No. 20-7612

IN THE

Supreme Court of the United States

MICHAEL D. JOHNSON,

Petitioner,

v.

INDIANA,

Respondent.

On Petition for a Writ of Certiorari To The Supreme Court of Indiana

BRIEF OF *AMICI CURIAE* 98 LAW PROFESSORS IN SUPPORT OF PETITIONER MICHAEL D. JOHNSON

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INTEREST OF *AMICI CURIAE*

Amici curiae[1] are 98 law professors and scholars at U.S. law schools who teach, research, and write about criminal law and criminal procedure. They share a common interest in ensuring a proper, practical application of this Court's precedent stemming from *Terry v. Ohio*, consistent with the original understanding of the Fourth Amendment. *Amici* are especially interested in this case because it presents an important question about the scope of fundamental Fourth Amendment protections, recognizing the need for police, the public, and courts to have clear guidance on when a person may be constitutionally subject to a frisk.

A full list of amici is attached as Appendix A.[2]

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae made any monetary contribution to its preparation or submission. Amici curiae gave notice of their intent to file this brief to all parties in accordance with Rule 37.2 and all parties provided written consent.

[2] Amici file this brief solely as individuals. Institutional affiliations are provided for identification purposes only.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court has held that "'[s]ubjective intent alone...does not make otherwise lawful conduct illegal or unconstitutional.'" *Whren v. United States*, 517 U.S. 806, 813 (1996) (*quoting Scott v. United States*, 436 U.S. 128, 138 (1978)). In other words, if a court finds that a seizure, search, or frisk was "otherwise lawful," it is constitutional even if the seizure, search, or frisk was prompted by an ulterior motive. *Id*. at 812.

This case, however, deals with a separate, predicate question: Is an officer's actual, good faith belief essential when determining whether a seizure, search, or frisk was in fact lawful? This Court consistently has answered this question in the affirmative, finding that an officer's claim of probable cause or reasonable suspicion requires an actual, good faith belief grounded on facts "which in the judgment of the court would make his faith reasonable." *Carroll v. United States*, 267 U.S. 132, 161-62 (1925) (*quoting Director General v. Kastenbaum*, 263 U.S. 25, 28 (1923)).

Indeed, in *Minnesota v. Dickerson*, 508 U.S. 366 (1993), this Court addressed the precise question in the case at hand: Can an officer commence or continue a frisk without an actual, good faith belief that a suspect is armed and presently dangerous? Consistent with *Carroll*, this Court (1) concluded that a frisk must be guided by an actual, good faith belief

that a suspect is armed and presently dangerous; and (2) explicitly distinguished *Dickerson* from cases such as *Horton v. California*, 496 U.S. 128 (1990), in which ulterior motives were deemed irrelevant to "otherwise lawful" seizures, searches, and frisks.

This Court should grant certiorari because decisions like the opinion below are entirely inconsistent with this Court's opinion in *Dickerson* and authorize violence against innocent citizens, including disproportionate violence against citizens of color. *See, e.g.,* Nicole Smith Futrell, *Vulnerable, Not Voiceless: Outsider Narrative in Advocacy Against Discriminatory Policing*, 93 N.C. L. Rev. 1597, 1601 (2015) ("[O]f the over 4.4 million people stopped from 2004 to 2012, eighty-eight percent were innocent of any criminal wrongdoing as measured by the fact that they were not arrested or given a summons. Further, Blacks and Latinos accounted for just short of ninety percent of the 4.4 million stops."); Kami Chavis Simmons, *The Legacy of Stop and Frisk: Addressing the Vestiges of a Violent Police Culture*, 49 Wake Forest L. Rev. 849, 850 (2014) ("Stop and frisk has long been a controversial law enforcement measure, particularly among black and Latino communities, two groups who disproportionately are subject to this policy."); *see also* JOSEPHINE ROSS, A FEMINIST CRITIQUE OF POLICE STOPS 140-51 (2020) (discussing the lasting trauma caused by stops and frisks).

ARGUMENT

I. An officer's claim of probable cause or reasonable suspicion requires an actual, good faith belief grounded on facts which make his belief reasonable.

This Court first recognized that a police officer's claim of probable cause requires good faith in *Director General v. Kastenbaum*, 263 U. S. 25 (1923). In *Kastenbaum*, two police officers arrested Samuel Kastenbaum at his home without a warrant after suspecting that he stole twenty-one tubs of butter from a freight car. *Id.* at 26. In addressing Kastenbaum's false imprisonment action, this Court held that "good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the Director General's agent, which in the judgment of the court would make his faith reasonable." *Id*. at 27.

Subsequently, this Court cited this language from *Kastenbaum* in *Carroll v. United States*, 267 U.S. 132 (1925), which established the automobile exception to the warrant requirement. Immediately after citing this language from *Kastenbaum*, this Court applied the test it set forth to find that the officers in *Carroll* had an actual, good faith belief reasonably grounded on facts within their knowledge. *Id*. at 161-62. According to the Court, "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating

liquor was being transported in the automobile which they stopped and searched." *Id*. at 162.

Finally, in *United States v. Ross*, 456 U.S. 798 (1982), this Court again cited this language from *Kastenbaum* in another automobile exception case. Specifically, the *Ross* Court held:

> [T]he probable-cause determination must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers. "'[A]s we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the [officer], which in the judgment of the court would make his faith reasonable.'"

Id. at 808 (*quoting Carroll*, 267 U.S. at 161-62).

Through these opinions, this Court has held that good faith is a necessary, but not sufficient, condition for a finding of probable cause, and, by implication, reasonable suspicion. To establish probable cause or reasonable suspicion, a police officer needs both (1) good faith grounded on facts within his knowledge; and (2) objective reasonableness. Or, put another way, a police officer needs a good faith hypothesis consistent with probable cause or reasonable suspicion that is both

grounded on facts within his knowledge and objectively reasonable.

This Court employed this hypothesis testing analysis in its landmark opinion in *Terry v. Ohio*, 392 U.S. 1 (1968).[3] In *Terry*, Detective Marti McFadden stopped and frisked Robert Terry and Richard Chilton after seeing them looking in store windows and engaging in other suspicious behavior. *Id*. at 6-7. This Court held:

> The actions of Terry and Chilton were consistent with McFadden's hypothesis that these men were contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons—and nothing in their conduct from the time he first noticed them until the time he confronted them and identified himself

[3] This Court also applied this analysis in *United States v. Cortez*, 449 U.S. 411, 414-21 (1981), finding that border patrolmen properly stopped a pickup truck because they had a good faith "hypothesis that the pickup vehicle approached milepost 122 from the east and thereafter returned to its starting point" that was grounded on facts within their knowledge and objectively reasonable. In doing so, the *Cortez* Court analogized the officers' inferences and deductions from the facts in their knowledge to the common sense conclusions that practical people make about human behavior and jurors make about evidence. *Id*. at 418.

> as a police officer gave him sufficient reason to negate that hypothesis.

Id. at 28.

In turn, this led the *Terry* Court to conclude:

> We cannot say his decision at that point to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so.

Id.

This holding in turn suggests the two ways in which the detective would have lacked reasonable suspicion to conduct the stop and frisk. First, the detective's decision to stop and frisk might have been "the product of a volatile or inventive imagination," *i.e.,* objectively unreasonable. For example, it would be objectively unreasonable for a detective to stop and frisk a woman and young child who were looking through a toy store window at 2:00pm. Even if the detective had the actual, good faith belief that they were contemplating a daylight robbery, his stop and

frisk would be unconstitutional because that belief would be objectively unreasonable.

Second, the detective's decision to stop and frisk might have been "undertaken simply as an act of harassment," *i.e.,* undertaken in bad faith. For example, it would be in bad faith for a detective to stop and frisk an anxious-looking man who was peering through a jewelry store window at 2:00pm if the detective (a) thought the man was merely nervous about buying an engagement ring; and (b) simply wanted to harass the man. Even if an objectively reasonable officer could have concluded that the man was contemplating a daylight robbery, the detective's stop and frisk would be unconstitutional because it was not based on such a conclusion and was instead done in bad faith*, i.e.,* simply to harass.

II. An officer's subjective motivation is irrelevant only when a seizure, search, or frisk is "otherwise lawful."

A sharp line can be drawn between this harassment language in *Terry* and this Court's opinions in cases such as *Whren v. United States*, 517 U.S. 806 (1996), *Robinson v. United States*, 414 U.S. 218 (1973), and *Horton v. California*, 496 U.S. 128 (1990).

In *Whren*, 517 U.S. at 808-09, D.C. vice-squad officers stopped two African American men in a truck, and one of the officers "immediately observed two

large plastic bags of what appeared to be crack cocaine in petitioner Whren's hands." The petitioners accepted that the officer "had probable cause to believe that various provisions of the District of Columbia traffic code had been violated." *Id.* The petitioners, however, claimed that, "'in the unique context of civil traffic regulations' probable cause is not enough." *Id.* at 810. Instead, the petitioners argued that the test should be "whether a police officer, acting reasonably, would have made the stop for the reason given." *Id.* Otherwise, they argued, "police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants." *Id.* This Court rejected the petitioners' argument, finding that an ulterior motive doesn't strip an officer of his legal justification to conduct a stop. *See id.* at 812.

Similarly, in *Robinson v. United States*, 414 U.S. 218, 220-23 (1973), a police officer arrested Willie Robinson, Jr. for operating a motor vehicle after the revocation of his operator's permit and then conducted a search incident to that arrest. Robinson conceded that the officer had probable cause to arrest him but claimed that the search was unconstitutional because the officer was neither afraid of him nor suspected that he was armed. *See id.* at 220. This Court rejected this argument, concluding that "[s]ince it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the

respondent or that he did not himself suspect that respondent was armed. *Id*. at 236."[4]

Finally, in *Horton v. California*, 496 U.S. 128, 131-32 (1990), a sergeant filed an affidavit for a search warrant, claiming that he had probable cause to search a home for the proceeds of a robbery and the weapons used by the robbers. The magistrate, however, only authorized a search for the proceeds. *Id*. at 132. During the subsequent search, the sergeant saw and seized weapons that were in plain view. *Id*. In finding that the defendant's motion to suppress the weapons was properly denied, this Court held that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Id*. at 138. Therefore, "[t]he fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement." *Id*. The *Horton* Court later added that "[i]f the interest in privacy has been invaded, the violation must have occurred before the object came

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[4] This Court later cited this language from *Robinson* in *Scott v. United States*, 436 U.S. 128, 133 n.6 & 138 (1978), to hold that the subjective motivations of government agents conducting a wiretap did not invalidate the wiretap, which was issued based upon a showing of probable cause.

into plain view and there is no need for an inadvertence limitation on seizures to condemn it." *Id*. at 141.

This last sentence from *Horton* reinforces the hard line drawn above between this line of cases and the harassment language in *Terry*. In *Whren*, there was no question that the officers had probable cause to stop the truck, in *Robinson*, the defendant conceded that there was probable cause to arrest, and, in *Horton*, it was undisputed that the sergeant was in the defendant's home pursuant to a valid warrant. Therefore, the officers' actions in these cases was constitutional because "'[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional.'" *Whren v. United States*, 517 U.S. 806, 813 (1996) (*quoting Scott v. United States*, 436 U.S. 128, 138 (1978)).

As a result, as implied in *Horton*, none of these cases speak to the predicate question of whether an officer's actual, good faith belief is essential in determining whether a seizure, search, or frisk was in fact lawful. Therefore, again, a hard line can be drawn between these cases and the harassment language in *Terry*. And this isn't merely a hypothetical line; it's a line this Court drew in *Minnesota v. Dickerson*, 508 U.S. 366 (1993).

III. *Minnesota v. Dickerson* and the necessity of good faith for frisks.

In *Dickerson*, Minneapolis police officers saw Timothy Dickerson leaving an apartment building that one of the officers considered "to be a notorious 'crack house.'" *Id*. at 368. Dickerson began walking toward the officers, but, upon spotting their squad car and making eye contact with one of them, he "abruptly halted and began walking in the opposite direction." *Id*. After Dickerson turned and entered an alley on the side of the apartment building, the officers ordered him "to stop and submit to a patdown search." *Id*.

One of the officers, Officer Vernon Rose, then conducted a patdown search and felt "'a small, hard object wrapped in plastic'" in Dickerson's pocket. *Id*. at 377. The "officer made 'no claim that he suspected this object to be a weapon.'" *Id*. at 378. Instead, "the officer determined that the lump was contraband," but only "after 'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket'-a pocket which the officer already knew contained no weapon." *Id*. Finally, the officer reached into Dickerson's "pocket and retrieved a small plastic bag containing one fifth of one gram of crack cocaine." *Id*. at 369.

The Supreme Court of Minnesota concluded that the officer's manipulation of the lump and seizure of the crack cocaine violated the Fourth Amendment. *See State v. Dickerson*, 481 N.W.2d 840,

844 (Minn. 1992). Specifically the court observed that "[t]he officer testified that he was sure he had found crack cocaine only after (1) feeling a lump, (2) manipulating it with his fingers, and (3) sliding it within the defendant's pocket. That testimony belies any notion that he 'immediately' knew what he had found." *Id.* The court acknowledged *Horton*'s holding "that an improper motive does not invalidate an otherwise lawful search." *Id.* But it then ruled that "[w]hen the officer assures himself or herself that no weapon is present, the frisk is over." *Id.*

In its Reply Brief on the Merits to this Court, the State of Minnesota argued that the state supreme court improperly focused on what Officer Rose was thinking rather than "the objective circumstances of the search . . . set forth by this Court in *Horton v. California*." Petitioner's Reply Brief on the Merits, *Minnesota v. Dickerson*, 508 U.S. 366 (No. 91-2019), 1993 WL 286634 (Jan. 23, 1993) at 7. Specifically, the State asserted that "[i]t was entirely reasonable for Officer Rose to suspect that Respondent could be carrying both weapons and drugs. Officer Rose had extensive experience in finding both drugs and weapons at the crack house from which he saw Respondent exit." *Id.* at *7 n.11.

The State, represented by Michael Freeman, pressed this *Horton*/objective reasonableness issue extensively at oral arguments, including the following exchange:

QUESTION: Could a reasonable trier of fact conclude that the officer went beyond the bounds of what was necessary in order to determine if the subject had a weapon?

MR. FREEMAN: Your Honor, a reasonable trier of fact could make that conclusion, but we believe since the Minnesota Supreme Court used the subjective standard rejected in *Horton*, that that so colored their judgment that they did not provide the proper analysis. I would point to the Court --

QUESTION: Well did -- would you agree, then, that a police officer cannot, in conducting a *Terry* frisk, go beyond what is necessary to make the determination that the subject does or does not have a weapon?

MR. FREEMAN: Yes, Your Honor, the limits of the *Terry* search say that that is a search strictly for -- is a search for weapons. And it -- the position is that, in fact, if -- at the time he decided it was not a weapon, that that search must stop.

Transcript of Oral Argument, *Minnesota v. Dickerson*, 508 U.S. 366 (No. 91-2019), 1993 WL 761230 (March 3, 1993) at 6.

The *Dickerson* Court ultimately affirmed the state supreme court's opinion, first noting that "the dispositive question before this Court is whether the officer who conducted the search was acting within the lawful bounds marked by *Terry* at the time he gained probable cause to believe that the lump in respondent's jacket was contraband." *Minnesota v. Dickerson*, 508 U.S. 366, 377 (1993). This Court acknowledged that "[t]he State District Court did not make precise findings on this point," but noted the factual findings by the Minnesota courts that (1) Officer Rose did not think the small, hard object in Dickerson's pocket was a weapon upon touching it; and (2) only realized it was drugs after further manipulating it. *Id*. at 377-78.

These threadbare facts were enough for the *Dickerson* Court's conclusion that "the officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to '[t]he sole justification of the search [under *Terry*:] . . . the protection of the police officer and others nearby.'" *Id*. at 378 (*quoting Terry v. Ohio*, 392 U.S. 1, 29 (1968). Therefore, "[b]ecause this further search of respondent's pocket was constitutionally invalid, the seizure of the cocaine that followed is likewise unconstitutional." *Id*. (*citing Horton*, 496 U.S., at 140, 110 S.Ct., at 2309-2310.).

The *Dickerson* Court ostensibly cited *Horton* in this way to distinguish it. As noted, in *Horton*, the sergeant's state of mind was irrelevant because he was in the defendant's home pursuant to a valid search warrant when he saw and seized weapons that were in plain view. *See Horton*, 496 U.S. at 138. Conversely, in *Dickerson*, the officer's state of mind was relevant and dispositive because his testimony that he knew the small, hard object was not a weapon meant that he was precluded from subsequently pinching that object to determine that it was drugs. *See Dickerson*, 508 U.S. at 377-78.

Indeed, the officer's testimony about his state of mind had to be dispositive because the *Dickerson* Court acknowledged that it lacked "precise findings" on the controlling question and had to rely exclusively on the officer's testimony about what he was thinking. *Id*. There was no discussion about whether an objectively reasonable officer might have concluded that the object was a weapon despite many courts concluding that officers conducting frisks held objectively reasonable beliefs that small, hard objects were weapons. *See, e.g., United States v. Richardson*, 657 F.3d 521, 524 (7th Cir. 2011) ("Courts, including ours, have concluded that an officer who encounters a small, hard object during a pat-down may have reasonable suspicion to believe the object is a weapon."); *State v. Fleenor*, 989 P.2d 784, 789 (Idaho App. 1999) (holding that it was reasonable for an officer to believe that a hard, one and one-half to two

inch object was a small pocket knife); *Colomo v. State*, 687 So.2d 880, 880 (Fla. App. 2nd 1997) (finding that it was reasonable for an officer to believe that a small, approximately one and one-half inch object contained a weapon).

The *Dickerson* Court did not need to address whether an objectively reasonable officer might have thought that the small, hard object in Dickerson's pocket was a weapon because Officer Rose lacked an actual, good faith belief that it was a weapon. *See Dickerson*, 508 U.S. at 377-78. In the absence of such good faith, Officer Rose's subsequent manipulation of the object was unconstitutional, even if it was objectively reasonable. *See* Orin S. Kerr, *The Questionable Objectivity of Fourth Amendment Law*, 99 Tex. L. Rev. 447, 460 (2020) ("Although the Court did not dwell on the point in *Dickerson*, its analysis appears to rest the scope of *Terry* frisks on the officer's subjective intent."); Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 Geo. Wash. L. Rev. 882 (2015) ("Professor Dix plausibly characterizes *Minnesota v. Dickerson* . . . as 'appear[ing] to rely on a purely subjective approach in defining the scope of a permissible weapons frisk.'"); George E. Dix, *Subjective "Intent" as a Component of Fourth Amendment Reasonableness*, 76 Miss. L.J. 373, 416 (2006) (observing that the *Dickerson* Court appeared to rely on a purely subjective approach in defining the scope of a permissible weapons frisk).

A similar analysis applies in the case at hand, except it pertains to the commencement of the frisk rather than its continuation. In this case, Agent Wilkinson never testified that he believed, feared, or suspected that Mr. Johnson was armed. *See* Pet. App. at 32a–54a; (Tr. at II:102–31). Instead, Agent Wilkinson testified that it was "common" to pat down people in the interview room "for criminal incidents in particular." (Tr. at II:112). Therefore, Agent Wilkinson did not have an actual, good faith belief that Johnson was armed and presently dangerous. As a result, his frisk of Johnson was unconstitutional, even if there were facts that could have made the frisk objectively reasonable. *See* Kit Kinports, *Veteran Police Officers and Three-Dollar Steaks: The Subjective/Objective Dimensions of Probable Cause and Reasonable Suspicion*, 12 U. Pa. J. Const. L. 751, 775 (2010) ("The policies the Court claims underlie the Fourth Amendment therefore suggest that a frisk cannot be justified where the police officer actually believed the suspect posed no danger.").

CONCLUSION

This Court concluded in *Dickerson* that a frisk must be guided by a good faith belief that a suspect is armed and presently dangerous. Specifically, in *Dickerson*, this Court held that an officer's frisk of a suspect's pocket had to halt once the officer had concluded that it did contain a weapon. Similarly, in the present case, when the officer never had an

actual, good faith belief that Mr. Johnson was armed and presently dangerous, the officer could not commence a frisk. This Court should grant certiorari because opinions like the one in this case do violence to this Court's opinion in *Dickerson* and authorize violence against innocent citizens, including disproportionate violence against citizens of color.

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