No. _____

In The
Supreme Court of the United States

CASONDRA POLLREIS, ON BEHALF OF HERSELF AND HER MINOR CHILDREN, W.Y. AND S.Y.,

Petitioner,

v.

LAMONT MARZOLF,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Fourth Amendment permit the search and seizure without probable cause of two compliant children, handcuffed and at gunpoint, even after the children have identified themselves to the seizing officer and been independently identified by their parents?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Casondra Pollreis, on behalf of herself and her minor children W.Y. and S.Y., was the plaintiff in the United States District Court for the Western District of Arkansas and the plaintiff-appellee in the United States Court of Appeals for the Eighth Circuit.

Respondent Lamont Marzolf was a defendant in the district court and the defendant-appellant in the circuit court. Another officer, Josh Kirmer, was named as a defendant in the district court but was not a party to the appellate proceeding below.

STATEMENT OF RELATED CASES

Pollreis v. *Marzolf*, (W.D. Ark.) No. 5:18-CV-5200 (judgment entered September 8, 2021).

Pollreis v. *Marzolf*, (8th Cir.) No. 20-1745 (judgment entered August 16, 2021).

Pollreis v. *Marzolf*, (8th Cir.) No. 21-3267 (appeal filed October 8, 2021).

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISION

RULE

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

This case presents a fundamental question about when probable cause is required for a police officer to seize a person. In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court identified "a special category" of seizures "so substantially less intrusive than arrests" that they do not require probable cause. *Dunaway* v. *New York*, 442 U.S. 200, 210 (1979). And the Court "has been careful to maintain [*Terry*'s] narrow scope." *Id.* Similarly, under the common law that guides Fourth Amendment jurisprudence, a suspicious person walking at night could be lawfully detained for questioning only "till he give a good account of himself." 2 William Hawkins, Pleas of the Crown ch. 13, § 6, p. 129 (8th ed. 1824).

The majority opinion below is just one example of the circuit courts' expansion of *Terry*, which goes far beyond the sort of minimal intrusions authorized by this Court. This trend is not new, but it is growing. As early as 1993, the Tenth Circuit observed that "[t]he last decade, however, has witnessed a multifaceted expansion of *Terry*." *United States* v. *Perdue*, 8 F.3d 1455, 1464 (10th Cir. 1993). More recently, the Seventh Circuit worried that "[t]he proliferation of cases in this court in which '*Terry*' stops involve handcuffs and ever-increasing wait times in police vehicles is disturbing * * * ." *Ramos* v. *City of Chicago*, 716 F.3d 1013, 1018 (7th Cir. 2013). Other circuits have similarly acknowledged their expansion of this

Court's doctrine.[1] And dissenting judges have increasingly decried the lower courts' ever-growing departure from this Court's precedents. *E.g.*, *United States* v. *Johnson*, 921 F.3d 991, 1010 (11th Cir. 2019) (en banc) (Jordan, J., dissenting) (noting that "the majority expands *Terry* beyond its 'narrow scope'" and arguing that "accepting *Terry* does not require extending its reach on an issue of first impression"); *United States* v. *Bailey*, 743 F.3d 322, 351 (2d Cir. 2014) (Pooler, J., dissenting in part) (similarly decrying the expansion of *Terry* without authorization from this Court).

These dissents have a point. The purported *Terry* stops approved by the approach of most lower courts bear little resemblance to either the minimal intrusions authorized by *Terry* or the common-law tradition on which *Terry* was nominally based. This case presents a useful example: A police officer stopped two young children at gunpoint because he was on the lookout for two suspects, one larger than the other, who had just run from a traffic stop and had recently been in the company of a different suspect who was once known to be armed. Based on this thin reed, the officer detained, handcuffed, and searched them. And even as his reed grew thinner—as the children identified themselves and were identified by their parents—he kept his gun aimed squarely at

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[1] *United States* v. *Black*, 707 F.3d 531, 534 (4th Cir. 2013) ("Since *Terry*, this discretion [of police officers performing their investigative duties] has been judicially broadened, giving police wide latitude to fulfill their functions."); *United States* v. *Tilmon*, 19 F.3d 1221, 1228 (7th Cir. 1994) ("[H]andcuffing—once highly problematic—is becoming quite acceptable in the context of a *Terry* analysis.").

them. This, in the view of the majority below, was not an arrest but only a minimally intrusive stop.

Nothing in this Court's precedents authorizes this sort of intrusive seizure of compliant suspects—let alone when an officer's suspicion is based on so little. This expansive view of *Terry*, though unmoored from this Court's precedents, is increasingly common in the lower courts and "threaten[s] to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." *Dunaway*, 442 U.S. at 213. Because it is the sole province of this Court to expand or contract its precedents, certiorari should be granted so the Court may consider the proper bounds of *Terry*.

OPINIONS BELOW

The opinion of the court of appeals, App. 1a, is reported at 9 F.4th 737. The opinion of the district court, App. 34a, is reported at 446 F. Supp. 3d 444.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2021. On October 6, 2021, Justice Kavanaugh extended the time to file a petition for a writ of certiorari until December 14, 2021. This petition is timely filed on December 14, 2021. Petitioner invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to

be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

STATEMENT

Police Hold Two Compliant Children at Gunpoint and in Handcuffs Without Probable Cause.

The facts of this case are simple and undisputed.[2] Two young boys, W.Y. and S.Y., then aged 14 and 12, respectively, were walking home from their grandparents' house when they were stopped at gunpoint by Springdale, Arkansas, police officer Lamont Marzolf. App. 35a, 40a–41a. Marzolf stopped them and, over the course of the next several minutes, grew progressively more intrusive—continuing to hold them at gunpoint, handcuffing them, and eventually searching them. App. 35a.

Marzolf did all this based on a radio call he received earlier in the evening. App. 36a. A different Springdale officer had been surveilling a nearby house based on a tip that a woman with outstanding warrants had been staying there with a known gang member. App. 35a. That officer saw the woman, the

[2] This is an interlocutory appeal from a denial of summary judgment, which means this Court, like the appellate court, can assume the truth of the facts relied upon by the district court. App. 3a n.1. The district court's recitation of the facts was drawn almost entirely from dashcam footage of the incidents that gave rise to this litigation. That video recording was in the record below, Defs.' Notice of Filing Exhibits Conventionally, ECF 23, *Pollreis* v. *Marzolf*, No. 5:18-5200-TLB, and the exhibit is reproduced for the Court's convenience at https://ij.org/wp-content/uploads/2021/12/ECF%2023.mp4.

gang member, and two unidentified males, one smaller than the other, get into a car. *Ibid.* After officers tried to initiate a traffic stop of that car, the driver crashed it, and all four occupants fled on foot. *Ibid.* Marzolf was directed to help set up a perimeter to stop the fleeing suspects. App. 36a. Shortly thereafter, a different voice announced over the radio that "the last time we made contact with [the gang member], he had a gun." *Ibid.* Marzolf was audibly discomfited by this news, cursing under his breath. *Ibid.*

Almost immediately after this last radio broadcast, Marzolf saw the two children en route from their grandparents' house. *Ibid.* Neither was running or out of breath, but they did match the other element of the bare-bones description Marzolf had received: One was smaller than the other. App. 36a, 42a. Marzolf then turned on his high beams, pointed his car at the children, and stopped with them squarely in front of the vehicle. App. 36a–37a.

"Hey, what are you guys doing?" Officer Marzolf asked. App. 37a. The older, larger boy (W.Y.) responded, pointing toward his home just over Officer Marzolf's shoulder. *Ibid.* The officer commanded, "Hey, stop, stop, turn away, turn away from me." The boys immediately complied, holding their arms out at their sides. *Ibid.*

Officer Marzolf then approached the boys with his gun pointed at their backs.[3] *Ibid.* He asked the

[3] Officer Marzolf's gun is drawn in his first appearance in the dashcam video. It is unclear from the record exactly how early in the interaction he began pointing his weapon at the children. *Ibid.*

boys their names. The older boy answered, and, at Officer Marzolf's prompting, twice confirmed his answer. *Ibid.* After the third repetition, Officer Marzolf repeated the boy's name, to which the boy promptly responded, "Yes, sir." Despite this confirmation, Officer Marzolf continued to point his gun at the children. *Ibid.*

The boys' mother, Petitioner Casondra Pollreis, approached Officer Marzolf and asked, "Officer, officer, may I have a word with you?" *Ibid.* Officer Marzolf did not answer. *Ibid.* He spoke into his radio, saying that he was holding two juveniles who were wearing dark hoodies and pants. *Ibid.* Petitioner continued to speak to Officer Marzolf throughout this exchange—her exact words are not contained in the record, but Officer Marzolf told her, "Yeah, I can hear you." App. 38a. After confirming that one boy was smaller than the other, the officer on the other end of the radio instructed Officer Marzolf to continue holding the children. *Ibid*.

Walking closer to the boys and still pointing his gun at them, Officer Marzolf ordered them to get on the ground. *Ibid.* They did so, lying face down. *Ibid.* Officer Marzolf instructed, "Put your hands out." The boys, again, promptly complied. *Ibid.*

Pollreis next calmly approached Officer Marzolf and asked what had happened. *Ibid.* He responded by telling her to "Get back." *Ibid.* She explained, "They're my boys." But instead of asking her about the boys' identities, he again told her to "get back[,]" eventually drawing his taser and pointing it at Pollreis while his gun remained trained on the two

children. *Ibid*. Holstering his taser, Officer Marzolf ordered Pollreis to "go back to [her] house," confirming that Pollreis had just emerged from her nearby home. *Ibid.*

Pollreis retreated, and Officer Marzolf continued standing over the boys with his gun pointed at them. App. 39a. A new radio transmission came in, stating that one of the suspects would be a Hispanic male with a black hoodie, black jeans, white shoes, and medium hair—a description that matched neither the boys, who were white, nor their attire. App. 39a, 40a, 54a n.9. Despite this new information, Officer Marzolf continued to point his gun at the children. App. 39a.

Officer Marzolf eventually asked the boys if they had identification. They responded that they did not. Officer Marzolf, still pointing his gun at the children, then requested a backup unit. *Ibid.*

The boys' stepfather then spoke to Officer Marzolf from a distance, telling him that the two boys "are my kids." *Ibid*.

"Ok," returned Officer Marzolf, without asking for any further confirmation of the boys' identities.

The stepfather continued, "We just left [Pollreis's] parents' right there. When you guys passed with your lights on, they were walking behind my car. I also have witnesses if you want me to call them." *Ibid.*

Officer Marzolf replied, "That's fine. I just need to figure out who these kids are right now." The

stepfather again gave the boys' names, which matched the information W.Y. had given. Officer Marzolf acknowledged this information but, again, continued to point his gun at the children. *Ibid.*

At this point, Marzolf's requested backup, Officer Adrian Ruiz, arrived. App 40a. He and Officer Marzolf approached the boys, each keeping his gun trained on the boys' backs. *Ibid.* At the same time, W.Y. moved a hand to adjust his shirt or belt. Officer Marzolf told him, "Hey, keep your hands out!" W.Y. immediately complied. *Ibid.*

As the officers approached, someone else relayed over the radio that the suspected gang member and the woman with outstanding arrest warrants "are the only two left out[.] He is wearing a blu[e] jacket with maybe a gr[a]y hoodie under." *Ibid.* After receiving this new information, Officer Marzolf nonetheless handcuffed W.Y. on the ground. *Ibid.* He then relayed over the radio that he had suspects with "black hoodies and khaki pants and jeans." *Ibid.* At this point, Officer Marzolf was detaining two male children despite having been told that the only remaining fugitives were a man and a woman. *Ibid.*

The sergeant in charge arrived next. *Ibid.* Officer Marzolf immediately informed him that the boys' parents were on the scene: "Sarge, you got a parent back there." *Ibid.*

The sergeant asked the boys if they had run from the police. *Ibid.* The boys answered no and explained, "We were at our grandparents * * * and we just started walking home." *Ibid.* The sergeant asked

their names, and the boys repeated what they had told Officer Marzolf earlier. App. 40a–41a. Officer Marzolf, meanwhile, searched the older boy and his pockets. App. 41a.

The sergeant then asked Officer Marzolf if the boys had been running. "No, they were just walking, sir," Officer Marzolf replied. *Ibid.*

"Okay. So these guys probably aren't them?" the sergeant observed. *Ibid.*

"Probably not," agreed Officer Marzolf. "I mean, we had both parents come out[.]" *Ibid.*

While Officer Ruiz searched the younger boy's backpack, the boys' grandparents walked up and (again) identified them. *Ibid.* The sergeant told the other officers to remove the handcuffs and let the boys go. *Ibid.* About seven minutes had passed since Officer Marzolf stopped W.Y. and S.Y. *Ibid.*

The District Court Holds the Encounter Exceeded the Bounds of a* Terry *Stop, but the Eighth Circuit Reverses.

Pollreis filed a civil rights complaint under 42 U.S.C. 1983, alleging (as relevant here) that Officer Marzolf had violated the boys' rights to be free from unlawful seizures, unlawful arrests, unlawful searches, and excessive force under the Fourth Amendment. She separately asserted claims, which are not at issue here, on her own behalf. App. 43a.

Officer Marzolf moved for summary judgment, arguing that he was entitled to qualified immunity.

Ibid. The district court denied the motion as to: (1) the prolonged seizure of W.Y. and S.Y.; (2) the arrest of W.Y. and S.Y.; (3) the search of W.Y.; and (4) the use of excessive force on W.Y. and S.Y. App.73a–74a. The court reasoned that the initial seizure, even based on so vague a description, was supported by reasonable suspicion and therefore constitutional. App. 52a. But the court reasoned that "the objective facts that came to light *after* the initial stop did not support a reasonable suspicion that [the boys] were the fleeing suspects." App. 53a–56a. It further found that Officer Marzolf had effected an illegal arrest because "handcuffing two boys laying facedown on the ground, at gunpoint, given the considerable evidence that the boys were not the fleeing suspects" was "more intrusive than necessary" for a *Terry* stop. App. 62a. It also denied summary judgment on the claim that Officer Marzolf's frisk of W.Y. was unconstitutional, noting that "no reasonable officer would have suspected [he was] armed and dangerous" at that point. App. 65a. And it held that Officer Marzolf's pointing his gun at the boys even as the evidence of their innocence mounted could constitute excessive force. App. 67a–68a.

Officer Marzolf appealed the denial of qualified immunity, and a divided panel of the Eighth Circuit reversed on all counts, holding that Officer Marzolf's conduct did not offend the Fourth Amendment. App. 11a, 15a, 16a–17a, 20a.

In determining whether Officer Marzolf had effected an arrest, the majority acknowledged that the line between a *Terry* stop and an arrest "can be hazy." App. 12a. And it further acknowledged that "using

handcuffs can transform an investigative stop into a de facto arrest." App. 13a. But, the majority stressed, using handcuffs "does not always do so." *Ibid.* And here, it did not, because the boys were handcuffed only briefly and Officer Marzolf had "indications that one of the boys may have been armed." App. 15a.

The frisk claim fared no better. Where the district court had focused on the fact that the frisk came at the end of the encounter (long after Officer Marzolf had learned enough to dissipate any suspicion that the boys were the suspects), the majority opinion held that the frisk was warranted simply because one of the boys had touched his waist and Marzolf may have "expected that at least one of the suspects was armed." App. 16a.

So too with the boys' objections to the handgun. The court observed that "these facts present a close question[,]" but nonetheless sided with Officer Marzolf. App. 17a. To be sure, Officer Marzolf had pointed a gun at two compliant children, but at that point, said the majority, he "lacked the personal knowledge to rule out the boys as suspects (despite their parents' attempts to identify them during the encounter)[.]" App. 20a. And his conduct was less egregious than that in other cases the majority found comparable—he did not, after all, "continue to point the gun at the boys after they were frisked" or "point his gun behind either boys' ear" or "threaten to blow their brains out." *Ibid.* In the absence of those egregious facts, the majority concluded, Officer Marzolf's decision to point his gun at the children was constitutionally reasonable. *Ibid.*

Judge Kelly dissented. In the dissent's view, the stop became an unlawful arrest without probable cause by the time Officer Marzolf chose to handcuff the children. App. 23a. By that point, the dissent noted, the boys "had been lying on their stomachs with their hands by their sides for minutes[and] had complied with all of Officer Marzolf's commands and answered all of his questions." App. 24a. They had done nothing to suggest "they were dangerous or likely to harm Officer Marzolf." App. 25a. And, like the district court had, it emphasized the mounting evidence that the compliant children in front of Officer Marzolf were exactly who they (and their parents) said they were. App. 25a–26a.

As the dissent noted, "Officer Marzolf did not have probable cause to arrest W.Y. and S.Y." when he first stopped them—and he "had even less reason to believe [they] were the suspects in question at the moment the arrest was made." App. 27a–28a (quotation marks omitted). Because the boys were arrested without probable cause, Officer Marzolf's decision to frisk them was, the dissent said, an unlawful search. App. 28a–29a.

Finally, the dissent held that the continued pointing of a firearm at the defenseless children violated the Fourth Amendment. It conceded that Officer Marzolf's conduct was not as extreme as that in the cases the majority had cited, but it noted that "the Fourth Amendment does not proscribe only extreme conduct." App. 32a. Any "reasonable officer in the same position would have realized a few minutes into the stop that W.Y. and S.Y. were not threatening and not resisting * * * and did not pose an immediate

threat to the safety of officers or others." App. 32a (quotation marks and citations omitted). Officer Marzolf's decision to treat the boys otherwise was unreasonable and, therefore, unconstitutional.

REASONS FOR GRANTING THE PETITION

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court recognized "the narrow authority of police officers who suspect criminal activity to make limited intrusions on an individual's personal security based on less than probable cause." *Michigan* v. *Summers*, 452 U.S. 692, 698 (1981). But as illustrated by the facts of this case, the lower courts increasingly disregard the "narrow" and "limited" nature of the stops endorsed by this Court. Over decades, *Terry* stops in the circuits have come to encompass highly intrusive law-enforcement conduct—like holding calm, compliant suspects at gunpoint and in handcuffs. This expansion has not gone unnoticed, as various circuit-court opinions have expressed dismay about the degree of intrusions that lower courts now allow in the name of *Terry* and how far from this Court's precedents these lower courts have strayed.

Certiorari should be granted to address the lower courts' expansion of *Terry*. This expansion directly conflicts with this Court's repeated descriptions of the "narrow" *Terry* exception, and various circuit-court judges have expressed concern about this conflict. The expansion of *Terry* has also led to inconsistent outcomes in the circuit courts. And, more broadly, expanding *Terry* conflicts with this Court's modern approach to the Fourth Amendment, which has been consistently guided by reference to the

common law. This case presents a good vehicle for the Court to consider this expansion of *Terry* and how *Terry* fits into the common-law approach to the Fourth Amendment. The petition should therefore be granted.

I. The decision below conflicts with this Court's decisions by expanding *Terry* beyond its "narrow" and "limited" bounds.

The decision below both conflicts with relevant decisions of this Court and decides an important issue of federal law that has not been, but should be, settled by this Court. Cf. R. 10(c). The majority opinion below conflicts with this Court's decision because it expands *Terry* far beyond the limits authorized by precedent. This Court has repeatedly stressed that *Terry* provides police officers who lack probable cause only a "narrow" authority to make "limited" intrusions on a person's liberty. *Michigan* v. *Summers*, 452 U.S. 692, 698 (1981).

The opinion below also decides an important, unsettled question of federal law, see R. 10(c), because this Court has never addressed the validity of the lower courts' expansion of *Terry*. As illustrated by the majority's decision below, the circuit courts have expanded *Terry* well beyond its original contours, permitting increasingly intrusive measures more common to traditional arrests. This Court has never considered, let alone ratified, this expansive vision of *Terry*, and the petition for certiorari should therefore be granted.

A. *Terry* authorized only limited intrusions.

The core holding of *Terry* is that officers can, without probable cause, make a limited intrusion on an individual's liberty to allay a reasonable, articulable suspicion of potential wrongdoing. Nothing in *Terry* or any of its progeny, though, authorizes the sort of violent intrusion seen in this case.

Before 1968, seizures and arrests were understood to be synonymous, and the Fourth Amendment required probable cause for all seizures. *Florida* v. *Royer*, 460 U.S. 491, 498 (1983); see *Torres* v. *Madrid*, 141 S. Ct. 989, 1008–09 (2021) (Gorsuch, J., dissenting) (citing historical dictionaries "defining an 'arrest' as a 'stop,' a 'taking of a person,' and the act 'by which a man becomes a prisoner'"). *Terry* created an exception to that general rule, recognizing a "narrow authority of police officers who suspect criminal activity to make limited intrusions on an individual's personal security based on less than probable cause." *Summers*, 452 U.S. at 698.

Terry specifically addressed whether a police officer may detain a man and pat down the outer surfaces of his clothing after (1) observing him walk past a storefront and peer into its window a dozen times and (2) the man mumbled responses to the officer's questioning. *Terry*, 392 U.S. at 6–7, 19. The pat-down encounter was "a severe, though brief, intrusion upon cherished personal security." *Id.* at 24–25. But it was "so much less severe than that involved in traditional 'arrests'" that the general probable-cause requirement yielded to a balancing test—balancing "the limited violation of individual privacy involved against

the opposing interests in crime prevention and detection and in the police officer's safety." *Dunaway* v. *New York*, 442 U.S. 200, 209 (1979). In other words, the balancing test was "premised on the notion that a *Terry*-type stop of the person is substantially less intrusive of a person's liberty interests than a formal arrest." *United States* v. *Place*, 462 U.S. 696, 705 (1983).

Since *Terry*, this Court "has been careful to maintain its narrow scope." *Dunaway*, 442 U.S. at 210; see also *id.* at 213 (noting that a broader scope for *Terry* "threaten[s] to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause"). As Justice Scalia noted in a prescient concurrence in *Minnesota* v. *Dickerson*, the danger in replacing the traditional probable-cause rule is that "all sorts of intrusion" on protected Fourth Amendment interests may then be deemed reasonable. 508 U.S. 366, 380 (1993) (Scalia, J., concurring).

That is why, while it has sometimes used the balancing test in circumstances beyond on-the-street detentions, this Court has nonetheless applied it only to minimally intrusive police encounters, which involved greater levels of suspicion than this case does. See *Dunaway*, 422 U.S. at 211; *e.g.*, *Adams* v. *Williams*, 407 U.S. 143 (1972) (frisk of suspect who was in a vehicle and did not comply with officer's request to open the door); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975) (vehicle stop by Border Patrol); *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977) (after lawful traffic stop, police order to get out of car—which was a *de minimis* additional intrusion and "a mere inconvenience"—and frisk after seeing bulge in

jacket).[4] No case considered the constitutionality of anything like pointing a firearm at compliant suspects who had been calmly walking down a residential street and then handcuffing them while they lie prone on the ground. See *Terry*, 392 U.S. at 22–23 ("[T]here [is not] anything suspicious about people * * * strolling up and down the street, singly or in pairs."). And in no case was there a situation where, like here, the more it became apparent that the children were not the suspects the officer was looking for, the more intrusive the seizure became. The decision below therefore blows far past the careful limits this Court has placed on *Terry* stops, and the petition for certiorari should therefore be granted.

B. The opinion below is part of a broader trend of *Terry*'s expansion, the legitimacy of which should be settled by this Court.

In direct conflict with this Court's limitation of *Terry* only to "narrowly circumscribed intrusions," lower courts have dramatically expanded *Terry*. *Dunaway*, 442 U.S. at 212. This continuing expansion "threaten[s] to swallow the general rule that Fourth

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[4] See also *Kansas* v. *Glover*, 140 S. Ct. 1183 (2020) (investigative traffic stop); *United States* v. *Cortez*, 449 U.S. 411 (1981) (vehicle stop by Border Patrol officers); *Reid* v. *Georgia*, 448 U.S. 438 (1980) (stop and questioning of two airline passengers at airport); *Brown* v. *Texas*, 443 U.S. 47 (1979) (stop and questioning of man in an alley); *Delaware* v. *Prouse*, 440 U.S. 648 (1979) (vehicle stop to check license and registration). The Court in *United States* v. *Sharpe* recognized that the duration of a stop and the officer's actions during a stop are distinct inquiries, even if they are both factors in assessing the reasonableness of a seizure. 470 U.S. 675, 683–85 (1985).

Amendment seizures are 'reasonable' only if based on probable cause." *Id.* at 213. And lower-court judges have noted the conflict with this Court's precedents and openly worried about this expansion's consequences on the future of Fourth Amendment rights.

In the decades after *Terry* was decided, the circuits uniformly held that highly intrusive interactions, such as the one at issue in this case, were outside the bounds of *Terry*. For example, in the Second Circuit, a stop became an arrest when police officers blocked progress of a person's car and approached with guns drawn. *United States* v. *Ceballos*, 654 F.2d 177 (2d Cir. 1981). And in the Ninth Circuit, an arrest occurred when a person (in his vehicle) was encircled by police and confronted with official orders made at gunpoint. *United States* v. *Strickler*, 490 F.2d 378 (9th Cir. 1974).

Over time, however, the circuit courts have broadened *Terry*'s narrow scope, expanding the level of intrusion and violence permitted in a *Terry* stop—and they have done so without any similar expansion by this Court. As the Tenth Circuit put it, "the typical police-citizen encounter envisioned by the Court in *Terry* usually involves no more than a very brief detention without the aid of weapons or handcuffs * * * . The last decade, however, has witnessed a multifaceted expansion of *Terry*." *United States* v. *Perdue*, 8 F.3d 1455, 1464 (10th Cir. 1993). And as the Seventh Circuit observed, circuit court decisions have charted "the path to [an] expansive view" of the measures law enforcement officers may take without transforming *Terry* stops into arrests. *United States* v. *Lechuga*, 925 F.2d 1035, 1040 (7th Cir. 1991) (collecting cases); see also *United States* v. *Black*, 707 F.3d 531, 534 (4th

Cir. 2013) ("Since *Terry*, this discretion [of police officers performing their investigative duties] has been judicially broadened, giving police wide latitude to fulfill their functions"); *United States* v. *Tilmon*, 19 F.3d 1221, 1228 (7th Cir. 1994) ("[H]andcuffing—once highly problematic—is becoming quite acceptable in the context of a *Terry* analysis.").[5]

This expansion has troubled some lower-court judges. One circuit panel, for example, opined that "[t]he proliferation of cases in this court in which '*Terry*' stops involve handcuffs and ever-increasing wait times in police vehicles is disturbing * * * ." *Ramos* v. *City of Chicago*, 716 F.3d 1013, 1018 (7th Cir. 2013). Other judges have dissented from their circuits' expansion of *Terry*. One dissenter explained, "the majority expands *Terry* beyond its 'narrow scope,'" and "accepting *Terry* does not require extending its reach on an issue of first impression." *United States* v. *Johnson*, 921 F.3d 991, 1010 (11th Cir. 2019) (en banc) (Jordan, J., dissenting) (quoting *Dunaway*, 442 U.S. at 210). Another lamented that the majority "expand[ed] *Terry* beyond what the Supreme Court originally intended." *United States* v. *Bailey*, 743 F.3d 322, 351 (2d Cir. 2014) (Pooler, J., dissenting in part).

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[5] *Terry*'s expansion in the circuit courts goes beyond the intrusiveness of an officer's conduct. See *United States* v. *Chaidez*, 919 F.2d 1193, 1198 (7th Cir. 1990) (observing that "[b]oth the permissible reasons for a stop and search and the permissible scope of the intrusion have expanded beyond their original contours" and collecting cases); see also, *e.g.*, *United States* v. *Johnson*, 921 F.3d 991 (11th Cir. 2019) (en banc) (holding that seizure of a bullet—not weapons or contraband—from an unarmed suspect in handcuffs and held at gunpoint by several officers was permissible under *Terry*); *United States* v. *Gori*, 230 F.3d 44 (2d Cir. 2000) (authorizing *Terry* stops within a home).

Whether these dissents are right or wrong on the merits, they are undeniably right that the law governing *Terry* has changed even as this Court's precedents have not. Indeed, while many circuit courts profess that the use of traditional hallmarks of an arrest like guns and handcuffs during an investigatory stop should be rare, they routinely hold that the use of these measures does not violate the Fourth Amendment. See, *e.g.*, *Grice* v. *McVeigh*, 873 F.3d 162, 167–68 (2d Cir. 2017); *Perdue*, 8 F.3d at 1463; *United States* v. *Smith*, 3 F.3d 1088, 1094 (7th Cir. 1993).

This Court's instructions in *Terry* were as clear as they were limited, but those instructions bear little relationship to the doctrine as it is applied in most circuits, where a free-floating "reasonableness" test allows all manner of violence and restraint in the absence of probable cause. In short, the law that has evolved in the lower courts fails "to preserve that degree of respect for the privacy of person and the inviolability of their property that existed when the [Fourth Amendment] was adopted." *Minnesota* v. *Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring). Instead, the lower courts seem to have adjusted to a "less virtuous age * * * [that has] become accustomed to considering all sorts of intrusion 'reasonable.'" *Ibid.* The petition for certiorari should therefore be granted so this Court can decide whether to ratify this new expansion of its precedents.

II. The lower courts reach conflicting results when applying their expansive views of *Terry*.

The circuits are alike in their disregard for *Terry*'s limited application to minimally intrusive encounters, but their specific approaches vary.

To be sure, the circuits generally use broadly similar multi-factor tests, see, *e.g.*, *United States* v. *White*, 648 F.2d 29, 34 (D.C. Cir. 1981), but different circuits frame the relevant factors differently. Some circuits, for example, expressly consider the degree of reasonable suspicion an officer possesses. In the Seventh Circuit, the more intrusive the encounter, the more suspicion the police need to avoid violating the Fourth Amendment. See *United States* v. *Burton*, 441 F.3d 509, 511–12 (7th Cir. 2006). So too in the Ninth Circuit, which considers "the specificity of the information that leads the officers to suspect that the individuals they intend to question are the actual suspects being sought." *Washington* v. *Lambert*, 98 F.3d 1181, 1189–90 (9th Cir. 1996). Other circuits, like the Eighth Circuit here, do not require greater suspicion for more intrusive seizures. Compare App. 12a–15a (majority opinion), with App. 25a (dissent).

These differences in framing the tests lead to different outcomes in similar cases. Take *Lambert* itself, for example. There, officers had a more detailed (but still vague) description of their suspects than the description that led to the detention of the boys here: They were looking for two African-American males, age 20–30, one larger than the other. 98 F.3d at 1183–84. And (unlike here) the police bulletin said that

these suspects were themselves considered armed and dangerous. *Id.* at 1184. Based on this description, a police officer called in backup after observing two men at a fast-food restaurant who matched the vague profiles. *Ibid.* Officers in police vehicles followed the men to their hotel parking garage, where the police shined lights on them, pointed guns at them, and ordered them out of their car. The men fully complied. An officer then handcuffed them, patted them down, and placed them in separate police cars. *Ibid.*

Those facts, based on the ruling below in this case, would have been a permissible *Terry* stop. But not so in *Lambert*. There, the Ninth Circuit held that the encounter "clearly was an arrest." *Id.* at 1185. It reasoned, in part, that the initiating officer "had an insufficient basis on which to justify conducting an investigatory stop in so aggressive and intrusive a manner." *Id.* at 1191. Indeed, at least one member of the *Lambert* panel viewed it as an easy case. See *id.* at 1194 (Kozinski, J., concurring) (chiding the majority for "giv[ing] the impression that this is a hard case" when "the conduct of the police here fell shockingly below the standards of decency in a civilized society").

In short, "the standards of decency in a civilized society" appear to be different in the Ninth Circuit than they are in the Eighth—or else they have changed entirely since 1996. In *Lambert*, violently stopping two compliant men based on only a vague physical description was obviously beyond the pale. But here, the Eighth Circuit said that the Fourth Amendment was no barrier to stopping two boys who committed no crime (beyond not being the same size as one another) and that the boys' scrupulous

compliance with instructions and honest answers to questions gave them no protection from being held at gunpoint or in handcuffs. The difference between the cases is that in one, an officer's degree of reasonable suspicion mattered, and in the other, it did not. The petition for certiorari should therefore be granted so this Court can authoritatively say which is right.

III. An expansive view of *Terry* is inconsistent with this Court's modern approach to the Fourth Amendment, which is uniformly grounded in the common law.

This Court's modern Fourth Amendment jurisprudence is expressly grounded in the common law. See, *e.g.*, *Virginia* v. *Moore*, 553 U.S. 164, 168 (2008) ("In determining whether a search or seizure is unreasonable, we begin with history. We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve."); *Torres* v. *Madrid*, 141 S. Ct. 989, 995 (2021); *Wilson* v. *Arkansas*, 514 U.S. 927 (1995); *California* v. *Hodari D.*, 499 U.S. 621, 624 (1991). And common law imposes "a constitutional floor below which Fourth Amendment rights may not descend." *Carpenter* v. *United States*, 138 S. Ct. 2206, 2270 (2018) (Gorsuch, J., dissenting); see also *Wyoming* v. *Houghton*, 526 U.S. 295 (1999).

This common-law approach has two important implications here. The first is that *Terry* itself rests on, at best, shaky common-law foundations that have never been (but should be) reconsidered. The second is that, whatever the status of *Terry* itself, the lower courts' wholesale expansion of the doctrine is entirely

at odds with the rest of this Court's Fourth Amendment jurisprudence.

First, take *Terry* itself. At common law, an arrest was understood to be "[a]ny * * * seizure of the person." 1 Samuel Johnson, A Dictionary of the English Language (6th ed. 1785); see also *United States* v. *Benner,* 24 F. Cas. 1084, 1086–87 (C.C.E.D. Pa. 1830) (No. 14,568) ("An arrest is the taking, seizing or detaining the person of another, touching or putting hands upon him in the execution of process, or any act indicating an intention to arrest."). This seizure could take place either by force or by control. *Hodari D.*, 499 U.S. at 626; see also *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968) (explaining that seizures could occur "by means of physical force or show of authority"). But if it was made without probable cause, the arrest was unlawful. See 3 William Blackstone, Commentaries on the Laws of England 127 (1768); see also *Wallace* v. *Kato*, 549 U.S. 384, 388–89 (2007).

It did not take much for such an arrest to occur. For example, as this Court explained in *Torres*, a common-law arrest by force occurred if a bailiff merely "touched the defendant even with the end of his finger." 141 S. Ct. at 996 (quoting *Genner* v. *Sparks* (1704), 6 Mod. 173, 87 Eng. Rep. 928, 929 (Q.B.)). So, too, even where the officer did not personally make contact with the suspect, but simply touched him with an object, no matter how briefly, the officer's use of force against the suspect amounted to an arrest. *Torres*, 141 S. Ct. at 997. It was not necessary for the officer to bring the suspect under his control for the seizure by force to occur. *Id.* at 1001. Therefore, it was not necessary for courts to grapple with the quality of the force, such as whether the officer "grab[bed] a

suspect," "tackle[d] him," or "slap[ped] on the cuffs." *Id.* at 1001–02. Any form of physical intrusion with the intent to seize was sufficient to effectuate an arrest, demanding probable cause.

Officers could also make an arrest by control. This form of seizure required only that the officer make a show of authority and that the suspect submit to that authority. See *Russen* v. *Lucas* (1824), 171 Eng. Rep. 1141 (K.B.). If the suspect acquiesced to the officer's commands, it "[was] a good arrest." *Horner* v. *Battyn* (1738), Buller's N.P. 62 (K.B.). Much like common law arrests by force did not require the suspect to come into the officer's control, common law arrests by control did not require the officer to use physical force against the suspect. *Mowry* v. *Chase,* 100 Mass. 79, 85 (1868) ("[I]t was not necessary to touch the person of the defendant in order to make an arrest. It is enough, to constitute an arrest, if the party be within the power of the officer and submit to the arrest."). Either constructive or actual control was an arrest, which demanded probable cause.

This history undermines the reasoning of *Terry* itself. As Justice Scalia explained in his concurrence in *Dickerson*, *Terry* is not entirely grounded in common law. 508 U.S. at 379–80 (Scalia, J., concurring). While, at common law, an officer could stop a "suspicious night-walker" and "detain him till he g[a]ve good account of himself," this detention was described as an "arrest," and required the passerby to be in violation of the nightwalker statute. See, *e.g.*, 2 William Hawkins, Pleas of the Crown ch. 13, § 6, p. 129 (8th ed. 1824) ("It is holden that this statute was made in affirmance of the common law, and that every private person may by the common law arrest any suspicious

night-walker, and detain him till he give a good account of himself."). Even under this statute, that detention could last no longer than the time required for the individual to identify himself, and it did not permit the officer to search the individual until after an arrest was made. *Dickerson*, 508 U.S. at 381 (Scalia, J., concurring); accord *Johnson*, 921 F.3d at 1009–10 (Jordan, J., dissenting) (collecting authorities "validat[ing] Justice Scalia's view" that *Terry* "could not be justified on originalist grounds").

But even accepting *Terry* as precedent, its inconsistency with the common law should give courts pause in extending it. After all, as Judge Jordan has observed, "[i]f *Terry* rests on a shaky originalist foundation * * * there is always the option of declining to broaden it—of 'refus[ing] to extend it one inch beyond its previous contours.'" *Johnson*, 921 F.3d at 1010 (Jordan, J., dissenting). But, as exemplified by this case, lower courts have not embraced Judge Jordan's caution, expanding *Terry* not by inches but by leaps and bounds. Perhaps the lower courts are right: Perhaps *Terry* really is an exception, and searches and seizures like these, unlike any others, should be governed by an amorphous reasonableness test rather than by the common law. Perhaps not. Either way, only this Court can ratify or reject the expansion of *Terry* exhibited here, and the petition for certiorari should therefore be granted.

IV. This case is a good vehicle.

This case is a good vehicle to resolve the question presented. The question was raised and squarely resolved below—indeed, it was the specific point on which the dissent and the majority disagreed. There

are no underlying jurisdictional problems. And the underlying facts of the case, nearly all of which were captured on video, are undisputed. There are thus no obstacles to this Court's answering the question presented and either bringing the scope of *Terry* in line with its common-law foundations or confirming that *Terry* is meant to be an outlier in this Court's Fourth Amendment jurisprudence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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