No. 22-

In the Supreme Court of the United States

DOUGLAS E. WILCOX,
Petitioner,

v.

MAINE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Maine

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a field sobriety test is a search for which the Fourth Amendment requires probable cause.

RELATED PROCEEDINGS

Supreme Judicial Court of Maine:

State v. Wilcox, No. Yor-22-90 (Jan. 26, 2023)

York County (Me.) Superior Court:

State v. Wilcox, No. YRKCD-CR-2020-22225 (Mar. 18, 2022)

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PETITION FOR A WRIT OF CERTIORARI

Douglas E. Wilcox respectfully petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of Maine.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Maine is published at 288 A.3d 1200 (Me. 2023).

JURISDICTION

The judgment of the Supreme Judicial Court of Maine was entered on January 26, 2023. On March 16, 2023, Justice Jackson extended the time to file a certiorari petition until May 26, 2023. No. 22A823. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. 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 searched."

STATEMENT

Every day, in every state, police officers conduct field sobriety tests of motorists they suspect of driving under the influence of alcohol or drugs. The police ask motorists to follow an object with their eyes from side to side. They ask motorists to walk heel-to-

toe along a straight line. They ask motorists to stand on one leg. These are standardized procedures recommended by the National Highway Traffic Safety Administration. They have been used by police departments all over the country for decades. *See Pennsylvania v. Muniz*, 496 U.S. 582, 585 n.1 (1990).

For many years now, there have been conflicts among the lower courts as to whether field sobriety tests constitute searches under the Fourth Amendment, and if so, whether they require probable cause or merely reasonable suspicion. These are important questions because field sobriety tests are so common.

This case is the perfect vehicle for resolving the conflict. It is undisputed that the police compelled Douglas Wilcox to submit to a series of field sobriety tests. At the suppression hearing, the court (following Maine precedent) held that field sobriety tests are not searches and therefore applied the reasonable suspicion standard. The court found that although the case was "a very close call," the "very low barrier" of reasonable suspicion was satisfied. T. 40.[1] Under any stricter standard, the police would have violated the Fourth Amendment.

A field sobriety test is a search requiring probable cause. The Court should grant certiorari and reverse.

1. Douglas Wilcox had just parked his brown Honda in the parking lot of a 7-Eleven store when he was approached by a police officer. App. 4a. The officer had received an anonymous report that a brown Honda had been involved in a traffic accident and

[1] "T." refers to the transcript of the suppression hearing.

that the driver appeared to be intoxicated. *Id.* The officer approached Wilcox, who was examining damage to the driver's side of his car. *Id.*

Wilcox tried to walk away, but the officer ordered Wilcox to remain by the car. *Id.* When the officer asked about the damage to the car, Wilcox explained that it had occurred on the highway. *Id.* The officer believed that Wilcox's speech was slurred. *Id.* He told Wilcox that he was going to conduct field sobriety tests. *Id.* He offered Wilcox no opportunity to decline. *Id.*

The officer compelled Wilcox to perform three standard sobriety tests. T. 27.[2]

First, the officer conducted the "horizontal gaze nystagmus" test. He ordered Wilcox to stand still with his arms by his sides. The officer moved his finger from side to side and instructed Wilcox to follow along with his eyes, without moving his head. According to the National Highway Traffic Safety Administration, people who are impaired by alcohol or certain drugs exhibit involuntary jerking of the eyes while performing this test. National Highway Traffic Safety Administration, *Instructor Guide: DWI Detection and Standardized Field Sobriety Testing (SFST)* (2018) session 7, page 8.[3]

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[2] The tests are most clearly seen in the officer's body camera video, which was introduced into evidence below.

[3] https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/sfst_full_instructor_manual_2018.pdf. A new version of the manual has recently been published, but it is materially identical to the 2018 version in all relevant respects. https://www.nhtsa.gov/sites/nhtsa.gov/files/2023-03/15911-SFST_Instructor_Guide_2023-tag.pdf.

Second, the officer conducted the "one leg stand" test. He ordered Wilcox to stand on one leg while counting "one thousand one, one thousand two," and so on, until the officer permitted him to stop after thirty seconds. According to NHTSA, "many impaired subjects are able to stand on one leg for up to 25 seconds, but few can do so for 30 seconds." *Id.* at session 7, page 24.

Third, the officer conducted the "walk and turn" test. He positioned Wilcox along a seam in the pavement and ordered him to take nine heel-to-toe steps in one direction, to turn, and to return by taking nine more heel-to-toe steps. According to NHTSA, this test is 79% accurate at detecting a blood alcohol concentration above .08%. *Id.* at session 7, page 17.

NHTSA describes the second and third tests as "divided attention" tests, because they probe the subject's ability to concentrate on physical and mental tasks at the same time. *Id.* at session 1, page 18.

After Wilcox performed these tests, he was handcuffed, arrested, searched, and taken into custody, where the officer conducted further alcohol and drug testing. App. 5a.

Wilcox moved to suppress evidence of the field sobriety tests and all evidence obtained as a result of the tests. The motion was denied. *Id.* The court observed that under Maine Supreme Court precedent, a field sobriety test is not a search, so "there's no requirement of probable cause." T. 40. Rather, the standard was "whether the officer had articulable suspicion to request field sobriety testing." *Id.* The court noted that "it's a very close call" as to whether this standard was satisfied. *Id.* But the court deter-

mined that the officer did have reasonable articulable suspicion to conduct field sobriety tests. *Id.* at 42.

Wilcox entered a conditional guilty plea to operating under the influence. App. 5a. Under the terms of the guilty plea, Wilcox preserved for appellate review the court's ruling on his motion to suppress, and the parties stipulated that "the case is not appropriate for the harmless error doctrine"—that is, they agreed that if the court erred in denying the motion to suppress, the error was prejudicial. *Id.* at 17a. Wilcox's license was suspended for 150 days and he was sentenced to pay a $500 fine. *Id.* at 5a.

2. The Maine Supreme Court affirmed. *Id.* at 2a-16a.

The court acknowledged that "[a] handful of other jurisdictions have held that field sobriety testing is a search, after determining that a person has an expectation of privacy in undertaking physical tasks that are not in the ordinary course of the person's conduct." *Id.* at 10a. But the court observed that its own precedent was to the contrary. The court held that "the field sobriety testing of Wilcox was not a search but rather part of a limited investigatory seizure." *Id.* at 12a (citing *State v. Little*, 468 A.2d 615, 617 (Me. 1983)). The court concluded that "[o]nly a reasonable articulable suspicion of safety concerns was required to begin the limited seizure and then, after a brief investigation, only a reasonable articular suspicion of intoxication was required to conduct field sobriety testing." *Id.* at 12a. The court determined that the police had reasonable suspicion. *Id.* at 13a-15a.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari. The lower courts have long been divided over whether field sobriety tests are searches for which the Fourth Amendment requires probable cause. The decision below is wrong: Under this Court's precedents, field sobriety tests *are* searches, and they *do* require probable cause. This case is an ideal vehicle in which to resolve the conflict on this recurring question. The parties have stipulated that if there was an error below, it was prejudicial. Indeed, as the trial court found, the police just barely had reasonable suspicion, so they lacked probable cause.

I. The decision below deepens a conflict among the lower courts as to whether field sobriety tests are searches for which the Fourth Amendment requires probable cause.

The lower courts have taken three different views as to whether field sobriety tests are searches under the Fourth Amendment. One group of courts holds that they are searches requiring probable cause. A second group holds that they are not searches and thus that officers only need reasonable suspicion. And a third group of courts takes the intermediate position that a field sobriety test is a search, but a special kind of search for which reasonable suspicion is the appropriate standard.

A. In Colorado and Oregon, field sobriety tests are searches requiring probable cause. *People v. Carlson*, 677 P.2d 310, 316-18 (Colo. 1984), *overruled in part on other grounds*, *People v. Chavez-Barragan*, 379

P.3d 330, 338 (Colo. 2016); *State v. Nagel*, 880 P.2d 451, 457-59 (Or. 1994).

In *Carlson*, the Colorado Supreme Court explained that "[a] roadside sobriety test involves an examination and evaluation of a person's ability to perform a series of coordinative physical maneuvers, not normally performed in public or knowingly exposed to public viewing, for the purpose of determining whether the person under observation is intoxicated." *Carlson*, 677 P.2d at 316. "Since these maneuvers are those which the ordinary person seeks to preserve as private, there is a constitutionally protected privacy interest in the coordinative characteristics sought by the testing process." *Id.* at 317. The court accordingly held that "[r]oadside sobriety testing constitutes a full 'search' in the constitutional sense of that term and therefore must be supported by probable cause." *Id.* The court continued:

> The sole purpose of roadside sobriety testing is to acquire evidence of criminal conduct on the part of the suspect. Intrusions into privacy for the exclusive purpose of gathering evidence of criminal activity have traditionally required, at the outset of the intrusion, probable cause to believe that a crime has been committed.

Id.

The court analogized field sobriety tests to other searches requiring probable cause, such as the testing of blood for alcohol and similar chemicals. *Id.* "Indeed," the court observed,

> in some respects, roadside sobriety testing might be considered more invasive of privacy interests than chemical testing. The latter is

> usually performed in the relatively obscure setting of a station house or hospital, while roadside sobriety testing will often take place on or near a public street with the suspect exposed to the full view of motorists, pedestrians, or anyone else who happens to be in the area.

Id.

The Oregon Supreme Court reached the same holding, for the same reason, in *Nagel*. "There are at least two reasons why the field sobriety tests administered in this case are counter to a reasonable expectation of privacy," the court explained. *Nagel*, 880 P.2d at 457.

> First, the tests require defendant to perform certain maneuvers that are not regularly performed in public. Unlike the quality of one's voice or one's handwriting, people do not regularly display that type of behavior to the public—there is no reason to believe that motorists regularly stand alongside a public road reciting the alphabet, count backward from 107, stand upon one leg while counting from 1001 to 1030, or walk a line, forward and back, counting steps and touching heel to toe.

Id.

"Secondly," the court continued, "defendant has a reasonable expectation of privacy in the *information* that the officer obtained through the field sobriety tests. Field sobriety tests seek to elicit evidence of a person's coordination, psychological condition, and physical capabilities." *Id.* at 458. The court analogized field sobriety tests to urine tests, which are searches requiring probable cause, "not only because

of the intrusive collection process, but also because of the nature of the information revealed by testing the sample." *Id.* The court determined that the field sobriety test at issue was consistent with the Fourth Amendment, but only because "there was probable cause to arrest defendant for" drunk driving. *Id.* at 459. *See also State v. Demus*, 919 P.2d 1182, 1184 (Or. Ct. App. 1996) (affirming the suppression of evidence of a field sobriety test because the police lacked probable cause).

B. In several other jurisdictions, by contrast, field sobriety tests are not searches and thus do not require probable cause. Courts in these jurisdictions have instead analogized field sobriety tests to the limited investigative stops that the police may undertake under *Terry v. Ohio*, 392 U.S. 1 (1968), upon the lesser showing of reasonable suspicion. *State v. Lamme*, 579 A.2d 484, 486 (Conn. 1990); *State v. Taylor*, 648 So. 2d 701, 703-04 (Fla. 1995); *Mitchell v. State*, 802 S.E.2d 217, 223-24 (Ga. 2017); *State v. Wyatt*, 687 P.2d 544, 552-53 (Haw. 1984); *State v. Stevens*, 394 N.W.2d 388, 391-92 (Iowa 1986); *Dixon v. State*, 737 P.2d 1162, 1163-64 (Nev. 1987); *State v. Sage*, 180 A.3d 1098, 1102-03 (N.H. 2018); *State v. Mecham*, 380 P.3d 414, 422-28 (Wash. 2016). *See also Galimba v. Municipality of Anchorage*, 19 P.3d 609, 612 (Alaska Ct. App. 2001); *City of Leawood v. Puccinelli*, 424 P.3d 560, 566 (Kan. Ct. App. 2018); *Vondrachek v. Comm'r of Pub. Safety*, 906 N.W.2d 262, 268-69 (Minn. Ct. App. 2017). As the decision below indicates, Maine is one of these jurisdictions as well. App. 12a.

These courts have reasoned that "in a 'search' of an individual, some tangible evidence is taken from that person: whether a physical object in the person's possession, or a sample of some part of their body, such as hair, blood, or urine." *Mitchell*, 802 S.E.2d at 223. They have contrasted the taking of tangible evidence with an "action by the State which does not obtain any tangible item, but merely obtains information as to 'personal characteristics,'" which they deem not to be search. *Id.* Because a field sobriety test does not take anything tangible from the person being tested, but rather exposes some of his characteristics—his gait, his coordination, and his memory—to the view of the police, these courts have held that sobriety tests are not searches. *Id.* at 224.

See also Mecham, 380 P.3d at 425 ("The information revealed from FSTs [field sobriety tests] is not significantly different from the information that is revealed from ordinary observation of a suspect driver's demeanor and gait. We have never considered these physical observations to constitute a search under the Fourth Amendment."); *Wyatt*, 687 P.2d at 553 (field sobriety test "only entailed a display of transitory physical characteristics associated with inebriation").

C. A third group of courts have taken an intermediate position. In these jurisdictions, a field sobriety test *is* a search, but it is a special kind of search that merely requires reasonable suspicion, not probable cause. *State v. Superior Ct.*, 718 P.2d 171, 176 (Ariz. 1986); *Commonwealth v. Blais*, 701 N.E.2d 314, 316-17 (Mass. 1998); *Hulse v. State*, 961 P.2d 75, 85-87

(Mont. 1998); *State v. Royer*, 753 N.W.2d 333, 340-41 (Neb. 2008); *State v. McGuigan*, 965 A.2d 511, 514-15 (Vt. 2008). *See also State v. Buell*, 175 P.3d 216, 218 (Idaho Ct. App. 2008); *People v. Nicolosi*, 146 N.E.3d 71, 74-75 (Ill. Ct. App. 2019); *State v. McCaa*, 963 N.E.2d 24, 30-31 (Ind. Ct. App. 2012); *Blasi v. State*, 893 A.2d 1152, 1167-68 (Md. Ct. Spec. App. 2006).

These courts have acknowledged that "[a]ny examination of a person with a view to discovering evidence of guilt to be used in a prosecution of a criminal action is a search," and that field sobriety tests satisfy this definition. *State v. Superior Court*, 718 P.2d at 176. But they have reasoned that "[t]he fourth amendment does not prohibit all warrantless searches, only those that are unreasonable." *Id.* To determine the reasonableness of field sobriety tests, these courts have balanced "the necessity of the search" against "the invasion of the privacy of the citizen that the search entails." *Id.* They have concluded that "the state has a compelling interest in removing drunk drivers from the highways" which outweighs "the intrusion or inconvenience of roadside sobriety tests that measure physical performance of the suspected drunk driver." *Id.*

See also Blais, 701 N.E.2d at 317 ("[I]t is appropriate for an officer with reasonable suspicion that a person is operating a vehicle while under the influence of drugs or alcohol to take the brief, scarcely burdensome steps involved in administering these tests."); *Hulse*, 961 P.2d at 87 ("[W]e conclude that the State's interest in administering field sobriety tests based upon particularized suspicion rather than the more stringent standard of probable cause

substantially outweighs the resulting limited intrusion into an individual's privacy.").

D. The lower courts are thus divided three ways over the status of field sobriety tests under the Fourth Amendment. Below, the Maine Supreme Court noted the existence of this conflict. App. 10a & n.7. So have many other courts. *See State v. Superior Court*, 718 P.2d at 176; *Mitchell*, 802 S.E.2d at 224 n.10; *Stevens*, 394 N.W.2d at 391-92; *Blais*, 701 N.E.2d at 317 n.2; *Royer*, 753 N.W.2d at 340; *Mecham*, 380 P.3d at 423-24; *State v. Gray*, 552 A.2d 1190, 1194 n.5 (Vt. 1988); *Puccinelli*, 424 P.3d at 565; *Blasi*, 893 A.2d at 1165-66; *Village of Little Chute v. Rosin*, 844 N.W.2d 667, *5 (Wis. Ct. App. 2014).

The leading treatise on the Fourth Amendment has also noted this conflict. Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.6(a), at n. 21 (Westlaw ed.).

It hardly needs saying that the conflict cannot be resolved without this Court's intervention. Until then, field sobriety tests are Fourth Amendment searches in some states but not in others. They require probable cause in some states but only reasonable suspicion in others. Tests that are routine in some jurisdictions are unconstitutional in others. The Court should grant certiorari to decide which of these three incompatible views of the Fourth Amendment is correct.

II. The decision below is wrong.

The decision below is contrary to this Court's precedents, under which field sobriety tests are

searches for which the Fourth Amendment requires probable cause.

A. Field sobriety tests are searches.

Field sobriety tests are searches. "When an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable, we have held that official intrusion into that private sphere generally qualifies as a search." *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (internal quotation marks omitted).

Field sobriety tests fit comfortably within this definition, for two reasons.

First, the tests themselves are invasions of reasonably expected privacy. No one expects to be displayed to public scorn by the roadside while the police compel him or her to perform humiliating tasks like standing on one leg or walking heel-to-toe along a line.

Second, the information revealed by the tests is also an invasion of reasonably expected privacy. People do not expect to be confronted by the police and forced to disclose whether they are coordinated or clumsy, or whether they are clever or dimwitted. No matter how one looks at field sobriety tests, they are searches.

In this respect, field sobriety tests are like other invasions of privacy the Court has classified as searches, such as breath tests, *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989), urine tests, *id.*, blood tests, *Birchfield v. North Dakota*, 579 U.S. 438, 455 (2016); *Schmerber v. California*, 384 U.S. 757, 767-68 (1966), swabs of the cheek,

Maryland v. King, 569 U.S. 435, 446 (2013), and scrapings of the fingernails, *Cupp v. Murphy*, 412 U.S. 291, 295 (1973). These are all searches because they are all means by which government officials obtain information by interfering with people's reasonable expectations of privacy.

Indeed, field sobriety tests are significantly more intrusive than breath tests. They are administered in public, in full view of onlookers, unlike breath tests, which "are normally administered in private at a police station, in a patrol car, or in a mobile testing facility, out of public view." *Birchfield*, 579 U.S. at 463. Field sobriety tests take a long time to administer, unlike breath tests, which take mere seconds to complete. *California v. Trombetta*, 467 U.S. 479, 481 (1984).

Moreover, field sobriety tests can reveal all sorts of private information beyond a person's sobriety, such as whether a person is disabled and whether a person suffers from a cognitive impairment such as Alzheimer's disease. The horizontal gaze nystagmus test can disclose a wide range of information that has nothing to do with intoxication, because there are so many other reasons a person might fail the test. *Schultz v. State*, 664 A.2d 60, 77 (Md. Ct. Spec. App. 1995) (identifying 38 causes of nystagmus other than intoxication). Breath tests, by contrast, "are capable of revealing only one bit of information, the amount of alcohol in the subject's breath." *Birchfield*, 579 U.S. at 462. If a breath test is a search, then a field sobriety test, *a fortiori*, must be a search as well.

By contrast, no search takes place where the police merely observe a person's publicly available

characteristics, because no one has a reasonable expectation of privacy in characteristics they display to the public. It is not a search, for example, for the police to record a person's voice, *United States v. Dionisio*, 410 U.S. 1, 13-14 (1973), or to take an exemplar of a person's handwriting, *United States v. Mara*, 410 U.S. 19, 21-22 (1973). "The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public," the Court has explained. *Dionisio*, 410 U.S. at 14. "Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world." *Id.*

These decisions draw a bright line. It is not a search for the police to observe a person driving or walking erratically, or for the police to observe that a person on the street has difficulty conducting an intelligent conversation, because such behavior is voluntarily displayed to the public. But it *is* a search for the police to compel a person to take a walking test, or an intelligence test, or a vision test, just as it is for the police to compel a person to take a breath test or a blood test. When the police force someone to take such tests, they compel the person to reveal information that he or she is *not* already revealing to the public.

Field sobriety tests are walking tests, intelligence tests, and vision tests. They are means by which the police interfere with a person's reasonable expecta-

tion of privacy to acquire information about the person. In short, they are searches.

B. Field sobriety tests require probable cause.

Because field sobriety tests are searches, they require probable cause—not merely reasonable suspicion—that a person has driven while intoxicated.

Before the police conduct a search, they must obtain a warrant, unless the search "falls within a specific exception to the warrant requirement." *Riley v. California*, 573 U.S. 373, 382 (2014). Every conceivable exception to the warrant requirement, apart from one, requires probable cause.

That one is consent. "Consent searches are part of the standard investigatory techniques of law enforcement agencies and are a constitutionally permissible and wholly legitimate aspect of effective police activity." *Fernandez v. California*, 571 U.S. 292, 298 (2014) (citation and internal quotation marks omitted). If a person voluntarily submits to a field sobriety test, the police do not violate the Fourth Amendment by administering one. But there was no consent in this case, nor in any of the cases that constitute the three-way conflict among the lower courts.

Apart from consent, every other possible exception to the warrant requirement would require probable cause. A search incident to arrest, for example, would require an arrest, which would in turn require probable cause to believe that the person being arrested drove while intoxicated. *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2531 (2019); *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018). A search based on

exigent circumstances would require the same showing at the very least. *Missouri v. McNeely*, 569 U.S. 141, 149-54 (2013); *id.* at 178 (Thomas, J., dissenting) ("[T]he natural metabolization of blood alcohol concentration (BAC) creates an exigency once police have probable cause to believe the driver is drunk.").

There are no other exceptions to the warrant requirement that could conceivably apply to field sobriety tests. Before the police may compel a person to take one, they need probable cause.

Courts in a few jurisdictions (the ones discussed above in section I-C) have evaded this conclusion by classifying field sobriety tests as a special kind of search for which reasonable suspicion is enough. But this reasoning is completely untethered from the Court's precedents, which include no such category of searches. When the police have reasonable suspicion, they may conduct a brief investigatory stop, at which they may frisk people for weapons, *Terry v. Ohio*, 392 U.S. 1, 27 (1968), and ask people to identify themselves, *Hiibel v. Sixth Judicial Dist.*, 542 U.S. 177, 186 (2004). But *Terry* does not permit "any search whatever for anything but weapons." *Ybarra v. Illinois*, 444 U.S. 85, 94 (1979). And it allows the police to conduct pat-downs, not more intrusive searches such as blood tests, breath tests, or field sobriety tests.

If reasonable suspicion were enough to justify searches, the result would be an exception to the warrant requirement so big that it would swallow up the requirement and all the other exceptions as well. There would be no more warrants or occasions to apply the other exceptions because every search would be based on reasonable suspicion.

The rationale for the *Terry* line of cases is that officers need "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual." *Terry*, 392 U.S. at 27; *see also New York v. Class*, 475 U.S. 106, 117 (1986). This rationale does not apply to field sobriety tests, a context in which the officer's safety is not in question. Of course, if the officer has reason to believe that a motorist is armed and dangerous, the officer may conduct a pat-down for weapons pursuant to *Terry*. But where a motorist is merely suspected to be intoxicated, *Terry* no more authorizes a field sobriety test than it authorizes a breath test or a blood test. These are searches that require probable cause.

III. This is an important issue, and this case is an exceptionally good vehicle for resolving it.

Few police procedures are more common than field sobriety tests. In every state, they are a routine part of police encounters with motorists who appear to be intoxicated. This issue is important because it arises so often.

This case is an unusually good vehicle for three reasons.

First, the parties stipulated below that on appeal, "the case is not appropriate for the harmless error doctrine." App. 17a. Maine has thus agreed that if the courts below erred, reversal is required.

Second, this is a case in which the police lacked probable cause. Both sides agree that where the police have probable cause, they may arrest a motorist

and administer a field sobriety test as a search incident to arrest. And both sides agree that where the police lack reasonable suspicion, they may not administer a field sobriety test at all (without the motorist's consent). Here, the trial court found that the police just barely satisfied the standard of reasonable suspicion. T. 40 ("it's a very close call"), 41 ("as I say, it's a close call"). The police would not have been able to satisfy the more stringent standard of probable cause.

Finally, it is undisputed that Douglas Wilcox did not consent to the field sobriety tests. App. 4a ("The officer told Wilcox that he was going to conduct field sobriety tests and offered Wilcox no opportunity to decline."). Some defendants consent to field sobriety tests, while in other cases the parties disagree as to whether the defendant consented. Here, by contrast, the clear absence of consent squarely raises the question whether field sobriety tests are searches requiring probable cause.

For these reasons, this case is as clean a vehicle for addressing the question presented as the Court could possibly see.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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