No. 21-5176

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Laws regarding firearm possession are evolving to provide expanded protections for individuals in possession of firearms in public. That is precisely what occurred in Florida, where the legislature amended its concealed carry statute in favor of firearm possession. As a result, courts "need to reevaluate [their] thinking" about the interaction between the Fourth Amendment and individuals' possession of firearms." *United States v. Williams*, 731 F.3d 678, 694 (7th Cir. 2013) (Hamilton, J., concurring in part and concurring in the judgment). "[T]he calculus is now quite different," *id.*, than when *Terry v. Ohio*, 392 U.S. 1 (1968), was decided. In states where large numbers of persons are authorized to carry weapons on a regular basis (and actually do so), there is "legal uncertainty regarding what police can do when they observe, or learn of, a person carrying a firearm." Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1, 25 (2015). This case perfectly illustrates that uncertainty, and highlights the deep disparities between how courts have chosen to respond. This Court's intervention and review is, therefore, urgently required.

I. There is a genuine conflict among the lower courts as to whether suspicion of a noncriminal violation can support a seizure

The Eleventh Circuit held as follows with regard to the seizure of the front passenger: "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)." Pet. App. 2a. Section 790.06 states, in pertinent part, that an

individual with a concealed carry license "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." Fla. Stat. § 790.06(1). Failure to do so "shall constitute a noncriminal violation. . . ." *Id.* As the government concedes, a violation of § 790.06(1) constitutes a "civil infraction." Br. in Opp. 11.

Per the plain language of the Eleventh Circuit's opinion, Detective Delgado seized the occupants of the vehicle upon suspicion of a noncriminal violation. In an effort to escape this conclusion, the government contorts the Eleventh Circuit's opinion and draws meaningless distinctions between the text of an opinion versus its citations. Br. in Opp. 11. But the government's reading of the Eleventh Circuit's opinion draws no support from the text of the opinion itself, nor from any canons of interpretation.[1] The Eleventh Circuit unambiguously referenced § 790.06(1)—a civil

[1] In its briefing before the Eleventh Circuit, the government itself relied upon § 790.06(1) to justify the seizure of the front passenger. (Resp't C.A. Br. at 26.) In fact, the government expressly argued that its investigatory detention of the front passenger was not based upon Detective Delgado's observation of a firearm "and the unsupported presumption that the firearm was unlawfully possessed," but was instead based upon "Detective Delgado's past experience with fake concealed weapons permits." (*Id.*) That is, the government argued that Detective Delgado had "reasonable suspicion to investigate . . . to confirm the permit's validity" per § 790.06(1). (*Id.* at 27.) "Detective Delgado asked to inspect that permit, as Florida law allows him to do, and only after the front passenger began 'fumbling around with his . . . pockets' did Detective Delgado elevate the encounter to an investigative detention by asking the front passenger to exit the vehicle." (*Id.*) Per the government's own arguments below, the seizure here was effectuated based upon reasonable suspicion of a *noncriminal* violation.

infraction—in justifying the seizure, and its reference is clear and not open to interpretation.

In upholding a seizure on the basis of suspicion of a noncriminal violation, the Eleventh Circuit split from this Court's existing Fourth Amendment jurisprudence, as well as from a growing number of state court opinions. The government attempts to minimize the enormity of the split in authority by suggesting that the cases referenced by Petitioner involved more stringent state constitutional provisions and not the Fourth Amendment. The government is incorrect. *See Commonwealth v. Rodriguez*, 37 N.E.3d 611, 620 (Mass. 2015) (noting that the police action being considered must accord with the Fourth Amendment); *Commonwealth v. Cruz*, 945 N.E.2d 899, 910 (Mass. 2011) (citing to this Court's decision in *Florida v. Jimeno*, 500 U.S. 248, 250 (1991), to support the holding that "reasonable suspicion is tied, by its very definition, to the suspicion of *criminal*, as opposed to merely infractionary, conduct"); *State v. Duncan*, 41 P.3d 513, 521 (Wash. 2002) (noting that "[t]o stop and detain" an individual, officers need "a reasonable and articulable suspicion" that a crime is about to occur, and declining "to extend the *Terry* stop exception to include nontraffic civil infractions").

This Court has not yet addressed whether a seizure can be predicated upon reasonable suspicion of a *noncriminal* violation. Such consideration is essential, however, given the split in authority on the issue, which can only be expected to grow.

II. There is a genuine conflict among lower courts—both intra- and inter-circuit—as to whether a seizure can be effectuated based solely upon the presence of a firearm in a state where carrying a firearm is presumptively lawful

The government acknowledges that the front passenger was seized "to determine whether he possessed a valid permit." Br. in Opp. 10. Implicit in that acknowledgement is that mere possession of a concealed firearm is a *presumptively unlawful* activity—a crime. But, that is not so in Florida. In 2015, the Florida Legislature amended its concealed carry statute to make the concealed carry of a firearm a presumptively lawful activity. That is, licensure is no longer an affirmative defense; it is an element of the offense. And though the government argues otherwise, this is a distinction with a difference.

The Eleventh Circuit here, by upholding Petitioner's seizure based upon the mere presence of a concealed firearm in the waistband of the front passenger, places itself in direct conflict with the express will of the Florida Legislature and Florida's courts, as well as with other state courts and federal circuit courts that have held the opposite in states where firearm possession is presumptively lawful. The government attempts to erase this deep intra- and inter-circuit split by disingenuously distinguishing what occurred here from the cases referenced in Petitioner's petition, but its attempts fall flat.

For example, the government contends that because this case "involved circumstances beyond the mere possession of a gun," it is distinguishable from the cases that have held that law enforcement may not initiate a stop based solely on the presence of a firearm in states where firearm possession is presumptively lawful. Br.

in Opp. 13. The alleged "circumstances" referenced include the neighborhood in which Petitioner's car was parked, "that the car was parked near a residence where numerous drug sales had taken place," and that "drugs and a firearm had been found in a recent search of the residence." Br. in Opp. 13. As an initial matter, none of these additional "circumstances" are at all particularized to Petitioner. His car was lawfully parked in the shared parking lot of a multi-unit complex that was home to numerous individuals, and law enforcement officers knew almost immediately that he had no connection to the subject of the DNA warrant they were there to serve.

Additionally, the government made similar arguments in the cases it now attempts to distinguish—asserting that various stops were reasonable after accounting for the totality of the circumstances. Its arguments were expressly considered and roundly rejected by the courts. *See United States v. Lewis*, 672 F.3d 232, 240–41 (3d Cir. 2012) (rejecting the government's argument that the "totality of the circumstances"—a tip from a reliable source and tints on the vehicle—supported the stop, instead finding such "*ex post facto*" justifications insufficient); *United States v. Ubiles*, 224 F.3d 213, 215–19 (3d Cir. 2000) (rejecting the government's contention that the court also consider that the defendant possessed the firearm at a crowded festival when determining if officers had reasonable suspicion); *United States v. Black*, 707 F.3d 531, 539–42 (4th Cir. 2013) (finding the government's proffered "totality of the factors"—presence in a high crime area at night, another individual's suspicious behavior at a gas station, that other individual's prior arrest history, being overly cooperative—insufficient to justify a seizure based merely upon the presence

of a firearm on another individual in a state that permits individuals to openly carry firearms); *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1132–34 (6th Cir. 2015) (rejecting the city's many attempts to legalize the seizure of a man seen walking his dog with a handgun holstered on his hip in a state that "decided its citizens may be entrusted with firearms on public streets"); *Duffie v. City of Lincoln*, 834 F.3d 877, 883–84 (8th Cir. 2016) (finding incident report of black male acting strangely inside a convenience store and then sitting in his car outside that convenience store holding up a handgun and acting like he was blowing smoke from the barrel of the gun insufficient to create reasonable suspicion of criminal activity in a state that permits the open carry of handguns in public); *Commonwealth v. Hicks*, 208 A.3d 916, 929 (Pa. 2019) (rejecting as irrelevant to the reasonable suspicion analysis the very same circumstances proffered by the government here—namely that the court should have considered the defendant's firearm possession in light of the fact that the defendant possessed the firearm inside a gas station in a high crime neighborhood where police regularly received calls about drug dealing, people with weapons, and loitering).

The courts saw the government's proffered additional "circumstances" for what they were—post-hoc justifications for seizures based solely upon the presence of a firearm in states where firearm possession was presumptively lawful. *See Black*, 707 F.3d at 539 ("Instead, we encounter yet another situation where the Government attempts to meet its *Terry* burden by patching together a set of innocent, suspicion-free facts, which cannot rationally be relied on to establish reasonable suspicion.").

The Eleventh Circuit's holding in Petitioner's case deepens an already profound circuit split regarding an issue of growing importance and urgency—whether law enforcement officers have reasonable suspicion to effectuate a seizure upon the mere presence of a firearm in states where possession of a firearm is presumptively lawful. The government asserts that this Court has "recently and repeatedly denied certiorari petitions raising similar issues." Br. in Opp. 6. But the government is once again incorrect. The petitions it references involved seizures premised upon the presence of a firearm in states where such possession is not presumed lawful—that is, in states where licensure is still an affirmative defense to the crime of carrying a concealed weapon without a license. *See, e.g.*, *Pope v. United States*, 140 S. Ct. 160 (2019) (No. 18-8785); *Sykes v. United States*, 140 S. Ct. 136 (2019) (No. 18-8988).[2] That is precisely the opposite of what occurred here. The Florida Legislature's express amendment of its concealed carry statute in favor of firearm possession squarely places this case in line with those cases referenced in Petitioner's petition, thereby placing the Eleventh Circuit's opinion in direct conflict with the decisions of numerous state and federal courts, both within and outside of the State of Florida. As a result, this Court's review is necessary and clearly warranted.

[2] The government references a third petition—*Robinson v. United States*, 138 S. Ct. 379 (2017) (No. 16-1532)—but that case is inapposite because it involves a challenge to the subsequent frisk, not the initial seizure.

III. This Case Presents an Ideal Vehicle to Review the Questions Presented

The government seemingly propounds two reasons for why this case does not warrant further review: (1) Petitioner challenges a seizure directed at the front passenger rather than himself; and (2) the Eleventh Circuit's reasoning is too "fact-bound." Br. in Opp. 6, 10. The government is incorrect on both fronts.

The government misapprehends Petitioner's entire argument when it reimagines Petitioner's case as challenging only the seizure of the front passenger. Br. in Opp. 6–7. Petitioner has consistently challenged his own seizure—based upon Detective Delgado's observation of a firearm in the waistband of the front passenger—before the district court, appellate court, and this Court. His challenge stems from the Eleventh Circuit's reasoning in *United States v. Lewis*, 674 F.3d 1298 (11th Cir. 2012), wherein the Eleventh Circuit held that "individualized suspicion is not an absolute prerequisite for every constitutional search or seizure," and that law enforcement officers may seize all members of a group—"absent . . . particularized reasonable suspicion" for each individual in the group—upon suspicion that one or more members of the group is in possession of a firearm. *Id.* at 1305–06. That is precisely what occurred here—Detective Delgado observed what he believed to be a firearm in the waistband of the front passenger, and, in accordance with *Lewis*, "briefly detain[ed] all . . . individuals for reasons of safety." *Id.* at 1306; *see also Black*, 707 F.3d at 537–38 (finding all individuals in a group to be seized upon police officers' seizure of a firearm from one individual member of the group). At that point, surrounded by at least eight to ten armed law enforcement officers in tactical gear

who had just opened the door to his vehicle to physically remove the front passenger, Petitioner was not free to leave. (Pet'r C.A. Br. at 6.); *see also Brendlin v. California*, 551 U.S. 249, 260 (2007) ("All the occupants were subject to like control by the successful display of [police] authority."). Petitioner was seized. *See Black*, 707 F.3d at 538 (noting that the defendant was seized when another member of his group was seized on account of that individual's possession of a firearm because of, among other factors, the "collective show of authority by the uniformed police officers and their marked police vehicles" that surrounded the group, as well as the officers' seizure of the other member of the group in order to secure his firearm, indicating that, "at the very least," that individual was not free to leave); *Brendlin*, 551 U.S. at 258 ("It is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety.").

Additionally, Petitioner's challenges to his seizure are not too "fact-bound" to warrant this Court's review. Br. in Opp. 10. In fact, it is quite the opposite. In upholding Petitioner's seizure, the lower courts relied upon outdated and erroneous legal precedent that fails to account for the Florida Legislature's changes to its concealed carry statute, which now carries with it a presumption of legality. The district court committed, and the court of appeals compounded, a legal error that places the Eleventh Circuit in direct conflict with both the state courts in Florida and federal and state courts outside of Florida. This Court's intervention is required to address this legal error and make clear that, where a state has decided to broaden

access to firearms, the mere presence of a presumed lawful firearm cannot suffice as reasonable suspicion of criminal activity.

The questions presented here are ones of great public importance with far-reaching implications that warrant review by this Court. They are squarely presented and properly preserved.

CONCLUSION

For all of the reasons stated herein and in his petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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