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

MOTION FOR LEAVE TO FILE AND BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

January 18, 2022

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* SUPPORTING PETITIONER

Pursuant to Supreme Court Rule 37.2(b), the Cato Institute respectfully moves for leave to file the attached brief as *amicus curiae* supporting Petitioner. All parties were timely notified of *amicus*'s intent to file as required under Rule 37.2(a). Petitioner consented to this filing; Respondent withheld consent.

Cato was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers. Toward these ends, Cato holds conferences; publishes books, studies, and the Cato Supreme Court Review; and files *amicus* briefs in this Court and courts around the country.

Amicus's interest in this case arises from its mission to support the rights that the Constitution guarantees to all citizens. *Amicus* has a particular interest in cases involving alleged misconduct by law enforcement officers and suits to vindicate constitutional rights brought under 42 U.S.C. § 1983. Cato was recently granted leave by the Court to file an *amicus* brief in another such case in *Tucker v City of Shreveport*, No. 21-569.

Cato has no direct interest, financial or otherwise, in the outcome of this case.

For the foregoing reasons, Cato respectfully requests that it be allowed to file the attached brief as *amicus curiae*.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice focuses on the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

This case concerns Cato because the lower court's decision represents an extension of the *Terry* doctrine beyond its constitutional or historical scope. In recent years, courts have expanded *Terry* to permit more force and more policing discretion than this court's original holding permits, and in doing so, have contributed to the public's declining trust in law enforcement.

SUMMARY OF ARGUMENT

When the Supreme Court created an exception to the Fourth Amendment's warrant requirement in *Terry v. Ohio*, 392 U.S. 1 (1968), it took great care to carve it narrowly. *Terry* allows brief, relatively unintrusive investigative stops based on reasonable suspicion of criminal activity. *Id.* at 27. Additional intrusions are strictly circumscribed by the exigencies presented by the case. *Id.* at 30. This individualized reasonable-suspicion requirement prevents police from

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[1] Rule 37 statement: All parties were timely notified. Petitioner consented to the filing of this brief; Respondent withheld consent. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

stopping individuals based merely upon whims or prejudices—a critical judicial bulwark against the unreasonable searches and seizures the Fourth Amendment proscribes. Without this requirement, law enforcement would wield virtually unlimited discretion to stop, search, and use force against citizens.

Yet in its decision below, the Eighth Circuit flouted these principles by holding that an officer may handcuff, search, and point a gun at suspects after reasonable suspicion had already dissipated. By the time Officer Marzolf handcuffed the two boys, they had been lying on their stomachs for minutes, had already complied with all his commands, and had already been identified by their parents and grandparents. Enough time transpired since the initial stop for Marzolf to notice the boys did not even match the description of the suspects he was looking for. Regardless, Officer Marzolf proceeded to handcuff and search while keeping a gun pointed at them. Because he failed to meet the reasonable suspicion requirement, Officer Marzolf's de facto arrest of the boys was unlawful.

The Eighth Circuit's contrary decision was no mere isolated legal error, but rather part of a troubling pattern of lower courts disregarding *Terry*'s limited application. More generally, this decision illustrates how decades of excessive judicial deference to the judgment of law enforcement have led to increasingly capacious exceptions to baseline Fourth Amendment rules. The warrant requirement, which presumptively applies to all searches and seizures, has itself become the exception, rather than the norm.

This Court should grant certiorari to reverse this trend, reestablish that *Terry*'s reasonable suspicion requirement is meant to be narrowly applied, and clarify

that arrests based on anything less than probable cause are per se unreasonable. That correction is especially urgent today, at a time when public trust in law enforcement has fallen to record lows. A rash of high-profile incidents of police misconduct has sent Americans to the streets in protest. Law-enforcement officers, in turn, report serious concerns about their ability to safely and effectively discharge their duties without the confidence of those they are sworn to protect. By telling the public that police are permitted to hold at gunpoint and handcuff children without probable cause, the Eighth Circuit is not only misapplying this Court's precedent—it is fueling a crisis of confidence in our nation's law-enforcement officers.

ARGUMENT

I. THE EIGHTH CIRCUIT'S HOLDING REFLECTS A TROUBLING JUDICIAL TREND FOR FOURTH AMENDMENT EXCEPTIONS TO SWALLOW THE RULES.

It is an axiom of Fourth Amendment jurisprudence that, "[a]lthough the text of the Fourth Amendment does not specify when a search warrant must be obtained," a "warrant must generally be secured" for a search to be "reasonable." *Kentucky v. King*, 563 U.S. 452, 459 (2011). In theory, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). In practice, however, these "exceptions" have become so expansive that "warrants are the exception rather than the rule." William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 882 (1991); *see also*

Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 384 (2001).

When the Supreme Court announced the reasonable suspicion standard in *Terry*, it understood the delicate ground it trod upon. The Court carved out a limited exception to the Fourth Amendment's warrant requirement, allowing "a carefully limited search" only "where a police officer observes unusual conduct which leads him reasonably to conclude . . . that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety." 392 U.S. at 30.

But Justice Douglas dissented, despite the limited nature of the holding, expressing his belief that it was a "mystery" how the Court could dilute the probable cause requirement consistent with the Fourth Amendment. *Id.* at 35 (Douglas, J., dissenting). If *Terry* itself was a mystery, Justice Douglas would likely find the expansion of *Terry* that would follow the decision befuddling.

Arrests were once clearly distinguishable from *Terry* stops. In *Berkemer v. McCarty,* this Court held that *Miranda* warnings are not required during *Terry* stops. 468 U.S. 420 (1984). This statement made perfect sense for a time when Fourth Amendment doctrine cleanly distinguished *Terry* stops from arrests. *See* Mark A. Godsey, *When Terry Met Miranda: Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715 (1994). Terry stops were brief, less intrusive than a formal arrest, and "substantially less 'police dominated.'" *Berkemer*, 468 U.S. at 439.

In the decades that followed, however, lower courts have dramatically expanded the scope of permissible force under *Terry*, blurring the distinction between stops and arrests. Courts like the Eighth Circuit now permit police officers to employ highly intrusive "arrest-like" force under *Terry*, including handcuffs and drawn weapons, which creates confusion about which seizures only require reasonable suspicion and which require probable cause. *Pollreis v. Marzolf*, 9 F.4th 737 (8th Cir. 2021) (police may draw weapons on and handcuff suspects who are lying on the ground); *United States v. Gil*, 204 F.3d 1347 (11th Cir. 2000) (police may detain handcuffed suspects for 75 minutes in police cars); *United States v. Taylor*, 716 F.2d 701 (9th Cir. 1983) (police may detain handcuffed suspects on the ground). With such a permissive reading of *Terry,* officers may get away with warrantless exertions of "arrest-like" force simply by labeling their actions a *Terry* stop instead.

Unfortunately, such steady erosion of Fourth Amendment protections is not limited to the *Terry* context. To the contrary, decades of excessive deference to the judgment of law enforcement have led to virtually unlimited "limited circumstances" in a wide variety of contexts. From intrusive searches incident to arrest, to the "good-faith" exception to the exclusionary rule, to exceedingly permissive interpretations of *Terry,* court-created exceptions to the warrant requirement have almost completely swallowed the warrant rule.

Consider, for example, the practical evolution of this Court's case law on pretextual traffic stops. In *Whren* v. *United States,* 517 U.S. 806 (1996), this Court "foreclose[d] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."

Id. at 813. In other words, even where the alleged probable cause is merely pretext for a stop motivated by an entirely separate concern—even pretext for unlawful motives, such as "selective enforcement of the law based on considerations such as race," *id.*—such stops are nevertheless still "reasonable" under the Fourth Amendment.

In effect, though, *Whren*-created a doctrinal loophole for racially-motivated policing. Allowing pretextual traffic stops led to a statistically significant increase in traffic stops of drivers of color relative to white drivers, especially "during the daytime, when officers could more easily ascertain a driver's race" through visual observation. Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 SLR 637, 644 (2021).

Law enforcement has certainly not hesitated to take full advantage of the power to make pretextual stops and push the boundaries of *Whren* ever further. For example, in *United States v. Escalante*, 239 F.3d 678 (5th Cir. 2001), the Fifth Circuit upheld a search and seizure where the purported probable cause was that the defendant violated Mississippi's careless driving statute by "weav[ing] across the lane divider lines two or three times." *Id.* at 679. But this justification was almost certainly pretextual, as the officer "candidly acknowledged at the suppression hearing that he suspected drug smuggling when Escalante passed him." *Id.* at 682 (Stewart, J., dissenting). As the dissent noted, the officer went beyond even a pretextual stop, and effectively "manufacture[d] probable cause by tailgating a motorist." *Id. See also United States v. Chhien*, 266 F.3d 1, 4 (1st Cir. 2001) (upholding search and seizure by member of an elite police team trained

to "look beyond the traffic ticket," and use "routine traffic patrols" to "ferret out serious criminal activity").

Moreover, law enforcement officers today engage in more than just the pretextual traffic stops of automobiles. According to a *Los Angeles Times* investigation, deputies frequently stop and search bike riders, especially Latino cyclists, often with no reason to suspect criminal activity. Ben Poston, Alene Tchkmedyian, *Sheriff's Department bike stops: How we reported the story*, L.A. TIMES (Nov. 4, 2021). Under *Whren*, Los Angeles deputies use obscure, rarely enforced bicycle traffic laws as pretexts for stops that often tend to end with a search of the rider and any belongings they have with them. *Id.* The *Times*' analysis of more than 44,000 bike stops logged by the Sheriff's Department since 2017 found that 7 of every 10 stops involve Latino cyclists, and bike riders in poorer communities with large nonwhite populations are stopped and searched far more often than those in more affluent, whiter parts of the county. *Id.* Most bicyclists were held in the backseat of patrol cars while deputies rummaged through their belongings or checked for arrest warrants. *Id.*

Several lower courts have even gone so far as to extend the *Whren* doctrine to parking violations—and effectively, to any and all fine-only infractions, no matter how trivial. For example, in *United States v. Johnson*, 874 F.3d 571 (7th Cir. 2017) (en banc), the Seventh Circuit affirmed the denial of a motion to suppress where "[f]ive officers in two police cars seized the passengers of a stopped car" by "swoop[ing] in on the car, suddenly parking close beside and behind it with bright lights shining in from both directions, opening the doors, pulling all the passengers out and handcuffing them." *Id.* at 575 (Hamilton, J., dissenting). The

only basis for this supposed "investigatory stop" under *Terry* was a suspected violation for parking too close to an unmarked crosswalk. But the majority nevertheless held that this plainly pretextual stop did not violate the Fourth Amendment. *Id.* at 573-74.

The deleterious impact of expansive understandings of *Terry* and *Whren* is compounded by those doctrines' intersection with *other* increasingly expansive exceptions to the warrant requirement. Most notable among these is the vehicle exception, first articulated in *Carroll v. United States*, 267 U.S. 132 (1925). The professed theory for this doctrine is that it often "is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Id.* at 153. But over time it has been extended to include "vehicles" that are not functionally mobile, in situations that do not appear to implicate any of *Carroll*'s practical concerns. *See Maryland v. Dyson*, 527 U.S. 465, 466-67 (1999) (upholding warrantless search despite lack of exigency); *Florida v. Meyers*, 466 U.S. 380, 382-383 (1984) (approving warrantless search of impounded car in secured area); *Texas v. White*, 423 U.S. 67, 68-69 (1975) (upholding search of seized car despite it being parked at police station); *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970) (approving warrantless search and seizure despite car being impounded and occupants jailed).

Exigency, another exception to the warrant requirement, has likewise been applied liberally in favor of police expediency. *See, e.g., Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (to fight fire and investigate cause); *Ker v. California*, 374 U.S. 23, 40-41 (1963) (to prevent imminent destruction of evidence). The same can also

be said of the circumstances necessary to obtain consent to search. *See, e.g. Ohio v. Robinette*, 519 U.S. 33 (1996); *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973) (upholding "consent search" of vehicle despite consenter's lack of knowledge that he could refuse). Police likewise have authority to conduct broad searches incident to lawful arrests. *See New York v. Belton*, 453 U.S. 454, 462-63 (1981).

The aggregation of these and other doctrines "already enables a host of aggressive and intrusive police tactics." *Johnson*, 874 F.3d at 577. Judge Hamilton's dissent from the Seventh Circuit's *en banc* decision in *Johnson* explains how *Terry* and *Whren* enable a cascade of severe consequences for anyone committing even a trivial traffic infraction:

> Officers who have probable cause for a trivial traffic violation can stop the car under *Whren* and then order all occupants out of the car, *Maryland v. Wilson*, 519 U.S. 408 (1997), often frisk them, *Arizona v. Johnson*, 555 U.S. 323 (2009), question them in an intimidating way, visually inspect the interior of the car, *Colorado v. Bannister*, 449 U.S. 1, 4 & n.3 (1980), often search at least portions of the vehicle's interior, *Arizona v. Gant*, 556 U.S. 332 (2009); *Michigan v. Long*, 463 U.S. 1032 (1983), and hold the driver and passengers while a drug-detection dog inspects the vehicle, *Illinois v. Caballes*, 543 U.S. 405, 406-08 (2005).
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> . . .

> The Fourth Amendment also allows police to arrest suspects for minor traffic infractions even if a court could impose only a fine, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), and arrested persons can be strip-searched, *Florence v. Board of Chosen Freeholders*, 566 U.S. 318, 339 (2012), fingerprinted, photographed, and perhaps even subjected to a DNA test, *see Maryland v. King*, 569 U.S. 435, 481 (2013) (Scalia, J., dissenting). Moreover, a *Terry* stop can even be justified by an officer's *mistake* of either law or fact. *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014).

Johnson, 874 F.3d at 577-78.

Thus, the Eighth Circuit's decision below should not be seen as an isolated misapplication of this Court's *Terry* doctrine. Rather, it is a troubling illustration of how easily Fourth Amendment "exceptions" can expand until they very nearly eclipse the baseline rules they were originally meant to modify.

II. EXCESSIVE DEFERENCE TO LAW ENFORCEMENT UNDERMINES PUBLIC TRUST IN THE POLICE.

By holding, in effect, that Officer Marzolf cannot be held accountable for arresting two innocent children at gunpoint without probable cause, the Eighth Circuit not only misapplied this Court's Fourth Amendment precedent, it is also hurting the law enforcement community itself, by reinforcing the public's perception

that police are held to a far lower standard of accountability than ordinary citizens.

In the aftermath of many high-profile police killings—most prominently, the murder of George Floyd at the hands of Minnesota police officers in May 2020—Gallup reported that trust in police officers had reached a twenty-seven-year low. Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020)[2] (Source: GALLUP). For the first time ever, fewer than half of Americans place confidence in their police force. *Id.*

This drop in confidence has been driven in large part by videos of high-profile police killings of unarmed suspects, but as well by the public perception that officers who commit such misconduct are rarely held accountable for their actions.[3] Indeed, according to a recent survey of more than 8,000 police officers themselves, 72 percent disagreed with the statement that "officers who consistently do a poor job are held accountable." Rich Morin et al., Pew Research Ctr., *Behind the Badge* 40 (2017).[4]

Policing is difficult and sometimes dangerous work. Without the trust of their communities, officers cannot safely and effectively carry out their responsibilities. "Being viewed as fair and just is critical to successful policing in a democracy. When the police are perceived as unfair in their enforcement, it will undermine their

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[2] *Available at* https://www.nytimes.com/2020/08/12/ us/gallup-poll-police.html.

[3] *See* Mike Baker, et al., *Three Words. 70 Cases. The Tragic History of 'I Can't Breathe.'*, N.Y. TIMES (June 29, 2020), https://www.nytimes.com/interactive/2020/06/28/ us/i-cant-breathe-police-arrest.html.

[4] *Available at* https://pewrsr.ch/2z2gGSn.

effectiveness." Inst. on Race and Justice, Northeastern Univ., *Promoting Cooperative Strategies to Reduce Racial Profiling* at 20-21 (2008).[5]

In other words, "when a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, increases the likelihood people will fail to comply with legal directives, and induces anomie in some groups that leaves them with a sense of statelessness." Fred O. Smith, *Abstention in a Time of Ferguson*, 131 HARV. L. REV. 2283, 2356 (2018); *accord* U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* 80 (Mar. 4, 2015) (A "loss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and investigate crime.").[6]

When properly trained and supervised, the vast majority of officers follow their constitutional obligations, and they will benefit if the legal system reliably holds rogue officers accountable for their misconduct. Indeed, "[g]iven the potency of negative experiences, the police cannot rely on a majority of positive interactions to overcome the few negative interactions. They must consistently work to overcome the negative image that past policies and practices have cultivated." Inst. on Race and Justice, *supra*, at 21.

In a recent survey, a staggering nine in ten law-enforcement officers reported increased concerns about their safety in the wake of high-profile police shootings. Pew Research Ctr., *supra*, at 65. Eighty-six percent agreed that their jobs have become more difficult

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[5] *Available at* https://www.ojp.gov/ncjrs/virtual-library/abstracts/promoting-cooperative-strategies-reduce-racial-profiling.

[6] *Available at* https://perma.cc/XYQ8-7TB4.

as a result. *Id.* at 80. Many looked to improved community relations for a solution, and more than half agreed "that today in policing it is very useful for departments to require officers to show respect, concern and fairness when dealing with the public." *Id.* at 72. Responding officers also showed strong support for increased transparency and accountability, for example, by using body cameras, *id.* at 68, and—most importantly for these purposes—by holding wrongdoing officers more accountable for their actions, *id.* at 40.

The public knows that police are rarely held accountable for their misconduct. Clark M. Neily III, *Police Accountability Is a Matter of Life and Death*, CATO AT LIBERTY (May 25, 2021), https://www.cato.org/blog/police-accountability-matter-life-death. And the widespread perception that law enforcement act is if they are above the law is one of the major causes of this crisis of confidence in police today. *Id.* But decisions like the Eighth Circuit's below "allow police misconduct to thrive" by expanding officers' discretion to use force and reducing the standard of suspicion needed to do so. Laurie L. Levenson, *Police Corruption and New Models for Reform,* 35 SUFFOLK U. L. REV. 1, 16 (2001). "The relatively few avenues available to challenge police misconduct under traditional search and seizure law make it easy for police misconduct to go undetected." *Id.*

There is no panacea for the problem of declining public trust in law enforcement; it is a serious structural issue that exceeds the bounds of any one case or doctrine. But by reversing the decision below and ensuring that *Terry* is not expanded beyond its original scope, this Court can take a small but significant step toward ensuring police accountability and restoring confidence in the rule of law.

CONCLUSION

For the foregoing reasons, and those set forth by the Petitioner, the Court should grant the petition.

Respectfully submitted,

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