No. 21-901

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

MOTION FOR LEAVE AND BRIEF OF LAURENT SACHAROFF AS AMICUS CURIAE SUPPORTING PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Laurent Sacharoff is a law professor at the University of Arkansas. Professor Sacharoff timely notified the parties of his intent to submit an amicus brief in this case, as required by Supreme Court Rule 37.2(a). Petitioner consented. Respondent refused consent. Professor Sacharoff respectfully moves this Court, under Supreme Court Rule 37.2(b), for leave to file the attached brief in support of Petitioner.

Professor Sacharoff submits this amicus brief to expand on the circuit split identified in the petition. Professor Sacharoff situates the Eighth Circuit's opinion in a doctrinal divide that has emerged in the circuit courts over what happens when the police's conduct exceeds the limited scope of the investigative stop approved of in *Terry v. Ohio*, 382 U.S. 1 (1968). In short, Professor Sacharoff argues that the Eighth Circuit has chosen the wrong side of that divide by treating *Terry* as boundless authority for police officers to take whatever steps necessary to further their brief investigation—no matter how intrusive—once an officer can establish specific and articulable facts that wrongdoing may have occurred. Other circuit courts have rejected the Eighth Circuit's fixed, yet expansive position in favor of one that balances the level of intrusiveness against the level of suspicion. It is this latter position—and not the one taken by the

Eighth Circuit below—that complies with *Terry* and with this Court's cases interpreting *Terry*.

Professor Sacharoff studies, teaches, and writes about the Fourth Amendment. His works on the subject include *The Broken Fourth Amendment Oath*, 74 Stan. L. Rev. __ (forthcoming); *The Fourth Amendment Inventory as a Check on Digital Searches*, 105 Iowa L. Rev. 1643 (2020); *Trespass and Deception*, 2015 B.Y.U. L. Rev. 359 (2015); *Constitutional Trespass*, 81 Tenn. L. Rev. 877 (2014); *The Binary Search Doctrine*, 42 Hofstra L. Rev. 1139 (2014); and *The Relational Nature of Privacy*, 16 Lewis & Clark L. Rev. 1249 (2012). His scholarly works have been cited to establish background principles of Fourth Amendment law. *See United States v. Sweeney*, 821 F.3d 893, 899 (7th Cir. 2016). He offers this brief to highlight the doctrinal problems with the Eighth Circuit's opinion below.

Respectfully Submitted.

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BRIEF OF PROFESSOR LAURENT SACHAROFF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF AMICUS CURIAE

Laurent Sacharoff is a law professor at the University of Arkansas.[1] He studies, teaches, and writes about the Fourth Amendment. His works on the subject include *The Broken Fourth Amendment Oath*, 74 Stan. L. Rev. __ (forthcoming); *The Fourth Amendment Inventory as a Check on Digital Searches*, 105 Iowa L. Rev. 1643 (2020); *Trespass and Deception*, 2015 B.Y.U. L. Rev. 359 (2015); *Constitutional Trespass*, 81 Tenn. L. Rev. 877 (2014); *The Binary Search Doctrine*, 42 Hofstra L. Rev. 1139 (2014); and *The Relational Nature of Privacy*, 16 Lewis & Clark L. Rev. 1249 (2012). His scholarly works have been cited to establish background principles of Fourth Amendment law. *See United States v. Sweeney*, 821 F.3d 893, 899 (7th Cir. 2016). Professor Sacharoff offers this amicus brief to situate the Eighth Circuit's opinion in a doctrinal divide that has emerged in the circuit courts over what happens when the police's conduct exceeds the limited scope of the investigative stop approved of in *Terry v. Ohio*, 382 U.S. 1 (1968).[2]

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[1] The views reflected in this amicus brief are Professor Sacharoff's and not necessarily those of the University of Arkansas.

[2] Under Supreme Court Rule 37.6, amicus curiae states that no party's counsel authored this brief in

SUMMARY OF ARGUMENT

Officer Lamont Marzolf was searching for suspects who fled running from a traffic stop when he spotted 14-year-old W.Y. and 12-year-old S.Y. walking home from their grandparents' house. He stopped the boys, held them at gunpoint, forced them to the ground, handcuffed them, and then searched them. The Eighth Circuit approved Marzolf's actions by treating this Court's decision in *Terry v. Ohio*, 382 U.S. 1 (1968), as standing authority for police officers to use any degree of restraint or threat of force to detain a person no matter how slender their suspicion of criminal activity. By doing so, the Eighth Circuit has chosen the wrong side of a divide that strikes at the heart of the *Terry*-stop doctrine: what happens when police officers' conduct exceeds the limited scope of the investigative stop approved of in *Terry*?

The Eighth Circuit's answer: nothing. In the opinion below, the court treats *Terry* as standing authority for all intrusive police action short of formal arrest, so long as the stop does not take too long in minutes and hours. But this approach expands *Terry* beyond its boundaries and conflicts with this Court's jurisprudence. Instead, the Eighth Circuit should

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whole or in part, and that no party or person other than amicus curiae contributed money towards the preparation or filing of this brief.

have adopted the approach of the Seventh and Ninth Circuits, which is to balance the level of intrusiveness, including the tactics used by the officers, against the level of suspicion. This latter position complies with *Terry* and with this Court's cases interpreting *Terry*. For these reasons, this Court should grant certiorari to address the doctrinal divide in the circuit courts and correct the Eighth Circuit's mistake below.

ARGUMENT

The Fourth Amendment establishes a default rule and starting point: police must have probable cause to detain a person in most instances. *E.g.*, *Michigan v. Summers*, 452 U.S. 692, 696 (1981); *Dunaway v. New York*, 442 U.S. 200, 208, 212–13 (1979). This probable cause requirement "has roots that are deep in our history." *Dunaway*, 442 U.S. at 213 (quoting *Henry v. United States*, 361 U.S. 98, 100 (1959)); *United States v. Watson*, 423 U.S. 411, 418–22 (1976). It represents not merely a balance based on policy suiting a particular era, but a balance that the framers and ratifiers of the Fourth Amendment intended. *Dunaway*, 442 U.S. at 208, 213; *Watson*, 423 U.S. at 418–22. Indeed, "[h]ostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment." *Dunaway*, 442 U.S. at 213.

I. *Terry* was a limited departure from the probable cause requirement.

A. *Terry* represents a limited departure from the probable cause requirement for "brief and narrowly circumscribed intrusions" on individuals' Fourth Amendment rights. *Dunaway*, 442 U.S. at 212; *Summers*, 452 U.S. at 698; *United States v. Brignoni-Ponce*, 422 U.S. 873, 881–82 (1975). In *Terry*, a police officer observed two men "hover about a street corner for an extended period of time"; "pace alternately along an identical route, pausing to stare in the same store window roughly 24 times"; stop at the end of each loop to confer with one another; and then meet up with a third man. 392 U.S. at 23. On that basis and relying on his thirty years' experience patrolling that neighborhood for potential thievery, the officer suspected the men of casing the place for a robbery. *Id.* The officer stopped the three men, ordered them to place their hands against a wall, and patted down the outside of their clothing for weapons. *Id.* at 6–7.

This Court held that the officer's conduct was permissible because the officer had "specific and articulable facts" that "warrant[ed] that intrusion." *Id.* at 21. *Terry* also held that the officer could make a limited search of the individuals he detained because a "reasonably prudent man in the circumstances would be warranted in the belief that his safety or that

of others was in danger." *Id.* at 27. By endorsing the officer's behavior, *Terry* did not abandon the general probable cause requirement. This Court simply sanctioned stops "so substantially less intrusive than arrests that the general rule requiring probable cause * * * could be replaced by a balancing test." *Dunaway*, 442 U.S. at 210; *Summers*, 452 U.S. at 699. In judging whether an encounter falls within *Terry*, "a court must consider all the circumstances surrounding the encounter." *See Florida v. Bostick*, 501 U.S. 429, 439 (1991); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

B. Officer Marzolf's actions here are far afield from the limited detention that occurred in and was approved by *Terry*. First, Marzolf trained his high beam on the two boys, pointed his car in their direction, and verbally stopped them. App. 36a–37a. Then, Marzolf pointed his gun at the boys and ordered them to the ground in the prone position. App. 37a–40a. Next, Marzolf requested backup and was joined by a second officer who also pointed his gun at the boys. App. 40a. Finally, Marzolf handcuffed the boys, frisked them, and searched their backpack. App. 40a–41a. The actions Marzolf took—holding the boys at gunpoint and restraining them with handcuffs—are quintessential emblems of arrest. In the ordinary human experience, they are frightening, they are intimidating, and they heighten the risk of harm to citizens.

The Eighth Circuit justified this encounter as a *Terry* stop. In doing so, the court ignored the basic premise of *Terry*: that the stop be "narrowly circumscribed." *E.g.*, *Dunaway*, 442 U.S. at 212.

II. *Terry* did not create standing authority for police officers to use any degree of restraint or threat of force to detain a person.

Faced with a police officer whose actions exceeded the limited scope of a *Terry* stop, the Eighth Circuit had two options. First, it could consider whether there was fit between Marzolf's actions and his level of suspicion. Or second, it could treat *Terry* as carte blanche for police officers to take any actions, no matter how intrusive and no matter how slender their suspicion of criminal activity. The Eighth Circuit chose the wrong option.

A. The Eighth Circuit did not consider whether the intrusiveness of Marzolf's conduct was justified by the facts supporting his suspicion that the boys were involved in wrongdoing and were armed. If it had, it could not have approved of Marzolf's actions because nothing about his actions was proportional. First, Marzolf used escalating restraints and threat of force to detain 14-year-old W.Y. and 12-year-old S.Y. even as his cause for stopping the boys dissipated. Marzolf was searching for persons who fled, running, from a

traffic stop. App. 36a. He spotted W.Y. and S.Y. walking down the street, not running; Marzolf trained his high beam on them and pointed his car in their direction, App. 36a–37a. The boys were calm, not out of breath; Marzolf detained them. App. 37a. The boys complied with Marzolf's commands; Marzolf trained his gun on them. App. 37a. The boys were Caucasian and wearing khakis and jeans while a radio transmission stated that the suspect was Hispanic and wearing black jeans; Marzolf ordered the boys to the ground, on their stomachs, in the prone position. App. 38a–40a, 54a n. 9. The boys' parents, first their mother, then their stepfather, identified W.Y. and S.Y. as their minor children who had been with them while the traffic stop in question occurred; Marzolf requested backup and was joined by a second officer who also pointed his gun at the boys. App. 40a. The boys wore black hoodies while dispatch stated that the only remaining suspects were a woman and her male companion in a grey hoodie and blue jacket; Marzolf handcuffed the boys, frisked them, and searched their backpack. App. 40a–41a. At each step, as his reason for suspicion lessened, Marzolf's intrusions escalated.

Second, Marzolf's suspicion that the boys were armed was attenuated. His suspicion rested on the premise that the boys were the fleeing suspects and that one of the suspects, at one point previously, had carried a firearm. App. 51a. Thus, as Marzolf's

suspicion that the boys were the fleeing suspects dissipated so went his basis for believing that they might be armed. Yet, with little cause to detain the boys and even less cause to believe that they were armed, Marzolf escalated.

Instead of balancing Marzolf's actions against the facts supporting the detention and search, the Eighth Circuit treated *Terry* as standing authority for police officers to use any degree of restraint or threat of force to detain a person no matter how slender their suspicion of criminal activity. Although the opinion below notes that the level of suspicion matters, the Eighth Circuit ignored this factor in favor of a single-minded focus on duration. App. 8a–11a. Duration does matter—*Terry* stops must generally be brief—but *Terry* and later cases all make clear that tactics matter too. *E.g.*, *Dunaway*, 442 U.S. at 212; *Terry*, 392 U.S. at 18 n. 15, 21. The opinion below also ignored the totality of circumstances—which show diminishing justification and escalating restraints and threat of force to carry out the seizure—treating the facts in piecemeal fashion. At the same time, the court took maximum advantage of bootstrapping when accessing the appropriateness of Marzolf's actions, relying on his slight suspicion that the boys were armed to justify intrusive restraints that violate the premise of *Terry*. By focusing on duration and ignoring the totality of the restraints and threat of

force Marzolf used, the Eighth Circuit's opinion effectively gives cover to police officers to use any tactics to detain a person, so long as they keep the encounter relatively short.

B. The Eighth Circuit should have considered whether there was a fit between the intrusiveness of Marzolf's actions and the facts supporting his suspicion that the boys were involved in wrongdoing and were armed. Other circuits have adopted this approach in one of two ways. Some have placed this balancing in the analysis of whether there was reasonable suspicion. *United States v. Edwards*, 761 F.3d 977, 981 (9th Cir. 2014). This approach finds some support in *Terry* itself. The case's seminal ruling is articulated as a balancing test that places the "particular intrusion" against the specific facts "warrant[ing] that intrusion." *Terry*, 382 U.S. at 21; *Dunaway*, 442 U.S. at 210 (describing *Terry* as creating a balancing test).

Other circuits have also acknowledged that highly intrusive stops exceed the boundaries of *Terry* and its reasonable suspicion standard. *United States v. Chaidez*, 919 F.2d 1193, 1197 (7th Cir. 1990); *cf. United States v. Quinn*, 815 F.2d 153, 158 (1st Cir. 1987). The Seventh Circuit's opinion in *Chaidez* illustrates this latter approach. When the police officer's actions fall between "a brief detention"

requiring reasonable suspicion and "a traditional arrest, where the defendant is handcuffed, trundled into a paddy wagon, carted to the station, fingerprinted, and held in a 12' v 8' cell," the circuit looks at whether the "degree of suspicion is adequate in light of the degree and duration of restraint." *Id.* at 1197–98. This approach aligns with this Court's opinions acknowledging that *Terry* is a cabined exception to the probable cause requirement and does not cover the field of all seizures falling short of formal arrest. *E.g.*, *Dunaway*, 442 U.S. at 212; *Summers*, 452 U.S. at 698, 702; *Brignoni-Ponce*, 422 U.S. at 881–82.

Both approaches—requiring a fit between the cause for a seizure or search and the intrusiveness of its execution—reflect *Terry's* admonition that the scope of the search, as much as its initiation, must be reasonable. *Terry*, 382 U.S. at 17–18, 28–29; *Atwater v. Lago Vista*, 532 U.S. 318, 364, 372 (2001) (O'Connor, J. dissenting).

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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