**No. 23-5918**

IN THE
SUPREME COURT OF THE UNITED STATES

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**THEODORE WILLIAMS, II,**

***Petitioner*,**

**v.**

**UNITED STATES OF AMERICA,**

***Respondent*.**

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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# REPLY TO THE BRIEF IN OPPOSITION

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## REPLY TO THE UNITED STATES'S BRIEF IN OPPOSITION

## ARGUMENT

The Eleventh Circuit departed from the other circuits and this Court's decision in *Florida v. Royer*, 460 U.S. 491 (1983), when it disregarded less-intrusive alternative means as "irrelevant" to the *Terry*[1] stop analysis. The government contends that the lower court decisions were correct and that the Eleventh Circuit's opinion does not conflict with any decision of this Court or any Court of Appeals. Br. in Opp. at 7. However, even before the instant case, the circuits were in conflict as to whether officers must use the least intrusive means reasonably available during a *Terry* stop or whether their failure to do so is only a factor in the analysis. This Court should intervene and resolve this important constitutional question.

### I. This Court should grant the writ because circuit courts are in conflict as to whether an officer's failure to use the least intrusive means reasonably available causes a *Terry* stop to ripen into a de facto arrest.

The government avers that, while "some court of appeals decisions" treat reasonably available, less intrusive alternative means as a factor in the analysis, "no circuit treats that concept as the determinative criterion when assessing whether the methods used during a *Terry* stop have gone too far." Br. in Opp. at 12-13. While at least one circuit has treated reasonably available, less intrusive means as a mere factor, the government's claim that no circuits treat the least-intrusive means question as determinative is straightforwardly false.

[1] *Terry v. Ohio*, 392 U.S. 1 (1968).

Multiple circuits require that officers use the least intrusive means reasonably available during a *Terry* stop. *See United States v. Palmer*, 820 F.3d 640, 649 (4th Cir. 2016) ("[W]hen following up on the initial reasons for a traffic stop, the officer must employ 'the least intrusive means reasonably available'"); *United States v. Martinez*, 462 F.3d 903, 907 (8th Cir. 2006) ("[O]fficers should use the least intrusive means of detention and investigation reasonably necessary"); *United States v. Tilmon*, 19 F.3d 1221, 1225 (7th Cir. 1994) ("The police should, of course, use the least intrusive means reasonably available"); *United States v. Sanders*, 994 F.2d 200, 208 (5th Cir. 1993) (describing the statement "that the police should employ the least intrusive means available" as a "truism"); *Martinez v. Nygaard*, 831 F.2d 822, 827 (9th Cir. 1987) (explaining that the government bears the burden of showing that the police used "the least intrusive means reasonably available").

Ironically, the United States itself has previously stated that "officers 'must . . . employ the least intrusive means of detention and investigation . . . that are reasonably necessary to achieve the purpose of the *Terry* stop.'" Brief for United States at 28, *United States v. Morgan*, 729 F.3d 1086 (8th Cir. 2013) (No. 12-4043), 2013 WL 875002 at *28; *see also* Brief for United States at 29, *United States v. Harvey*, 1 F.4th 578 (8th Cir. 2020) (No. 19-3735), 2020 WL 1695378 at *29 (stating "officers must use the 'least intrusive means' once the [*Terry*] stop begins"); Brief for United States at 23-24, *United States v. Ngumezi*, 980 F.3d 1285 (9th Cir. 2019) (No. 19-10243), 2019 WL 7376906 at *23-24 ( arguing that "[i]n the context of a traffic or *Terry* stop, investigative methods are reasonable when they are 'necessary to

effectuate the purpose of the stop' and are 'the least intrusive means reasonably available'"); Brief for United States, *United States v. Davenport,* 303 Fed. App'x 42 (2d Cir. 2007) (No. 07-0164), 2007 WL 6334886 ("To prevent a *Terry* stop from crossing the line into a de facto arrest, officers 'must employ the least intrusive means reasonably available'"); Brief for United States, *United States v. Askew*, 529 F.3d 1119 (D.C. Cir. 2006) (No. 04-3092), 2006 WL 2432076 at *18 (stating that *Royer* requires that officers use "the least intrusive means reasonably available").

Although the government suggests that there is no circuit split, its admission that "some" circuits treat less intrusive alternatives as a factor undermines its position. Br. in Opp. at 12-13. By acknowledging the circuits' inconsistencies in conducting the analysis, the government implicitly concedes that the circuits are split on this issue. Courts have also acknowledged the inconsistency. As the Eighth Circuit explained nearly three decades ago:

> We note in passing that the continued validity of the "least intrusive means" test, announced by a plurality in *Royer* but skirted in subsequent Supreme Court cases, is a matter of some question. Nevertheless, this circuit continues to employ this test.

*United States v. Dixon*, 51 F.3d 1376, 1380 (8th Cir. 1995) (internal citations omitted). Notably, despite representing in previous cases that *Royer* requires officers to use the least intrusive means reasonably available, the government has also argued that the "least intrusive means reasonably available" principle "cannot be reconciled" with Supreme Court precedent. Brief for United States, *United States v. Hutchinson*, 408 F.3d 796 (D.C. Cir. 2005) (No. 03-3147), 2005 WL 139669 at *42 n.32.

Conflict and confusion abound as to the whether *Royer*'s "least intrusive means" principle is a determinative test or a simply a relevant factor in the *Terry* stop analysis. Even the government cannot figure out what its position should be. This Court should grant certiorari and resolve the issue.

## II. This Court should grant the writ because the Eleventh Circuit's decision to cast aside reasonably available, less intrusive alternative means as "irrelevant" to the *Terry* analysis is unambiguously at odds with the other circuits and *Royer*.

Curiously, the government does not dispute that the Eleventh Circuit disregarded reasonably available, less intrusive alternative means as "irrelevant" to the analysis. However, the government nonetheless contends that the Eleventh Circuit's decision "does not conflict with any decision of this Court or another court of appeals." Br. in Opp. at 7. That is demonstrably false; the Eleventh Circuit's decision is irreconcilable with the other circuits and *Royer*. As the government argued in a previous case, when determining whether the use of handcuffs exceeds the bounds of a *Terry* stop, "the relevant inquiry is whether police have a reasonable basis to think that the person detained poses a present physical threat and that handcuffing is the least intrusive means to protect against that threat." Brief for United States, *United States v. Fiseku*, 915 F.3d 863 (2d Cir. 2018) (No. 17-1222), 2018 WL 1188949 at *27. The Eleventh Circuit's total departure from that inquiry has exacerbated the pre-existing circuit split.

Although the government now disputes that officers must use the least intrusive means reasonably available, it acknowledges this Court's precedent requires that force used during a *Terry* stop be "reasonably necessary to protect [an

officer's] personal safety and to maintain the status quo during the course of the stop." Br. in Opp. at 7-8 (quoting *United States v. Hensley*, 469 U.S. 221, 235 (1985). While the government goes on to claim that standard was met here, the government's own analysis shows otherwise: "[a]s the court of appeals explained, the deputy suspected—based on his experience—'a high likelihood' that petitioner 'w[ould] flee on foot' because he had 'exit[ed] [his] vehicle quickly on [the] traffic stop [ ],' 'walked back towards [the deputy's] car,' 'appeared nervous,' and 'was trying to distance himself from [his] vehicle.'" Br. in Opp at 8. The Eleventh Circuit made no finding that the initial attempt to handcuff Mr. Williams was reasonably *necessary* to protect officer safety. Other than the officer being alone, which is true in most traffic stops, the Eleventh Circuit failed to mention any particular circumstances that would pose a risk to officer safety. And handcuffing Mr. Williams would not have reinstated the status quo, though verbally ordering him to reenter the vehicle would have. *See United States v. Sanders*, 510 F.3d 788, 791 (8th Cir. 2007) ("By ordering Sanders to reenter the car, Officer Uredi simply reinstated the status quo; the only change in Sanders's circumstances was that he was inside of, rather than outside of, the stopped car.").

The government further points out that the opinion below is unpublished, suggesting that any conflict is internal to the Eleventh Circuit and thus unworthy of further review. But the circuit split is bigger than just Mr. Williams's case: the confusion and conflict on the *Terry* analysis is a fire that has been burning for decades. *Cf. Royer,* 460 U.S. at 511 (Brennan, J., concurring) ("In any event, the

relevance of a least intrusive means requirement within the context of a *Terry* investigative stop is not clear to me. As I have discussed, a lawful stop must be so strictly limited that it is difficult to conceive of a less intrusive means that would be effective to accomplish the purpose of the stop."). The Eleventh Circuit's decision below did not start the fire; it poured gasoline on it. Unpublished or not, the decision eviscerates any notion that the conflict might sort itself out. Indeed, the Eleventh Circuit's decision to disregard *Royer* has already impacted other cases. *Cf. United States v. Chandler*, No. 7:22-CR-00272, 2023 WL 7928995, at *9 (N.D. Ala. Aug. 21, 2023), *report & recommendation adopted*, 2023 WL 6462603 (N.D. Ala. Oct. 4, 2023) (relying on *Williams* for proposition that an officer being by himself justified detaining defendant for safety reasons); *United States v. Ruoho*, No. 4:-23CR-00058, 2023 WL 5424759, at *7 (N.D. Ala. July 13, 2023), *report & recommendation adopted*, 2023 WL 5418744 (N.D. Ala. Aug. 22, 2023) (relying on *Williams* in holding handcuffing of suspect did not convert *Terry* stop into arrest based in part on officer's belief that he was the only officer on the scene).

The Eleventh Circuit's decision reveals its willingness to permit officers to handcuff suspects in virtually any traffic stop, without considering whether the use of force was the least intrusive means reasonably available. Its departure from both sides of the previous circuit split makes clear that, without this Court's intervention, this conflict will continue to worsen.

## III. This Court should grant the writ because at issue is an important Fourth Amendment question: whether courts must consider an officer's failure to use the least intrusive means reasonably available during a *Terry* stop.

As part of its effort to dissuade this Court from granting certiorari, the government makes multiple arguments that distract from the actual issue, which is whether courts must consider an officer's failure to use the least intrusive means reasonably available during a *Terry* stop. The government's approach—whether borne of confusion as to the state of the law or a calculated plan to avoid engaging with Mr. Williams's arguments directly—speaks volumes.

The government describes the decision below as "factbound." Br. in Opp. at 7. Its description misses the point. Every *Terry* analysis is factbound. But whether reasonably available, less intrusive means must be considered by courts is not a factual question; it is a legal one. The lower courts' factual determinations—while certainly erroneous[2]—are not the reason Mr. Williams asks this Court to grant the writ. Rather, this Court should grant the writ because of the worsening circuit split

[2] It bears repeating that the courts' factual conclusions were directly contradicted by unambiguous video evidence. The video of Mr. Williams's encounter with law enforcement was short and dark, and it seems that the district court's mischaracterization of it was an unfortunate mistake resulting from timeline confusion. On appeal, Mr. Williams screenshotted every second of the video and included the images in his brief, complete with diagrams showing his feet never moved. "The video[ ] quite clearly contradicts the version of the story told by [law enforcement] and adopted by the Court of Appeals." *Scott v. Harris*, 550 U.S. 372, 378 (2007). Lamentably, the Eleventh Circuit ignored the video, failing to even mention it in its analysis and concluding that "[t]he record does not contradict the Court's determination that the officer's testimony was credible—it corroborates it." Pet. App'x C5. As this Court has reasoned in a different context, "[t]he Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the video[ ]." *Scott*, 550 U.S. at 380–81.

on the important question of whether and to what extent courts must consider reasonably available, less intrusive means when determining if a *Terry* stop has ripened into a de facto arrest.

The government also claims that Mr. Williams argued that, in the absence of verbal commands, handcuffing is "invariably" impermissible during a *Terry* stop. Br. in Opp. at 9. But a review of the cited page confirms that he made no such argument. Having built up a straw man, the government attempts to tear it down by citing cases that indicate handcuffing is sometimes necessary during a *Terry* stop. Mr. Williams never disputed handcuffing is sometimes necessary. Rather, he contends that courts must at least consider less-intrusive alternative means in determining whether a *Terry* stop has ripened into a de facto arrest.

In addition to mischaracterizing the reasons for granting the writ and Mr. Williams's argument, the government mischaracterizes what it calls the "principal issue." Br. in Opp. at 10. Unable to rebut Mr. Williams's contention that courts are required to at least consider reasonably available, less intrusive alternative means, the government constructs another straw man, baselessly claiming that the principal issue is whether "'officers may use handcuffs in the course of a *Terry* stop' when 'a suspect threatens physical danger or flight.'" Br. in Opp. at 10. The government avers that circuit courts agree on this "principal issue." Ironically, the cases cited by the government highlight the confusion and inconsistency among and within the circuits as to the actual issue: whether and to what extent courts must consider reasonably

available, less intrusive means of detention when determining if a *Terry* stop has ripened into a de facto arrest.

In *United States v. Cervantes-Flores*, the Ninth Circuit reasoned that, "[w]here a suspect threatens physical danger or flight, officers may use handcuffs in the course of a *Terry* stop." 421 F.3d 825, 830 (9th Cir. 2005). The Ninth Circuit has emphasized that *Terry* stops ripen into de facto arrests if officers fail to use the least intrusive means reasonably available,[3] putting it on the majority side of the circuit split. However, it evidently has had difficulty with this confusing area of the law, further showing that certiorari is necessary to resolve this issue. *See United States v. Guerrero*, 47 F.4th 984, 989 (9th Cir. 2022), *amended on denial of reh'g*, 50 F.4th 1291 (9th Cir. 2022), *and cert. denied*, 143 S. Ct. 838 (2023) (Thomas, J., dissenting) (stating that handcuffing caused the stop to ripen into a de facto arrest and that, for a stop to retain its *Terry* character, officer must use the least intrusive means reasonably available).

In *United States v. Bailey*, which the government also cites as evidence of the lack of a circuit split, the Second Circuit held that "the relevant inquiry is whether police have a reasonable basis to think that the person detained poses a present physical threat and that handcuffing is the least intrusive means to protect against that threat." 743 F.3d 322, 340 (2d Cir. 2014). *Bailey*'s holding is hopelessly at odds

[3] *United States v. Baron*, 860 F.2d 911, 914 (9th Cir. 1988) ("When assessing the circumstances, we must bear in mind the Supreme Court's admonition that to qualify as a *Terry*-stop, 'the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.'").

with the Eleventh Circuit's decision below, which treated less intrusive alternative means as "irrelevant" to the analysis.

The government also cites to an Eighth Circuit decision stating that, "when officers are presented with serious danger in the course of carrying out an investigative detention, they may brandish weapons or even constrain the suspect with handcuffs in order to control the scene and protect their safety." *El-Ghazzawy v. Berthiaume*, 636 F.3d 452, 460 (8th Cir. 2011) (internal quotation marks omitted). However, the court also made clear that the officers can only use weapons or handcuffs if they are "the least intrusive means of detention and investigation, in terms of scope and duration, that are reasonably necessary to achieve the purpose of the *Terry* stop." *El-Ghazzawy*, 636 F.3d at 458. The court emphasized that "nowhere in our case law is it suggested that a sole responding officer retains the ability to handcuff and frisk suspects absent any objective safety concern." *Id.*

The government also cites *Lundstrom v. Romero*, where the Tenth Circuit stated that "[a] police officer may take such steps as are reasonably necessary to protect his safety and to maintain the status quo during a detention." 616 F.3d 1108, 1120 (10th Cir. 2010). The Tenth Circuit has indicated that it requires only reasonable means rather than the least intrusive means reasonably available. *United States v. Albert*, 579 F.3d 1188, 1193-95 (10th Cir. 2009) (concluding that "use of handcuffs was reasonable under the [ ] circumstances"). The Tenth Circuit's approach is at odds with other circuit cases cited by the government and with the Eleventh Circuit's decision below.

This important Fourth Amendment question has needed an answer for decades. Percolation has only resulted in more confusion and inconsistency. This Court should grant certiorari and resolve the issue.

## CONCLUSION

In order to resolve the conflict as to whether the methods employed during a *Terry* stop should be the least intrusive means reasonably available, Mr. Williams respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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