No. ____

IN THE

Supreme Court of the United States

NATHAN COOPER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court authorized police officers to "stop and frisk" Americans even when there is no probable cause to arrest them for a crime. Specifically, the Court held that police officers may conduct an investigatory stop based on reasonable suspicion that criminal activity is afoot. The Court further held that, during such a stop, police officers may physically feel a person's body in a search for weapons based on reasonable suspicion that the suspect is armed and dangerous.

Writing twenty-five years later, Justice Scalia observed that "the 'stop' portion of the *Terry* 'stop-and-frisk' holding accords with the common law," but he was "unaware" of any historical "precedent for a physical search of a person thus temporarily detained for questioning." *Minnesota v. Dickerson*, 508 U.S. 366, 381 (1993) (Scalia, J., concurring). He found "no clear support at common law for physically searching [a] suspect" absent probable cause to arrest, and he "doubt[ed]" that "the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity." *Id*. The "*Terry* opinion," he opined, represented an "original-meaning-is-irrelevant, good-policy-is-constitutional-law school of jurisprudence." *Id*. at 382.

The question presented is:

Whether the Court should overrule the frisk holding of *Terry v. Ohio*, 392 U.S. 1 (1968), which allows police officers to search people absent probable cause to arrest.

RELATED PROCEEDINGS

- *United States v. Nathan Cooper*,
  No. 23-10224 (11th Cir. Apr. 24, 2024);

- *United States v. Nathan Cooper*,
  No. 22-cr-20286 (S.D. Fla. Jan. 6, 2023).

There are no other related proceedings within the meaning of Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nathan Cooper respectfully seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion is reported at 2024 WL 1765707 and reproduced as Appendix ("App.") A, 1a–7a. The district court did not issue a written opinion.

JURISDICTION

The Eleventh Circuit issued its judgment on April 24, 2024. Justice Thomas granted Petitioner's application to extend the time to file this certiorari petition until August 22, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. Constitution provides in full:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

INTRODUCTION

One of the Warren Court's most consequential precedents is *Terry v. Ohio*, 392 U.S. 1 (1968). In an opinion authored by the Chief Justice, the Court held that police officers may search people for weapons based on reasonable suspicion that they are armed and dangerous, even if there is no probable cause of a crime. These "frisks," the Court acknowledged, are a "serious intrusion upon the sanctity of the person," for they allow officers to "feel with sensitive fingers every portion of the [person's] body." *Terry*, 392 U.S. at 17 & n.13; *see id*. at 17 n.13 ("A thorough search must be made of the [person's] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.") (quotation omitted). The Court further acknowledged that these frisks were already a "severely exacerbating" source of tension between law enforcement and communities of color. *Id*. at 14 n.11.

Terry's invasive and degrading frisk authority is profoundly ahistorical. As Justice Scalia observed twenty-five years later, and as scholars have since confirmed, there is no framing-era precedent authorizing the search of a person absent probable cause to arrest for a crime. *Minnesota v. Dickerson*, 508 U.S. 366, 381 (1993) (Scalia, J., concurring). The *Terry* Court, Justice Scalia decried, "made no serious attempt to determine compliance with traditional standards, but rather, according to the style of this Court at the time, simply adjudged that such a search was 'reasonable' by current estimations." *Id*. at 380. Indeed, the face of the *Terry* opinion reflects that its frisk holding was the byproduct of the Court's then-prevailing "original-meaning-is-irrelevant, good-policy-is-constitutional-law school of jurisprudence." *Id*. at 382.

The time has come for the Court to reconsider this errant search authority. Significant developments over the past five decades compel a fresh reexamination.

The legal landscape has fundamentally changed. Originalism did not even exist when *Terry* was decided; now it is the prevailing method of constitutional interpretation. And that methodology has significantly shaped the Court's current Fourth Amendment jurisprudence. The Court's analysis now begins—and often ends—with history. And the Court has stated that the Fourth Amendment cannot be less protective than the common law was at the Founding. Applying that interpretive methodology here, *Terry*'s frisk holding is incompatible with the Fourth Amendment.

Yet *Terry* frisks now occur hundreds of times every single day. And, even more troubling, this unconstitutional practice systematically and disproportionately affects people of color. This invidious form of racial inequality plagues our society and exacerbates the enduring tension between law enforcement and communities of color. The only way to eradicate these racial disparities is to prohibit the unconstitutional searches creating them. After 56 years, it's time to end this ahistorical experiment.

The traditional *stare decisis* factors compel rather than forbid this overdue course correction. This Court has never hesitated to reconsider constitutional precedents that openly substituted the Court's own policy preferences for the views of the Framers. And this Court has "never relied on *stare decisis* to justify the continuance of an unconstitutional police practice." *Arizona v. Gant*, 556 U.S. 332, 348 (2009). There is no basis for the Court to do so for the first time here, especially in light of the racial disparities. In short, *Terry*'s frisk holding should be overruled.

STATEMENT

1. At approximately 9:30 p.m. on January 26, 2022, Homestead Police Officer Belinda Ramirez was dispatched to a Popeye's Chicken in a high-crime area. Dispatch informed Officer Ramirez that the manager, Jenema Phillips, had reported that an employee, Petitioner Nathan Cooper, had threatened her and stated that he had a firearm, though no firearm was seen. Officer Ramirez arrived at the restaurant around 10:00 p.m., and Ms. Phillips was standing in the parking lot. All of the events from that point forward were captured on Officer Ramirez's body-worn camera.

In the parking lot, Ms. Phillips informed Officer Ramirez that she and Petitioner had a workplace dispute. Ms. Phillips explained that she had reduced Petitioner's hours for taking unauthorized breaks and giving away food. Petitioner became agitated, using profanity and slinging a metal poker used to clean the fryer. When Officer Ramirez asked Ms. Phillips if Petitioner had directly threatened her, she responded that he had not, contradicting the dispatch report. Ms. Phillips also never reported seeing Petitioner with a firearm on that day or any other. But she believed that he had one in his book bag, and she saw him grab the bag. She did not explain why she believed that Petitioner had a gun in his bag, other than to say that he had previously told her that he had once sold a firearm to one of the employees.

After Ms. Phillips provided a description of Petitioner, Officer Ramirez and her partner entered the restaurant. The restaurant was operating normally. Officer Ramirez saw Petitioner working in the kitchen in the back. Officer Ramirez did not see a book bag, which led her to suspect that Petitioner might have a firearm on his

person. She called his name and asked to speak with him. Petitioner was calm and cooperative. He came out from behind the kitchen. When he emerged, Officer Ramirez immediately patted him down and discovered a loaded handgun on his waistband.

2. Petitioner was charged in the Southern District of Florida with being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1).

He moved to suppress the firearm and ammunition found during the *Terry* frisk. Dist. Ct. ECF No. 14. He made three arguments. First, he challenged the *Terry* stop on the ground that the officers lacked reasonable suspicion to believe that he was engaged in criminal activity. *Id*. at 2–3. Second, he challenged the *Terry* frisk on the ground that the officers lacked reasonable suspicion to believe that he was armed and dangerous. *Id*. at 3–4. Third, and relying on Justice Scalia's concurring opinion in *Dickerson*, he argued that, even if the frisk was valid under *Terry*, *Terry* frisks themselves were unconstitutional because the original meaning of the Fourth Amendment did not permit officers to search people absent probable cause to arrest. *Id*. at 4–6. Petitioner acknowledged that the district court "remain[ed] bound by *Terry*," but he sought to "preserve[ ] this argument for further review." *Id*. at 7.

The district court held an evidentiary hearing on the motion. Officer Ramirez testified, and the defense played the entirety of the body-worn camera footage. That evidence revealed the undisputed facts recounted above. At the conclusion of the hearing, and after the parties presented their arguments, the district court denied the motion to suppress from the bench. The court found that Officer Ramirez had reasonable suspicion to conduct the stop and the frisk. Dist. Ct. ECF No. 53 at 76–79.

To preserve his Fourth Amendment arguments for appeal, Petitioner proceeded to a stipulated bench trial. At the trial, Petitioner objected to the admission of the firearm and ammunition, reiterating his Fourth Amendment arguments. The district court noted the objection but overruled it. Dist. Ct. ECF No. 60 at 16–17, 24. Petitioner did not otherwise contest the government's case, and the district court therefore adjudicated him guilty. *Id*. at 24–25. The district court later sentenced him to 51 months in prison, followed by three years of supervised release. App. 9a–10a.

3. On appeal, Petitioner again reiterated his three Fourth Amendment arguments. First, he challenged the *Terry* stop on the ground that the officers lacked reasonable suspicion of criminal activity—emphasizing that neither the district court nor the government had identified a specific crime during the workplace dispute. Pet. C.A. Br. 20–21, 23–27; Pet. C.A. Reply Br. 2–9. Second, he challenged the *Terry* frisk on the ground that the officers lacked reasonable suspicion that he was armed and dangerous. Pet. C.A. Br 27–30; Pet. C.A. Reply Br. 9–12. Finally, he reiterated his argument that *Terry* frisks were contrary to the Fourth Amendment's original meaning. Petitioner acknowledged that the court of appeals was bound by *Terry*, but he "continue[d] to preserve this argument for further review." Pet. C.A. Br. 30–31.

The Eleventh Circuit affirmed. The court of appeals first set out the standards of review, as well as the legal framework under *Terry* and its progeny. App. 2a–4a. In doing so, the court observed that *Terry*'s reasonable-suspicion standard was a "less demanding one than probable cause, and requires a showing less than preponderance of the evidence." App. 3a. The court then rejected all three of Petitioner's arguments.

As for the *Terry* stop, the court of appeals held that, based on the dispatch call and Ms. Phillips' statements at the scene, Officer Ramirez had reasonable suspicion that Petitioner had engaged or was about to engage in criminal activity. App. 4a–5a. Notably, however, the court of appeals did not specify or identify the criminal activity.

As for the *Terry* frisk, the court of appeals held that Officer Ramirez had reasonable suspicion that Petitioner was armed and dangerous. App. 5a–7a & n.1. And, most relevant here, the court expressly "reject[ed] Cooper's argument that *Terry* frisks are unconstitutional because they are contrary to the Fourth Amendment's original meaning." App. 7a n.2. The court stated simply that, as an inferior court, it remained "bound by the Supreme Court's decisions until [it] overrule[s] them." *Id*.

REASONS FOR GRANTING THE PETITION

As Justice Scalia explained back in 1993, *Terry* frisks contravene the original meaning of the Fourth Amendment. There is no framing-era authority permitting the physical search of a person absent probable cause to arrest. Yet *Terry* frisks happen every day. Thus, for the last fifty-plus years, police officers have been violating the Fourth Amendment rights of American citizens en masse. Worse, this systematic constitutional violation disproportionately affects people of color, exacerbating the tension between law enforcement and communities of color. The only way to eradicate the racial inequality and division caused by *Terry*'s ahistorical frisk holding is to overrule it. The only legal basis *not* to do so would be *stare decisis*, but the traditional factors weigh decisively in *favor* of overruling it. At the very least, this exceptionally important issue warrants the Court's review. And this is an ideal vehicle to do so.

I. *Terry* frisks contravene the Fourth Amendment.

In *Terry*, the Court authorized police officers to search people absent probable cause to arrest. There is no common-law authority for such a search. And, since *Terry*, the Court has stated that the Fourth Amendment cannot be less protective than the common law at the Founding. *Terry* frisks therefore violate the Fourth Amendment.

A. People can be searched if there is probable cause to arrest.

A search incident to a lawful arrest is the established, constitutional method for police officers to physically search people without a warrant. As the Court has recognized, searches incident to arrest were "always recognized under English and American law." *United States v. Weeks*, 232 U.S. 383, 392 (1914); *see Carroll v. United States*, 267 U.S. 132, 158 (1925) (citing authorities); *People v. Chiagles*, 142 N.E. 583, 583–84 (N.Y. 1923) (Cardozo, J.) (characterizing search-incident-to-arrest authority as "firmly" established under the common law and citing "illustrative precedents both in our own county and abroad"). That historic authority remains "well accepted," and "warrantless searches incident to arrest occur with far greater frequency than searches conduct pursuant to a warrant." *Riley v. California*, 573 U.S. 373, 382 (2014). For an arrest to be lawful, however, there must be "probable cause" that a crime has been committed. *District of Columbia v. Wesby*, 583 U.S. 48, 56–57 (2018).

"The requirement of probable cause has roots that are deep in our history." *Henry v. United States*, 361 U.S. 98, 100 (1959). "The general warrant . . . and the writs of assistance . . . perpetuated the oppressive practice of allowing the police to arrest and search on suspicion." *Id*. The Fourth Amendment "rebelled against" those

practices, as "early American decisions both before and immediately after its adoption show" that "common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate." *Id*. at 100–01 (footnotes omitted). "Since [Chief Justice] Marshall's time," probable cause has required "more than bare suspicion." *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (citing *Locke v. United States*, 7 U.S. (Cranch) 339, 348 (1813)). That "long-prevailing" standard "represented the accumulated wisdom of precedent and experience" about how to balance individual liberty with security. *Dunaway v. New York*, 442 U.S. 200, 208 (1979) (quotation omitted). As a result, "the requirement of probable cause" was always "treated as absolute." *Id*. Until *Terry*.

B. *Terry* departed from the probable-cause requirement.

"[D]epart[ing] from traditional Fourth Amendment analysis," the Court in "*Terry* for the first time recognized an exception to the requirement that Fourth Amendment" searches/seizures "must be based on probable cause." *Id*. at 208–09.

Terry acknowledged that an investigatory stop was a Fourth Amendment "seizure," and that a frisk was a Fourth Amendment "search." 392 U.S. at 16–19. The latter, it recognized, was not some "petty indignity" but rather a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." *Id*. at 16–17 & n.13. Nonetheless, it held, officers may conduct the stop if they have reasonable suspicion (not probable cause) of criminal activity. *Id*. at 22–23, 30. And, it held, officers may frisk the suspect if they have reasonable suspicion that he is armed and dangerous, "regardless of whether he has probable cause to arrest the individual for a crime." *Id*. at 23–27.

In so holding, the *Terry* Court "made no serious attempt to determine compliance with traditional standards, but rather, according to the style of this Court at the time, simply adjudged that such a search was 'reasonable' by current estimations." *Dickerson*, 508 U.S. at 380 (Scalia, J., concurring). *Terry* did not even nod to history; there is not a single allusion in the opinion to the common law or what the Fourth Amendment protected at the Founding. To the contrary, *Terry* rejected the notion "that the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment." 392 U.S. at 11. Instead, the Court believed that there was "no ready test for determining reasonableness other than by balancing the need to search or seize against the invasion which the search or seizure entails." *Id*. at 21 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534–35 (1967) (brackets omitted)).

The Court thus proceeded to balance those interests based on its own policy views. On the one hand, the Court believed that it "would be unreasonable to require that police officers take unnecessary risks in the performance of their duties," since "American criminals have a long tradition of armed violence." *Id*. at 23. The Court relied on statistics showing the number of officers killed and assaulted in recent years. *Id*. at 24 n.21. On the other hand, the Court believed that, while the intrusion of a frisk was "severe," "frightening, and perhaps humiliating," *id*. at 24–25, it fell "short of an arrest," and the search was strictly limited to weapons, *id*. at 25–27.

In dissent, Justice Douglas observed that, since magistrates may issue warrants based only on probable cause, the majority had effectively given the police

"greater authority to make a 'seizure' and conduct a 'search' than a judge has to authorize such action." *Id*. at 36. He continued: "To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment." *Id*. at 38. That view did not prevail. Notably, *Terry* was decided in June of 1968 when, according to Justice Douglas, the "hydraulic pressure" to "water down constitutional guarantees and give the police the upper hand" had "probably never been greater." *Id*. at 39.

While *Terry* assured that its newly-minted frisk authority was "narrowly drawn," *id*. at 27, it expanded to suit the needs of law enforcement. In *Adams v. Williams*, 407 U.S. 143 (1972), for example, the Court held that *Terry* authorized a police officer to reach into the waistband of a driver based on a tip that a firearm was there, even though the officer could not see one from outside the car. In *Michigan v. Long*, 463 U.S. 1032, 1034–35, 1037, 1045–52 (1983), the Court held that *Terry* authorized a police officer to search not just the suspect himself but also the passenger compartment of his unoccupied car. And, in *Dickerson*, the Court held that *Terry* authorized the police to seize non-threatening contraband detected during a frisk where its status as contraband was immediately apparent. 508 U.S. at 373–79.

C. *Terry*'s frisk holding lacks any support in the common law.

Writing separately in *Dickerson*, Justice Scalia returned to first principles. An early, leading proponent of originalism, he took "it to be a fundamental principle of constitutional adjudication that the terms of the Constitution must be given meaning

ascribed to them at the time of their adoption." *Id*. at 379 (Scalia, J., concurring). The prohibition on unreasonable searches and seizures must therefore be "construed in light of what was deemed an unreasonable search and seizure when it was adopted." *Id*. at 379–80 (quotation omitted). Such construction was necessary "to preserve the degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of instruction 'reasonable.'" *Id*. at 380.

After reviewing the historical record, Justice Scalia found "good evidence" that *Terry* stops "accord[ ] with the common law—that it had long been considered reasonable to detain suspicion persons for the purpose of demanding that they give an account of themselves. This is suggested, in particular, by the so-called night-walker statutes, and their common-law antecedents." *Id*. at 380–81 (citing authorities). He was "unaware, however, of any precedent for a physical search of a person thus temporarily detained for questioning" in the absence of probable cause to arrest. *Id*. at 381. When "the detention did not rise to the level of a full-blown arrest (and was not supported by the degree of cause needful for that purpose), there appears to be no clear support at common law for physically searching the suspect." *Id*. (citing authorities stating that there was "no right to search" a nightwalker before arrest under common law, and there was "no English authority" permitting the police to "search [a suspect] for arms, by tapping his pockets, before making up their minds whether to arrest him"). And given that police manuals directed officers to frisk suspects head to toe, he "frankly doub[ted]" that "the fiercely proud men who adopted

our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity." *Id.* at 381–82. He criticized the "*Terry* opinion" as "represent[ing]" the Court's "original-meaning-is-irrelevant, good-policy-is-constitutional-law school of jurisprudence." *Id.* at 382.

Over the last three decades, "subsequent scholarship" has "validate[d] Justice Scalia's view." *United States v. Johnson*, 921 F.3d 991, 1009–10 & n.1 (11th Cir. 2019) (en banc) (Jordan, J., dissenting) (citing authorities). "Scholars and judges seeking a historical hook for *Terry* have uncovered little evidence linking *Terry*'s stop and frisks to police actions at common law." Sophie J. Hart & Dennis M. Martin, Judge Gorsuch and the Fourth Amendment, 69 Stan. L. Rev. Online 132, 136 (2017). Despite defending *Terry* on policy grounds, one scholar who surveyed the historical record admitted that "there is no framing-era precedent for the warrantless detention or search of a person on less than the standard that would justify arrest." Lawrence Rosenthal, Pragmatism, Originalism, Race, and the Case Against *Terry v. Ohio*, 43 Tex. Tech. L. Rev. 299, 301, 330–37 (2010). Some scholars have thus disagreed with Justice Scalia that the common law supported *Terry* stops. *E.g.*, Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 629 n.216 (1999) (finding "no historical precedent for the general authority of police officers to detain persons based on 'reasonable suspicion' as authorized by *Terry*"). But there appears to be no dispute when it comes to *Terry* frisks: no one has uncovered any framing-era authority permitting searches of a person absent probable cause to arrest. As one scholar put it, that practice "would have baffled the Framers." George C. Thomas III,

Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment, 80 Notre Dame L. Rev. 1451, 1514–16 (2005).

D. The common law sets the constitutional floor.

Terry's ahistorical frisk authority violates the Fourth Amendment under this Court's modern jurisprudence prioritizing that Amendment's original meaning.

While this Court had occasionally looked to the common law before and after *Terry*, it not until the end of the 20th century that the Court formally declared history the analytical starting point and, where clear, the ending point as well. In *Wyoming v. Houghton*, 526 U.S. 295 (1999), the Court explained that, "[i]n determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed." *Id*. at 299. Only "[w]here that inquiry yields no answer" does the Court then conduct a balancing analysis by "evaluat[ing] the search or seizure under traditional standards of reasonableness by assessing" the competing interests of privacy and security. *Id*. at 299–300.

Over the last twenty-five years, the Court has adhered to that history-first methodology. In *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), for example, the Court began by conducting an extensive historical analysis, explaining that the "first step" was to analyze the common law, "since an examination of the common-law understanding . . . sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be

reasonable." *Id*. at 326–27 (quotation omitted). Only after history proved inconclusive did the Court proceed to balance the competing interests for itself. *Id*. at 345–46.

In *Virginia v. Moore*, 553 U.S. 164 (2008), the Court reiterated that it "begin[s] with history" and the "common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve." *Id*. at 168. After all, the Court explained, "Joseph Story, among others, saw the Fourth Amendment as 'little more than the affirmance of a great constitutional doctrine of the common law.'" *Id*. at 169 (quoting 3 J. Story, Commentaries on the Constitution of the United States § 1895, p. 748 (1833)). So, again, only after history failed to "provide[ ] a conclusive answer" did the Court proceed to balance the competing interests for itself. *Id*. at 171.

As originalism continued to emerge as the dominant method of constitutional interpretation, the Court went a step further. In *United States v. Jones*, 565 U.S. 400 (2012), the Court declared that the common law also sets the constitutional floor. For the first time, the Court expressly stated that the Fourth Amendment "must provide *at a minimum* the degree of protection it afforded when it was adopted." *Id*. at 411 (emphasis in original). More recently, the Court repeated that same language from *Jones*, confirming again that "the Framers' view provides a baseline for our own day." *Lange v. California*, 594 U.S. 295, 309 (2021); *see also id*. at 316 (Thomas, J., concurring in part and concurring in the judgment) (joining the majority opinion on the understanding that the Court's discussion of "doctrine before history" did "not disturb our regular rule that history—not court-created standards of reasonableness—dictates the outcome whenever it provides an answer").

Put simply, where the common law is clear, so too is the meaning of the Fourth Amendment. *See, e.g.*, *id*. at 309 ("Sometimes, no doubt, the common law of the time is hard to figure out: The historical record does not reveal a limpid legal rule. Here, we find it challenging to map every particular of the common law's treatment of warrantless home entries. But the evidence is clear on the question before us: The common law did not recognize a categorical rule enabling such an entry in every case of misdemeanor pursuit.") (citation omitted); *Torres v. Madrid*, 592 U.S. 306, 313 (2021) ("Sometimes the historical record will not yield a well-settled legal rule. We do not face that problem here. The cases and commentary speak with virtual unanimity on the question before us today."); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (holding that the reasonableness of a dwelling search may depend on whether officers announce their presence because the common law left "no doubt" about that).

* * *

In sum, there is no framing-era authority supporting the search of a person absent probable cause to arrest. That means *Terry* frisks are unreasonable under the original meaning of the Fourth Amendment. And that means such searches are unconstitutional under this Court's modern-day Fourth Amendment jurisprudence.

II. The question presented is exceptionally important.

For more than half a century, police officers have been violating the Fourth Amendment rights of Americans on a massive scale. Indeed, *Terry* frisks now occur every day. Such a systematic constitutional deprivation alone warrants the Court's close scrutiny. But that is especially true here because this unconstitutional practice

disproportionately affects people of color. This racial inequality is well-documented, it is entrenched, and it exacerbates enduring tensions between law enforcement and communities of color. Given the heightened stakes for law and society, the ahistorical experiment of *Terry* frisks should continue only if this Court decides that it should.

A. *Terry* frisks are pervasive.

Pat downs are ubiquitous in America. While national statistics do not exist, some state and local jurisdictions do collect data on *Terry* stops and frisks. And the data from just a few large jurisdictions confirms that *Terry* frisks are pervasive.

In California, there were over 4.5 million *Terry* stops (including traffic stops) in 2022. Cal. Racial & Identity Profiling Advisory (RIPA) Bd., 2024 Annual Report 6.[1] And "officers searched 13.8 percent of individuals they stopped." *Id.* at 48. That amounts to over 600,000 *Terry* frisks in just a single year in just a single state.

In Chicago, there were over 40,000 pat downs per year in both 2018 and 2019, amounting to an average of over 100 pat downs per day. Consultant Report: Progress Update and Data Analysis of Chicago Police Department Stops between 2018 and 2020 at 29 tbl. 1 (June 14, 2023).[2] And those were *slow* years for the police compared to 2014, when "Chicagoans were stopped at a far higher rate than New Yorkers at

[1] https://oag.ca.gov/system/files/media/ripa-board-report-2024.pdf.

[2] https://www.aclu-il.org/sites/default/files/2023.06.14_consultant_report_0.pdf.

the height of New York City's stop and frisk practice in 2011." ACLU of Ill., Stop and Frisk in Chicago 11 (Mar. 2015) (showing four times as many stops per 1,000 people).[3]

At the height of New York City's controversial stop-and-frisk policy, the police conducted 4.4 million *Terry* stops between 2004 and 2012—with a high of 686,000 in 2011. *Floyd v. City of New York*, 959 F.Supp.2d 540, 558 (S.D.N.Y. 2013). And "52% of all stops were followed by a protective frisk for weapons." *Id*. That amounts to approximately 2.5 million *Terry* frisks over an eight-year period—an average of over 300,000 frisks per year—in the nation's largest city. While New York City has since scaled back its stop-and-frisk policy, its officers are now conducting frisks in 76% of all *Terry* stops—the City's highest frisk rate in the last two decades. ACLU of New York, Stop-and-Frisk Data, https://www.nyclu.org/data/stop-and-frisk-data.

B. *Terry* frisks disproportionately affect people of color.

Not only are these unconstitutional searches occurring on a daily basis; they are disproportionately affecting people of color. The disparities are stark and odious.

The 2022 data out of California reveals that "Black individuals were stopped 131.5 percent more frequently than expected, given their relative proportion of the California population." RIPA 2024 Report, *supra* at 6, 46. That was "2.5 times as frequent per capita compared to stops of White individuals." *Id*. at 47. And, as a percentage of those who were stopped, Black, Hispanic, Native American, and multiracial individuals were all searched more than White individuals. *See id*. at 48.

[3] https://www.aclu-il.org/sites/default/files/wp-content/uploads/2015/03/ACLU_StopandFrisk_6.pdf.

Data from Chicago in 2018 and 2019 tells a similar story. "About 1 in 25 Black people were patted down annually, compared to 1 in 86 Latino people and 1 in 475 White People." Consultant Report, *supra*, at 34. Notably, "[t]he disparity in pat down rates of Black and White people was even greater than that for stops." *Id.* at 39.

Likewise, of the 4.4 million people stopped in New York City between 2004 and 2012, 52% were Black, 31% were Hispanic, and 10% were White—yet the population was roughly 23% Black, 29% Hispanic, and 33% White. *Floyd*, 959 F.Supp.2d at 559. These disparities have not improved. In 2022 and 2023, approximately 60% of those stopped were Black and 30% were Hispanic, accounting for 90% of all *Terry* stops. ACLU of New York, A Closer Look at Stop-and-Frisk in NYC (Dec. 12, 2022), https://www.nyclu.org/data/closer-look-stop-and-frisk-nyc. "This means Black people were stopped at a rate nearly eight times greater than white people, and Latinx people were stopped at a rate four times greater." *Id.* And "Black and Latinx 15-24-year-olds account for approximately 40 percent of all stops. They were frisked in approximately 60 percent of stops, compared to white 15-24-year-olds who were frisked 44 percent of the time—despite having nearly identical arrest rates." *Id.*

Studies showing similar racial disparities in various American cities have been the norm for the last few decades. *See, e.g.*, *Illinois v. Wardlow*, 528 U.S. 119, 132–33 nn.7–10 (2000) (Stevens, J., concurring in part and dissenting in part) (citing authorities). And this was true both before and after the Court's decision in *Whren v. United States*, 517 U.S. 806 (1996), holding that the Fourth Amendment does not prohibit pretextual stops if they are objectively supported by the requisite cause.

In fact, such disparities existed even when *Terry* was decided. "By 1967, the abuse of blacks by police using stops and frisks—the very technique at issue in *Terry*—had become such a pervasive experience in inner city neighborhoods that the President's Commission on Law Enforcement and the Administration of Justice addressed the subject directly." David A. Harris, Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under *Terry v. Ohio*,72 St. John's L. Rev. 975, 981 (1998). In an amicus brief, the NAACP expressly warned the *Terry* Court that the "evidence is weighty and uncontradicted that [the] stop and frisk power is employed by the police most frequently against the inhabitants of our inner cities, racial minorities and the underprivileged." *Terry*, NAACP Amicus Br., 1967 WL 113672, at *3. And the *Terry* Court acknowledged this fact in the opinion, noting that frisking "minority groups, particularly Negroes," was a "severely exacerbating factor in police-community tensions." 392 U.S. at 14 & n.11.

Yet the Court nonetheless "authorized a police practice that was being used to subvert the Fourth Amendment rights of blacks nationwide." Tracie Maclin, *Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion, 72 St. John's L. Rev. 1271, 1277 (1998). It is therefore unsurprising that the racial disparities did not abate after the *Terry* Court expressly endorsed the stop-and-frisk practice. Fifty-plus years later, there is still no end is in sight. *Cf. Students for Fair Admission, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 213 (2023) ("Twenty years later, no end is in sight."). The only way, then, to eradicate these persistent racial disparities is to eliminate the legal authority creating them: *Terry*'s frisk holding.

C. *Terry* frisks have pernicious societal effects.

Terry frisks tear at the fabric of our multiracial society. *Terry* itself acknowledged that frisks were a "serious intrusion upon the sanctity of the person" precisely because they "may inflict great indignity and arouse strong resentment" and "friction" in communities of color, especially when that practice is "abus[ed]." 392 U.S. at 17 & n.14. The *Terry* Court further noted that, with respect to youths and minorities in particular, officers had conducted stop and frisks to "maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control." *Id*. at 14 & n.11 (quotation omitted).

Living in perpetual fear of being stopped and physically searched because of race engenders enduring psychological and emotional harm. *See generally* Susan A. Bandes, et al., The mismeasure of *Terry* stops: Assessing the psychological and emotional harms of stop and frisk to individuals and communities, 37 Behavioral Sciences & Law 174 (2019). Over two decades ago, four members of this Court recognized that living in such an environment could reasonably lead even innocent people to flee just to avoid contact with law enforcement. *Wardlow*, 528 U.S. at 132–35 & n.8 (Stevens, J., concurring in part and dissenting in part). Such fear has only intensified in recent years, as *Terry* stops and frisks have more publicly resulted in fatalities of people of color. *See People v. Flores*, 546 P.3d 1114, 1128 (Cal. 2024) (Evans, J., joined by four Justices, concurring); *see also* Weston J. Morrow, et al., After the Stop: Exploring the Racial/Ethnic Disparities in Police Use of Force During *Terry* Stops, Police Quarterly (vol. 20, issue 4) (Dec. 2017) (finding that, in 2012, New York

City officers used force during *Terry* stops against Black or Hispanic citizens more than White citizens). In the end, the resulting distrust of law enforcement makes it harder—not easier—for officers to effectively root out crime and protect the public.

Meanwhile, available data reveals "disturbingly low hit rates for weapons and other contraband in police frisks." David Rudovsky & David A. Harris, *Terry* Stops and Frisks: The Troubling Use of Common Sense in a World of Empirical Data, 79 Ohio St. L.J. 501, 506 (2018). Remarkably, "on a macro level, the hit rate for all frisks in departments that have collected comprehensive data on stop-and-frisk practices shows a hit rate that rarely exceeds 1–2%. Thus, in Philadelphia, data for the years 2012–2016 show a frisk hit rate for weapons of approximately 1%. In New York, the hit rate for frisks over the period 2004–2012 was 1.5%." *Id*. at 541 (footnotes omitted). And arrest/citation rates for *Terry* stops are also quite low (hovering around 10%), *see id*. at 539–40, all of "which further exacerbates the perceptions of discrimination felt by racial minorities and people living in high crime areas," *Wardlow*, 528 U.S. at 133 n.8 (Stevens, J., concurring in part and dissenting in part) (citing additional studies).

Then there are instances of abuse. In Philadelphia, for example, over *half* of the *Terry* frisks conducted between 2012 and 2013 lacked reasonable suspicion. *Bailey v. City of Philadelphia*, No. 10-cv-5953, ECF No. 153 at 2 (E.D.P.A. Nov. 13, 2023); *see Utah v. Strieff*, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting) ("it is no secret that people of color are disproportionate victims" of suspicionless searches). Between 2008 and 2013, Miami Gardens officers stopped and frisked one man well over 100 times—mostly while he was working in a store. Sarah Goodyear, A

Horrifying Story of 'Stop and Frisk' Taken to its Logical Extreme, Bloomberg (Nov. 22, 2013).[4] There are reports of strip searches and sexual abuse. *E.g.*, *Wardlow*, 528 U.S. at 133 n.10 (Stevens, J., concurring in part and dissenting in part) (citing J. Shannon, Attorney General of Mass., Report of the Attorney General's Civil Rights Division on Boston Police Department 60–61 (Dec. 18, 1990)). And, again, there are the publicized incidents of *Terry* frisks that have tragically turned brutal and fatal.

III. *Stare decisis* is at its nadir.

The only legal basis for retaining *Terry*'s frisk holding would be *stare decisis*. But the traditional factors all weigh in favor overruling that holding, not retaining it. At the very least, the compelling arguments below further bolster the need for review.

To be sure, *stare decisis* serves essential purposes in the law. Among other things, "it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 455 (2015) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). Thus, "[o]verruling precedent is never a small matter." *Id*. Before doing so, the Court requires "a 'special justification,' over and above the belief that the precedent was wrongly decided." *Allen v. Cooper*, 589 U.S. 248, 259 (2020) (quotation omitted).

On the other hand, the Court has "long recognized . . . that *stare decisis* is not an inexorable command, and it is at its weakest when we interpret the Constitution."

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[4] https://www.bloomberg.com/news/articles/2013-11-22/a-horrifying-story-of-stop-and-frisk-taken-to-its-logical-extreme.

Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 264 (2022) (quotations omitted). While precedents interpreting statutes can be corrected by Congress, precedents interpreting the Constitution can be corrected only by amending the Constitution, which is "notoriously hard" to do. *Id*. Accordingly, "when it comes to the interpretation of the Constitution—the great charter of our liberties, which was meant to endure through a long lapse of ages—we place a high value of having the matter settled right." *Id*. (citations omitted). "Some of our most important constitutional decisions have overruled prior precedents." *Id*.; *see id*. at 264–65 & n.48 (citing over two dozen examples from the last century); *see also Ramos v. Louisiana*, 590 U.S. 83, 117 (2020) (Kavanaugh, J., concurring in part) (citing additional recent examples). Here, there are several "special justifications" for adding *Terry*'s frisk holding to that list.

A. *Terry*'s frisk holding is egregiously wrong.

The frisk holding in *Terry* was not simply wrong; it was "egregiously wrong" that "stood on exceptionally weak grounds." *Dobbs*, 597 U.S. at 268, 270.

Terry's fatal flaw is that it disregarded history. Although "*Terry* for the first time recognized an exception to the requirement that Fourth Amendment [searches] of persons must be based on probable cause," *Dunaway*, 442 U.S. at 208–09, the Court did not even pay lip service to the common law or original meaning. In fact, the Court was openly hostile to history. The *Terry* Court considered but rejected "the argument . . . that the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment." *Terry*, 392 U.S. at 11. And the *Terry* Court cited no precedent, statutory

or decisional, for its doctrinal innovation. Precedents that so openly flout the original meaning of the Constitution do not warrant *stare decisis* protection. *See, e.g.*, *Ramos*, 590 U.S. at 106 (overruling a prior precedent that "spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right").

Moreover, *Terry*'s ahistorical approach is irreconcilable with "subsequent legal developments." *Kimble*, 576 U.S. at 45. Originalism did not even exist when *Terry* was decided; now it is the dominant method of constitutional interpretation. *See, e.g.*, *United States v. Rahimi*, 144 S. Ct. 1889, 1908–09 (2024) (Gorsuch, J., concurring). And it has significantly shaped this Court's Fourth Amendment jurisprudence over the past few decades. As summarized above, the Court now assesses the reasonableness of a search or seizure by consulting the common law. That is where the constitutional analysis begins and often ends. Only where history is unclear does the Court assess reasonableness by balancing the competing interests of privacy and security. The *Terry* Court, however, bypassed the historical lodestar under which this Court now interprets the Fourth Amendment—and the Constitution more generally.

In place of history, the *Terry* Court substituted policy. *Terry* "made no serious attempt to determine compliance with traditional standards, but rather, according to the style of this Court at the time, simply adjudged" that *Terry* frisks were "'reasonable' by current estimations." *Dickerson*, 508 U.S. at 380 (Scalia, J., concurring). Overlooking history, the Court believed that there was "no ready test for determining reasonableness other than by balancing the need for search or seizure against the invasion which the search or seizure entails." *Terry*, 392 U.S. at 21

(citation omitted). The Court then balanced privacy versus officer safety based on its own policy views. *See id*. at 22–27. These are "precisely the sort of considerations that legislative bodies often taken into account when they draw lines that accommodate competing interests." *Dobbs*, 597 U.S. at 274. Unsurprisingly, the frisk authority emerging from *Terry*'s "original-meaning-is-irrelevant, good-policy-is-constitutional-law school of jurisprudence," *Dickerson*, 508 U.S. at 382 (Scalia, J., concurring), "resemble[d] the work of a legislature," *Dobbs*, 597 U.S. at 271; *see id*. at 278–79 (overruling precedent others had criticized as "not constitutional law" but the Court's "extraconstitutional value preferences") (citations omitted); *Ramos*, 590 U.S. at 106 (same, where precedent had engaged in a "functionalist analysis of its own creation").

Worse, the *Terry* Court's policy judgement was the byproduct of tumultuous current events. *Terry* cited statistics showing the number of officers injured in recent years. 392 U.S. at 23–24 & n.21. And Justice Douglas observed in dissent that the "hydraulic pressures . . . to water down constitutional guarantees and give the police the upper hand" had "never been greater than it is today." *Id*. at 39. For context, *Terry* was decided months after the assassination of Martin Luther King, Jr. and widespread rioting, and only four days after the assassination of Robert F. Kennedy.

Decades later, a law clerk to the Chief Justice opined that the Court had bowed to societal pressure. The Court, he wrote, was "unwilling to be—or to be perceived as—the agents who tied the hands of the police in dealing with intensely dangerous and recurring situations on city streets." Earl C. Dudley, Jr., *Terry v. Ohio*, The Warren Court, and the Fourth Amendment: A Law Clerk's Perspective, 72 St. John's

L. Rev. 891, 892–93 (1998). Since *Terry*, the Court has recognized that it is "dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment." *Richards v. Wisconsin*, 520 U.S. 385, 392 n.4 (1997). That *Terry* carved out a novel exception to the time-honored requirement of probable cause based on such "extraneous influences" is another strike against it. *Dobbs*, 597 U.S. at 291.

B. *Terry* frisks have caused significant damage and division.

Over the last five-plus decades, *Terry* frisks have had profoundly "damaging consequences" for society, and they have "enflamed debate and deepened division" about one of the most fraught issues in America: race. *Dobbs*, 597 U.S. at 232.

For *stare decisis* purposes, the Court should "scrutinize the precedent's real-world effects on the citizenry, not just its effects on the law and the legal system." *Ramos*, 590 U.S. at 122 (Kavanaugh, J., concurring in part). As explained above, the evidence is overwhelming that *Terry* frisks have disproportionately affected people and communities of color. And this disparate racial treatment engenders long-lasting psychological and physical harm. That sort of harm is what led to *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). In one of this Court's finest moments, it unanimously overruled the infamous "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), recognizing that segregation effectively subjugated African Americans by suggesting that they were an inferior race. *Brown*, 347 U.S. at 494–95 & nn.10–11.

Although the Court has since "vindicate[d] the Constitution's pledge of racial equality" in "other areas of life," *Students for Fair Admission*, 600 U.S. at 204–05, *Terry* frisks have continued to perpetuate the racial degradation that *Brown* and its

progeny sought to eradicate. Racial tensions still run high, and *Terry* frisks exacerbate this destabilizing state of affairs. *See Strieff*, 579 U.S. at 252 (Sotomayor, J., dissenting) (opining that unconstitutional searches "risk treating members of our communities as second-class citizens"). After all, viral videos of police brutality often begin with a *Terry* frisk. To be sure, eliminating *Terry* frisks will not eliminate racial strife. But the *Terry* Court usurped the Framers' judgment that Americans may be searched only upon probable cause. And that judicial arrogation of authority "has inflamed our national politics." *Dobbs*, 597 U.S. at 269 (quotation omitted).

Even the academic literature reflects this sentiment. Despite this Court's vast Fourth Amendment catalogue, "[p]erhaps no decision" of this Court "has received more criticism than *Terry v. Ohio*." Rosenthal, *supra*, at 299. Indeed, *Terry* has "encountered a firestorm of criticism in the academy, where it is frequently denounced as granting the police excessively broad discretion that threatens the liberty of the innocent and which facilitates discrimination against minorities and others that the police are all too likely to view as suspicious." *Id*. at 299–300 & n.7 (citing literature). Here are just a few examples: *see* Daniel S. Harawa, Whitewashing the Fourth Amendment, 111 Geo. L.J. 923, 929 & n.6 (2023) (*Terry* is "viewed by many as the godfather of modern racialized policing"); Ekow N. Yankah, Pretext and Justification: Republicanism, Policing, and Race, 40 Cardozo L. Rev. 1543, 1573 (2019) (*Terry* was the start of "modern policing case law" and the "sublimation of race in policing"); I. Bennett Capers, Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle, 46 Harv. C.R.-C.L. L. Rev. 1, 14, 32 (2011)

(*Terry* "has enabled racial profiling to flourish," and "if the Fourth Amendment itself has a poisonous tree, its name is *Terry v. Ohio*"); Maclin, *supra*, at 1278–79 ("*Terry* deserves censure" because it "provided a springboard for modern police methods that target black men and others for arbitrary and discretionary intrusions").

In short, *Terry*'s frisk holding has now been "tested by experience," and the last half century has confirmed that it is "inconsistent with the sense of justice [and] with the social welfare" that is embodied in "our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin." *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989) (citations omitted).

C. *Terry*'s frisk holding is unworkable.

Terry's frisk holding has also proven unworkable, for it cannot "be understood and applied in a consistent and predictable manner." *Dobbs*, 597 U.S. at 280–81. The facts on the ground reveal that *Terry*'s legal standard affords police officers virtually boundless discretion to frisk, all but guaranteeing its inconsistent application.

As explained above, the data shows that officers disproportionately frisk people of color, and that frisk rates per stop vary widely. Thus, the decision to frisk may arbitrarily depend on race or on whether a particular police department or officer adopts an aggressive frisk policy. And the data further shows that "hit rates" for weapons and contraband are exceedingly low, reflecting that officers are often frisking people who are not in fact armed. *See* Rudovsky & Harris, *supra*, at 540–45 ("The data show that certain factors regularly reported by police, such as observation of a 'bulge,' a suspect not being cooperative, a suspect having their hands in their

pockets, presence in a high-crime neighborhood, acting nervous or making furtive movements, and 'flight' are poor predictors of whether one is armed and dangerous, yet the courts have regularly credited these explanations in sustaining police frisks.").

These inconsistencies in application are unsurprising given that "reasonable suspicion" is an "amorphous legal standard[ ]," *City of Morales v. Chicago*, 527 U.S. 41, 109–10 (1999) (Thomas, J., dissenting), and "[a]rticulating precisely" what it "mean[s] is not possible," *Ornelas v. United States*, 517 U.S. 690, 695 (1996). Like probable cause, it is a "fluid concept[ ]" that takes its "substantive content from the particular context[ ]" in which it is applied. *Ornelas* 517 U.S. at 696. In other words, the standard is "correlative to what must be proved." *Brinegar*, 338 U.S. at 175.

Reasonable suspicion is unworkable in the context of *Terry* frisks because it requires police officers to decide not whether someone has engaged in criminal activity but whether someone is "armed and dangerous." Even today, the lower courts still do not agree about what that critical phrase means on the most basic level. For example, is it a "unitary" concept, such that an armed individual is also necessarily dangerous? Or must officers have reasonable suspicion to believe that a person is *both* armed *and* dangerous? *See, e.g.*, *United States v. Robinson*, 846 F.3d 694, 703 (4th Cir. 2017) (en banc) (Wynn, J., concurring in the judgment) ("disagree[ing] with the majority opinion's contention that 'armed and dangerous' is a unitary concept," and noting that "other Circuits have held that law enforcement officers must reasonably suspect a detainee is *both* armed and a danger") (citations omitted); *United States v.*

Hammond, 890 F.3d 901, 910 (10th Cir. 2018) (Phillips, J., dissenting) (criticizing the district court for "collaps[ing] armed and dangerous into one condition").

And how are officers supposed to determine whether someone is "dangerous?" Far from constraining discretion, that subjective criterion all but ensures that officers will employ their own biases. As Justice Douglas predicted in *Terry*, officers will frisk a suspect "whenever they do not like the cut of his jib." 392 U.S. at 39 (Douglas, J., dissenting). Assessing "dangerousness" has become even more unmanageable with the proliferation of concealed carry laws, as well as this Court's recognition of a constitutional right "to carry a handgun for self-defense outside the home." *NYSRPA, Inc. v. Bruen*, 597 U.S. 1, 10 (2022). Is a suspect "dangerous" when he *lawfully* carries a firearm? The en banc Fourth Circuit has said yes: lawful gun possession is "inconsequential." *Robinson*, 846 F.3d at 696. The upshot is that individuals who exercise their Second Amendment rights must now "forfeit" their Fourth Amendment rights. *Id.* at 707 (Harris, J., dissenting). *Terry* frisks are thus on a "collision course" with expanding gun rights. *Id.* And "[a]nother traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law" where, as here, it "poses a direct obstacle to the realization of important objectives embodied in other laws." *Patterson*, 491 U.S. at 173.

The lower courts have otherwise maximized officer discretion for *Terry* frisks. When it comes to being "armed," for example, *Terry* created a "narrowly drawn authority," 392 U.S. at 27, allowing a search only for "weapons," *Ybarra v. Illinois*, 444 U.S. 85, 93–94 (1979). Yet the lower courts have expansively "ruled that officers

are entitled to seize a variety of items that are not traditional weapons," provided it could pose a threat to officer safety. *Johnson*, 921 F.3d at 1000. But virtually *any* object could pose a threat to officer safety if used in such a manner. *See Wright v. New Jersey*, 469 U.S. 1146, 1149 n.3 (1985) (Brennan, J., dissenting) (listing objects). Thus, some lower courts have held that officers may frisk suspects whenever they see a "bulge" because "it theoretically could have been a weapon," even if there is no reason to believe that the suspect is armed. *United States v. Roggeman*, 279 F.3d 573, 585 (8th Cir. 2002) (Heaney, J., dissenting from the majority's conclusion to that effect).

Further enlarging officer discretion, "lower courts have slowly and steadily created whole categories of cases which allow police to frisk after a stop, whatever the specific facts are." Harris, *supra*, at 976. "Many lower courts have concluded that frisks may automatically follow stops in cases involving crimes which do not always require weapons and violence," including drug and burglary offenses. *Id*. at 1002–07. And "many lower courts have found that police may always frisk certain people in particular situations," such as when they are a companion of an arrestee, present during the execution of a search warrant, or placed in a squad car. *Id*. at 1007–12.

D. No reliance interests are implicated.

Overruling *Terry*'s frisk holding would not "upend substantial reliance interests." *Dobbs*, 597 U.S. 287. This Court's cases "emphasize very concrete reliance interests, like those that develop in cases involving property and contract rights." *Id*. at 288 (quotation omitted); *see Payne*, 501 U.S. at 828 ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where

reliance interests are involved."). "[T]he opposite is true in cases . . . involving procedural and evidentiary rules." *Payne*, 501 U.S. at 828; *see Alleyne v. United States*, 570 U.S. 99, 116 n.5 (2013) ("The force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections.").

Terry's frisk holding falls squarely in the latter camp. It plainly does not implicate property or contract rights; nobody has structured their business or financial affairs around whether officers can search people without probable cause to arrest. Instead, the holding implicates the constitutional rights of Americans. And it is both procedural and evidentiary, in that the primary remedy for a violation is the exclusion of evidence from a criminal proceeding. Analogously, the Court has overruled multiple Sixth Amendment precedents that were contrary to the original meaning and that were procedural in nature. *See, e.g.*, *Ramos*, 590 U.S. at 90–93, 105–09 (jury verdict must be unanimous); *Alleyne*, 570 U.S. at 103, 116 & n.5 (jury must find facts triggering mandatory minimum); *Crawford v. Washington*, 541 U.S. 36 (2004) (defendants enjoy right to confront out-of-court, testimonial statements).

The only actors who have relied on *Terry*'s frisk holding are the police officers conducting the frisks, but this Court has held in the Fourth Amendment context that such reliance interests do not warrant *stare decisis*. In *Arizona v. Gant*, 556 U.S. 332 (2009), the Court explained that *stare decisis* did not require adherence to a broad reading of *Belton v. New York*, 453 U.S. 454 (1981), which had erroneously authorized police officers to search a vehicle incident to the arrest of an occupant even if the arrestee could no longer access the vehicle. In language particularly relevant here,

the Court explained that it had "never relied on *stare decisis* to justify the continuance of an unconstitutional police practice," and "[t]he doctrine of *stare decisis* does not require us to approve routine constitutional violations." *Gant*, 556 U.S. at 348, 351.

The Court expressly rejected the suggestion that "consideration of police reliance interests requires a different result," even though the broad reading of *Belton* had "been widely taught in police academies" and "officers ha[d] relied on the rule in conducting vehicle searches during the past 28 years." *Id*. at 349. The Court explained: "The fact that the law enforcement community may view the State's version of the *Belton* rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected. If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement 'entitlement' to its persistence." *Id*. The exact same logic applies here.

This situation is the polar opposite of *Dickerson v. United States*, 530 U.S. 428 (2000), where the Court declined to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966). Unlike *Terry* frisks, scripted *Miranda* warnings are "reasonably clear," and no "subsequent cases ha[d] undermined [*Miranda*'s] doctrinal underpinnings." *Id.* at 433. But, more importantly, *Miranda* established a prophylactic rule to *safeguard* a constitutional right, *see Vega v. Tekoh*, 597 U.S. 134 (2022), whereas *Terry*'s frisk holding *eviscerated* a constitutional right. *Miranda* warnings are a constitutional surplus; *Terry* frisks are a constitutional stain. And while *Dickerson* observed that "*Miranda* has become embedded in routine police practice to the point where the

warnings have become part of our national culture," 530 U.S. at 443, *Gant* later clarified that "the Court was referring not to police reliance on a rule requiring them to provide warnings but to the broader societal reliance on that individual right," 556 U.S. at 349–50. That *Terry* frisks have also become embedded in police practice and national culture underscores the untenable ubiquity of this unconstitutional practice.

In the end, *stare decisis* cannot insulate "routine constitutional violations." *Gant*, 556 U.S. at 351. And no reliance interest could support "discard[ing] a [Fourth] Amendment right in perpetuity" and "elid[ing] the reliance the American people place in their constitutionally protected liberties." *Ramos*, 590 U.S. at 111 (plurality op.).

IV. This case is an ideal vehicle.

This is an ideal vehicle for the Court to reconsider *Terry*'s frisk holding because Petitioner properly preserved this issue below, and it is dispositive of this case.

1. In the district court, Petitioner relied on Justice Scalia's concurrence in *Dickerson* as well as scholarship to argue that *Terry* frisks are contrary to the Fourth Amendment's original meaning, which allows officers to search only when there is probable cause to arrest. Dist. Ct. ECF No. 14 at 4–6. He acknowledged that the district court remained bound by *Terry*, but he "preserve[d] this argument for further review." *Id.* at 7; *see* Dist. Ct. ECF No. 60 at 17, 24. He did the same in the court of appeals. Pet. C.A. Br. 30–31. As a result, his argument is subject to *de novo* review in this Court; thus, there is no risk that plain-error review would obstruct the Court's ability to resolve the question presented. And although "bound" by *Terry*, the court of appeals still expressly addressed and "reject[ed]" Petitioner's argument. App. 7a n.2.

2. *Terry*'s frisk holding was also dispositive of this felon-in-possession case. Applying *Terry*, the district court and the Eleventh Circuit upheld that pat down revealing the firearm/ammunition on the exclusive ground that the officer had reasonable suspicion that Petitioner was armed and dangerous. App. 5a–7a; Dist. Ct. ECF No. 53 at 78–79. Although Petitioner alerted the lower courts of his intention to seek review in this Court, neither offered any alternative basis to uphold the search.

In the district court, the government alternatively argued that the frisk was consensual. Dist. Ct. ECF No. 20 at 5–7; Dist. Ct. ECF No. 53 at 64. But the officer's body camera footage refuted that argument. As a result, the district court easily rejected it. Dist. Ct. ECF No. 53 at 78. And the government did not renew it on appeal.

The only other basis to uphold the frisk would be as a search incident to arrest. But the government never advanced that argument below, and the lower courts did not find probable cause of a crime. To the contrary, they relied solely on "reasonable suspicion" to uphold the stop and the frisk—a standard that the Eleventh Circuit observed was "less demanding . . . than probable cause." App. 3a (citing *Wardlow*, 528 U.S. at 123). In fact, the lower courts did not even identify a specific crime supporting the *Terry* stop, despite Petitioner's repeated insistence that they do so. Pet. C.A. Br. 20–21; Pet. C.A. Reply Br. 2–9; Dist. Ct. ECF No. 14 at 2–3; Dist. Ct. ECF No. 21 at 3–4; Dist. Ct. ECF No. 53 at 54, 59, 61. This procedural history reflects that, while probable cause to arrest may exist in some *Terry* stops, it did not exist in this case.

As a result, Petitioner's conviction would be vacated were this Court to overrule *Terry*'s frisk holding and hold that such searches require probable cause to arrest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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