriminal* violation. Such consideration, however, is essential given the split in authority on this issue, which can only be expected to deepen, especially as individual states continue to decriminalize a wide array of once-criminal conduct. *See, e.g.*, David Keenan & Tina M. Thomas, Note, *An Offense-Severity Model for Stop-and-Frisks*, 123 YALE L.J. 1448, 1476 (2014) ("Federalism embraces the idea of localities as laboratories for experimentation. That localities choose to define offenses as noncriminal rather than criminal, for instance, is indicative of such experimentation.").

For example, in *State v. Duncan*, 43 P.3d 513 (Wash. 2002), the Supreme Court of Washington considered whether to extend the principles from *Terry* to include stops for civil infractions. Law enforcement officers on patrol "observed three black men standing in front of [a] bus shelter, and at least one brown paper bag sitting on

a bench inside the shelter, with a glass bottleneck protruding from its top." *Duncan*, 43 P.3d at 514. The officers seized the defendant to "investigate a potential violation of the Seattle Municipal Code that prohibits possessing an open container of liquor in public"—a noncriminal violation of the Seattle Municipal Code, "a civil infraction." *Id.* at 515–16. The Supreme Court of Washington "declin[ed] to extend *Terry* to general civil infractions." *Id.* at 517.

The court so concluded after considering the public policy principles behind *Terry* stops, as well as this Court's jurisprudence, which "focus[es] on preventing *crimes*, and promoting the interests of justice in arresting felons . . . suggest[ing] that the interest in preventing civil infractions may not be accorded the same weight." *Id.* at 518 (emphasis in original). Because noncriminal offenses involve a lower safety risk than criminal ones, their detection warrants a less intrusive procedure than that sanctioned by *Terry*. *Id.* at 519 ("When investigating a civil infraction an officer is not seeking to arrest an individual, but rather to issue a citation. In light of the lower risk to society involved with civil infractions, the common law principle [requiring a warrant prior to arresting an individual for the commission of a misdemeanor] suggests that a less intrusive procedure would be more acceptable than with the commission of a felony or even a misdemeanor.").

Thereafter, the Massachusetts Supreme Judicial Court, in *Commonwealth v. Cruz*, 945 N.E.2d 899 (Mass. 2011), explicitly held that "to order a passenger in a stopped vehicle to exit based merely on *suspicion* of an offense, that offense must be criminal." *Id.* at 908 (emphasis in original). The court considered the Massachusetts

legislature's decision to decriminalize possessing one ounce or less of marijuana in its reasonable suspicion analysis, and noted "at the outset" that "the lesser standard of reasonable suspicion is tied, by its very definition, to the suspicion of *criminal*, as opposed to merely infractionary, conduct." *Id.* at 908–09 (emphasis in original). In so holding, the court noted that "[f]erreting out decriminalized conduct with the same fervor associated with the pursuit of serious criminal conduct is neither desired by the public nor in accord with the plain language of the statute" at issue. *Id.* at 910. *See also Commonwealth v. Rodriguez*, 37 N.E.3d 611, 620 (Mass. 2015) ("[W]e are disinclined to extend the rule that allows vehicle stops based on reasonable suspicion of a civil motor vehicle offense to stops to enforce the civil penalty for possession of one ounce or less of marijuana. Such stops are unreasonable. . . .").

It is a bedrock principle that an intrusion on an individual's Fourth Amendment right be based upon suspicion of *criminal* conduct. It is an unreasonable invasion of an individual's right to privacy to sanction a seizure based upon suspicion of a noncriminal offense. This Court's intervention is required to restore balance and provide guidance on an issue that has, and will continue to, confound and split the lower courts.

II. The Eleventh Circuit's Determination that Officers had Reasonable Suspicion to Effectuate a Seizure Based Solely Upon the Presence of a Concealed Firearm in a State Where Concealed Carry is Presumptively Lawful Creates Both an Inter-State and Intra-State Conflict

Carrying a concealed firearm is now a presumptively lawful activity in the State of Florida. In 2015, the Florida Legislature purposefully and intentionally

amended its concealed carry statute—Fla. Stat. § 790.01—in favor of firearm possession. Therefore, the mere possession of a concealed firearm, without more, does not provide any suspicion, let alone reasonable suspicion, of a crime. The Eleventh Circuit's holding otherwise, in reliance on outdated precedent, creates a significant inter- and intra-state conflict, and fails to account for the express will of the Florida Legislature.

Before 2015, § 790.01, entitled "Carrying concealed weapons," provided, in pertinent part:

> (2) [A] person who carries a concealed firearm on or about his or her person commits a felony of the third degree . . . .
> (3) This section does not apply to a person licensed to carry a concealed weapon or a concealed firearm pursuant to the provisions of s. 790.06.

Fla. Stat. § 790.01 (2014). The Florida Supreme Court interpreted the pre-2015 version of § 790.01 to mean that "licensure is an affirmative defense to a charged crime of carrying a concealed weapon . . . and the lack of a license is not an element of the crime." *Mackey v. State*, 124 So. 3d 176, 181 (Fla. 2013) (emphasis in original).

In 2015, however, the Florida Legislature retitled § 790.01 as "Unlicensed carrying of concealed weapons or concealed firearms," and amended § 790.01 to provide, in pertinent part:

> (2) . . . [A] person who is not licensed under s. 790.06 and who carries a concealed firearm on or about his or her person commits a felony of the third degree . . . .

Fla. Stat. § 790.01 (2015) (emphasis added). That is, the Legislature's amendment of § 790.01 "eliminated the pre-2015 version's burden of requiring a defendant to prove,

as an affirmative defense to the crime, that he or she was 'licensed to carry a concealed weapon or a concealed firearm,'" and instead "requires the state to prove, as an element of the crime, that 'the defendant was not licensed to carry a concealed firearm.'" *Jackson v. State*, 289 So. 3d 967, 969 (Fla. Dist. Ct. App. 2020) (emphasis in original). The standard jury instructions for the offense were amended accordingly "to include a third element that requires the State to prove that the defendant did not have a license to carry a concealed weapon or firearm at the time he or she did the carrying." *Id.* (quotation marks omitted). *See also In re: Standard Jury Instr. in Crim. Cases-Rep. 2017-10*, 253 So. 3d 1040, 1041 (Fla. 2018) ("Criminal jury instruction 10.1 (Carrying a Concealed [Weapon] [Firearm]) is amended to include a third element that requires the State to prove that the defendant did not have a license to carry a concealed weapon or firearm at the time he or she did the carrying.").

This change is critical, and renders the Eleventh Circuit's reliance on its outdated precedent—*United States v. Lewis*, 674 F.3d 1298, 1304–05 (11th Cir. 2012)—erroneous. Critical to the Court's reasoning in *Lewis*—that officers had reasonable suspicion to detain an individual in possession of a concealed firearm—was the fact that, at that time, under Florida law, "the possession of a valid permit for a concealed weapon [was] not related to the elements of the crime, but rather [was] an affirmative defense." *Lewis*, 674 F.3d at 1304. As a result, because officers had reasonable suspicion to believe that the possessor of the firearm was committing a

crime under Florida law—carrying a concealed weapon—both the possessor's, and as a result his friends'—detention was deemed lawful. *Id.* at 1304–06.

But Florida law has since changed. Evidence of a concealed firearm, without more—such as some evidence indicating that the firearm possessor is unlicensed—does not provide reasonable suspicion that criminal activity is afoot. Due to the Florida Legislature's amendments, the concealed carry statute now carries with it a presumption of legality. To allow the Eleventh Circuit's holding to stand would invert the presumption, and with it, the express will of the democratically-elected state legislature, render the protections afforded by the Second Amendment a nullity, eviscerate critical Fourth Amendment protections, and create both inter- and intra-state conflicts.

At a minimum, the Third, Fourth, Sixth, Seventh, and Eighth Circuits are in conflict with the Eleventh Circuit with regard to the legality of a seizure based upon the mere presence of a lawfully-possessed firearm. *See United States v. Lewis*, 672 F.3d 232, 240 (3d Cir. 2012) (Where "[i]t is lawful for certain individuals in the Virgin Islands to carry a firearm provided that a license is obtained," and "[a]bsent any information about the criminality of the firearms, the mere possession of the firearms could not provide [the officer] with reasonable suspicion to stop the vehicle."); *United States v. Ubiles*, 224 F.3d 213, 217–18 (3d Cir. 2010) (finding no reasonable suspicion that criminal activity was afoot where individual was observed carrying a firearm in a large crowd because it is not a crime to possess a firearm in the Virgin Islands "nor does a mere allegation that a suspect possesses a firearm, as dangerous as firearms

may be, justify an officer in stopping a suspect absent the reasonable suspicion required by *Terry*"); *United States v. Black*, 707 F.3d 531 (4th Cir. 2013) ("Being a felon in possession of a firearm is not the default status. More importantly, where a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention. Permitting such a justification would eviscerate Fourth Amendment protections for lawfully armed individuals in those states . . . . Additionally, even if the officers were justified in detaining Troupe for exercising his constitutional right to bear arms, reasonable suspicion as to Troupe does not amount to, and is not particularized as to Black, and we refuse to find reasonable suspicion merely by association."); *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1131–33 (6th Cir. 2015) (noting that where the state legislature "has decided its citizens may be entrusted with firearms on public streets," the police have "no authority to disregard this decision" by subjecting law-abiding citizens to *Terry* stops); *United States v. Leo*, 792 F.3d 742, 749–752 (7th Cir. 2015) (rejecting "frisk" and search of backpack on suspicion that it contained a gun in light of "important developments in Second Amendment law together with Wisconsin's [concealed carry] gun laws"); *Duffie v. City of Lincoln*, 834 F.3d 877, 883 (8th Cir. 2016) ("Nebraska law permits individuals who are at least 18 years old to open carry handguns in public. The City of Lincoln does not restrict an individual's right to open carry except in certain locations. Moreover, the mere report of a person with a handgun is insufficient to create reasonable suspicion.") (citations omitted).

The Eleventh Circuit's opinion is also out of line with decisions from the highest courts in states with concealed carry laws similar to Florida's amended concealed carry law. In those states, the state supreme courts have also found it unconstitutional to seize an individual merely because he possesses a concealed firearm. *See, e.g.*, *Commonwealth v. Hicks*, 208 A.3d 916 (Pa. 2019) (after reviewing its own laws, which allow properly licensed individuals to carry a concealed firearm, the Pennsylvania Supreme Court found "no justification for the notion that a police officer may infer criminal activity merely from an individual's possession of a concealed firearm in public . . . . Although the carrying of a concealed firearm is unlawful . . . for a person not licensed to do so, there is no way to ascertain an individual's licensing status . . . merely by his outward appearance" and therefore, "there simply is no justification for the conclusion that the mere possession of a firearm, where it lawfully may be carried, is alone suggestive of criminal activity").

Additionally, the Eleventh Circuit's decision would permit defendants in Florida to be prosecuted in the federal system for conduct that would not be prosecuted in the state, contrary to the express will of the Florida Legislature and its electorate. Florida recently had occasion to consider its amended concealed carry statute as it related to the Fourth Amendment in *Kilburn v. State*, 297 So. 3d 671 (Fla. Dist. Ct. App. 2020). There, an officer detained an individual after seeing the butt of a handgun sticking out of the individual's waistband. *Kilburn*, 297 So. 3d at 672. The First District Court of Appeal invalidated the seizure, however, because "[t]he citizens of Florida have spoken through their Legislature and have stated that

those who possess a license to carry a concealed weapon have the right to carry a concealed firearm." *Id.* at 674. More specifically, after Florida amended its concealed carry statute in 2015, it became "even more clear that a law enforcement officer may not use the presence of a concealed weapon as the sole basis for seizing an individual." *Id.* at 675 (emphasis added). Noting that as of January 31, 2020, over two million Florida residents—or over 13% of Floridians over the age of twenty-one—were licensed to carry concealed weapons, the court concluded that "[t]he thought that these millions of people are subject to seizure by law enforcement until their licenses are verified is antithetical to our Fourth Amendment jurisprudence." *Id.* at 676.

That is precisely the risk to defendants charged in federal court, however, if the Eleventh Circuit's opinion is allowed to stand. Florida transformed the concealed carry of a firearm into a presumptively lawful, statutorily (and constitutionally) protected activity. The Eleventh Circuit's holding otherwise disregards the express will of the people of Florida, its Legislature, and its courts, not to mention the Second and Fourth Amendments to the U.S. Constitution. In Florida, there is no violation of a statute—and therefore no crime—based solely upon the mere possession of a concealed firearm. As a result, the mere observation of a concealed firearm does not create suspicion, let alone reasonable suspicion, of a crime.

III. The Questions Presented Are Exceptionally Important

As of June 30, 2021, approximately 2,494,536 residents of Florida were licensed to carry concealed weapons. *See* Number of Licensees by Type, Fla. Dep't of Agric. and Consumer Servs., Div. of Licensing (June 30, 2021),

https://www.fdacs.gov/content/download/82618/file/Number_of_Licensees_By_Type.pdf. This represents a sizable (and rapidly growing) portion of Florida's population. And Florida is not alone in its facilitation of an individual's right to possess a firearm. Texas will become the twentieth state not to require permits for the open or concealed carry of firearms when its new law takes effect on September 1, 2021. *See* Katharina Buchholz, *Which States Allow the Permitless Carry of Guns?*, STATISTA (June 18, 2021), https://www.statista.com/chart/20047/gun-carry-laws-in-us-states/.

With so many states expanding their citizens' access to firearms, and correspondingly, as more citizens exercise their expanded rights, this Court's Fourth Amendment jurisprudence and police practices must adapt. The circuits and state courts are already divided—a division that can only be expected to deepen. As such, the questions presented are ones of great public importance with far reaching implications that warrant review by this Court.

IV. This Is an Ideal Vehicle

This case presents the perfect opportunity for the Court to clarify its Fourth Amendment jurisprudence—more specifically seizure jurisprudence—in light of a growing number of state laws that have expanded rights to carry firearms in public. Procedurally, both questions are squarely presented here. And factually, this case is ideal because the lower court's erroneous denial of Petitioner's motion to suppress resulted in error that merits reversal.

Both in the district court and on appeal, Petitioner challenged the legality of his seizure. The district court denied Petitioner's motion to suppress the physical

evidence recovered—the firearm—finding the warrantless seizure justified, in part, because of a firearm visible in the waistband of the front passenger of the vehicle. (Dist. Ct. Dkt. No. 41 at 4.) Petitioner then entered into a conditional plea of guilty that specifically reserved his right to seek appellate review of the district court's denial of his motion to suppress. (Dist. Ct. Dkt. No. 45 at 2–3.) The government acknowledged that an order suppressing the firearm, "or an appeal granting such relief," would be "case dispositive." (Dist. Ct. Dkt. No. 45 at 3.) On appeal, Petitioner once again challenged the legality of his seizure. He also raised the issues raised herein in a separate petition for rehearing en banc. The Eleventh Circuit, relying on outdated precedent, brushed off Petitioner's arguments, and affirmed the district court's order denying Petitioner's motion to suppress. (App. A at 1a.)

Factually, too, this case is an ideal vehicle because of the significance of the erroneously denied motion to suppress. As the government acknowledged in the conditional plea agreement entered into between itself and Petitioner, the motion to suppress is case dispositive. That is, if this Court reverses the Eleventh Circuit, Petitioner's conviction must be vacated.

The Fourth Amendment concerns are starkly presented in this case. Granting this petition would afford the Court an opportunity to clarify both whether suspicion of a noncriminal violation suffices for a seizure, and whether the mere presence of a firearm in a state where such firearm possession is presumptively lawful suffices for a seizure. The Court will be able to address these important Fourth Amendment

concerns, which are only expected to grow and worsen as more states provide expanded rights to their citizens to carry guns in public.

CONCLUSION

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

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: /s/ *Anshu Budhrani*
Anshu Budhrani
Assistant Federal Public Defender
Counsel of Record
150 West Flagler Street
Suite 1700
Miami, FL 33130
(305) 530-7000

Counsel for Petitioner

Miami, Florida
July 9, 2021