No. 24-_____

IN THE
SUPREME COURT OF THE UNITED STATES

CURTIS PAUL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *Terry v. Ohio,* 392 U.S. 1 (1968), the Fourth Amendment permits officers to stop a person in the street to ask a few brief investigatory questions only if they have a specific and articulable basis, objectively reasonable in the totality of the circumstances, to suspect the person of criminal activity. *Id.* at 20-21. The question presented is:

Whether a police officer violates the Fourth Amendment when he seizes for criminal investigation a pedestrian walking in the vicinity of a recent robbery when the officer has on his smart phone three color images of the robbery suspect wearing attire that does not match the pedestrian's attire, and no commonsense inference or officer experience can explain away the mismatch.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Paul*, No. 2:21-cr-00112, District Court for the Eastern District of Tennessee. Judgment entered March 9, 2023.

(2) *United States v. Paul*, No. 23-5241, U.S. Court of Appeals for the Sixth Circuit. Order affirming judgment entered March 1, 2024.

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Petitioner Curtis Paul respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Sixth Circuit.

OPINIONS BELOW

The unpublished panel opinion of the United States Court of Appeals for the Sixth Circuit affirming the district court's judgment appears at pages 1a to 5a of the appendix to this petition. The memorandum and order of the district court denying the motion to suppress appears at pages 13a to 21a of the appendix.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals

entered its judgment on March 1, 2024. Pet. App. 1a. On May 23, 2024, this Court granted an application (No. 23A1042) to extend the time for filing this petition to July 29, 2024.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part:

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . .

18 U.S.C. § 922(g) states in relevant part:

> It shall be unlawful for any person –
>
> > (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year ; . . .
>
> to . . . possess in or affecting commerce, any firearm or ammunition . . . .

STATEMENT OF THE CASE

The Fourth Amendment generally prohibits police from seizing and searching an individual absent a warrant or probable cause. In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court established a "narrowly drawn" exception to this prohibition. *Id.* at 27. As relevant here, *Terry* permits officers to stop a person in the street to ask a few brief investigatory questions if they have a specific and articulable basis, objectively reasonable in the totality of the circumstances, to suspect the person of criminal activity. *Id.* at 20-21.

In this case, the Sixth Circuit held that an officer had reasonable suspicion that petitioner Curtis Paul might be the person who had robbed a nearby convenience store about twenty minutes earlier, Pet. App. 3a-5a, despite that the officer was using

as his guide three color images of the robber captured mid-crime, sent to the officer via email on his smart phone, and at least one of the photographs showed the robber wearing pants and shoes unmistakably unlike the petitioner's (among other discrepancies).

In reaching this holding, the Sixth Circuit allowed the officer's specialized experience regarding the general habits of crime suspects to override the specific and unexplainable mismatch between the images of the robber on his smart phone and the petitioner. Review by this Court is necessary to make real—and uniformly handled—the scenario hypothesized in *Kansas v. Glover*, 589 U.S. 376 (2020), that a plain mismatch between empirical evidence and officer observation can and *should* dispel reasonable suspicion otherwise based on common sense or officer experience.

Overview. On a winter afternoon in February 2021, petitioner Curtis Paul went into a convenience store on Walnut Street in Johnson City, Tennessee to purchase some items. Six feet three inches tall, he was wearing a black hoodie, a black baseball cap, blue jeans, and light brown work boots. He was also wearing a black bandana worn as a gaiter, tied around his neck and pulled up to cover his nose and mouth. (This was during the height of the Covid-19 era when people routinely covered their faces in buildings.) Surveillance video played at the suppression hearing and entered into the record in the court below captured these full-body images of Mr. Paul while in the store:[1]

[1] These images are screenshots captured from the full surveillance video, at timestamp 00:05 and 00:53 respectively. The full surveillance video was entered into the record below as Defendant's Exhibit D2.

Mr. Paul paid the man behind the counter, who was also wearing a face covering, left the market, and went on his way.

A few minutes later, a different man entered the store. This person was white, like Mr. Paul and like most people in Johnson City, Tennessee.[2]

But he was much shorter, around five feet two inches, and wearing different clothes. He had on a bright blue jacket with some sort of black top underneath, a blue beanie-style cap, sunglasses, khaki pants, and black shoes. He was also wearing a dark green gaiter covering his mouth and nose. This other man was carrying a large knife, maybe 10 to 12 inches long, which he wielded to rob the store, moving around the counter and grabbing money from the register. Surveillance video captured this full-body image the robber as he entered the store wielding the knife:

[2] U.S. Census Bureau, *Quick Facts*, https://www.census.gov/quickfacts/ (last visited July 25, 2024) (data accessed via map view) (showing that 84.9 percent of people in Johnson City, Tennessee are white).

This man—the robber—then ran out of the market, headed west toward University Parkway.

A. Factual background

At approximately 2:00 P.M. on February 10, 2021, Johnson City police officer and FBI Task Force Officer Joe Jaynes was at his desk when he heard the emergency tone on his hand-held dispatch radio. (Suppression Hr'g Tr. ["Hr'g Tr."], R. 24, PageID #72, 74-75.) He was on the phone at the time, but started listening to the dispatch after hearing the emergency tone, "pretty keyed in to what was happening on the radio" "for the most part." (*Id.* at PageID #76, 93.) He heard the dispatcher advise that a robbery had just taken place at the In and Out Tobacco market at 815 West Walnut Street in Johnson City, Tennessee, near the campus of East Tennessee State University. (*Id.* at PageID #75, 76, 94.) Officer Jaynes grabbed his dispatch radio, got in his unmarked police-issued car, and went to the area of the robbery. (*Id.* at PageID #76.)

As Officer Jaynes made his way to the area of West Walnut Street, he heard more information over the dispatch radio. Although he testified later that he did "not recall" the dispatch information describing the robber as about five feet two inches tall, he recalled hearing that a white male brandishing a silver knife "about 10 inches" long had demanded money from the cash register and left on foot "in the alley" "behind" the store, headed toward University Parkway. (*Id.* at PageID #76, 77, 95-96, 97, 99, 100, 109, 110, 135-36.) He also recalled, after his memory was refreshed, that he heard over the dispatch that a photo was being sent out showing the robber wearing a "bluish hat." (*Id.* at PageID #100-01.) University Parkway is to the left of (i.e., to the west of) the In and Out Tobacco market. (*Id.* at PageID #110; Gov't Exh. 1.)

While Officer Jaynes was out looking for the robbery suspect, another officer at the scene of the robbery sent out by email three photographs of the robber, which Officer Jaynes received and looked at on his "average sized" department-issued smart phone, a Samsung S7 (not a flip phone). (*Id.* at PageID #77, 102, 103.) In addition to mentioning the "bluish" hat, the sending officer described the photographs over dispatch as showing the robber wearing a "dark green face mask" and "white jacket," the latter of which was incorrect (they showed a bright blue jacket), but Officer Jaynes testified that he "was mostly going off the pictures" themselves. (*Id.* at PageID #100, 101; Call Report, Def's Exh. D4.)

The photographs consisted of three screen shots of surveillance video taken at In and Out Tobacco as the robbery took place and were entered into evidence. Pet. App. 22a-24a.

The photographs showed the robber from three aspects:[3]

(1) Front view, close-up, showing the top half of the robber's body, near the store entrance, showing part of a large knife in his right hand. Pet. App. 22a.

(2) Front view, full body, at the front of the store, showing the robber's jacket, pants, and shoes, as well as the knife in blurred motion. Pet. App. 23a. (Of course, when Officer Jaynes received this image, it did not have the yellow exhibit sticker on it.)

[3] The pictures inserted in this petition are themselves screenshots of the exhibit screenshots. Copies of the original exhibits are included in the Appendix.

(3) Front view, full body, showing the robber from head to toe and reaching into the cash register, still holding the knife in his right hand. Pet. App. 24a.

As Officer Jaynes described them, the photos as seen on his smart phone while he was driving around "weren't very big and the resolution wasn't very good," "a little grainy." (*Id.* at PageID #78; #85.) He was nonetheless able to discern that the suspected robber was wearing "[a] black hat, a black neck gaiter, [and] a bright blue jacket that . . . looked to be too large and it looked like he had a black jacket underneath." (*Id.* at PageID # 119 ("Just based off the pictures that were provided, [] it looked like he had something, a black jacket or shirt underneath."); *see also id.* at PageID #125.) Officer Jaynes was also able to discern from the photos an exceptionally tiny detail: a slim protrusion at the back of the robber's head, from which he deduced that the robber was wearing a "black ball cap" "pointed backwards." (*Id.* at PageID #103, 107, 138.)

While Officer Jaynes drove his unmarked car near the In and Out Tobacco market in the minutes after the robbery, looking for someone who matched the pictures he had seen, he came across a pedestrian, petitioner Curtis Paul. It was 2:16

P.M., about seventeen minutes after the robbery. (*Id.* at PageID #128.) Mr. Paul—who is white, six feet three inches tall, and described by Officer Jaynes as a "big guy"—was walking in a normal fashion along West Maple Street, near the intersection of West Maple and Cherokee Street, about one block from In and Out Tobacco. (*Id.* at PageID #80, 115, 128.) Mr. Paul was about a block or block-and-a-half to the right (i.e., to the east) of the market. (*See* Gov't Exh. 1; Hr'g Tr., R. 24, PageID #80, 81, 86-87; *see also id.* PageID #91, 128.)

Officer Jaynes testified that he saw that Mr. Paul was wearing "[a] black hat, a black neck gaiter, a black jacket and blue jeans." (*Id.* at PageID #81.) He later described the hat with more detail as a "black ball cap" and the neck gaiter as a black "bandana." (*Id.* at PageID #115.) He also remembered that he saw that Mr. Paul was wearing a "blue or dark colored hoodie," a "gray t-shirt under his hoodie," brown work boots, and no sunglasses. (*Id.* at PageID #122 (agreeing that surveillance video showing Mr. Paul going into same market before robber "looks like what he was wearing when I encountered him," so "matches [his] memory of what Mr. Paul looked like to [his] observation" when he stopped him).) Officer Jaynes also saw that Mr. Paul "had a bulge in his right front pant pocket." (*Id.*)

Upon observing Mr. Paul, Officer Jaynes got out of his unmarked car and identified himself as law enforcement. (*Id.* at PageID #82.) He said "Hey, I'm Detective Jaynes with the police department. Come over here and talk to me." (*Id.* at PageID #82.) Mr. Paul turned and said, "No, I didn't do anything," and continued walking. (*Id.* at PageID #82, 83, 84.) He did not run away or change direction, unlike

most robbers who, in Officer Jaynes' experience, "have a tendency to run." (*Id.* at PageID #131.[4]) Instead, Mr. Paul kept walking down the street in the same normal way and "just . . . waved his hand to wave [Officer Jaynes] off. (*Id.* at PageID #82 ("to like wave me away like go away"); *id.* PageID #84 ("[H]e just waved me off like I didn't do anything.").) Officer Jaynes, however, believed that Mr. Paul was "possibly the robbery suspect" based on the pictures he had seen on his smart phone. (*Id.* at PageID #82.) As stated in his contemporaneous report of the incident, he believed that the bulge in Mr. Paul's pocket "could be the [10-inch] knife that was used in the robbery." (Officer Statement, Gov't Exh. 6.) At the hearing, he expanded on his belief, testifying that he thought that "either the [10-inch] knife or money" from the robbery was the bulge in Mr. Paul's right front pocket. (Hr'g Tr., R. 24, PageID #82.) Officer Jaynes "felt like [he] needed to conduct a brief detention to investigate whether or not he was the robbery suspect." (*Id.* at PageID #83.)

Officer Jaynes recognized that Mr. Paul's attire matched the robber's only "to an extent." (*Id.* at PageID #119; *id.* at PageID #138 (AUSA: "[W]hat the defendant was wearing did not match the pictures that you'd received, right? Jaynes: Yes.); Officer Statement, Gov't Exh. 6.) But he explained away the mismatch in his report and at the suppression hearing, specifically when addressing the fact that Mr. Paul

[4] At the hearing, when asked if it is common for robbers to loiter in the area of a robbery, Officer Jaynes recalled that he knew of one instance in which a person suspected in a felony "laid low" near the crime "for several minutes afterward." (Hr'g Tr., R. 24, PageID #133.) Otherwise, he said they "have a tendency to run." *Id.* Officer Jaynes also testified that he had encountered a suspect fleeing a scene who changed directions, which is what Mr. Paul would have done if he were the robber. (*Id.* at PageID #136-37.)

was not wearing the bright blue jacket the robber was wearing. (*Id.* at PageID #79, 138.) He explained that based on his observation and experience, "it's common for robbery suspects to shed outer garments of clothing in an attempt to avoid detection." (*Id.* at PageID #79, 119; Officer Statement, Gov't Exh. 6.) He reiterated that in the images he saw on his phone, he saw enough detail to discern that it "looked like there was something black – some kind of black article of clothing underneath the bright blue jacket." (*Id.* at PageID #125.) He did not address or explain how Mr. Paul might have also come to be wearing different pants (changed from khakis to blue jeans), a different color hat (changed from bluish to black), and different colored shoes (changed from black to brown)—as was apparent in those same pictures.

Having seen enough of a match for his purposes, Officer Jaynes "grabbed [Mr. Paul's] arm." (*Id.* at PageID #83.) His plan was to "just pat him down for weapons. In this case, a knife or possibly money that was collected from the robbery." (*Id.* at PageID #83.) Once grabbed by the arm, Mr. Paul "jerked away." (*Id.*) Officer Jaynes then "tried to get him under control to handcuff him to conduct a *Terry* pat down." (*Id.* at PageID #89.) As he was trying to handcuff him, Mr. Paul "started reaching for his right front pocket," saying "something – I'm going to grab something here or something." (*Id.*) Officer Jaynes then "began to fear for [his] safety," so he pushed Mr. Paul against a nearby rock wall so "he couldn't get into that pocket." (*Id.*) Another officer had arrived by that time, and "after a brief struggle [they] were able to get Mr. Paul into custody." (*Id.*) A pat down followed, revealing a loaded Taurus .22 caliber pistol in the right front pocket of Mr. Paul's blue jeans. (*Id.* at PageID #89-90.)

Mr. Paul was not the robber. (Presentence Investigation Report ¶ 9, R. 35.) But he had been previously convicted of a felony and could not legally possess a gun.

B. Procedural history

1. The United States charged Mr. Paul in the Eastern District of Tennessee with a single count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Pet. App. 2a. He moved to suppress the gun found during the stop, arguing that the seizure of his person was unsupported by reasonable suspicion, in violation of the Fourth Amendment. (Motion to Suppress, R. 16, PageID #29-33.) A hearing was held before the U.S. Magistrate Judge on August 29, 2022, at which Officer Joe Jaynes testified on behalf of the government.

The magistrate judge issued a report recommending that the district court deny the motion, finding that under the totality of the circumstances, and as required under *Terry*, Officer Jaynes was "aware of specific and articulable facts which gave rise to reasonable suspicion" that criminal activity may be afoot, permitting the temporary investigative detention of Mr. Paul. (Report & Recommendation, R. 25, PageID #145-56.) The magistrate judge found that Mr. Paul's clothing "reasonably matched what Officer Jaynes observed in the photographs" and he "was in the general area of the robbery within a relatively short time after it was committed," and that Officer Jaynes permissibly relied "on his training and experience to form reasonable suspicion, as he did when concluding that Defendant could have shed outer articles of clothing to avoid detection." (*Id.* at PageID #153.)

Mr. Paul objected to the magistrate judge's report and recommendation, and specifically the conclusion that his clothing reasonably matched the robber's (Def.'s Objection, R. 26, PageID #157-65), but the district court overruled it, adopted the recommendation, and denied the motion. Pet. App. 13a-21a. The court concluded that "because [Mr. Paul] was in the vicinity of the robbery, was of the same race and sex of the suspect and was wearing clothing that *in some respects* matched that of the suspect, Officer Jaynes had reasonable suspicion to stop [him]." Pet. App. 20a (emphasis added). The court said that the differences in Mr. Paul's appearance did not render the stop unreasonable, as the "touchstone of the Fourth Amendment is reasonableness, not perfection," and as "the description" of the robbery suspect was "sufficiently unique to permit a reasonable degree of selectivity from the group of all potential suspects." Pet. App. 18a (internal quotation marks and citations omitted).

In reaching its conclusion, the district court acknowledged that the photos showed that the robber was wearing khakis and that Mr. Paul was wearing blue jeans, as well as that their shoes were different, but reasoned that "not all the photos showed the suspect was wearing khaki pants and shoes" and that Officer Jaynes viewed "the low-resolution images on his cell phone." Pet. App. 18a (explaining that "some differences in the descriptions do[] not defeat reasonable suspicion"). The district court later noted, however, that Mr. Paul had raised "an interesting question, quite frankly," that it "wrestled with," but "ultimately determined that it was a sufficient basis to do what the officer did in this case." (Sent'g Tr., R. 56, PageID #659.)

Mr. Paul entered a conditional plea, reserving his right to appeal the denial of the motion to suppress. (Plea Tr., R. 55, PageID #610, 616; Consent to Plea, R. 30, PageID #178-79.) He was sentenced to serve 55 months in prison, to be followed by three years of supervised release. (Judgment, R. 49.)

2. A panel of the Sixth Circuit affirmed. In deciding that the circumstances gave rise to reasonable suspicion to conduct a *Terry* stop, the court ignored that at least one of the images on the officer's smart phone showed that Mr. Paul's pants and shoes did not match the robber's, reasoning that "not all the photos showed the suspect was wearing khaki pants and shoes." Pet. App. 4a. It was enough that (1) the officer observed Mr. Paul "in the vicinity of the convenience store shortly after the robbery occurred"; (2) the officer observed that Mr. Paul had a "bulge in his right front pant pocket" that could have been a "knife or possibly money that was collected from the robbery"; and (3) in the officer's experience and training, suspects often shed clothing, which would explain the absence of the bright blue jacket and sunglasses. *Id.*

REASONS FOR GRANTING THE PETITION

Not a single piece of attire worn by the petitioner was the same as shown in the images of the robbery suspect. Nor should it be surprising that a random man on the street would be wearing attire different from a robbery suspect. Yet, somehow, the exculpatory mismatch between the photographic evidence of the robber's clothing in the officer's possession and the officer's own observations did not dispel reasonable suspicion. With modern technology making such objective empirical data more easily

and immediately available to officers on the street, the Fourth Amendment demands more.

In *Kansas v. Glover*, 589 U.S. 376 (2020), the Court hypothesized that a plain mismatch between the empirical information known to an officer and the officer's own observations can and *should* dispel reasonable suspicion that might otherwise be validly based on common sense and officer experience. *Id.* at 386. The Sixth Circuit's contrary approach permits an officer to ignore known, objective details about a suspect and rely instead on his general experience to stop any person in the vicinity of a crime with the same basic demographic characteristics (sex and race), no matter the plain mismatch in observable and observed detail. Review by this Court is necessary to make real the Fourth Amendment's promise that a known and obvious mismatch will dispel reasonable suspicion.

I. This mismatch case raises an important issue in our modern age of easy, immediate, electronic access to empirical information.

A. The Fourth Amendment's "totality of the circumstances" standard for reasonable suspicion allows room for officer mistakes, but the mistake must be objectively reasonable.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV. Consistent with this right, a police officer may briefly stop a person for investigation, known as a *Terry* stop, when the police officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). And in making that assessment, the facts must be judged against an objective standard: would the facts

available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate. *Id.* at 21-22 (internal quotation marks omitted).

Whether such "reasonable suspicion" exists is based on the "totality of the circumstances." *United States v. Arvizu*, 534 U.S. 266, 273 (2002). While this Court has "deliberately avoided reducing" reasonable suspicion to "'a neat set of legal rules,'" *id.* at 274 (quoting *Ornelas v. United States*, 517 U.S. 690, 695-96 (1996)), the "totality of the circumstances" includes all the information and experience available to the police officer at the time of the stop, *id.* at 273-74. And it allows for "commonsense judgments and inferences about human behavior," *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000); *Glover*, 589 U.S. at 383, as well as inferences the officer may draw based on his "experience and specialized training," *Arvizu*, 534 U.S. at 273.

The "totality of the circumstances" also allows room for officers' reasonable mistakes. In *Brinegar v. United States*, 338 U.S. 160, 176 (1949), the Court recognized that "[b]ecause many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part." *Id.* at 176. But, crucially, "the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." *Id.*

Applying these principles in *Hill v. California*, 401 U.S. 797 (1971), the Court addressed the factual situation in which officers with probable cause to arrest Hill mistakenly arrested someone else, Miller. They did so based on official records and a

physical description of the suspect the officers believed "fit the description exactly" of Miller, the person who answered the door at Hill's verified residence. *Id.* at 799, 803 n.6 (the only discrepancies were that Miller was two inches taller and ten pounds heavier than the available description Hill). Because the person the officers encountered at Hill's residence matched the description of Hill, they arrested him, searched the home, and found evidence inculpating Hill. *Id.* at 799-800. This Court concluded that the arrest of the wrong person, Miller, was objectively reasonable because "the officers in good faith believed Miller was Hill." *Id.* at 803-04. This was so even though Miller presented an ID that said he was Miller, not Hill. The officers could reasonably downplay that detail because "aliases and false identifications are not uncommon." *Id.* at 803 & n.7. The Court reasoned that "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time." *Id.*

In other Fourth Amendment contexts, too, the Court has upheld mistakes as objectively reasonable. In *Maryland v. Garrison*, 480 U.S. 79 (1987), for example, the Court upheld the search of the wrong apartment based on a warrant supported by probable cause with respect to an entire floor, when it was unclear that the floor was divided into two apartments. The Court said:

> The validity of the search of respondent's apartment pursuant to a warrant authorizing the search of the entire third floor depends on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable. Here it unquestionably was. The objective facts available to the officers at the time suggested

> no distinction between [the suspect's] apartment and the third-floor premises.

Id. at 88. The Court explained that courts must "allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests." *Id.* at 87

In *Illinois v. Rodriguez*, 497 U.S. 177 (1990), the Court upheld a warrantless search of an apartment where officers reasonably believed the person who used her own key to let them into the apartment had authority to do so, even if she did not in fact have that authority. *Id.* at 184-86. The Court again explained that "what is generally demanded of the many factual determinations that must regularly be made by agents of the government—whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement—is not that they always be correct, but that they always be reasonable."

And in *Heien v. North Carolina*, 574 U.S. 54 (2014), the Court held that an officer may reasonably rely on a mistaken understanding of the scope of state traffic law to satisfy the reasonable-suspicion standard for making a traffic stop. *Id.* at 60. There, the Court held that the officer made a reasonable mistake given the lack of clarity in the vehicle code at issue. *Id.* at 67-68. The Court reiterated, however, that "the limit" to the Fourth Amendment's allowance of officer mistake "is that 'the mistakes must be those of reasonable men.'" *Id.* at 61 (quoting *Brinegar*, 388 U.S. at 176). Because the officer's mistake of law in *Heien* was "objectively reasonable," the

traffic stop did not violate the Fourth Amendment. *Id.* at 68; *id.* at 68-69 (Kagan, J., concurring) (emphasizing that the officer's subjective belief is irrelevant).

B. Some mistakes cannot be objectively reasonable given the empirical evidence known to the officer.

Some officer mistakes cannot be objectively reasonable regardless of common-sense inferences or officer experience. The Court recently offered a "clear example" of "observational evidence dispelling reasonable suspicion": "[I]f an officer knows that the registered owner of the vehicle is in his mid-sixties but observes that the driver is in her mid-twenties, then the totality of the circumstances would not raise a suspicion that the particular individual being stopped is engaged in wrongdoing." *Glover*, 589 U.S. at 386 (internal quotation marks omitted); *id.* at 389 (Kagan, J., concurring). Taking the Court's illustration to heart, the New Jersey Supreme Court held last year that "once it becomes reasonably apparent to the officer that the observed driver does not resemble the owner – either by the photo displayed on the [motor vehicle database screen] or the age, gender, or description of the owner reported on the license or other visible characteristics – the pursuit or stop of that driver must cease." *New Jersey v. Williams*, 293 A.3d 1185 (N.J. 2023)

Of course, what is objectively reasonable at any given time will depend on the context and the types and form of information available to officers, which itself will evolve as society evolves. *Id.* at 390 (Kagan, J., concurring) (observing that "statistical evidence, which is almost daily expanding in sophistication and scope" may be relevant to the question whether an officer's actions are objectively reasonable). For example, back in 1971 when *Hill* was decided and for decades thereafter, officers

searching for a criminal suspect might in the ordinary course have as their guide only a witness's verbal description of the suspect. *E.g.*, *United States v. Ross*, 456 U.S. 798, 800-801 (1978) (officers searched for a person known as "Bandit" based on witness's description of "Bandit" and report that "Bandit" was selling drugs out of a trunk of a described vehicle at a particular address). Given the well-known fallibilities of eyewitnesses, *see Perry v. New Hampshire*, 565 U.S. 228, 245 (2012), it might be objectively reasonable under these circumstances for an officer to overlook minor discrepancies between the mental picture he has formed from the words painted by the eyewitness and his own observations of the person seized. In *Hill* itself, the arrest of the wrong person was deemed objectively reasonable when the officers had a description of Hill from reliable sources, and the person who answered the door at Hill's verified address "fit the description exactly" except for being slightly taller and ten pounds heavier. 401 U.S. at 799, 803 n.6. If the match was "perfect" enough, the officers could reasonably discount or explain away other evidence that they might have the wrong person, such a form of identification. *Id.* at 803 & n.7.

Indeed, there are legions of such cases. In *United States v. Hurst*, 228 F.3d 751 (6th Cir. 2000), for example, police conveyed over dispatch radio a verbal report by the victim who described seeing a "dark colored Thunderbird" in the driveway of his house shortly before discovering a burglary. The court held that the officer reasonably stopped a "dark blue Mercury" speeding away from the scene of the burglary at roughly the time it would have taken the burglar to get to that point. *Id.* at 755. This was because a Mercury is "similar in appearance to a Thunderbird," and the victim

could have reasonably been mistaken about the make of the car he saw in his driveway. *Id.* at 755, 758.

And in *United States v. Moberly*, 861 F. App'x 27 (6th Cir. 2021), the court upheld as reasonable a *Terry* stop and frisk where the officer was going by the witness's description of a reportedly armed suspect with "dreadlocks" standing among a group of people in a specified location with "a brown jacket" and driving an "Oldsmobile." It was reasonable, the court held, for the officer to frisk the only person onsite with dreadlocks who was wearing a "gray "sweatshirt" that was "dark" and standing by gold Buick Le Sabre, a "color, make, and model [that] closely resembled a silver Oldsmobile." *Id.* at 30-31. "The facts reported by the caller and those observed on scene, though not an exact match, were similar enough for the officer reasonably to believe that Moberly was the suspect who the caller had said was potentially armed." *Id.* at 30.

But times have changed. Today, an officer in hot pursuit of a crime suspect may have ready access to empirical information about the suspect that he can use to either confirm or dispel suspicion raised by those he encounters. It is hardly an exaggeration to say that our every move is subject to recorded surveillance—in businesses, on streets, at neighbors' front doors—producing high-quality images and videos that any schoolchild can immediately enlarge, copy, forward, or post on social media. With a few clicks on a hand-held minicomputer with "immense storage capacity" and high-speed internet connection, i.e., a smart phone, *Riley v. California*, 573 U.S. 373, 379, 393 (2014), police officers increasingly have available for their use

in solving crimes full-length color images, possibly even brief "live" moving images or livestreamed video, captured while a crime is or was recently in progress. *See* Jamiles Larty, *More Police Are Using Your Cameras for Video Evidence*, The Marshall Project (Jan. 13, 2024) (describing growing array of real-time police access to public and private surveillance information), https://www.themarshallproject.org/2024/01/13/police-video-surveillance-california; Sarah Holder, *How NextDoor Courts Police and Public Officials*, Bloomberg News (Mar. 21, 2020) (describing various "apps" by which police have access to surveillance images), https://www.bloomberg.com/news/articles/2020-05-21/nextdoor-s-delicate-partnership-with-local-police'; *see also, e.g.*, *United States v. McDonald*, No. 22-4516, 2024 WL 1528958, at *1 (4th Cir. Apr. 9, 2024) (after officers observed an individual with an outstanding arrest warrant "broadcasting live Instagram video of himself and another person brandishing firearms," arriving within minutes to the livestreamed location to arrest him). And like most people, police officers carry these smart phones on their person, enabling them to receive these images and videos near-instantaneously, while out in the streets. An officer who has received electronic images of a suspect committing a crime just minutes earlier can easily compare these images to any individual they encounter in their search for the suspect.

In the context of a *Terry* stop, this type of empirical information is wholly unlike an ordinary "commonsense judgment" or an "inference[] about human behavior," *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000), and wholly unlike an inference the officer may reasonably draw based on his "experience and specialized

training," *Arvizu*, 534 U.S. at 273. Real-time electronic images convey objective—and objectively observable—information that is not susceptible to reasonable downplay in lieu of reliance on officer training, inferences, or common sense. If plain and unexplainable discrepancies exist between images of a suspect captured during the commission of a crime and a person encountered mere minutes later, no number of inferences or amount of common sense or experience (or perceived "bulge" in a man's pocket)[5] should overcome this objectively "exculpatory information." *Cf. Glover*, 589 U.S. at 386 (; *id.* at 389 (Kagan, J., concurring); *id.* at 392 (Sotomayor, J., dissenting) ("[G]aps may not go unfilled.").

This is just the sort of situation hypothesized but not present in *Glover*, made real by the increasingly commonplace availability to police of unmistakable empirical

[5] A "bulge" in a man's pocket is generally unremarkable. Most men today carry personal items in their pockets, including bulkier items such as cell phones, that will create a bulge, so that a bulge without more is not sufficient. *See Ransome v. Maryland*, 816 A.2d 901, 906 (Md. 2003) ("[M]ost men . . . carry innocent personal objects in their pants pockets – wallets, money clips, keys, change, credit cards, cell phones, cigarettes, and the like – objects that, given the immutable law of physics that matter occupies space, will create some sort of bulge."); *Matter of J.M.*, 54 Misc. 3d 591, 597 (N.Y. Fam. Ct. 2016) ("Pockets are made for carrying things, and may be weighed down by any number of things commonly stored in a pocket, such as a wallet or a cellular phone."); *see also, e.g.*, *United States v. James*, 62 F. Supp. 3d 605, 612 (E.D. Mich. 2014) (finding no reasonable suspicion to conduct *Terry* stop based on a perceived bulge in a person's pocket when bulge "could have been a wallet or cell phone," even when the person was in a high-crime area and appeared to try to hide his pocket when seen by officers); *Calhoun v. Florida*, 308 So. 3d 1110, 1118 (Fla. Ct. App. 2020) ("No generalized 'bulge' exception exists in Fourth Amendment jurisprudence.").

information through modern technology. The Court should grant review to put meat on the bones of its promise that officers cannot resort to their common sense and prior experience to turn a blind eye to an objectively unexplainable mismatch right in front of them.

II. The Sixth Circuit's decision is wrong.

The Sixth Circuit did just what *Glover* said would violate the Fourth Amendment. To uphold as objectively reasonable the seizure of the wrong man, the court below had to downplay—if not outright dismiss—the import of the surveillance images the officer observed on his smart phone, focusing instead on the officer's experience that suspects frequently shed clothing. Pet. App. 4a. Though the court recognized that at least one of the three photographs showed that petitioner was wearing different pants and shoes, it dismissed its relevance to dispelling reasonable suspicion because "not all the photos showed the suspect was wearing khaki pants and shoes," Pet. App. 4a. But at least one image clearly did, and it did not match petitioner:[6]

[6] The image below on the left is a screenshot of the surveillance video taken at the same time as the image used as the government's exhibit, but without the yellow exhibit sticker, so as it appeared on the officer's smart phone. These record images were presented similarly side-by-side to the court below. Reply Br. at 6, *United States v. Paul*, No. 23-5241 (6th Cir. Jan. 13, 2024).

As can be seen in these images, not a single piece of attire was the same or similar, except perhaps the face coverings at a time when face coverings were commonly worn inside businesses due to the pandemic. Yet under the Sixth Circuit's approach, an officer can explain away virtually *any* person's unmatching clothing simply by referring to his general experience that criminals often shed clothing as they flee.

The Sixth Circuit's approach is wrong. This is not the usual case involving understandable discrepancies between an eyewitness's description (or other verbal description) and an officer's observations on the street, fairly upheld by invoking the less than 51% quantum of needed accuracy in this context. *Arvizu*, 534 U.S. at 274. Rather, the Sixth Circuit's approach essentially gives officers permission to ignore concrete, real-time, observable empirical evidence in favor of reliance on their general experience and an unremarkable bulge in a man's jeans pocket. It prevented the petitioner, and will prevent individuals in the future, from showing that the "presence of additional facts" "dispel[s] reasonable suspicion." *Glover*, 589 U.S. at 386. And the

consequence of this approach "is to absolve officers from any responsibility to investigate the identity of a [pedestrian] where feasible." *Id.* at 394 (Sotomayor, J., dissenting). Officers searching for a suspect with clear images of the suspect right at the tips of their fingers are "more than capable of" observing concrete mismatches between the images and people walking in the streets, *cf. id.* (Sotomayor, J., dissenting), and when they observe such mismatches, ought not to be allowed to stop a pedestrian on suspicion of crime.

The proper rule should be that when an officer has real-time images to guide his immediate search of a crime suspect, made possible by sophisticated advances in technology, he cannot claim to override that empirical data with "experience" or "commonsense judgments and inferences" about human behavior. It is not objectively reasonable for him to seize as a match a person whose physical appearance does not actually match the images he has seen.

III. This case presents an ideal vehicle to resolve this important question.

This case is an ideal vehicle to resolve the question presented. Mr. Paul's case cleanly illustrates the circumstance in which a court relies on general officer experience to override real-time empirical proof to the contrary. The issue is also cleanly presented. It was raised in the district court and in the court of appeals, and the court of appeals rejected the petitioner's arguments on the merits. And the issue is outcome determinative. A decision that the officer lacked objectively reasonable suspicion to seize the petitioner in these empirically verifiable circumstances would mean that the government is forbidden from using at trial the evidence procured in

violation of the Fourth Amendment. *Herring v. United States,* 555 U.S. 135, 139-40, 144 (2009).

CONCLUSION

The petition for a writ of certiorari should be granted.

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