No. _____

In the
Supreme Court of the United States

Mark Galloway,

Petitioner,

v.

United States of America,

Respondent.

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

Petition for a Writ of Certiorari

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Question Presented for Review

The Ninth Circuit has split from this Court's precedent to create a new category of seizures exempt from the Fourth Amendment's requirement of probable cause. So long as law enforcement believes a suspect is armed or dangerous, it does not matter in the Ninth Circuit how intrusive the encounter becomes—it is categorically not an arrest, only a "*Terry*" stop, which is justified on reasonable suspicion alone.

The question presented is**:** Whether the Ninth Circuit has unjustifiably expanded the *Terry* exception to the probable cause requirement by creating a new category of exempt seizures when a suspect is armed or dangerous, no matter the circumstances or intrusiveness of that seizure.

Related Proceedings

The prior proceedings for this case are found at:

United States v. Galloway, No. 22-10208, 2023 WL 5665773 (9th Cir. Sept. 1, 2023), *pet. reh'g denied*, Dkt. 35 (9th Cir. Oct. 24, 2023). Appx. A, pp. 1–5; Appx. B., p. 6.

United States v. Galloway, 2:21-cv-02155-APG, Dkt. 16 (D. Nev. Aug. 17, 2022). Appx. C, pp. 7–14.

United States v. Galloway, 2:20-mj-01041-EJY, Dkts. 41, 65 (D. Nev.). Appx. D, pp. 15–32; Appx. E, pp. 33–35.

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Petition for Writ of Certiorari

Mark Galloway petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the denial of his motion to suppress.

Opinions Below

The Ninth Circuit order denying appellate relief is not published in the Federal Reporter but is reprinted at: *United States v. Galloway*, No. 22-10208, 2023 WL 5665773 (9th Cir. Sept. 1, 2023), *pet. reh'g denied*, Dkt. 35 (9th Cir. Oct. 24, 2023). Appx. A, pp. 1–5; Appx. B., p. 6.

The magistrate judge's order denying the motion to suppress, the district court's order affirming, and the judgment of conviction are unpublished and not reprinted: *United States v. Galloway*, 2:21-cv-02155-APG, Dkt. 16 (D. Nev. Aug. 17, 2022); *United States v. Galloway*, 2:20-mj-01041-EJY, Dkts. 41, 65 (D. Nev.). Appx. C, pp. 7–14; Appx. D, pp. 15–32; Appx. E, pp. 33–35.

Jurisdiction

The Ninth Circuit entered the final order denying Galloway's timely request for en banc rehearing on October 24, 2023. Appx. B., p. 6. This Court's jurisdiction is invoked under 28 U.S.C. § 1254. This petition is timely under Supreme Court Rule 13.3 as it is filed within 90 days from the lower court's order.

Relevant Constitutional Provisions

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

> Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Introduction

This Court in *Terry v. Ohio*, 392 U.S. 1 (1968), created a limited exception to the general rule that seizures require probable cause. For brief encounters between police officers and the public, reasonable suspicion that the suspect is armed and dangerous is sufficient for a pat-down search. *Id.* at 30–31. For a short detention, the officer must have reasonable suspicion the suspect is involved in criminal activity. *Id.*

In subsequent cases, this Court has carefully limited *Terry*'s scope. *See, e.g.*, *Dunaway v. New York*, 442 U.S. 200, 207–14 (1979). The Ninth Circuit, in contrast, has greatly expanded *Terry*'s limited exception. Under Ninth Circuit precedent, it does not matter whether a seizure resembles an arrest in all but name. So long as officers have reasonable suspicion the suspect is armed or dangerous, this Court deems the seizure a "*Terry* stop."

The Ninth Circuit relied on this precedent to conclude Mark Galloway was stopped, but not arrested, when officers ordered him out of his vehicle at gunpoint. Appx. A, pp. 1–5. Because of the importance of the Fourth Amendment's privacy protections, and because the Ninth Circuit's rule conflicts with this Court's Fourth Amendment caselaw, certiorari review is appropriate. Sup. Ct. R. 10(c).

Statement of the Case

In December 2021, a camper at Lake Mead National Recreation Area reported a man was yelling on the phone, and a woman showed up later saying she had been hurt. Appx. D, pp. 15–16. Park Ranger Dylan Romine received the call, caught up to the Jeep Liberty, and followed the vehicle for the next six minutes. Appx. D, pp. 16–17. During that time, he testified noticing slight variations in speed over hills (within five miles per hour), the car touch—but not cross—the center line on curves, and the vehicle "rock[ing] back and forth," suggesting movement inside. Appx. D, pp. 16–17.

Park Ranger Joshua Fitch joined Romine, and at 9:49 p.m., the officers performed a "high risk stop"—ordering Galloway out of his car with guns, including an AR-15 rifle, drawn. Appx. D, pp. 17–19. When Galloway exited his car, they ordered him to lift the back of his shirt to check for a weapon; he did so, but also pulled down his pajama pants, showing he likely did not have a weapon. Appx. D, p. 19. Galloway was then handcuffed and frisked—with Romine's rifle still drawn. Appx. D, pp. 19–20. He was placed in the back of a patrol car, with the doors closed, and was not free to leave. Appx. D, pp. 19–20.

The Ninth Circuit, relying on its precedent, concluded that, "[u]nder the circumstances, ordering Galloway out of the vehicle with guns drawn did not convert the stop into a de facto arrest." Appx. A, p. 3 (citing *United States v. Jacobs*, 715 F.2d 1343, 1345–46 (9th Cir. 1983), and *United States v. Greene*, 783 F.2d 1364, 1367 (9th Cir. 1986)). The court then denied Galloway's petition for en banc review. Appx. B., p. 6.

Reasons for Granting the Petition

I. This Court in *Terry* and its progeny created a limited exception to the Fourth Amendment's probable cause requirement.

A. In *Terry*, this Court departed from past precedent requiring probable cause for governmental seizures.

Prior to *Terry*, this Court had a bright-line rule: seizures required "probable cause" that the person being seized "had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *see Dunaway v. New York*, 442 U.S. 200, 207–08 (1979); *Ker v. California*, 374 U.S. 23, 35 (1963) (plurality). "While warrants were not required in all circumstances, the requirement of probable cause, as elaborated in numerous precedents, was treated as absolute." *Dunaway*, 442 U.S. at 208 (footnotes omitted). The requirement for probable cause "applied to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations." *Id.*

Terry complicated this standard. The case involved a "stop and frisk"—an encounter between a police officer and suspect involving a brief detention and pat-down search for weapons. *Terry*, 392 U.S. at 9–10. The Court acknowledged that "[n]o right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person[.]" *Id.* at 9 (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)); *see also id.* at 24–25. But the Court also recognized police have a legitimate interest in safely investigating crime, even when probable cause for a search or arrest has not yet developed. *Id.* at 9–10, 22–24.

The Court balanced these competing interests by distinguishing these encounters from traditional arrests. The Fourth Amendment allows brief detentions on less than probable cause where an officer reasonably concludes "that criminal activity may be afoot." *Id.* at 30; *see United States v. Kerr*, 817 F.2d 1384, 1386 (9th Cir. 1987). Similarly, limited searches are permissible when "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27. But the Court did not detract from its prior precedent requiring probable cause for searches and seizures exceeding the scope of these brief encounters. *See id.* (describing exception as "narrowly drawn").

B. This Court's decisions following *Terry* emphasized the limited nature of the exception.

Following *Terry*, this Court has had multiple occasions to consider its rule distinguishing "*Terry* stops" from arrests requiring probable cause. On each occasion, this Court has emphasized that *Terry* represents a limited exception to the probable cause requirement for seizures. *See Dunaway*, 442 U.S. at 210–11 (compiling cases).

In a series of cases, this Court applied *Terry* to similarly limited searches and seizures. *See Pennsylvania v. Mimms*, 434 U.S. 106, 111–12 (1977) (per curiam) (order to exit vehicle and frisk for weapons); *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975) (stops of less than a minute); *Adams v. Williams*, 407 U.S. 143, 146–48 (1972) (frisk for weapons). And in two other cases, the Court identified searches and seizures that went beyond what was permitted by *Terry*. *See Brown v. Illinois*, 422 U.S. 590, 600–02 (1975); *Davis v. Mississippi*, 394 U.S. 721, 726–28

(1969); *see also Brignoni-Ponce*, 422 U.S. at 881–82 (explaining actions beyond brief detention and questioning "must be based on consent or probable cause").

In *Dunaway*, the Court relied on the differences between these lines of cases to reject the state's proposed expansion of *Terry*. The petitioner in *Dunaway* was detained at a police station and interrogated. 442 U.S. at 202–03. The state conceded probable cause was lacking, but argued the detention was constitutional under *Terry*, as police "had a reasonable suspicion that petitioner possessed intimate knowledge about a serious and unsolved crime." *Id.* at 207 (cleaned up). The Court rejected that argument, explaining "*Terry* and its progeny clearly do not support such a result." *Id.* at 211–12. Probable cause is required unless the intrusion at issue falls "far short of the kind of intrusion associated with an arrest." *Id.* at 212. And in *Dunaway*, several factors supported the existence of an arrest rather than a *Terry* stop: (1) police did not question the petitioner "briefly where he was found"; (2) he was never told he was free to go; and (3) police would have prevented him from leaving if he had tried. *Id.* "[A]ny 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." *Id.* at 213.

II. The Ninth Circuit has created a rule that greatly expands *Terry*'s limited exception.

In the years immediately following the decision, the Ninth Circuit interpreted *Terry* consistent with its narrow contours. In *United States v. Strickler*, the court held probable cause was required when officers surrounded a vehicle at gunpoint

and ordered the occupants to raise their hands. 490 F.2d 378, 380 (9th Cir. 1974). In *United States v. Chamberlin*, the court relied on *Dunaway* to conclude a 20-minute detention in the back of a patrol car exceeded the bounds of *Terry*. 644 F.2d 1262, 1265–67 (9th Cir. 1980); *contra United States v. Smith*, 713 F.2d 491, 493–94 (9th Cir. 1983) (concluding defendant was detained, not arrested, when detention lasted only 90 seconds, and questions were reasonably related to the reason for the stop). And in *United States v. Beck*, the court reversed the district court's finding that the defendant was only detained, when officers surrounded his taxi, then physically escorted him to a separate location. 598 F.2d 497, 501–02 (9th Cir. 1979). But in *Beck* the court suggested the outcome could have been different had the detention "occur[ed] under circumstances justifying fears for personal safety." *Id.* at 501 (citing *United States v. Russell*, 546 F.2d 839, 840 (9th Cir. 1976) (Wright, J., concurring)).

The division between this Court and the Ninth Circuit widened over the following years, as other panels have seized on this dicta from *Beck*. In *United States v. Bautista*, the Ninth Circuit held that handcuffs did not transform a stop into an arrest, when officers had reasonable suspicion the men detained had committed armed bank robbery. 684 F.2d 1286, 1289–90 (9th Cir. 1982); *see also United States v. Bravo*, 295 F.3d 1002, 1008–12 (9th Cir. 2002); *United States v. Taylor*, 716 F.2d 701, 709 (9th Cir. 1983). Similarly, in *United States v. Jacobs*, the court held that a stop did not transform into an arrest when the police officer pointed his gun at a bank robbery suspect and "ordered her to 'prone out.'" 715 F.2d 1343, 1345–46 (9th Cir. 1983) (per curiam); *see also United States v. Miles*, 247 F.3d

1009, 1012–13 (9th Cir. 2001) (explaining the court "permit[s] the use of intrusive means to effect a stop where the police have information that the suspect is currently armed or the stop closely follows a violent crime"); *United States v. Buffington*, 815 F.2d 1292, 1300–01 (9th Cir. 1987) (justifying stop on reasonable suspicion based on "violent criminal history" and "unusual conduct"). In *United States v. Greene*, the court held that officers' use of force was justified during a *Terry* stop when an informant told police she had seen a pistol in the suspect's hotel room. 783 F.2d 1364, 1367–68 (9th Cir. 1986). In *United States v. Parr*, the court concluded that the defendant was only detained, not arrested, when he was placed in the back of a police car. 843 F.2d 1228, 1231 (9th Cir. 1988); *see also United States v. Torres-Sanchez*, 83 F.3d 1123, 1127–29 (9th Cir. 1996), *as amended* (July 15, 1996). And in *Allen v. City of Los Angeles*, the court rejected the plaintiff's argument that he was arrested when he was ordered to the ground at gunpoint, handcuffed, and placed in the back of a police vehicle for questioning, while his companion was severely beaten by police. 66 F.3d 1052, 1056–57 (9th Cir. 1995); *see also Alexander v. County of Los Angeles*, 64 F.3d 1315, 1320–22 (9th Cir. 1995).

In each case, the Ninth Circuit relied on a consideration unsupported by *Terry*: an officer's fears for personal safety outweighing a defendant's interest in freedom from unreasonable government action. Although safety is a legitimate concern, this Court in *Dunaway* was clear—it cannot justify an arrest on less than probable cause. The law in the Ninth Circuit thus conflicts with Supreme Court precedent, and certiorari is needed to resolve this conflict. Sup. Ct. R. 10(c).

III. This case is appropriate for certiorari review.

The petitioner in *Terry* was briefly stopped, while an officer patted down the outside of his clothing. 392 U.S. at 7. Galloway, in contrast, was ordered out of his vehicle with guns drawn, including an AR-15 rifle. Despite the significant differences between the two cases, the Ninth Circuit concluded the same rule controlled—police needed only reasonable suspicion, in Galloway's case, because a camper reported he "was leaving the site of a physical domestic violence altercation and may have had a firearm." *Galloway*, 2023 WL 5665773, at *1.

The decision reflects an ever-growing divide with this Court's caselaw. And it does so in an area of exceptional importance—the right to be free from unreasonable searches and seizures. 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; *see Henry v. United States*, 361 U.S. 98, 100–01 (1959). But in the Ninth Circuit, so long as police have reasonable suspicion a suspect is armed or dangerous, probable cause is unnecessary. "The central importance of the probable-cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised in this fashion." *Dunaway*, 442 U.S. at 213. Certiorari review is appropriate. Sup. Ct. R. 10(c).

Conclusion

Because the Ninth Circuit's opinion conflicts with this Court's precedent on issues of exceptional importance, this Court should grant a writ of certiorari.

Dated this 17th day of January, 2024.

Respectfully submitted,

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